HEARING OF THE COMMITTEE ON HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS
United States Senate

"Correcting the Public Record: Reforming Federal and Presidential Records Management"

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Chairman Peters, Ranking Member Portman and distinguished members of the Committee thank you for the opportunity to testify today about needed reforms to the Presidential Records Act of 1978 (PRA) and the Federal Records Act (FRA).

I have spent many years seeking to enforce the provisions of both statutes through litigation to ensure the preservation of our nation's history and the accountability that comes from public access to government information. In that capacity I have experienced the frustrating limitations of these laws. Today I highlight some proposed reforms to address those limitations and ensure the statutes' continued vitality in a digital age.

Both the PRA and the FRA fall short in two significant respects. First, neither law contains sufficiently effective enforcement mechanisms, which has placed the preservation of our historical record at considerable risk. Second, as products of an era when the government operated exclusively in paper, neither has kept pace with changing technologies. Recent events highlight these problems, but their origins date back decades, accelerated by the transition to a digital environment.

Congress enacted both statutes at a time when the government conducted business almost exclusively using paper (with the notable exception of President Nixon's pervasive use of a sound-activated taping system). Today's technological advances include technology that "Richard Nixon could only have dreamed of . . . message-deleting apps that guarantee confidentiality by encrypting messages and then erasing them forever once read by the recipient."[1] As we unfortunately have seen, government officials have taken advantage of these ephemeral messaging apps to conduct business in secrecy. In some instances, such as at the State Department where U.S. diplomats often use WhatsApp to communicate, officials are following the business practices of the international diplomatic community. But even if there is no intent to avoid creating a record the result may be the same—a gaping hole in our historical record.

Through the PRA Congress sought to "promote the creation of the fullest possible documentary record" of a president and ensure its preservation for "scholars, journalists, researchers and citizens of our own and future generations."[2] The PRA establishes the duty of a president to both create and maintain records while in office and the public's ownership of and eventual right to

[1] *Citizens for Responsibility and Ethics in Washington v. Trump*, 924 F.3d 602, 604 (D.C. Cir. 2019).
[2] 124 Cong. Rec. 344,894 (daily ed. Oct. 10, 1978) (statement of Rep. John A. Brademas).

access those records "under standards fixed in law."[3] Toward that end, the PRA directs presidents to

> take all such steps as may be necessary to assure that the activities, deliberations, decisions, and policies that reflect the performance of the President's constitutional, statutory, or other official or ceremonial duties are adequately documented and that such records are preserved and maintained as Presidential records[.][4]

A key impetus for the law was President Nixon's efforts to retain ownership of and control over his presidential records after leaving office, including the right to destroy those records. Without a statute mandating preservation "[e]vidence vital to ongoing criminal investigations could have been permanently lost."[5] But while Congress intended the PRA to prevent this destruction, it omitted any enforcement mechanism. The legislators instead placed their faith in the commitment by future presidents to the rule of law, a faith that has been tested by recent revelations concerning President Trump's recordkeeping violations.

President Trump is by no means the first president to engage in practices that violate the PRA. Upon assuming the office of president many have felt the tug between a desire to shield their decisions from public view and the preservation requirements that the PRA imposes. President Reagan, for example, sought to protect from disclosure emails concerning the Iran-contra arms deal.[6] During Bill Clinton's presidency some of his staff, in response to advice from his White House Counsel about the risk of disclosure because of the PRA, stopped keeping diaries and conducted government business through private email accounts.[7] Vice President Dick Cheney's actions and statements suggested he believed the vast majority of his vice presidential records fell outside the reach of the PRA, which prompted a lawsuit by Citizens for Responsibility and Ethics in Washington. In response, the White House and the National Archives argued—unsuccessfully—that the court lacked authority to review that classification determination.[8] Staff from the Obama White House met at coffee shops to avoid having a record of their meetings created. These off-the-record coffee shop meetings undermined the agreement of the Obama White House to make visitor logs publicly available in settlement of a lawsuit brought by Citizens for Responsibility and Ethics in Washington.

