IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL SECURITY ARCHIVE,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Civil Action No. 07-1577 (HHK/JMF)**
	)	
EXECUTIVE OFFICE OF THE	)	**(Consolidated with**
PRESIDENT, *et al.*,	)	**Civil Action No. 07-1707 (HHK/JMF))**
	)	
Defendants.	)	
	)	

OPPOSITION TO DEFENDANTS' SECOND MOTION TO DISMISS PLAINTIFFS' FIRST FOUR CLAIMS

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INTRODUCTION

The National Security Archive brought this suit in 2007 to protect our nation's history. The Complaint alleges that an unknown problem caused emails to be deleted from White House servers and put at risk of permanent destruction. To prevent this unlawful loss of federal records, the Archive seeks to invoke the remedies of the Federal Records Act — an order compelling Defendants to seek legal action from the Attorney General to preserve or recover emails and review of Defendants' recordkeeping guidelines.

Since the Complaint was filed, Defendants have kept the facts of this case under wraps. Despite this stonewalling, Defendants' own evidence now establishes the merits of Plaintiff's claims: that emails were not properly preserved on the servers and that, although some emails were restored from backup tapes, there are likely other emails that can be restored from the backup tapes, portable media, and workstations that this Court ordered be preserved. Defendants present no evidence as to what caused the emails to go missing from the servers, how broad that problem was, or whether the problem has been fixed. As a result, it cannot be said at this time that Defendants have found the emails that were deleted from the servers, and therefore it cannot be said that they have abated the risk that emails might be irretrievably destroyed. Under the FRA, when a risk of records destruction remains, relevant federal officials must act, and they have no choice about how to act: they must seek legal action through the Attorney General.

Rather than do what the FRA commands, Defendants ask this Court to dismiss half this case as "moot" based on one self-serving affidavit, one statistician's report, and one purported piece of evidence. Defendants' argument is that there has been some "action" by an agency, so the Archive's "agency inaction" claims are moot and the Archive cannot complain about the "more recent agency action." Motion to Dismiss at 5. But the "action" Defendants claim they took, which apparently consisted of counting and recounting emails that are on the White House

servers and selectively restoring some emails that were not on the servers, does not demonstrate that the risk of destruction of emails has been abated and thus is not sufficient to discharge Defendants' FRA duties. When there is a risk of records destruction, the FRA requires, and can only be satisfied by, one specific enforcement action: initiation of legal action through the Attorney General. So long as the Court still has the legal authority to order that relief, which it does here on evidence that emails are still likely to be missing, there is a live controversy.

That controversy is not resolved by Defendants' untested scraps of evidence. Instead, Defendants' evidence confirms that emails were not properly preserved on White House servers, creating a risk of unlawful records destruction. The evidence falls far short of demonstrating that Defendants have abated the risk and thus are relieved of their duty to take enforcement action under the FRA. Defendants' self-serving evidence does not replace the need for the administrative record that must form the basis for resolution of such merits-based issues in this APA case, nor is it sufficient to establish Defendants' "mootness" claim, because it is vague, frequently conclusory, and raises more questions than it answers. The evidence is also tangential to the central issue in this case; the Archive's Complaint is about emails that were deleted from the servers, while much of this evidence is only about emails that stayed on the servers (even though they were mislabeled and effectively lost to the White House and the public). The issue of mootness in this case should not be resolved on the basis of this thin record and cannot be resolved using the procedures Defendants seek. As a matter of law, this issue must be resolved on the basis of a full record through summary judgment or a trial on the merits.

Defendants' Second Motion to Dismiss is a last-ditch attempt to keep the facts of this case from seeing the light of day. This Court has held that the Archive's Complaint adequately alleges that records are at risk of destruction. The Archive is entitled to develop these allegations

and, if it wins on the merits, is entitled to judicial relief compelling the agency action that to this day is still withheld: referral of this matter to the Attorney General.

FACTUAL AND PROCEDURAL HISTORY

I. JUDICIAL REVIEW UNDER THE FRA

Defendants mischaracterize the FRA. This Court has already addressed these issues, as well as the FRA's overall purposes, which include "'[a]ccurate and complete documentation of the policies and transactions of the Federal Government.'" *Citizens for Responsibility & Ethics in Wash. v. Executive Office of President*, Nos. 07-1707, 07-1577, 587 F. Supp. 2d 48, Mem. Op. at 3 [Docket #90] (D.D.C. Nov. 10, 2008) ("Kennedy Mem. Op.") (quoting *Armstrong v. Executive Office of President*, 1 F.3d 1274, 1278 (D.C. Cir. 1993) ("*Armstrong II*")).

The FRA "prescribes the exclusive mechanism for disposal of federal records." *Armstrong II*, 1 F.3d at 1278 (citing 44 U.S.C. § 3314). "Record" is defined broadly, to include electronic records such as email. *Id*.; *see also* 44 U.S.C. § 3301. "If a document qualifies as a record, the FRA prohibits an agency from discarding it by fiat," *Armstrong II*, 1 F.3d at 1278, and therefore "[n]o records may be 'alienated or destroyed' except pursuant to the disposal provisions of the FRA." *Armstrong v. Bush*, 924 F.2d 282, 285 (D.C. Cir. 1991) ("*Armstrong I*") (quoting 44 U.S.C. § 3314); *see also* Kennedy Mem Op. at 3; *Am. Friends Serv. Comm. v. Webster*, 720 F.2d 29, 37 (D.C. Cir. 1983).

Because "Congress did not intend to grant [the agency] . . . a blank check for records disposal," *Am. Friends Serv. Comm.*, 720 F.2d at 62, "the FRA requires the agency to procure the approval of the Archivist before disposing of any record." *Armstrong II*, 1 F.3d at 1279; *see also* 44 U.S.C. § 3303(a), (d). The disposal procedures set forth in Chapter 33 of the FRA "are exclusive, and records of the United States Government may not be alienated or destroyed except under this chapter." 44 U.S.C. § 3314. The FRA gives the Archivist the exclusive duty of

"judging the suitability of records for disposal." *Armstrong II*, 1 F.3d at 1279. Any "removal, defacing, alteration, or destruction of records" that does not accord with the FRA's process, including obtaining the Archivist's formal approval, is therefore unlawful.[1] 44 U.S.C. § 2905(a).

When it appears that an unlawful destruction of records has occurred or may occur in the future, the FRA imposes specific, mandatory duties on the Archivist and relevant agency heads. "If the Archivist discovers that any provision of the FRA 'has been or is being violated, the Archivist shall (1) inform in writing the head of the agency concerned of the violation and make recommendations for its corrections; and (2) unless satisfactory corrective measures are inaugurated within a reasonable time, submit a written report of the matter to the President and Congress.'" *Armstrong I*, 924 F.2d at 285 (quoting 44 U.S.C. § 2115(b)). The Archivist also "shall notify the head of a Federal agency of any actual, impending, or threatened unlawful removal, defacing, alteration, or destruction of records in the custody of the agency that shall come to his attention, and assist the head of the agency in initiating action through the Attorney General for the recovery of records wrongfully removed and for other redress provided by law." *Id.* (quoting 44 U.S.C. § 2905(a)). The statute thus compels the Archivist to act not only when records have already been unlawfully disposed, but also when unlawful disposal is "impending" or "threatened." The FRA guards against more than outright destruction too, prohibiting other unlawful means of rendering records unfit for use, such as "defacing, alteration, or destruction."

An agency head has similar obligations when there exists "any actual, impending, or threatened" unlawful destruction of records. The agency head "shall notify" the Archivist and

[1] Defendants underscore the word "unlawful" when discussing the FRA, apparently to insinuate that the FRA only prohibits willful destruction of records animated by ill motive. *See* Defs.' Br. Sup. Second Mot. to Dismiss 8 [Docket #112] (Jan. 21, 2009) ("Second Mot. to Dismiss"). Quite the opposite is true, as the FRA prohibits "*any* actual, impending, or threatened" "removal, defacing, alteration, or destruction of records" that has not been approved in advance by the Archivist through the exclusive procedures set forth in the FRA, rendering any such destruction *a fortiori* unlawful.

"with the assistance of the Archivist shall initiate action through the Attorney General for the recovery of records." 44 U.S.C. § 3106. But even where "the agency head is recalcitrant in pursuing legal remedies," the Archivist must act alone. *Armstrong II*, 1 F.3d at 1279; *see also* 44 U.S.C. § 3106 ("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.").

The FRA thus commands that officials "shall" enforce the FRA whenever they perceive "any actual, impending, or threatened" risk to records. The imperative "shall" means "'the FRA enforcement provisions leave no discretion to determine which cases to pursue.'" Kennedy Mem. Op. at 21 (quoting *Armstrong I*, 924 F.2d at 295). Defendants wish the FRA were otherwise, asserting that when an agency head becomes aware of a risk of records being destroyed, "she, along with the Archivist, *may* 'initiate action through the Attorney General for the recovery of records[.]'" Second Mot. to Dismiss 8 (emphasis added) (quoting 44 U.S.C. § 3106). Contrary to Defendants' selective quotation, the word before "initiate" is "shall," not "may," eliminating all discretion to refrain from seeking legal action when records are at risk. This Court has held that "[t]he agency head and Archivist plainly have a duty to take enforcement action when necessary," because the FRA does not merely authorize such action, it "'*requires* the agency head and Archivist to take enforcement action'" whenever the factual predicate for such action is present. Kennedy Mem. Op. at 21 (quoting *Armstrong I*, 924 F.2d at 295) (emphasis in original).

The FRA sets forth one specific action that must be taken in response to any risk of records destruction: the Archivist and agency head "shall initiate, through the Attorney General, an action to recover the records." *Armstrong I*, 924 F.2d at 285; *see also Armstrong II*, 1 F.3d at

at 1279; Kennedy Mem. Op. at 4. Admittedly, the D.C. Circuit has acknowledged that an agency can first try other "safeguards against the removal or loss of records," such as "disciplining the staff involved in the unlawful action, increasing oversight by higher agency officials, or threatening legal action." *Armstrong I*, 924 F.2d at 296 n.12. But, if informal actions do not successfully "prevent the statutory violations," the duty "to take the specific actions provided for in the statute" remains. *Armstrong II*, 1 F.3d at 1288 n.12. As will be shown, Defendants' evidence, at best, suggests that the time has come to take the mandatory step required by the FRA of requesting action from the Attorney General.

