

United States Senate

WASHINGTON, DC 20510

May 4, 2026

The Honorable T. Elliot Gaiser
Assistant Attorney General
Office of Legal Counsel
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

Dear Mr. Gaiser:

We write in response to your recent opinion, “Constitutionality of the Presidential Records Act.” In this opinion, you declare unconstitutional the Presidential Records Act (PRA)—a nearly 50-year-old statute, and one of the cornerstones of transparent government by and for the American people. It is the judicial branch, not the executive branch, that has the power to “say what the law is,” and this opinion represents an unacceptable move by the executive branch to undermine Congress’s legislative authority.¹ Until now, the Department of Justice (DOJ) has never questioned the constitutionality of the PRA. We are alarmed that the opinion not only contradicts clear Supreme Court precedent but also has the audacity to proclaim the Supreme Court’s longstanding precedent is simply wrong. This is a troubling move that signals disregard for the rule of law, and we ask that you rescind the opinion immediately.

DOJ’s Office of Legal Counsel (OLC) was created to provide legal advice to the President and executive agencies on matters of interagency legal dispute, or to comment on the constitutionality or legality of pending legislation or novel policy changes.² Congress did not, and could not, delegate to OLC the authority to become a roving constitutional court.³ OLC has no judicial authority under Article III of the Constitution, and cannot serve as a vehicle for the executive branch to ignore laws enacted by Congress.

¹ *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

² *La. Pub. Serv. Comm’n v. FCC*, 476 U.S. 355, 374 (1986) (“[A]n agency literally has no power to act . . . unless and until Congress confers power upon it.”).

³ *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 385-86 (2024) (“The Framers . . . envisioned that the final ‘interpretation of the laws’ would be ‘the proper and peculiar province of the courts.’”).

When Congress passed the PRA, it formalized the fact that the records of the presidency belong to the American people, so that they may have a fuller understanding of their government and of White House decisions. The law provides the public with a mechanism for accountability and for building a body of historical knowledge that shapes the future. The loss of presidential records would create an enormous void in the historical record, preventing future generations from learning about the Trump presidency and future presidencies, making it all the more difficult to act as informed participants in their nation and government. President Trump violated the Presidential Records Act in his first term when he took presidential records to Mar-a-Lago,⁴ and reporting has consistently indicated that his second Administration does not appropriately preserve records to this day.⁵

OLC's opinion is based on a gross misunderstanding of the PRA and Supreme Court precedent, marking a dramatic departure from 50 years of executive branch practice.⁶ The Supreme Court ruled the PRA's predecessor constitutional, based in part on the fact that it did not violate the separation of powers because it provided for executive branch supervision of presidential records.⁷ The PRA follows this precedent by providing for executive branch control and stewardship of presidential records.⁸ Yet the bulk of this flawed opinion focuses on a minor PRA provision that allows congressional access to presidential records. The opinion does not acknowledge that, in drafting this provision, Congress took care to protect presidential authority by recognizing the President's right to invoke constitutionally-based executive privileges in response to record requests from Congress.⁹ Moreover, even if a court found the congressional access provision unconstitutional, the proper remedy would be to sever the offending provision, not invalidate the entire statute as the opinion purports to do.¹⁰

⁴ See, *National Archives asks Justice Department to investigate Trump's handling of White House records*, CBS News (Feb. 10, 2022) (www.cbsnews.com/news/trump-records-national-archives-justice-department); *'He never stopped ripping things up': Inside Trump's relentless document destruction habits*, Washington Post (Feb. 5, 2022) (www.washingtonpost.com/politics/2022/02/05/trump-ripping-documents); and *Another Problem With That Signal Chat? The Messages Disappear*, New York Times (Mar. 27, 2025) (<https://www.nytimes.com/2025/03/27/us/politics/signal-messages-disappear.html>).

⁵ See, *The White House Frames the Past by Erasing Parts of It*, New York Times (Apr. 5, 2025), (www.nytimes.com/2025/04/05/technology/trump-history-websites.html); *U.S.A.I.D. Official Orders Employees to Shred or Burn Classified and Personnel Records*, New York Times (Mar. 11, 2025), (www.nytimes.com/2025/03/11/us/politics/usaid-shred-burn-documents.html).

⁶ *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 441 (1977) (noting that both Presidents Ford and Carter supported the PRA's constitutionality).

⁷ *Id.* at 443-44 ("It is . . . highly relevant that the Act provides for custody of the materials in officials of the Executive Branch.").

⁸ 44 U.S.C. § 2203.

⁹ 44 U.S.C. § 2205(2)(c); *United States v. Nixon*, 418 U.S. 683, 708 (1974); *Trump v. Mazars U.S.A., LLP*, 591 U.S. 848, 863-64 (2020); *Senate Select Comm. v. Nixon*, 498 F.2d 725, 730-31 (D.C. Cir. 1974).

¹⁰ *Barr v. Am. Assoc. Of Political Consultants, Inc.*, 591 U.S. 610, 625 (2020) (holding "[t]he Court's cases have . . . developed a strong presumption of severability.").

In *Nixon v. Administrator of General Services*, the Supreme Court expressly held that Congress has the constitutional authority to regulate “material generated in the executive branch.”¹¹ That authority is further “augmented by the important interests that the Act seeks to attain.”¹² The OLC opinion’s claim that Congress has no constitutional power to regulate presidential records is simply not supported by the facts or the law.

The Constitution grants all legislative powers to Congress. Until Congress repeals the Presidential Records Act or the Supreme Court finds the law unconstitutional, it remains binding on the executive branch and must be followed. Presidential records are invaluable to government accountability and the historical record. Please rescind this baseless opinion and ensure that no government records are unlawfully destroyed.

Sincerely,



Gary C. Peters
United States Senator
Ranking Member, Committee
on Homeland Security and
Governmental Affairs



Richard J. Durbin
United States Senator
Ranking Member, Senate
Committee on the Judiciary

¹¹ 433 U.S. at 445.

¹² *Id.* at 445-46.