This trend has only continued. From the earliest days of the Trump administration reports described top White House officials using ephemeral messaging apps to conduct government business in secret. I served as one of the lead attorneys in a lawsuit filed on behalf of historians and good government groups challenging this use of self-deleting messaging apps.[9] The U.S. District Court Judge hearing the matter noted that "[t]he use of automatically-disappearing text

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[3] H.R. No. 94-1487, 95th Cong. 2d Sess. § 2 (1978).
[4] 44 U.S.C. § 2203(a).
[5] 124 Cong. Rec. 36,845 (daily ed. Oct. 13, 1978) (statement of Sen. Charles H. Percy).
[6] *See* John Langford, Justin Florence, Erica Newland, Trump's Presidential Records Act Violations: Short-and-Long-Term Solutions, *Lawfare*, Feb. 18, 2022, https://www.lawfareblog.com/trumps-presidential-records-act-violations-short-and-long-term-solutions.
[7] *Id.*
[8] *Citizens for Responsibility and Ethics in Washington v. Cheney*, 593 F. Supp. 2d 194, 216 (D.D.C. 2009).
[9] *Citizens for Responsibility and Ethics in Washington v. Trump,* 302 F.3d 127 (D.D.C. 2018).

messages to conduct White House business would almost certainly run afoul" of the PRA.[10] Ultimately, however, judicial precedent forced him to conclude that the statute left no role for a court to enforce its provisions. The D.C. Circuit agreed, which left the White House, like predecessor administrations, free to continue its use of message deleting apps even though their use runs "afoul" of the PRA.

Subsequent reporting documented that President Trump was affirmatively refusing to create records of his bi-lateral meetings with Vladimir Putin and Kim Jong-un. Not only did President Trump insist that no recordkeeper be present for those meetings, but after one with Putin he seized the translator's notes and ordered the interpreter not to disclose to anyone what the translator had heard, including to administration officials.[11] Again, we filed suit on behalf of good government groups and historians arguing the PRA imposed on the President an affirmative duty to create records documenting how he exercised his constitutional authority.[12] And again the District Court concluded that it lacked "authority to oversee the President's day-to-day compliance with" the PRA.[13] The Court noted, however, that it was up to Congress "to revisit its decision to accord the executive such unfettered control."[14] It also emphasized that its opinion "should not be interpreted to endorse, the challenged practices; nor does it include any finding that the Executive Office is in compliance with its obligations."[15] The implication was clear: even if the President were in violation of the law the court's hands were tied.

Near the end of President Trump's term in office these same groups brought a third lawsuit seeking to ensure preservation of presidential records during the transition to a new president.[16] The District Court declined our request for an interim order requiring the White House to preserve all documents until it resolved our lawsuit. The Court took the White House and its Justice Department counsel at its word that there was "absolutely no need for a preservation order" because the Justice Department had conveyed "preservation instructions" to the White House.[17] Subsequent events show that trust was misplaced.

After President Trump left office new details emerged about the extent of his recordkeeping violations in the face of repeated admonitions that his conduct violated the PRA. He tore up his memos, leaving White House records officers to tape them back together for accession to the National Archives. After leaving office President Trump took with him to Mar-a-Lago at least 15 boxes of records, many classified at the highest levels and including his letters with North Korean dictator Kim Jong Un.[18] It took a year for the National Archives to get these presidential records back, and we still do not know whether others remain in President Trump's possession.

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[10] *Id.* at 129.
[11] Peter Baker, Trump and Putin Have Met Five Times, What Was Said Is a Mystery, *New York Times*, Jan. 15, 2019, https://www.nytimes.com/2019/01/15/us/politics/trump-putin-meetings.html.
[12] *Citizens for Responsibility and Ethics in Washington v. Trump*, 438 F. Supp. 3d 54 (2020).
[13] *Id.* at 66.
[14] *Id.* at 64.
[15] *Id.* at 57.
[16] *National Security Archive v. Trump*, No. 20-3500 KBJ (D.D.C. Dec. 1, 2020).
[17] National Security Archive v. Trump, Transcript of Dec. 7, 2020 Hearing (Dkt. 12).
[18] *See, e.g.*, Jacquelihne Alemany, Josh Dawsey, Tom Hamburger & Ashley Parker, National Archives had to retrieve Trump White House records from Mar-a-Lago, *Washington Post*, Feb. 7, 2022, https://www.washingtonpost.com/politics/2022/02/07/trump-records-mar-a-lago/.