When the agency head or Archivist fails to abate a risk of records destruction, "private litigants may bring suit to require the agency head and Archivist to fulfill their statutory duty to notify Congress and ask the Attorney General to initiate legal action," *Armstrong I*, 924 F.2d at 295, which is the relief the Archive seeks here. Upon a later action by the Attorney General, a federal court would have the power to issue an order for recovery or retrieval of records because the FRA "expressly provides for judicial review in an action brought by the Attorney General to prevent the destruction or removal of records." *Armstrong I*, 924 F.2d at 291 (citing 44 U.S.C. §§ 2905(a), 3106). The Archive's Complaint seeks to jump-start that process by compelling Defendants to seek legal action while there is still a prospect of recovery. In doing so, the Archive is serving its prescribed role under the FRA, as the court in *Armstrong I*, *id.*, explained:

> judicial review of the agency head's and Archivist's failure to take enforcement action reinforces the FRA scheme by ensuring that the administrative enforcement and congressional oversight provisions will operate as Congress intended. Unless the Archivist notifies the agency head (and, if necessary, Congress) and requests the Attorney General to initiate legal action, the administrative enforcement and congressional oversight provisions will not be triggered, and there will be no effective way to prevent the destruction or removal of records.

The fact that the FRA "preclud[es] private litigants from suing directly to enjoin agency actions in contravention of agency guidelines," *id.* at 294, does not affect judicial review in this

case, since the Archive does not seek such relief, as the Court has already found. Kennedy Mem. Op. at 9-11 ("Plaintiffs are not asking the court to enjoin the Archivist, EOP, and OA to recover the deleted emails."). Defendants misstate the law by asserting that "a court cannot itself order the recovery or retrieval of records that may have been removed or destroyed." Second Mot. to Dismiss at 8. To the contrary, a Court *can* issue such an order when the Attorney General sues.

As this Court has recognized, "[t]he agency head and Archivist plainly have a duty to take enforcement action when necessary." Kennedy Mem. Op. at 21. Enforcement action is necessary when "at least *some* federal records will be permanently lost or destroyed" because "[t]his circumstance alone creates the predicate for an order requiring the Archivist and the relevant agency heads to take the statutorily prescribed steps to prevent the destruction of those [records]." *Armstrong II*, 1 F.3d at 1282 (emphasis in original). If there is still a risk of records being destroyed, Plaintiffs are entitled to an order directing referral to the Attorney General for the initiation of legal action.

II. FACTS UNDERLYING THE ARCHIVE'S CLAIMS

The Executive Office of the President ("EOP") is an agency for purposes of the FRA, and is a Defendant along with its components that are FRA agencies. Defendant Office of Administration ("OA") is a component of EOP and administers the email servers, archives, and backup tapes for all EOP components at issue in this case. Defendant the National Archives and Records Administration ("NARA") is an independent federal agency with statutory responsibilities for assisting, ensuring, and enforcing the compliance of federal agencies under the FRA. The individual Defendants, all named in their official capacities, are the Archivist of the United States, who is the agency head of NARA, as well as the agency head of OA.

ARMS and the Journaling Archive System

In 1994, EOP implemented the Automated Records Management System ("ARMS"), an electronic records management system that worked with Lotus Notes to automatically "receive[] emails and then preserve[] and categorize[] them." Answer ¶ 29 [Docket #92] (Nov. 28, 2008); *see also* Feb. 26, 2008 Test. of Theresa Payton Before House Comm. on Oversight & Gov't Reform at 2 ("Payton Test.") (Ex. 12 to Archive's Emergency Mot. to Extend TRO [Docket #58] (Mar. 11, 2008)). "[B]oth federal and presidential records [were] stored in ARMS" and "ARMS contain[ed] controls to prevent unauthorized deletion of emails." Answer ¶ 29; *see also* Payton Test. 2. All EOP components operate on the same shared environment. Answer ¶ 31.

In 2002, EOP decided to replace Lotus Notes with Microsoft Exchange. Payton Test. 2. The migration of the EOP email system from Lotus Notes to Microsoft Exchange occurred over a two-year period from 2002 through 2004. *Id*. at 2; Jan. 20, 2009 Declaration of Stephen M. Everett at 2 (Jan. 21, 2009) ("Everett Decl.") (attached to 2d Motion to Dismiss). Because ARMS could "not be effectively integrated with Microsoft Exchange," the EOP did not use the ARMS' automatic archiving system with Microsoft Exchange. Payton Test. 2; Everett Decl. 5.

In place of the automatic ARMS system, the Office of the Chief Information Officer ("OCIO") developed an "archiving process that used the journaling function inherent in Microsoft Exchange."[2] Payton Test. 2. In her testimony, *id.*, Theresa Payton explained how this journaling archive system was supposed to work:

> Under that process, and in very general terms, whenever email is sent or received by an EOP Exchange customer, a copy of that email is automatically created and stored on a journal to which the customer should not have access. Journaled emails are then archived on a separate server in what is referred to as a Personal Storage Table or "PST" file.
>
> When Exchange was first deployed at EOP, the ".PST file was [] *manually* created by contractors within OA to archive the message contained in the Journal." Everett Decl. at 2. This

[2] OCIO is an office within OA responsible for the information technology systems at issue in this case.

".PST file therefore contained multiple email messages in its archived form, and was stored in the EOP email message archive." *Id.* Later, "the process for moving files from Journal to .PST files was automated in a program called 'Mail Attender,'" described as:

> Mail Attender relied on the creation of a duplicate copy of every email sent or received by EOP components on the EOP Network. Thus, the EOP email process is "bifurcated," resulting in two identical messages on the Exchange Server for every message sent or received on the EOP Network. One message is placed into the Journal Mailbox for the component sending or receiving the email, and the other message is contained in the user's mailbox. . . . [T]his email process is automated, no end user may control it. Mail Attender then automatically moves emails from the component Journal Mailbox into .PST files in the appropriate component directory. Those .PST files constitute the email message archives.

Id.

Problems with the Journaling Archive System Come to Light

In 2005, in response to a subpoena issued by Special Counsel Patrick Fitzgerald in the Scooter Libby investigation, EOP discovered that neither the email message archives, nor the backup tapes, contained any journaled emails or .PST files from September 30 through October 6, 2003 for the Office of the Vice President, an EOP Presidential Records Act component. *See* Feb. 26, 2008 Mem. to Majority Members of the Comm. Oversight & Gov't Reform at 3 ("Comm. Mem.") (Mar. 11, 2008) (attached as Ex. 5 to Emergency Motion to Extend TRO [Docket #58]); Jan. 26, 2006 Letter from Patrick Fitzgerald to Libby Counsel at 7 (attached as Ex. 5 to CREW's Response to Defs.' Notice of Filing [Docket #49] (Jan. 17, 2008)). The only emails that could be recovered and provided to Fitzgerald were emails the White House was able to restore from the personal email accounts of officials in the Vice President's Office. Comm. Mem. 5.

"[W]hen it became apparent in October 2005 that OCIO staff and contractors were not effectively managing the .PST files used to retain the email records for the EOP," a team of OCIO employees undertook an analysis of the .PST file storage process led by Steven McDevitt, a senior official in the OCIO, which will be referred to in this brief as the "2005 Statistical

Analysis." Feb. 21, 2008 Letter from Steven McDevitt to Rep. Waxman ¶ 18 ("McDevitt Letter") (attached as Ex. 8 to Emergency Mot. to Extend TRO [Docket #58]); Comm. Mem. 18. The goal of the 2005 Statistical Analysis was to "organize and inventory the .PST files used for EOP email records retention and to put in place a formal process to manage these files." McDevitt Letter ¶ 18. To complete this analysis a team of OCIO staffers attempted to: search all servers on the EOP network for all .PST files to identify and locate all .PST files in the EOP environment; collect a data set that contained all relevant information about these files; create a secure and organized server environment in which these files could be stored; and create an inventory of all .PST files and verify all the information. *Id*. Because the team noticed "anomalies" with the .PST files, an additional level of analysis was conducted. *Id.* In this analysis, OCIO found that "[i]n addition to there being hundreds of days for which specific components had no email retained, there were a number of days for which it was clear that the number of emails retained was lower than expected." *Id*. Specifically, a spreadsheet revealed that there were 473 days during this period in which a component of the EOP had no emails preserved on the servers, as well as 229 in which a component had an unusually low number of emails preserved on the servers. *See* 2005 Spreadsheet of "EOP Exchange Environment—All Components" ("2005 Spreadsheet") (attached as Ex. 7 to Emergency Mot. to Extend TRO [Docket #58]). The number of emails deleted from servers, and recoverable only from backup tapes, was estimated at approximately five million.

Subsequently, at least two spokespersons from the White House admitted the missing email problem. White House Spokesperson Dana Perino acknowledged in a press gaggle that there was a problem with missing White House emails and stated that she was "not taking issue" with CREW's conclusions that there were hundreds of days for which emails were missing. Apr.

13, 2007 Press Briefing by Dana Perino at 2 (attached as Ex. 3 to CREW's Response to Defs.' Notice of Filing [Docket #49]). Neither did Ms. Perino dispute CREW's estimate that there over five million missing emails. *Id.* More recently, White House Spokesperson Tony Fratto said that an uncertain number of emails were deleted: "It was a problem we announced, admitted to and will remedy." Elizabeth Williamson, *White House Secrecy Starts to Give*, WASH. POST, Jan. 13, 2008 (attached as Ex. 4 to CREW's Response to Defs.' Notice of Filing [Docket #49]).

Congressional Action and Evidence of a Problem

Press reports of the missing emails prompted the House of Representatives Committee on Oversight and Government Reform to investigate email preservation within the White House.[3] Evidence received by the Committee revealed significant problems with the EOP's journaling archive process that "posed serious dangers, such as the risk of data loss, the risk of tampering, and the inability to verify that systems were working properly." Comm. Mem. 4. Specifically:

- One NARA official wrote: "I refer to it as a 'message collection system,' even though we all understand that it hardly qualifies as a 'system' by the usual IT definition." Nov. 6, 2007 Email from Sam Watkins to Theresa Payton (attached as Ex. 6 to Emergency Mot. to Extend TRO [Docket #58]).
- Carlos Solari, Theresa Payton's predecessor as Chief Information Officer, described the journaling process as a "temporary" solution that was not considered by the White House as a "good long-term solution." Comm. Mem. 5.
- A White House Discussion Document stated: "There is operational risk in current email storage management processes. Lost or misplaced email archives may result in an inability to meet statutory requirements . . . Standard operating procedures for email management do not exist . . . The current version is prone to failure." *Id.* at 6.
- In 2005, McDevitt sent a memorandum to John Straub, Acting Chief Information Officer and the Director of OA, warning that, "[t]he current email archive process depends on manual operations and monitoring, standard operating procedures do not exist, automated tools that support the email archive process are not robust, and there is no dedicated archive storage location." *Id.* at 7.
- As early as 2004, NARA warned the White House that it was "operating at risk by not capturing and storing messages outside of the email system." *Id.* at 6.

[3] The Committee was specifically concerned with the White House's compliance with the Presidential Records Act, but the same information technology systems and servers are at issue here for FRA components.

