

March 22, 2023

The Honorable Gary Peters
Chairman
Senate Committee on Homeland Security &
Governmental Affairs
340 Dirksen Senate Office Building
Washington, DC 20510

The Honorable James Comer
Chairman
House Committee on Oversight and
Accountability
2157 Rayburn House Office Building
Washington, DC 20515

The Honorable Rand Paul
Ranking Member
Senate Committee on Homeland Security &
Governmental Affairs
340 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Jamie Raskin
Ranking Member
House Committee on Oversight and
Accountability
2157 Rayburn House Office Building
Washington, DC 20515

Dear Chairmen Peters and Comer and Ranking Members Paul and Raskin:

The past months have been punctuated by ongoing revelations about and investigations into the handling of classified materials by former President Donald Trump, President Joe Biden, and former Vice President Mike Pence.¹ In response, we, the undersigned organizations and individuals committed to transparent and accountable government, urge you to reform the Presidential Records Act to reduce the likelihood of future violations and to hold those who violate the law accountable.²

Although the Presidential Records Act establishes that presidential and vice presidential records belong to the public, recent events have made clear that at least some individuals bound by the law have continued to treat these records — including classified documents — like their own private property, destroying or laying claim to records covered by the law.³ Whether these violations are deliberate or inadvertent, and whether the documents are classified or not, these actions need to stop.

Preservation of presidential records is key to facilitating public and congressional oversight of the executive branch. But the Presidential Records Act does not currently ensure robust records preservation. The lack of oversight and enforcement systems written into the law, coupled with technological advancements in the storage and access of documents, have deeply undercut the act's efficacy.

We urge you to enact the following reforms to bolster oversight and enforcement of the Presidential Records Act, which presently operates on little more than an honor system.

First, we encourage Congress to amend the law to require that individuals covered by the act annually certify that they are in compliance. Congress should also authorize the U.S. Attorney General to bring civil action against individuals who knowingly and willingly refuse to certify or file false certifications. Such a provision could build on the proposal detailed in the Presidential Records

¹ Alexandra Hutzler, “5 questions and takeaways from the Trump, Biden and Pence classified documents cases,” ABC News, January 28, 2023, <https://abcnews.go.com/Politics/5-questions-takeaways-trump-biden-pence-classified-documents/story?id=96666161>.

² 44 U.S.C. §§ 2202-2209 (2022), <https://www.law.cornell.edu/uscode/text/44/chapter-22>.

³ Hutzler, “5 questions and takeaways from the Trump, Biden and Pence classified documents cases,” [see note 1].

Certification Act of 2022, which would require all individuals covered by the law, including the president and vice president, to send written certifications to the White House counsel each year, “indicating compliance with [the act] during the year prior to the submission of the certification” and “acknowledging that it is unlawful to knowingly and willingly falsify or fail to file any information that such person is required to include in the certification.”⁴

In addition to requiring annual certification from those currently in the White House, we recommend Congress expand this proposal and include language requiring former presidents and vice presidents to submit an additional certification to the National Archives and Records Administration five years after leaving office. Such a measure, with an attendant civil penalty for noncompliance, would allow for an additional check after a presidential transition, when materials have been unpacked and sent to presidential libraries or other non-government offices.

In addition to providing enforcement mechanisms within the law, we also recommend that Congress bring preservation standards for presidential records in line with the standards for other executive documents. The Federal Records Act, which codifies records preservation for federal agencies, requires agency heads to “notify the Archivist of any actual, impending, or threatened unlawful removal, defacing, alteration, corruption, deletion, erasure, or other destruction of records in the custody of the agency.”⁵ We urge Congress to add a parallel provision to the Presidential Records Act, requiring the White House counsel to notify the archivist, the attorney general, and Congress of any actual, impending, or threatened presidential recordkeeping violations. This mandate should also extend to former presidents and vice presidents and their post-government staff, should they become aware of any unlawful removal or destruction of records from the administration in which they served.

In its amendments to the Presidential Records Act, Congress must also address the threats that new communication technology poses to presidential and federal records preservation. New technology has helped streamline White House operations in numerous ways, but it has also made it easier to communicate through private channels and through applications that intentionally leave no record.⁶ Records preservation laws must adapt. Last year, Open The Government urged Congress to amend the Presidential and Federal Records Acts to address the use of private devices and ephemeral messaging apps to conduct government business. While banning the use of these technologies outright risks hampering government efficiency, our coalition continues to support the addition of language to both acts allowing for their use “only if there is a system in place to automatically back up content to a federal system.”⁷

⁴ Presidential Records Certification Act of 2022, H.R. 9278, 117th Cong., § 2210 (2022), <https://www.congress.gov/bill/117th-congress/house-bill/9278/text>.

⁵ 44 U.S.C. § 3106 (2022), <https://www.law.cornell.edu/uscode/text/44/3106>.

⁶ Ashley Parker and Philip Rucker, “Upheaval is now standard operating procedure inside the White House,” *Washington Post*, February 13, 2017, https://www.washingtonpost.com/politics/upheaval-is-now-standard-operating-procedure-inside-the-white-house/2017/02/13/d65dee58-f213-11e6-a9b0-ecee7ce475fc_story.html.

⁷ *Correcting the Public Record: Reforming Federal and Presidential Record Management*, Hearing of the Senate Homeland Security and Government Affairs Committee, 117th Cong., (March 15, 2022) (statement by Lisa Rosenberg, executive director of Open The Government), <https://web.archive.org/web/20221007221113/https://www.openthegovernment.org/senate-committee-holds-hearing-on-records-preservation-and-management/>.

Finally, we recommend Congress require the White House to establish a plan at the start of each presidential administration, in consultation with the archivist, for the accessioning of presidential records. Implementing oversight of records management from the start of an administration can help the White House identify and remedy recordkeeping issues in a timely manner before years of records are mismanaged or even lost. That's why we're uplifting a recommendation Open The Government has made in the past: Congress should amend the Presidential Records Act "to require the White House Office of Administration to monitor and report to NARA and Congress on the Executive Office of the President's compliance with the [law]."⁸

The need for accurate, robust government recordkeeping is not a partisan issue: Recent presidential administrations from both political parties have violated both the spirit and the letter of the law intended to protect those records. Absent necessary reforms, future administrations will likely do the same. By strengthening the Presidential Records Act, Congress can reaffirm the importance of strong recordkeeping and the oversight and accountability such records can provide.

Thank you for your consideration of these critical reforms.

Sincerely,

American Oversight

Anne L. Weismann

Association of Research Libraries

Citizens for Responsibility and Ethics in Washington (CREW)

Defending Rights & Dissent

Demand Progress

The Digital Democracy Project

Essential Information

Government Accountability Project

Government Information Watch

Inclusive America

Iowa Freedom of Information Council

Jason R. Baron, Professor of the Practice, College of Information Studies, University of Maryland

National Security Archive

National Security Counselors

Open The Government

Project On Government Oversight

cc:

Members of the Senate Committee on Homeland Security and Governmental Affairs

Members of the House Committee on Oversight and Accountability

⁸ *Correcting the Public Record*, Hearing of the Senate Homeland Security and Governmental Affairs Committee, (statement by Lisa Rosenberg) [see note 7].