This history reflects a clear pattern by administrations from both political parties of ignoring the recordkeeping obligations that the PRA imposes. But I must emphasize that former President Trump's PRA violations far exceed those of previous administrations in both scope and severity. Throughout his time in office President Trump showed a brazen disregard for the PRA. But, as my litigation experiences demonstrate, the judicial system provided no relief, believing it lacked any authority to enforce the terms of the PRA. To be fair, courts are relying in part on the complete absence in the PRA of any enforcement mechanism either within or outside the executive branch. Why did Congress enact such a toothless law? It assumed presidents would voluntarily comply with the law both because they would surely recognize the rule of law as fundamental to our democracy and because they would want to preserve their place in history through a full historical record. We now have reason to question the efficacy of the norm-based system that underlies the PRA.

It is therefore up to Congress to transform the PRA from a toothless statute to one that achieves its intended purpose—preserving our history. Constitutional concerns may constrain how far Congress can go,[19] but they do not prevent Congress from enacting sensible reforms and, in the words of District Court Judge Amy Berman Jackson, "revisit[ing] its decision to accord the executive such unfettered control."[20] As a first step, Congress should establish a bright-line rule that all presidential records, given their inherent value, merit preservation by eliminating the disposal provision of the PRA, 44 U.S.C. §§ 2203(c)(e). The risk that historically valuable records will not otherwise be preserved far outweighs the risk that a president will be required to preserve records of limited value. And once a president's records have been accessioned to NARA, the Archivist would retain the authority to dispose of those with "insufficient administrative, historical, information, or evidentiary value[.]"[21]

Congress should further amend the PRA to require the White House Counsel to certify to the Archivist on a quarterly basis those PRA-covered employees who are in compliance with the statutory requirement to create and preserve their presidential records. Certification affords a level of accountability and transparency currently absent in the statute. Some of the recordkeeping abuses of past administrations might have been avoided had the White House Counsel been required to monitor and report on employee compliance.

Along these same lines, Congress should amend the PRA to require the Office of Administration—the entity within the Executive Office of the President that provides administrative and technical support EOP-wide—to report to Congress and the Archivist at least annually on EOP's implementation of the PRA and for those agency components their implementation of the FRA. This reporting mechanism can serve as an early warning system to avoid learning of recordkeeping violations after a president has left office and remediation may not be possible.

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[19] *But see Nixon v. Administrator*, 433 U.S. 425, 444 (1977) (upholding constitutionality of predecessor statute to PRA where the "Executive Branch remains in full control of the presidential materials" and executive privilege was available to project president's interests).
[20] *Citizens for Responsibility and Ethics in Washington v. Trump*, 438 F. Supp. 3d at 64.
[21] 36 C.F.R. § 1270.32(a).

The PRA should also impose a mandatory reporting requirement on the White House Counsel to advise the Archivist and the Attorney General of any actual, impending, or threatened unlawful removal or destruction of presidential records as well as persistent recordkeeping violations that the Counsel has not been able to resolve. The PRA should direct the White House Counsel, with assistance from the Archivist, to recover or restore unlawfully removed or destroyed presidential records and require the Archivist to notify and update Congress and the Attorney General on the violations and what actions the White House has taken to address them. This would leave control of a president's records within the Executive Branch while still providing an internal enforcement mechanism to ensure maximum preservation.

Through amendments to the PRA Congress should require the White House Counsel to share with the Archivist at the beginning of a new administration recordkeeping guidance for the EOP, and the Archivist should be required to post that guidance on its website. The public deserves to know and evaluate for itself whether a president has put in place adequate recordkeeping guidance to ensure the public's records are preserved.