In written responses to questions from the Committee, Steven McDevitt provided an extensive description of the potential problems with the journaling archive system. McDevitt Letter ¶ 11. First, he stated that data might be missing because "[t]he process by which email was being collected and retained was primitive and the risk that data would be lost was high . . . [and] the risk was compounded by the fact that there was no mechanism to reconcile the messages that were retained in the .PST files and the messages that had been processed by the Exchange system." *Id*. Second, he identified a problem with "data reconciliation" because "[t]he use of .PST files for warehousing email records does not provide a mechanism to reconcile against what was originally retained by the system. This is there [sic] is no way to guarantee that all records are retained in their complete and unmodified state." *Id*. Third, there was little "user accountability" in the system because:

> The approach of simply storing email message in .PST files provides no mechanism or audit trail that tracks changes to data files or the activities performed by users or system administrators. The integrity of the data could be called into question because it was not possible to ensure the [sic] inappropriate action, either intentional or unintentional, could not occur. Or, if they did occur, the actions would be logged and the user who performed those actions could be identified. The potential impact: No verification that data retained has not been modified or what activities have been performed by system users or administrators.

Id.

III. DEFENDANTS HAVE RESISTED ALL EFFORTS TO CONFIRM THE STATUS OF EOP EMAILS

In the year and a half since the Archive filed its Complaint, the allegations that there was a risk that emails would be deleted from White House servers and that some emails had in fact been deleted are still unrefuted (indeed are now conceded), and Defendants have resisted every effort by Plaintiffs or the Court to get to the facts of this case, or even to preserve the emails at issue so that the case can unfold in an orderly manner. Having failed with their First Motion to Dismiss, Defendants' Second Motion to Dismiss seeks to saw off half of the Archive's claims

and deal with them on the basis of a truncated record. This motion should be seen for what it is — no more than the latest in a long series of stonewalling tactics, which a less charitable litigant might characterize as a cover-up.

When Plaintiffs sought early on to preserve backup tapes for the emails at issue in the case while the legal issues were resolved, CREW's Mot. for a TRO [Docket #4] (Oct. 11, 2007), Defendants implored the Court to rely solely on counsel's assurances that everything would be preserved and "balk[ed] at entering into any stipulation that would in effect serve as the premise of an order requiring it to do so." Rep. & Rec. at 4 [Docket #11] (Oct. 19, 2007); *see also* Defs.' Opp. to CREW's Mot. for TRO [Docket #5] (Oct. 12, 2007). The Court wisely, as is now confirmed by Defendants' narrative description of their restoration effort, chose to order complete preservation of the backup tapes. Rep. & Rec. at 4 [Docket #11] (Oct. 19, 2007); *adopted by* Order [Docket #18] (Nov. 12, 2007). When Plaintiffs sought targeted discovery to ensure that all relevant emails were being preserved during the pendency of the case in the event the Court ultimately ruled in Plaintiffs' favor, Defendants again resisted, arguing that they would file a successful motion to dismiss, so there would be no need for discovery.[4]

When Magistrate Judge Facciola recognized in January of 2008 that "a small amount of information not currently in the record may have a large [e]ffect on the resolution of [the discovery] motion and the direction of the lawsuit," he posed a series of targeted questions regarding preservation. Mem. Order at 3-4 [Docket #46] (Jan. 8, 2008). In response, Defendants submitted a series of declarations that were so vague and incomplete, and that so utterly failed to answer the Magistrate Judge's questions, that Magistrate Judge Facciola decried the "lack of

[4] In fact, Defendants argued that any judicial review should be limited only to an administrative record, which "Defendants would be obliged to . . . submit . . . only in the event that the motions to dismiss were to be denied." *See* Defs.' Opp. to Plas.' Mot. for Leave to Conduct Expedited Disc. at 16 [Docket #16] (Nov. 9, 2007).

precision in EOP's responses," Mem. Order & First Rep. & Rec. at 3 ("First Rep. & Rec.") [Docket #67] (Apr. 24, 2008), and declared that Defendants' "response was inadequate." Mem. Opinion & Second Rep. & Rec. at 6 ("Second Rep. & Rec.)[Docket #84] (July 29, 2008).[5] After Defendants' *third* attempt at responding to his inquiries, Magistrate Judge Facciola found that Defendants "once again fail[ed] to provide anything more than generalizations," and "once again failed to describe the potential costs [of proposed relief] in precise terms." *Id*. at 5-6 & n.6.

When the House of Representatives Committee on Government Oversight and Reform held a February 24, 2008 hearing on the issues at the heart of this case, it became clear that the Court's existing preservation order was not broad enough to preserve the emails at issue in this case because, among other things, it was made public that Defendants had recycled email backup tapes for several of the months at issue. When the Archive moved to extend the preservation order, and submitted evidence from the congressional hearing, Emergency Mot. to Extend TRO [Docket #58] (Mar. 11, 2008), Defendants again strenuously resisted this motion, as well as efforts to gain further discovery, even though it was Defendants' own failure to preserve backup tapes — or to mention this fact to the Court — that had necessitated the motion. After several unsuccessful attempts to extract information from Defendants,[6] Magistrate Judge Facciola recommended that the Court grant the Archive's motion in part, recommending that the Court order EOP to search employee workstations for .PST files from the March 2003 through October 2005, and to issue a preservation notice to employees ordering them to surrender any and all media that might contain emails from the relevant period. First Rep. & Rec. at 5-6, 7.

[5] After months of litigation, Magistrate Judge Facciola explained that "[t]he Court must admit that it is still unclear which back-up tapes are being preserved and stored by EOP." First Rep. & Rec. at 8.

[6] *See* Mem. Order, Jan. 8, 2008 [#46] (seeking additional information about the back-up tapes being preserved); Mem. Order, Mar. 13, 2008 [#62] (seeking additional information about forensic imaging); First Rep & Rec. at 3 & 8 (seeking further information about forensic imaging and backup tapes).

Defendants tried every trick in the book, plus a few that are not, to avoid having to comply with Magistrate Judge Facciola's recommended relief. For starters, they did nothing to prepare to take the actions recommended by Magistrate Judge Facciola until *after* the Court adopted his recommendations. *See* Tr. of Status Conf. Tr. 5-8 [Docket #113] (Jan. 14, 2009). Defendants also filed a motion with Magistrate Judge Facciola to reconsider his report and recommendation, Defs.' Responses to & Request for Reconsideration of the First Rep. & Rec. [Docket #69] (May 5, 2008), a motion that is specifically prohibited by Local Civil Rule 72.3 and the comments thereto, while at the same time filing objections to the report and recommendations with this Court. Defs.' Local Rule 72.3(b) Objections to the Mag. Judge's First Rep. & Rec. [Docket #72] (May 12, 2008). Magistrate Judge Facciola then denied the "motion for reconsideration" and issued a second report and recommendation reiterating his first report. Second Rep. & Rec. at 5-6 & n.6. Defendants promptly objected to that, raising the very same objections they had already made to this Court. Defs.' Renewed Local Rule 72.3(b) Objections to First Rep. & Rec. [07-1707 Docket #89] (Aug. 15, 2008). While those objections were pending, Defendants took no steps to prepare to comply with the orders recommended by the Magistrate Judge, instead hoping they would succeed in their pending Motion to Dismiss. Nor, apparently, did they take any steps to prepare to comply after the Court denied that motion.

IV. THIS COURT'S RULING THAT THIS CASE IS JUSTICIABLE AND THE ARCHIVE STATES A CLAIM ON THE MERITS DID NOT CHANGE DEFENDANTS' REFUSAL TO DISCLOSE RELEVANT FACTS

In November of 2007, Defendants had moved to dismiss the case on a variety of grounds, arguing that the Archive's claims were precluded by the Presidential Records Act, that the FRA precludes the relief requested by the Archive, and that both plaintiffs lacked standing. Defs.' First Mot.to Dismiss Plas.' Complaints [Docket #39] (Nov. 29, 2007). On November 10, 2008, this Court issued an opinion and order denying the Motion to Dismiss in its entirety. *Citizens for*

Responsibility & Ethics in Wash. v. Executive Office of President, Nos. 07-1707, 07-1577, 587 F. Supp. 2d 48 [Docket #90] (D.D.C. Nov. 10, 2008) ("Kennedy Mem. Op."). The Court found that Plaintiffs stated valid claims on all counts of their complaints and that neither the Presidential Records Act nor the Federal Records Act precluded the requested relief. Additionally, the Court found that Plaintiffs have Article III standing because they "seek precisely the relief outlined in FRA and upheld by the D.C. Circuit: an order requiring the Archivist and agency head to ask the Attorney General to initiate legal action." *Id.* at 19.

Soon after, Defendants filed an Answer. A few admissions are particularly pertinent. In the Answer, Defendants admit that they had notice as of 2005 that there was a problem with the way EOP emails were stored. Answer ¶ 32. They also admit that Defendants recognized, almost immediately, the need for remedial action to address the problem. *Id.* ¶ 34 ("OA admits that in late 2005-early 2006, a plan was developed and implemented to focus on recovery of certain limited information in response to legal inquiry."). Finally, and perhaps most significantly, Defendants admit that the Archivist has never authorized disposal of the email records at issue in this case. *Id.* ¶ 37. Therefore, any removal, disposal or destruction of these records is still unlawful. Defendants also admit that they themselves have not requested that the Attorney General file a lawsuit or seek other legal redress to recover or restore the emails. *Id.* ¶ 47.

In an APA case the first step after a plaintiff survives a motion to dismiss is production of the administrative record if one has not already been produced. In this case, Defendants previously acknowledged that the Archive would be entitled to an administrative record upon denial of the motion to dismiss. *See supra*, n. 4; Dec. 11, 2008 Letter from S. Shadmand to H. Hong (attached as Ex. 1 in Archive's Mot. to Compel Prod. of the Admin. Record ("Mot. to Compel") [Docket #97] (Jan. 8, 2009)). At the same time, Plaintiff CREW stated its concern that

in light of the pending transition there would not be a complete administrative record in this case and moved for leave to conduct discovery. *See* Renewed Mot. for Leave to Conduct Expedited Disc. [Docket #93] (Dec. 4, 2008).

Rather than produce anything, counsel for Defendants asserted that they would seek dismissal of the first four counts in the complaints on mootness grounds and would "compile an administrative record to show that defendants' guidelines are adequate" on the second four counts in the complaints. Defs.' Opp. to Renewed Mot. to Conduct Expedited Disc. at 2, 10 [Docket #94] (Dec. 18, 2008). In subsequent correspondence, as well as a telephone conference, Defendants made clear that they refused to produce an administrative record for the entire case and would instead produce a record for only half of Plaintiffs' claims, while "providing evidence" in support of their argument that "the first four causes of action are now moot" because of "actions defendants have taken" since initiation of the suit. *See* Jan. 5, 2009 Letter from H. Hong to S. Shadmand (attached as Ex. 4 in Archive's Mot. to Compel [Docket #97]). With respect to the last four claims, Defendants stated that they would provide "an administrative record in support of summary judgment." *Id.* Defendants said that they would produce the record at the same time they move for summary judgment, which they said would be February 6, 2009. That day has come and gone, with no motion and no record.

In response to Defendants' refusal to produce or even compile the full administrative record to which it was entitled, the Archive filed a Motion to Compel Production of the Administrative Record [Docket #97] on January 8, 2009. The next day, Plaintiff CREW filed an Emergency Motion for an Immediate Status Conference [Docket #98]. Both motions were referred to Magistrate Judge Facciola, who held a status conference on January 14, 2009. On the morning of January 14, this Court overruled Defendants' objections to Magistrate Judge

Facciola's recommended relief and granted in part the Archive's Emergency Motion to Extend the TRO. *See* Order [Docket #102] (Jan. 14, 2009).

At the January 14 status conference, Magistrate Judge Facciola asked Defendants what they had done in the past eight months to preserve the media at issue in the April 24, 2008 recommendation, which this Court had adopted in an order issued that morning. *See* Tr. of Status Conf. Tr. 40-41 [Docket # 113] (Jan. 14, 2009). Magistrate Judge Facciola also asked whether the administrative record had been compiled, where it was located, and what effect the presidential transition might have on the record. *Id.* at 37-50. Although two and a half months had elapsed since Defendants' Motion to Dismiss had been denied, and almost nine months had passed since the Magistrate Judge issued his recommendation, Defendants stated they had issued a preservation notice but had taken no other steps to ensure that Magistrate Judge Facciola's recommendations could be implemented if adopted by the Court. *Id.* at 5-8. [7]

The next day, Magistrate Judge Facciola issued a supplementary order detailing the steps defendants must take to comply with the Court's January 14, 2009 Order regarding media preservation. Order [Docket #104] (Jan. 15, 2009). That same day Magistrate Judge Facciola denied CREW's request for expedited discovery, deeming it "inappropriate to order discovery in this case until after the administrative record has been certified." Mem. Order [Docket #107] (Jan. 15, 2009). After Defendants raised objections to the supplementary order, this Court issued an Order overruling the substantive objections, treating the Magistrate Judge's Order as a Recommendation, and then adopting it in full. Order [Docket #116] (Jan. 26, 2009).

[7] With regard to the administrative record, Defendants made vague assurances that record materials were being preserved, but did not state that a record had been compiled. *Id.* at 37-50

V. DEFENDANTS CLAIM THAT THEIR HANDPICKED EVIDENCE SHOWS THEY HAVE FIXED THE PROBLEM

On January 21, 2009, before this Court ruled on the appeal of Magistrate Judge Facciola's order, Defendants moved to dismiss the first four claims as moot. Second Mot. to Dismiss [Docket #112] (Jan. 21, 2009). In this motion, Defendants contend that they have "initiated action" within the meaning of the FRA, mooting Plaintiffs' entitlement to relief. Defendants describe a "three-phased email recovery process," in which the OCIO "determined that the 2005 review that grounds plaintiffs' complaints . . . is flawed and limited." *Id.* at 2.

First, Defendants claim they studied the 2005 Statistical Analysis and recreated that study with "better" technology. *Id.* at 17-20. In this first Phase, Defendants claim to have located millions of emails previously rendered effectively lost because they had been mislabeled or misallocated to the wrong EOP components, but provide no explanation of what caused the mislabeling or misallocation, or any facts that would establish the accuracy or completeness of their claim.

In Phase II, Defendants claim they analyzed the .PST file inventory contained in the email archive by using a new scanning and indexing tool that reallocated messages to their respective EOP components. *Id.* at 20-21. Defendants state they also used a new statistical model in Phase II, ARIMA, to calculate days that were "low," that is, that had fewer emails compared to other days for which ARIMA had data. *Id.* at 22-23. At the end of Phase II, despite the reallocation and new statistical model, there were still 7 "zero" message days in the email archive and 76 "low" message days in the Archive. *Id.* Defendants provide no explanation in their motion for what caused this now-acknowledged loss of emails from the servers.

In Phase III, Defendants claim they identified and restored 125 additional .PST files which "had been identified in previous work as existing at one point," but which then could not

be located in Phase II. *Id*. at 24. This restoration resulted in an *increase* in the number of "low" days to 106. *Id*. No explanation is offered as to why Defendants did not locate these 125 additional .PST files during phases I and II. Moreover, while Defendants contend that they searched "other repositories" of emails that resulted from "searches or mailbox restorations due to file corruption," *id*. at 21, no explanation is given as to whether all such "other repositories" have been searched. Furthermore, at the end of Phase III, Defendants claim they had identified 106 "low" and 7 "zero" days.[8] *Id*. at 24. Defendants then used the backup tapes to restore only 21 calendar days, covering **only** 48 of the "low" or "zero" component days. *Id*. at 24-25. Inexplicably, Defendants did not restore the remaining 65 "low" or "zero" days. This decision not to restore all "low" or "zero" days is not explained by Defendants.

Other than the limited restoration, Defendants made no use of backup tapes. For instance, there is no mention of an audit using random sampling to compare the contents of the backup tapes to the email archive. There is also no discussion of what caused the problem, what its magnitude was, or whether the problem has been fixed. There is also no mention of whether the Archivist played any role whatsoever in this process, despite the FRA's requirements.

ARGUMENT

I. UNDER MOOTNESS DOCTRINE, THE ARCHIVE'S CLAIMS ARE MOOT ONLY IF DEFENDANTS HAVE COMPLETELY AND IRREVOCABLY ABATED THE RISK OF UNLAWFUL DISPOSAL OF RECORDS THAT RAISED PLAINTIFFS' RIGHT TO RELIEF

"The mootness doctrine 'rests on the fundamental principle of our jurisprudence that Article III of the Constitution limits the judicial power of the United States to the resolution of cases and controversies.'" *Am. Postal Workers Union v. U.S. Postal Serv.*, 422 F. Supp. 2d 240,

[8] It is unclear from Defendants' brief and the Everett Declaration whether the 7 "zero" days are included in the 106 "low" days. Even if the 7 "zero" days were included in the 106 "low" days, that leaves 58 days unrestored.

247 (D.D.C. 2006) (Kennedy, J.) (quoting *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State*, 454 U.S. 464, 471 (1982)). "[M]ootness has two aspects: when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome.'" *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 396 (1980) (internal citation omitted). The Supreme Court has admonished that "[i]t is no small matter to deprive a litigant of the rewards of its efforts," and that dismissal on mootness grounds "would be justified only if it were *absolutely clear* that the litigant no longer had any need of the judicial protection that it sought." *Adarand Constructors, Inc. v. Slater*, 528 U.S. 216, 224 (2000) (emphasis added). Therefore "[t]he burden of demonstrating mootness 'is a heavy one.'" *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979) (quoting *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953)). To establish that a properly pleaded claim has become moot, Defendants must show that "intervening events 'have *completely and irrevocably* eradicated the effects of the alleged violation.'" *Ctr. for Biological Diversity v. Kempthorne*, 498 F. Supp. 2d 293, 296 (D.D.C. 2007) (quoting *County of Los Angeles*, 440 U.S. at 631) (emphasis added).

The "alleged violation" at issue in the first four counts of the Archive's Complaint is that, despite a risk of "any actual, impending, or threatened unlawful removal, defacing, alteration, or destruction of records," 44 U.S.C. § 2905(a), the Archivist and agency head have breached the statutory duty to seek legal action from the Attorney General. The Archive seeks to compel this agency action which has been unlawfully withheld or unreasonably delayed even though the factual predicate for FRA enforcement action — the risk of records being destroyed — is present.

Defendants do not and cannot contend that they have taken the specific enforcement action prescribed by the FRA, as they admit that they have not asked the Attorney General to initiate legal action. Answer ¶ 47. Instead, Defendants' only option is to contend that they have

"completely and irrevocably eradicated" the FRA's factual predicate for enforcement action – that there is no longer "any actual, impending, or threatened unlawful removal, defacing, alteration, or destruction of records."[9] If Defendants cannot carry their burden of establishing that they have "completely and irrevocably eradicated" that risk, then the case is not moot. Indeed, if a risk still remains, the Archive would win on the merits. As discussed below, Defendants have not established that they have abated the risk of records destruction that underlies the Archive's Complaint. But first, and more fundamentally, the issues raised by Defendants cannot be decided in the procedural manner they propose and cannot be resolved on the basis of the self-selected, woefully inadequate "record" they present to the Court.

II. CONTRARY TO DEFENDANTS' ASSERTIONS, A MOTION FOR SUMMARY JUDGMENT OR RESOLUTION AT A TRIAL ON THE MERITS ARE THE ONLY APPROPRIATE VEHICLES FOR RESOLVING THIS MOOTNESS CHALLENGE

A. Defendants Mischaracterize Their Motion As One Under Rule 12(b)(1), Even Though It Is Intertwined With Facts that Go Straight to the Merits, and Therefore Must Be Resolved Using Summary Judgment Procedures.

Defendants characterize their motion as one attacking subject matter jurisdiction that should be resolved under Rule 12(b)(1), at the present time and without any discovery or production of the record. *See* Second Motion to Dismiss 10-11. But Defendants' motion is fact-bound and raises the same question that would resolve this case on the merits: whether Defendants are still under the FRA's mandatory duty to seek legal action through the Attorney

[9] To be clear, the Archive has not altered the factual allegations or theory of injury set forth in the Complaint in support of its first four claims: "that unless the deleted [emails] are restored under [the] FRA enforcement scheme, [the Archive] will not be able to obtain these federal records through their pending and future requests and therefore suffer real injury," which can be remedied by "precisely the relief outlined in FRA and upheld by the D.C. Circuit: an order requiring the Archivist and agency head to ask the Attorney General to initiate legal action." Kennedy Mem. Op. at 18-19. In resolving Defendants' Second Motion to Dismiss, the Court is not called upon to apply APA review to the sufficiency of the actions that the Defendant agencies have taken, which they say moot the Archive's claims, and is not asked to declare those actions unlawful or set them aside. The Court in this case is simply asked to determine whether there still remains a risk that federal records will be destroyed and, if so, to order Defendants to initiate legal action through the Attorney General.

General because there is still a risk of destruction of federal records. If such a risk exists, then the Archive wins on the merits and is entitled to relief on its first four counts. Because that factual question goes to the ultimate merits of the Archive's case, it should be decided on a fully developed record under summary judgment procedures or by the finder of fact at trial. Instead, Defendants invite the Court to commit reversible error by dismissing half of the suit now under Rule 12(b)(1), on the basis of limited evidence selected by Defendant. It would be error to go down this procedural road for at least two reasons: (1) because the supposedly jurisdictional issue is intertwined with the merits, the two issues should both be decided at the merits stage, not on a threshold 12(b)(1) motion; and (2) because Defendants seek to enter materials outside the pleadings, the Court should develop the record on its own accord or allow the Archive to do so.