Finally, Congress should conform the PRA with the technical realities of the 21st century by prohibiting the use of any technology that does not enable the preservation of records created by that technology. Correspondingly, Congress should mandate that all electronic messages no matter the system on which they were created or received should be preserved in an official White House recordkeeping system within 20 days of their creation and transmission.

These reforms are a small but necessary first step toward a more robust enforcement process and recordkeeping system at the White House in future administrations. They place critical restraints on an otherwise unfettered White House with respect to creating and preserving all presidential records—the ultimate goals of the PRA. And they ensure that technology does not outpace or threaten the viability of the statute.

Like the PRA the Federal Records Act also seeks to ensure the "[a]ccurate and complete documentation of the policies and transactions of the Federal Government."[22] The FRA directs agency heads to document through agency records the "organization, functions, policies, decisions, procedures, and essential transactions of the agency."[23] Unlike the PRA, however, the FRA requires the Archivist to take action to remediate certain FRA violations by notice to the agency head and, unless corrected, a report of the problem to the President and Congress.[24] The FRA specifically directs agency heads, with the assistance of the Archivist, to initiate action through the Attorney General to recover unlawfully removed records.[25] When the agency head fails to act, the FRA directs the Archivist to request initiation of an action by the Attorney General with notice to Congress.[26]

[22] 44 U.S.C. § 2902.
[23] 44 U.S.C. § 3301.
[24] 44 U.S.C. § 2115.
[25] 44 U.S.C. § 3106(a).
[26] 44 U.S.C. § 3106(b).

Courts have construed these enforcement provisions narrowly to limit suits by private parties to two types: (1) challenges to the refusal of the agency head or the Archivist to seek the initiation of an enforcement action by the Attorney General and (2) challenges to an agency's recordkeeping directives and guidelines.[27] In addition one court has recognized a narrow claim under the Administrative Procedure Act to challenge an agency's aggregate practice and policy as inconsistent with the FRA's legal requirements.[28]

These limitations may have made sense when the government functioned exclusively in a paper environment in which a destroyed document could not be recovered. By contrast, many digital records such as emails, leave a footprint that usually allows for their recovery. And digital methods of communication, including ephemeral messaging apps, provide additional ways to skirt the FRA's preservation requirements. The FRA, however, has not been sufficiently updated to reflect this new reality. As a result, compelling compliance with a large swath of the FRA essentially remains beyond the reach of the courts.

To address this gap in the FRA's enforcement scheme, Congress should amend the statute to require agency heads to create an administrative process to hear and remedy claims of unlawfully destroyed or removed documents and any other repeated violation of the agency's recordkeeping requirements. Such a process should permit the filing of administrative complaints by anyone harmed by the unlawful actions, which if supported by substantial evidence should trigger an administrative investigation. Congress should provide for judicial review of any administrative complaint on which the agency head, the Archivist, or the Attorney General fails to act after the passage of a specified time-period, provided the complainant can satisfy the standing requirements of Article III. Congress should limit a court's jurisdiction to only those claims supported by substantial evidence of unlawful conduct. This type of enforcement provision would strike the right balance between the need for additional remedies and the concern that courts would be clogged by lawsuits whenever an individual disagrees with an agency's records-related decision. And it would not place the onus on NARA alone, which has demonstrated an inability if not unwillingness to take on a more aggressive enforcement role.

The FRA, like the PRA, needs to be updated to reflect changing technology. Congress should impose an outright ban on the use of private devices and ephemeral messaging apps unless there is a system in place to automatically back up their content on federal recordkeeping systems. No business reason justifies the use of technology that does not permit a record copy to be created and preserved.