There are generally two types of 12(b)(1) motions to dismiss for lack of jurisdiction, facial and factual, and Defendants' motion is factual.[10] In a factual challenge like the one raised in Defendants' Second Motion to Dismiss, a defendant acknowledges that the facts alleged in the complaint may be sufficient to establish jurisdiction, but argues that the alleged jurisdictional facts are not true. *See Al-Owhali*, 279 F. Supp. 2d at 20. Defendants incorrectly assert that it is always appropriate for the Court to make factual findings to resolve a factual challenge to jurisdiction. To the contrary, "[o]n a factual attack of subject matter jurisdiction, a court's power to make findings of facts and to weigh the evidence depends on whether the factual attack on jurisdiction also implicates the merits of plaintiff's cause of action." *Garcia v. Copenhaver, Bell & Assocs., M.D.'s, P.A.*, 104 F.3d 1256, 1261 (11th Cir. 1997).

[10] "A facial challenge attacks 'the factual allegations of the complaint' that are contained on 'the face of the complaint,'" contending that the complaint fails to sufficiently allege facts upon which jurisdiction can be based. *See, e.g., Al-Owhali v. Ashcroft*, 279 F. Supp. 2d 13, 20 (D.D.C. 2003); *see also Erby v. United States*, 424 F. Supp. 2d 180, 182 (D.D.C. 2006); 2 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE, § 12.30[4], at 39 (3d ed. 2002). Defendants raised a facial challenge to justiciability in their First Motion to Dismiss, which was denied, and do not raise a facial challenge here.

Where the issue of jurisdiction is not bound up with the merits issues, and did not revolve around the same facts, the Court would be free to conduct its own investigation into jurisdiction and "look beyond the pleadings and to inquire into facts that are pertinent to the determination of whether it has subject matter jurisdiction." *Macharia v. United States*, 238 F. Supp. 2d 13, 19 (D.D.C. 2002) (citing *Land v. Dollar*, 330 U.S. 731, 735 n.4 (1947)), *aff'd*, 334 F.3d 61 (D.C. Cir. 2003). On the other hand, it is well settled that "where the jurisdictional facts are intertwined with the facts central to the merits of the dispute," as in this case, "the entire factual dispute is appropriately resolved only by proceeding on the merits." *Adams v. Bain*, 697 F.2d 1213, 1219 (4th Cir. 1982); s*ee also Gordon v. Nat'l Youth Work Alliance*, 675 F.2d 356, 363 n.13 (D.C. Cir. 1982) (Robinson, C.J., concurring) ("If, however, the issue on jurisdiction is intertwined with the merits of the case, the decision on jurisdiction should be postponed until trial."); *Gentek Bldg. Prods. v. Sherwin-Williams Co.*, 491 F.3d 320, 331 (6th Cir. 2007). Therefore, "though the trial court may rule on disputed jurisdictional facts at any time, if they are inextricably intertwined with the merits of the case it should usually defer its jurisdictional decision until the merits are heard." *Herbert v. Nat'l Acad. of Scis.*, 974 F.2d 192, 198 (D.C. Cir. 1992); *see also United States v. North Carolina*, 180 F.3d 574, 580 (4th Cir. 1999) (same).

In cases like this one where an attack on jurisdiction implicates the merits, "12(b)(1) is an inappropriate basis upon which to ground the dismissal." *Adams*, 697 F.2d at 1220. Instead, "where . . . the jurisdictional issue and substantive claims are so intertwined [that] the resolution of the jurisdictional question is dependent on factual issues going to the merits, the district court should employ the standard applicable to a motion for summary judgment." *Torres-Negron v. J & N Records, LLC*, 504 F.3d 151, 163 (1st Cir. 2007) (internal quotation marks omitted; ellipsis

in original).[11] Further, Plaintiffs must be provided "with the essential safeguards of summary judgment procedure whenever they face a motion to dismiss that turns on questions of fact," including appropriate discovery. *Gordon*, 675 F.2d at 360 ("Even under Rule 12(b)(1), procedural safeguards equivalent to those in Rule 56 are required, with Rule 56 used selectively as a guide to ensuring fairness," because where facts material to jurisdiction are at issue, "both fairness and analogy to Rules 12(b)(6) and 56 require that the court provide the parties a full opportunity to air their factual dispute.").[12]

If after development of the factual record, there exists a genuine dispute of material jurisdictional facts, then the case must proceed to trial, with the jurisdictional dispute resolved there. *See Loughlin v. United States*, 230 F. Supp. 2d 26, 36 (D.D.C. 2002) (such motions "are treated as motions for summary judgment and any material factual disputes are decided at trial." (internal quotation marks omitted)); *see also Chatham Condo. Ass'n v. Century Vill., Inc.*, 597 F.2d 1002, 1011 (5th Cir. 1979); *Flores v. Dist. of Columbia*, 437 F. Supp. 2d 22, 28 n.11 (D.D.C. 2006); *Am. Farm Bureau*, 121 F. Supp. 2d at 104.

Here, there can be no doubt that the merits of Plaintiffs' claims are intertwined with the jurisdictional issue, because "the pertinent inquiry will resolve both the question of subject matter jurisdiction and a necessary element of [plaintiff's] claim." *Lawrence v. Dunbar*, 919

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[11] The case law also suggests that, where the merits and the jurisdictional issues are intertwined, Defendants may challenge the sufficiency of Plaintiffs' claims through a 12(b)(6) motion to dismiss. *See, e.g.*, *Am. Farm Bureau v. U.S. Envtl. Prot. Agency*, 121 F. Supp. 2d 84, 104 (D.D.C. 2000). As the Court well knows, Defendants have already brought such a challenge, and lost. *See generally* Kennedy Mem. Op.

[12] There are sound reasons for advancing to the merits when jurisdictional and merits facts are intertwined. "'This refusal to treat indirect attacks on the merits as Rule 12(b)(1) motions provides . . . a greater level of protection to the plaintiff who in truth is facing a challenge to the validity of his claim: the defendant is forced to proceed under Rule 12(b)(6) . . . or Rule 56 . . . both of which place great restrictions on the district court's discretion.'" *Garcia*, 104 F.3d at 1261 (quoting *Williamson v. Tucker*, 654 F.2d 404, 415-16 (5th Cir. 1981)) (alterations in original). If Defendants had their way, all plaintiffs who raise federal questions would have to prove their case on the merits just to invoke jurisdiction. If that were the case, litigation in federal court would become an entirely different animal, because "[i]f federal jurisdiction turned on the success of a plaintiff's federal cause of action, no such case could ever be dismissed on the merits." *Moore v. LaFayette Life Ins. Co.*, 458 F.3d 416, 444 (6th Cir. 2006).

F.2d 1525, 1529 (11th Cir. 1990); *see also Pringle v. United States*, 208 F.3d 1220, 1223 (10th Cir. 2000). To decide Defendant's Motion to Dismiss is to decide whether Defendants are under a duty to initiate enforcement action under the FRA; the precise merits issue raised by the Archive's case. Therefore, "the jurisdictional issues are intertwined with the substantive merits," and "'the jurisdictional issues should be referred to the merits, for it is impossible to decide one without the other.'" *Eaton v. Dorchester Dev., Inc.*, 692 F.2d 727, 733 (11th Cir. 1982) (quoting *Chatham Condo. Ass'n*, 597 F.2d at 1011). At a recent status conference, Magistrate Judge Facciola recognized that Defendants' motion would call on the Court to address the merits:

> I've always understood those to really be saying the same thing at the same time, *i.e.* we have now found everything you were looking for, . . . therefore, it's moot and the court lacks jurisdiction over issues that are moot. Isn't that saying the same thing the same way? . . . May be one of those cases where you have to peak [*sic*] at the merit[s]."

Emergency Status Conf. Tr. 40-41. *Id*.

As Magistrate Judge Facciola acknowledged, the mootness defense raised by Defendants goes to the ultimate issue in this case. A true mootness case, on the other hand, is one "[w]here intervening events preclude the Court from granting plaintiffs any effective relief, even if they were to prevail on their underlying claim." *Citizens Alert Regarding Env't v. Leavitt*, 355 F. Supp. 2d 366, 369 (D.D.C. 2005). If after a proper airing of the facts, this Court is persuaded by the Archive that there is still a risk of federal records destruction, then nothing precludes it from ordering Defendants to seek legal action through the Attorney General. For similar reasons, this Court has recognized in the past that when a "mootness" defense essentially challenges the plaintiff's entitlement to relief on the merits, and not the Court's legal ability to render relief, the "mootness" defense should be resolved as a merits issue, not as a threshold matter of jurisdiction. In *American Postal Workers Union*, this Court stated:

> USPS argues that the case must be dismissed as moot because this court "can grant no meaningful relief." This is incorrect, for this court certainly has the constitutional

> authority to agree with APWU's argument, assuming the facts support such an argument, and find that arbitration before a new arbitrator is appropriate under the settlement agreement. Therefore, the court cannot conclude that the present case is moot.

422 F. Supp. 2d at 247-48 (citation omitted).

Summary judgment procedures in this case are also appropriate because summary judgment is the correct vehicle for resolving a jurisdictional challenge where the defendant submits matters outside the pleadings. *See Garcia*, 104 F.3d at 1261 (reviewing jurisdictional challenge under summary judgment standard because extra-record evidence considered); *Loughlin*, 230 F. Supp. 2d at 36-37 (reviewing challenge to subject matter jurisdiction under summary judgment standard); *Settles v. U.S. Parole Comm'n*, 429 F.3d 1098 (D.C. Cir. 2005). Here, relying on the notion that a court "may look beyond the pleadings," Defendants have attached a few pieces of extraneous evidence to their motion. However, in other cases where defendants have submitted extra-record evidence, this Court has resolved factual mootness challenges by applying summary judgment procedures.[13] *See Cmty. Hous. Trust v. Dep't of Consumer & Regulatory Affairs*, 257 F. Supp. 2d 208, 217 (D.D.C. 2003) (Kennedy, J.) ("Because both parties have presented material outside the pleadings, and the court has relied upon such material, the parties' motions will be treated as motions for summary judgment."); *Evangelical Lutheran Church in Am. v. INS*, 288 F. Supp. 2d 32, 49-50 (D.D.C. 2003) (Kennedy, J.) (in APA case, resolving mootness challenge under summary judgment procedures, on basis of administrative record); *Gray Panthers Project Fund v. Thompson*, 273 F. Supp. 2d 32, 37-38

[13] While some courts suggest that a defendant can attack subject matter jurisdiction at the 12(b)(1) stage by submitting matters outside the pleadings, the D.C. Circuit has held that considering evidence submitted by the defendant at this stage is reversible error. In *Haase v. Sessions*, 835 F.2d 902 (D.C. Cir. 1987), the D.C. Circuit held that only the *court* can go beyond the pleadings when defendant brings a 12(b)(1) motion to dismiss; the defendant cannot mount such a factual challenge under 12(b)(1). The defendant is limited to challenging subject matter jurisdiction in only two ways: "a motion to dismiss, which is based exclusively on plaintiff's pleadings, and a motion for summary judgment, in which evidence, not pleadings, pertinent [to the jurisdictional issue] are evaluated by the district court." *Id.* at 904. Because the lower court inappropriately considered the defendant's submissions at the motion to dismiss stage, the *Haase* court reversed and remanded.

(D.D.C. 2002) (Kennedy, J.) (in APA case, denying motion to dismiss on mootness grounds and granting summary judgment in favor of plaintiff, based on review of administrative record).

Because Defendants' mootness defense is "inextricably intertwined" with the merits of the Archive's claim and calls for consideration of extra-record evidence, it should be decided through summary judgment procedures on the basis of a full record. *See Vestcom Int'l, Inc. v. Chopra*, 114 F. Supp. 2d 292, 297 (D.N.J. 2000) (applying summary judgment standard because questions of mootness were intertwined with merits where "subsequent events [] called into question the continued viability of plaintiff's allegations"); *Horsehead Res. Dev. Co. v. B.U.S. Envtl. Servs., Inc.*, 928 F. Supp. 287, 290 (S.D.N.Y. 1996) (resolution of factual issue going to mootness "should be deferred until the summary judgment stage or the trial" because mootness issue is inextricably intertwined with merits).

B. The Court Cannot Decide Defendants' Motion — One That Raises Issues of Fact Going to the Ultimate Merits — on the Basis of the Current Record, and Must Deny Defendants' Motion so that Discovery can Proceed.

While Defendants style their Second Motion to Dismiss as being made under Rule 12(b)(1), it puts facts at issue — facts that neither Plaintiff nor the Court have had any opportunity to investigate. Because of the lack of factual development, dismissal is improper at this time. Instead, the Archive should be permitted the opportunity to conduct discovery. The obligation to go forward with discovery in this case comes from several sources.

The first is the APA, which mandates "whole record" review.[14] 5 U.S.C. § 706; *see also Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977). Defendants give no reason to deviate from

[14] Since the Court must be able to understand the problem that caused emails to be deleted if it is to review the adequacy of Defendants' current recordkeeping guidelines, the "whole record" for this case must include materials made pertinent by all eight of Plaintiffs' claims.

the typical first step in discovery in APA cases, which is production of the record. *See* Mem. Order [Docket #107] (Jan. 15, 2009) (Facciola, J.) (denying CREW's motion for expedited discovery because it is "inappropriate to order discovery . . . until after the administrative record has been certified"). If review of the record demonstrates that more information is needed, the Court has the discretion to "resort to extra-record information," *Esch v. Yeutter*, 876 F.2d 976, 991 (D.C. Cir. 1989), or to "require the administrative officials who participated in the decision to give testimony explaining their actions." *Overton Park*, 401 U.S. at 420. Indeed, the D.C. Circuit has reversed and remanded in an APA case where a district court denied a preliminary injunction motion in part on the ground that plaintiff had not shown a probability of success on the merits, but did so without reviewing the administrative record. *See Am. Bioscience, Inc. v. Thompson*, 243 F.3d 579, 582 (D.C. Cir. 2001). "Rather than calling for the administrative record," the court noted, "the district court appears to have relied on the parties' written or oral representations to discern the basis on which the FDA acted. Surely that was not sufficient." *Id*. The Archive has already moved for an order compelling production of the administrative record, *see* Mot. to Compel [Docket #97] (Jan. 8, 2009), and this motion is ripe for review.

Second, the D.C. Circuit has held that when jurisdictional facts are in dispute, a district court must "afford the nonmoving party an ample opportunity to secure and present evidence relevant to the existence of jurisdiction." *Prakash v. Am. Univ.*, 727 F.2d 1174, 1180 (D.C. Cir. 1984) (internal quotation marks omitted); *see also Phoenix Consulting, Inc. v. Republic of Angola*, 216 F.3d 36, 40 (D.C. Cir. 2000). This is true whether the motion is captioned as one to dismiss or for summary judgment. *See Wilderness Soc'y v. Griles*, 824 F.2d 4, 16 n.10 (D.C. Cir. 1987) ("What is clear is that under *either* Rule 12(b)(1) *or* Rule 56, a district court must give the plaintiff the opportunity to discover evidence relevant to his jurisdictional claim." (emphasis

in original)). The Supreme Court has warned that where "the proof is largely in the hands" of the moving party, dismissal for lack of subject matter jurisdiction "prior to giving the plaintiff ample opportunity for discovery should be granted very sparingly." *Hosp. Bldg. Co. v. Trs. of Rex Hosp.*, 425 U.S. 738, 746 (1976) (internal quotation marks omitted). Therefore, "should the trial court look beyond the pleadings, it must bear in mind what procedural protections could be required to assure that a full airing of the facts pertinent to a decision on the jurisdictional question may be given to all parties." *Herbert*, 974 F.2d at 198 (citing *Collins v. N.Y. Cent. Sys.*, 327 F.2d 880 (D.C. Cir. 1963)); *see also Lawrence*, 919 F.2d at 1530-31 (reversing 12(b)(1) dismissal and remanding for discovery where issue of jurisdiction intertwined with merits).

Third, while Rule 56 is undoubtedly the correct procedural mechanism to employ in this case, summary judgment "ordinarily is proper only after the plaintiff has been given adequate time for discovery." *Info. Handling Servs., Inc. v. Def. Automated Printing Servs.*, 338 F.3d 1024, 1032 (D.C. Cir. 2003) (internal quotation marks omitted); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) (nonmoving party must have "adequate time for discovery"). Defendants have strenuously resisted any efforts to obtain discovery in this case, even though the relevant evidence is all in their control. As a result, the Archive is hard pressed to respond to Defendants' fact-intensive Second Motion to Dismiss. [15]

[15] Under Rule 56, the Archive is entitled to oppose any motion for summary judgment by showing through an affidavit "that, for specified reasons, it cannot present facts essential to justify its opposition." FED. R. CIV. P. 56(f). The Archive is prepared to file a Rule 56(f) affidavit outlining the facts it needs to oppose summary judgment, which can be obtained through discovery. Of course, if the Court does decide to resolve Defendants' mootness challenge through summary judgment, the first step is for Defendants to submit a statement of undisputed facts as required by Local Civil Rule 56.1.

III. EVEN ON THE BASIS OF THE CURRENT RECORD, DEFENDANTS HAVE NOT MET THEIR BURDEN OF ESTABLISHING THAT THEY HAVE MOOTED PLAINTIFFS' FIRST FOUR CLAIMS BY ABATING THE RISK OF AN UNLAWFUL DISPOSAL OF FEDERAL RECORDS

On Defendants' theory for dismissal, it is their burden to establish that this case is moot by showing that "events [have] outrun the controversy such that the court can grant no meaningful relief," *Mogu v. Chertoff*, 550 F. Supp. 2d 107, 109 (D.D.C. 2008) (internal quotation marks omitted), and that burden "is a heavy one." *Davis*, 440 U.S. at 631. Dismissal on mootness grounds is "justified only if it were absolutely clear that the litigant no longer had any need of the judicial protection that it sought." *Adarand*, 528 U.S. at 224. Even on the basis of the limited, self-serving record they have deigned to make public, it is clear that Defendants are not entitled to dismissal of any of the Archive's claims on mootness grounds.

A. Defendants Concede That They Have Not Taken Any Action To Moot Some of the Archive's Claims, and That They Have Not Finished Any of the Actions that They Argue Have Mooted the Claims.

To establish that a properly pleaded claim is moot, Defendants must show that "intervening events 'have *completely and irrevocably* eradicated the effects of the alleged violation.'" *Ctr. for Biological Diversity*, 498 F. Supp. 2d at 296 (quoting *Davis*, 440 U.S. at 631) (emphasis added). Thus, to render *all* of the relief sought in Counts One through Four moot, Defendants must completely and irrevocably moot those claims. They have not done so.

First, the actions that Defendants argue have mooted the Archive's claims are not complete. Even if Defendants' assertions are taken as true, Defendants acknowledge that their three-phase process only covers emails up to August 10, 2005. Second Mot. to Dismiss at 20. The Complaint goes beyond that, alleging a continuing risk of deleted emails through October of 2005. Archive's Compl. ¶ 32 (alleging that "there were hundreds of days of missing White House emails created or received between March 2003 and October 2005."). Therefore even if

the Court accepted all of the contentions in the Second Motion to Dismiss as true, Plaintiffs' first four claims are completely uncontroverted with respect to emails on or after August 10, 2005, and judicial review may go forward on those claims.

Second, Defendants' actions are also not complete and irrevocable because they admit that the process described in the Motion to Dismiss and Everett Declaration is not even finished. Defs.'s Second Mot. to Dismiss at 25 ("OCIO and the contractor are completing the analysis of the messages to determine what, if any messages might have been found in the restored files from the tapes that were not previously accounted for."). Defendants cannot hide the fact that this process is ongoing, and that Defendants merely hope and predict that when all is said and done, their actions will indeed have mooted the Archive's claims. But all of those actions must be completed before anyone can definitively say that they have rendered moot any part of these claims. In short, Defendants' mootness argument suffers from a ripeness problem.

There is no reason to dismiss a case on mootness grounds where, as here, the "court can fashion *some* form of meaningful relief." *Church of Scientology v. Zolin*, 506 U.S. 9, 12 (1992). For example, when the plaintiff in *Scott v. Williams*, 924 F.2d 56, 58 (4th Cir. 1991), sued because her driver's license had been suspended due to her drug addiction the state countered that her claim was moot since she had already been issued a license, albeit with significant restrictions. The Fourth Circuit held that this did not moot her entire claim "[b]ecause she previously had an unrestricted license," and as a result "her personal interest in the litigation continue[d]," despite conduct by the defendant alleged to have mooted some part of her claims. *Id*. *See also Flores*, 437 F. Supp. 2d at 31 (refusing to dismiss suit as moot where defendant had "yet to provide at least one form of relief specifically requested by the plaintiff in her complaint").

B. Defendants Have Not Established Mootness Because the Court Can Still Provide Effective Relief to Plaintiff by Granting the Orders that Plaintiff Seeks.

Defendants themselves acknowledge that a case is moot only "where intervening events preclude the Court from granting plaintiffs any effective relief." Second Mot. to Dismiss at 11 (internal quotation marks omitted). Thus, this case would only be moot if the Court were unable to provide the relief the Archive requests. *See Gates v. Towery*, 430 F.3d 429, 432 (7th Cir. 2005) ("Mootness occurs when no more relief is possible."). This is simply not the case. If the Archive prevails on its claims, the Court can order Defendants to request that the Attorney General initiate legal action to preserve or recover emails that are not properly archived.