To combat the ever-growing problem of over classification—and the multi-year backlog of records awaiting declassification—Congress should require agencies with original classification authority to establish a "drop dead" date for declassification at the time of original classification, not to exceed 25 years. Upon reaching the drop-dead date the information should be automatically declassified, with limited and specified exceptions. Those exceptions should include information that clearly and demonstrably will reveal the identity of a confidential

[27] *See, e.g.*, *Armstrong v. Bush*, 924 F.2d 282, 293, 294-95 (D.C. Cir. 1991).
[28] *Citizens for Responsibility and Ethics in Washington v. Pruitt*, 319 F. Supp. 3d 252, 258–60 (D.D.C. 2018).

human source or a human intelligence source or key design concepts of weapons of mass destruction. [29]

The PRA and FRA rest on the central proposition that government records, as the records of the people, play an essential role in creating a stronger democracy. They allow us to understand how and why our government has behaved. Despite their worthy goals, both statutes have proven to be no match for the wonders of technology and individuals intent on operating in secrecy and without accountability. The recent revelations raise a concern that this important issue will be dismissed as nothing more than partisan politics in Washington. I hope this is not the case. Absent a legislative fix, the gap in our historical record will continue to widen and government officials—including those at the highest levels—will feel empowered to ignore their recordkeeping obligations at will. How can we hope to chart a path for our future if we do not know what came before? As Thomas Jefferson noted, "Information is the currency of democracy." We must preserve and spend that currency carefully.

I look forward to working with the Committee on these important issues. I am happy to answer any questions you have.

[29] These are just some of the reforms that a broad spectrum of non-profit organizations has recommended. A full list of those recommendations is enclosed with this testimony.

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Presidential Records Act and Federal Records Act Reform OVERVIEW

PRA Reforms

1. Eliminate the disposal provisions of the PRA to establish a bright-line rule that all presidential records merit preservation given their inherent value and the likelihood that few, if any, presidential records of a sitting president could accurately be characterized as being of no public interest.
2. Ban the use of private devices and disappearing messaging apps (on any device) unless there is a system in place to automatically back up content to a federal system.
3. Require the President to issue records preservation policy, including definition of records to be preserved, at start of administration to be reviewed by NARA.
4. Require the White House Office of Administration to monitor and report to NARA and Congress on EOP's compliance with the PRA.
5. Put proactive disclosure in PRA codifying that the White House is in charge of visitor logs.
6. Require an executive branch entity (such as the Office of Science and Technology Policy or Office of Administration, and/or NIST) to issue regular reports to NARA and Congress regarding the technological landscape to ensure that guidelines keep up with rapidly evolving technology and enable identification of systemic noncompliance.
7. Mandate the Archivist's disclosure of NARA's database on all foreign gifts received by the former President as soon as practicable and no later than three months after a President leaves office.

FRA Reforms

1. Ban the use of private devices and disappearing messaging apps (on any device) unless there is a system in place to automatically back up content to a federal system.
2. Establish a private right of action to allow private parties to bring enforcement actions to remedy FRA violations and give the Act's requirements teeth, while allowing agencies to set up an administrative process for recovering removed records or otherwise remedying violations.
3. Require proactive disclosure of all agency records retention schedules.
4. Increase funding for NARA to obtain advanced search software for the purpose of more efficiently searching presidential and federal records in their custody, in response to

Congressional inquiries, subpoenas, FOIA access requests, and other types of reference requests.

5. Create opportunities for external subject matter experts to assist NARA with reviewing, and providing guidance on, proposed records retention schedules.
6. Prohibit the National Archives and Records Administration (NARA) from censoring or otherwise altering exhibition materials in a misleading manner, whether or not the materials are official government records or content obtained from private entities.
7. Create summary record on retention schedules to assist with document identification.
8. Require NARA, with input from OSTP, to review advancements in communications technology and issue guidance every five years on approved technologies and how to appropriately use them.
9. Mandate that an automatic, “drop-dead” declassification date be embedded in newly created electronic records.
10. Establish an advisory committee charged with the responsibility of issuing specific recommendations on automating all aspects of electronic recordkeeping, including with respect to the management and preservation of records, as well as providing access to records.
11. Codify the Capstone approach to email, requiring that the email accounts of designated government officials at each agency be preserved permanently, and also to require capture of electronic messages sent by those officials in a Capstone account in line with FRA Reform #1.