As Defendants recognize, the Archive's Complaint seeks an injunctive order or a writ of mandamus "'compelling' defendants to 'request that the Attorney General initiate action, or seek other legal redress, to recover the deleted emails.'" Second Mot. to Dismiss at 9 (citing Archive's Compl. ¶¶ 44-54, 61, 68). It is undisputed that neither the agency head nor the Archivist have fulfilled their statutory duty to request legal action from the Attorney General, despite being faced with the known loss of federal records. Instead, Defendants contend in a footnote that the previous Attorney General was made aware of the basic allegations in this case through a letter from CREW, and that the last Congress was also aware of the issue because it requested information on the subject from the previous White House Counsel. *Id.* at 26 n.11.[16] This hardly moots the relief the Archive seeks.

As the Archive has made clear throughout this case, the FRA's enforcement duties are mandatory and do not excuse the duties of the Archivist or agency heads where some third party

[16] As the majority staff memorandum to the Committee on Oversight and Government Reform makes clear, Defendants have been less than cooperative with Congress and its investigation of the missing emails. *See* Comm. Mem at 21 [Docket #58-10] ("The Committee's investigation into the extent of the missing White House emails has been complicated by a lack of cooperation from the White House."). This makes it particularly ironic for Defendants to claim that their statutory duty to inform Congress of the problem has been constructively fulfilled.

has informed the Attorney General that records are at risk and the Attorney General does not take action. Defendants cannot seriously contend that a letter to the Attorney General from a litigant is likely to produce the same response as a formal request by the Archivist of the United States or the head of a federal agency requesting legal action to prevent or remedy the unlawful disposal of federal records. The FRA's congressional notice provisions require that Congress be notified when such action has been requested from the Attorney General, and are not satisfied merely because some members of Congress have learned from other sources that there is a problem.

For these reasons, Defendants' citation to the highly distinguishable *Alliance for Democracy v. Federal Election Commission*, 335 F. Supp. 2d 39, 43 (D.D.C. 2004) (cited in Second Mot. to Dismiss at 12) is of no avail. In that case, plaintiffs sued the Federal Election Commission ("FEC"), alleging that the FEC violated the Federal Election Campaign Act ("FECA") by failing to timely act on an administrative complaint filed by the plaintiffs. *Id.* FECA allowed a party who files an administrative complaint with the FEC to seek judicial review in the district court should the FEC "fail to act" on a complaint within 120 days. *Id.* The only judicial relief authorized by FCA was an order in which "the court may declare . . . the failure to act is contrary to law, and may direct the Commission to conform with such a declaration within 30 days." *Id.* (quoting 2 U.S.C. § 437 g(a)(8)(c)). FECA did not create a duty to act on complaints in a certain way, so the plaintiffs could only seek an order compelling the FEC to act in *some* manner. After plaintiffs filed a complaint in district court, the FEC acted on the administrative complaint and entered a conciliation agreement resolving the dispute. *Id.* The court granted the FEC's motion to dismiss the case as moot, concluding that it was unable to grant effective relief because any order it issued "would be nothing more than an order directing the FEC to do what it has already done." *Id.* Similarly, in *Lawal v. INS*, No. 94 CIV 4606

(CSH), 1996 U.S. Dist. LEXIS 9585, at *4 (S.D.N.Y. July 10, 1996) (cited in Second Mot. to Dismiss at 4, 12), the court dismissed plaintiffs' complaint for lack of subject matter jurisdiction because "the only relief sought was a judicial order that the INS act" on their immigration applications, and subsequent to the filing of plaintiffs' complaints, the INS acted on the petitions. Therefore, in both of these cases, subsequent to the filing of plaintiffs' complaints, the agencies acted and thus satisfied the minimal statutory requirement of taking *some* action, so there was nothing more they could be required to do.

In contrast to both of these cases, Defendants in this case have not done the one thing the Archive requested in its Complaint and the FRA requires. It is undisputed that Defendants have not asked the Attorney General to file a lawsuit, and therefore it is absurd for Defendants to claim that they have mooted the Archive's claims in the manner of *Alliance for Democracy* and *Lawal*. It is simply not true that any order issued by the Court "would be nothing more than an order directing the [Defendants] to do what [they have] already done," for Defendants have refused to take the action sought by Plaintiffs. *Cf. Gates*, 430 F.3d at 432 ("To eliminate the controversy and make a suit moot, the defendant must satisfy the plaintiffs' *demands*; only then does no dispute remain between the parties.") (emphasis in original).

C. The Evidence Relied Upon By Defendants is Inadequate to Demonstrate that There No Longer Exists a Risk of Unlawful Disposal.

The materials submitted by Defendants are not sufficient to establish entitlement to judgment as a matter of law and therefore Defendants' Motion must be denied. First, Defendants have not provided the Court with an adequate record upon which to evaluate their claims. Second, the evidence that Defendants did provide is insufficient to show that they have abated the risk of unlawful disposal and obviated the need for action under the FRA.

Despite the requirement that APA cases must be decided on the basis of the whole record, *see, e.g.*, 5 U.S.C. § 706, Defendants have failed to provide either the Court or plaintiffs with a copy of the complete administrative record. *See* Archive's Mot. to Compel [Docket #97] (Jan. 8, 2009); Archive's Reply Sup. Mot. to Compel [Docket #109] (Jan. 15, 2009). Instead, Defendants rely on one self-serving and largely conclusory affidavit of an official who lacks personal knowledge of many of the topics on which he testifies. *See* Everett Decl. at 1 (admitting that Everett has only been employed as the Chief Information Office for less than five months); *id.* (admitting that his affidavit is based on "discussions [he] had with OCIO staff and documents presented to [him]," not personal knowledge); *id.* at 3,5,7 (qualifying his explanations with statements such as "it is my understanding," "according to OCIO documents," "I understand today that the following took place before my arrival," and "I have been made aware"). Standing alone, this vague and ambiguous affidavit raises more questions than it answers and cannot by itself warrant dismissal of a well-pleaded complaint. *See Overton Park*, 401 U.S. at 419 (administrative record does not include "litigation affidavits").

Further, the Everett Declaration is insufficient to justify dismissal because it does not go to the crucial question in this case: whether there is still a risk of unlawful disposal or removal of federal records, such that Defendants' duty to take enforcement action under the FRA is still in place. The affidavit is practically silent as to whether the 2008 process in which OA engaged has mitigated the risk, apparently first discovered in 2005, that emails were deleted from the archive and that others were at risk of being deleted. The affidavit focuses entirely on rebutting the 2005 Statistical Analysis and attacking its findings, without addressing the underlying risk of records disposal that prompted the 2005 Statistical Analysis in the first place. The Everett Declaration concerns itself with a statistical sideshow that does not address the real question of

whether emails have been properly preserved in accordance with the FRA. In making this point, the affidavit repeatedly refers to facts and documents not in the record, thus calling out for discovery and undermining the credibility and reliability of the affidavit.

D. Defendants' Actions Have Not Mooted Plaintiffs' Claims.

Defendants contend that they "have 'initiated action' within the meaning of the FRA," and as such, Plaintiffs' first four claims are moot. Second Mot. to Dismiss 4. To the extent Defendants appear to be trying to argue that they have "completely and irrevocably" eradicated the risk which created the obligation to act in the first place, Defendants have failed to meet their burden in at least two capacities. *See Ctr. for Biological Diversity*, 498 F. Supp. 2d at 296 (stating mootness standard). First, Defendants' actions are wholly insufficient to assure the Court that the missing emails have been recovered. Second, the methods described in Defendants' Second Motion to Dismiss and the Everett Declaration are fatally flawed.

1. The Actions Taken By Defendants Are Insufficient To Mitigate a Known Risk

Defendants have not even attempted to demonstrate that they have found and restored all of the missing emails. Instead, the restoration conducted by the Defendants is aimed solely at reanalyzing the findings of the 2005 Statistical Analysis, with the goal of making the unfavorable findings of the 2005 Statistical Analysis disappear. While Defendants themselves acknowledge that their efforts were undertaken to "address the concerns raised by the 2005 chart," Everett Decl. at 12, the issue at hand is not whether the 2005 Statistical Analysis was accurate. The issue in this case is whether any emails deleted from the system — a problem which was discovered *before* the 2005 study was conducted — are still at risk of being destroyed.

This exclusive focus on the 2005 Statistical Analysis might make sense if it was the only piece of evidence indicating that the journaling archive system failed to capture all of the emails it was supposed to be archiving. But as discussed above, there is more. The 2005 Statistical

Analysis was only part of a larger OA effort which found that many emails were missing. *See* McDevitt Letter ¶ 18. Defendants have withheld all information about that effort. That effort, moreover, was only conducted after EOP discovered it was missing emails, when it could not respond to a subpoena issued by Patrick Fitzgerald. Comm. Mem. 3; *see also* McDevitt Letter ¶ 18. Defendants have *never* explained what caused the failure to archive these emails. Without any explanation of what caused the inadequate archiving in the first place, it is impossible to know whether the Defendants' actions have remedied the problem.

Even on the basis of the thin, self-serving record Defendants have selected to put before the Court, it is apparent that Defendants have failed to take certain steps that, at a minimum, would demonstrate that there no longer remains a risk that emails are missing. For instance, OA has not asserted that it ever used random sampling or any other method of comparing the email records on its archive with the email records on any backup tape, email records on portable media, or email records on individual machines to demonstrate that emails were being properly preserved on the archive. Instead, OA merely reanalyzed its own archive, which has already been demonstrated to be woefully deficient. *See* Second Mot. to Dismiss at 17; Declaration of Al Lakhani & Michael P. Salve, Ph.D. ¶ 8 ("Second Lakhani Decl.") (attached as Exhibit 1).

This Court ordered all of these email repositories to be preserved so they could be used for any ultimate restoration, yet Defendants have never even looked at these repositories. *Id.* Throughout this case, the Archive has consistently taken the position that the .PST files, whether contained in the journaling archive or the backup tapes, do not contain copies of all emails sent and received by EOP FRA components between March 2003 and October 2005. *See, e.g.*, Mar. 25, 2008 Decl. of Al Lakhani ("First Lakhani Decl.") (attached to Archive's Reply on March 18, 2008 Order to Show Cause [Docket #65] (Mar. 25, 2008)). A number of pieces of evidence

point towards the likely truth of this allegation. First, the EOP was unable to provide Fitzgerald with copies of the emails requested in the subpoena, even after searching back-up tapes. Comm. Mem. 5. Second, Theresa Peyton admitted that no backup tapes are being preserved that were created between March 1, 2003 and May 22, 2003. May 5, 2008 Third Decl. of Theresa Payton ¶¶ 9-11 ("Third Payton Decl.") (attached as Ex. 1 to Defs.' Responses to First Rep. & Rec. [Docket #69] (May 5, 2008)). Third, a team of OA staff identified a number of flaws in the journaling archive system, any of which could have caused emails not to be stored in the .PST files or the backup tapes. McDevitt Letter ¶ 18. Fourth, until implementation of Mail Attender in late 2004, the .PST file was manually created. Everett Decl. at 2. This is a "monotonous manual process [that] introduces human error." First Lakhani Decl. ¶ 7. Fifth, even Mail Attender has documented bugs which "often created empty and corrupted .PST files." *Id.*

Indeed, this Court has agreed on the necessity of preserving other sources of emails. In a March 18, 2008 Memorandum Order, Magistrate Judge Facciola explained:

> It is nevertheless true that if emails have not been properly archived as plaintiffs allege, and copies of those emails do not exist on back-up tapes, then the obliteration of date upon which those emails may be reconstructed threatens the plaintiffs with irreparable harm. This appears to be the case for any emails that were not properly archived between March 2003 and October 2003, during which time no back-up tapes exist. It would also be the case for any emails not properly archived between October 2003 and October 2005, to the extent those emails are not, as plaintiffs allege, contained on the back-up tapes.

Mem. Order at 2 [Docket #62] (Mar. 13, 2008).[17]

Magistrate Judge Facciola recommended that this Court order Defendants to preserve all media that might contain emails sent or received between March 2003 and October 2005 and this Court adopted that recommendation. Second Rep. & Rec. [Docket #84] (July 29, 2008), *adopted by* Order [Docket #102] (Jan. 14, 2009). Magistrate Judge Facciola explained that "every

[17] Defendants later provided information that no back-up tapes were being preserved that were created between March 1, 2003 and May 22, 2003. (Third Payton Decl. ¶¶ 9-11.)

reasonable effort must be made to preserve the res of this lawsuit." *Id.* at 4. Even though this Court ordered OA to preserve a range of media, OA has not looked at those media devices during its process. Second Lakhani Decl. ¶ 8; Defs.' Second Mot. to Dismiss at 17. Without examination of these potential sources of missing emails, it is impossible to say that the risk of unlawful disposal has been ameliorated.

Defendants contend that this case is moot because they have "completed all that reasonably may be done to restore any records that may exist that are potentially not contained in the email message archives." Second Mot. to Dismiss at 26. This is simply not true, and this case cannot be dismissed until Defendants actually demonstrate that the risk of unlawful removal of federal records has been extinguished. *See Metcalf v. Daley*, 214 F.3d 1135, 1145-46 (9th Cir. 2000) (holding case not moot because, even though defendants prepared environmental impact statement after commencement of litigation, the statement that was prepared was deficient and did not satisfy defendants' statutory obligations). To begin with, Defendants would have to answer the many questions raised by their Motion, such as which days and components that the OCIO identified as "problematic" were restored, which were not, and why. In addition, Defendants simply excluded from their 2008 process the records of EOP components that were created during migration of EOP components from Lotus Notes to Microsoft Exchange, without demonstrating that emails from those components were properly preserved *somewhere*. *See* Second Mot. to Dismiss at 19 n.2 & 22 n.7.

2. The Defendants' Methodology Was Flawed

The Everett Declaration is also troubling because it attempts to cloak Defendants' process in a mantle of scientific authority when, in reality, Defendants' methodology was deeply flawed.

First, Defendants counted emails that were preserved on White House servers and used the ARIMA model to calculate "normal" daily email counts for each FRA component. *See*

Everett Decl. at 9-10. This is misleading, since ARIMA can only analyze the data it is supplied. Second Lakhani Decl. ¶ 16. ARIMA does not, and cannot, predict that there is a "true" universe of emails over and beyond that described by the data given. *Id.* ¶ 10,16. Rather, ARIMA discerns and predicts averages based on the data that is loaded into the database to which the ARIMA model is applied. *Id.* Therefore, an ARIMA analysis can only state that a count of properly preserved emails on one day is above or below average compared to the number of properly preserved emails for other days. *Id.* ¶ 16. ARIMA does not analyze and therefore cannot speak to the number of emails that are missing on particular days, and therefore does not predict what a true "normal" number of emails is. *Id.* ¶ 17. No statistical tool can calculate the amount of missing emails by analyzing the population of emails that are not missing. *Id.*

Second, the ARIMA model's analysis changes as additional data is added into the analysis. *Id.* ¶ 17. For instance, the results of the ARIMA analysis changed between Phase II and Phase III due to the addition of more emails into the database. *Id.* It is critical to note that the ARIMA model did not find these emails or predict that they existed or where they could be found. *Id.* The emails were located through "a prior analysis," Everett Decl. at 11, which is not described in any way in either Defendants' motion or Everett's declaration. Once these previously undiscovered emails were loaded into the database, the new ARIMA analysis conducted in Phase III yielded different results, with some days that previously were "low" no longer appearing so, and some days that had not seemed "low" in Phase II emerging as "low" in Phase III. Second Lakhani Decl. ¶ 18. This is a demonstration that the ARIMA model makes comparisons across the known data put in front of it. *Id.* It does not speak to missing emails.

Third, even as to its analysis of emails existing on the White House servers, the ARIMA model was applied in a flawed manner. For instance, Defendants chose to identify as "outliers"

those days whose email counts fell three or more standard deviations outside of what was deemed "normal." *Id.* ¶ 20. There is no scientific reason to select three as the number of standard deviations that defines what is an "outlier." *Id.* The number is arbitrary and was selected for subjective reasons that Defendants do not state. *Id.* Had it been higher or lower, the number of outliers would have gone down or up, with no practical significance. *Id.*

Fourth, even though they could control the number of outliers by choosing the number of standard deviations that defined "outlier," Defendants still encountered more outliers than they expected for two EOP components and therefore excluded them from the outlier analysis. *Id.* ¶ 21. One of the reasons for the exclusion was "the high number of outliers in the last half of the series." *Id.* Defendants essentially chose to exclude from the outlier analysis those components that persisted in producing uncomfortable numbers of outliers even after Defendants rigged the definition of "outlier" to their liking. There is a certain method to this, but it is not scientific.

Fifth, despite this tinkering, the ARIMA model still produced more outliers than expected across every point in Phase III. *Id.* ¶ 22. The report submitted by Defendants concluded that this anomaly could have any of several explanations. Nancy Kirkendall, Ph. D., Time Series Analysis of Daily Email Counts at 15 ("Kirkendall Rep.") (Ex. 3 to the Second Mot. to Dismiss). It "could mean there are indicators that need to be included in the model, the residuals are not normally distributed, or that there are missing email messages." Kirkendall Rep. at 15; *see also* Second Lakhani Decl. ¶ 22. Kirkendall's alternative explanations for the number of outliers are thus that the ARIMA model was not able to take account of enough factors, or there simply are missing email messages that were not included in the data set analyzed under ARIMA. Kirkendall Rep. at 15; *see also* Second Lakhani Decl. ¶ 22. These are not promising findings from Defendants' perspective, and do more to support the Archive's position than Defendants'.

Sixth, the Everett Declaration attempts to draw unsupportable conclusions from the ARIMA analysis. Because the ARIMA model only analyzes the number of emails that are preserved on the White House archive, its analysis only points to "normal," "low" or "high" amounts of archived email for given days relative to the amounts of archived email for other days. Second Lakhani Decl. ¶ 25. Therefore it can be misleading to refer to certain days as "problematic" compared to others, since no attempt has been made to look beyond the archive and count emails that have been deleted from the archive. *Id.* For that reason, it is misleading for Defendants to laud their success in reducing the numbers of "problematic" or "low" days between the 2005 Statistical Analysis and the 2008 process. *Id.* ¶ 24, 25. The analyses used completely different methods that naturally produced different results. The comparison is one of apples and oranges – even though this lawsuit is concerned with neither. Even when the phases of the 2008 process are compared to each other, Defendants do not explain whether the reduction in "problematic" days resulted solely from the restoration of emails from back-up tapes, which introduced new data to the ARIMA analysis. *Id.* ¶ 22.

CONCLUSION

A significant part of America's historical record has been at risk of destruction for several years, yet Defendants took no action besides studying the number of emails on its archive. After this suit was filed, they studied the problem again. This time they used different methods and assumptions and were able to dial down the number of days they considered "problematic." But while Defendants devised a new study to debunk the old study, their recounting of emails that *are* on the White House servers says nothing about whether the emails that were deleted from the servers are still at risk.

While Defendants' evidence thus raises more questions than it answers, it does confirm that the central allegation in the Archive's Complaint was correct. There indeed are emails that were not properly preserved on the White House servers. Defendants admit they found 14 million emails that were misallocated on the servers themselves, and archived them properly for the first time. They admit that they found hundreds of thousands of other emails that were not on the servers at all, but were restored from the backup tapes that this Court ordered be preserved for that very purpose. We do not know how many more emails could be restored but have not been, because Defendants have not looked. They have not looked at the backup tapes, beyond the few they used for restoration, and they have not looked at all at the other media the Court ordered be preserved. Yet this Court is told that all is well: Defendants have taken *some* action and have restored *some* emails, so this case is moot and must be dismissed.

The FRA cannot be so easily satisfied. When federal records remain at risk, the FRA commands that not any old action will do, but only the specific enforcement action of seeking legal redress through the Attorney General. When officials refuse to take that action or delay unreasonably, courts will compel them to do so whenever the risk remains.

Defendants' evidence confirms that federal record emails were put at risk and does not prove that this risk has been mitigated. Defendants do not identify the problem that caused emails to go missing, rendering it impossible to determine if their response to the problem was adequate. The process described by Defendants is not even finished and does not cover emails created after August 10, 2005, an inexplicably arbitrary date that falls short of the period covered by the Complaint. That process is itself flawed and is oriented in the wrong direction, looking inward to count the emails that are preserved, instead of looking outward to find the emails that were deleted from the servers and that remain at risk. This case is about that risk, a risk that

there will be a hole in our collective consciousness, that a few glitches in information technology will be allowed to determine what our nation remembers and how. The American people have a right to these records, which belong to them. Defendants demean the stakes of this case and ignore the law when they ask this Court to rule, on the basis of this slim record, that our history is in good hands, that there are no missing emails, and that this has all been much ado about nothing. The facts and therefore the law say otherwise. This case is not moot, it should proceed, and the facts should come out.

The Archive simply asks for the same opportunity afforded to any other litigant who states a claim for relief: a chance to prove its case on the basis of a factual record. For the foregoing reasons, Defendants' Second Motion to Dismiss should be denied, Defendants should be ordered to produce the administrative record applicable to this case, and the Court should order any other discovery or relief deemed proper.

Pursuant to Local Civil Rule 7(f), oral argument is requested.

Respectfully Submitted,

DATED: February 20, 2009

_/s/ Sheila L. Shadmand_____

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CERTIFICATE OF SERVICE

I hereby certify that, on this 20th day of February, 2009, I caused a copy of the foregoing Plaintiff National Security Archive's Opposition to Defendants' Second Motion to Dismiss to be served electronically by the United States District Court for the District of Columbia's Electronic Case Filing ("ECF") system and that this document is available on the ECF system.

/s/ Sheila L. Shadmand
Sheila L. Shadmand