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

Committee on Homeland Security and Governmental Affairs
United States Senate

March 15, 2022

Chairman Peters, Ranking Member Portman, members of the Homeland Security and Governmental Affairs Committee, thank you for inviting me to testify today on reforming federal and presidential records management. Twenty years ago, I testified on the Presidential Records Act (PRA) and the need for reforms of our system for the preservation of presidential papers.[1] As demonstrated by recent controversies, these problems persist decades after the enactment of the PRA and the Federal Records Act (FRA).[2] The passage of time should demonstrate not only the need for substantial reforms, but also the bipartisan interests in supporting and strengthening these laws. The FRA and PRA are transformative laws that guarantee not only greater transparency but accountability for actions taken in the name of the public as a whole. It is said that those who cannot remember the past are condemned to repeat it. These laws guarantee that we will not just remember but understand our history so that we do not repeat past errors.

Forcing transparency in government has been a struggle for centuries. In the United States, both Democratic and Republican administrations have shown the same reflexive opposition to public disclosures and record preservation. Governments are risk adverse and public disclosures can fuel public questions and public criticism. It is particularly hard for citizens to prevail against the government when information is withheld. That is why citizen suit provisions and mandatory certifications are so essential. For those seeking transparency in government, it often seems like trying to move the world out of the way. Yet, the Greek mathematician Archimedes famously said, "give me a lever long enough and a fulcrum on which to place it, and I shall move the world." Laws like FOIA, FRA, PRA, and the Freedom of Information Act (FOIA) create a lever long enough to move government out of the way of

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[1] United States House of Representatives, Committee on Government Reform, Subcommittee on Government Management, Information, and Technology, "H.R. 4187: The Presidential Records Act Amendments of 2002," April 24, 2002 (testimony of Professor Jonathan Turley). *See also* Jonathan Turley, *Presidential Records and Popular Government: The Convergence of Constitutional and Property Theory in Claims of Control and Ownership of Presidential Records*, 88 Cornell Law Review 651-732 (2003).

[2] *See generally* Presidential Records Act, 44 U.S.C. §§ 2201-09; Archival Administration, 44 U.S.C. §§ 2101-20; Records Management by the Archivist of the United States and by the Administrator of General Services, *Id.* §§ 2901-09; Records Management by Federal Agencies, *Id.* §§ 3101-07 (1988); Disposal of Records, *Id.* §§ 3301-14.

information. That lever rests on the fulcrum of Congress. Despite our many political disagreements, this is an area where people of good faith can come together in the interest of good government. It is possible to reach a balanced accommodation of both transparency and confidentiality while addressing new technologies and challenges under the PRA and FRA.

I have already written on the history of the Presidential Records Act, and I will not repeat that earlier academic work.[3] The PRA represented a clean break from the flawed view of past presidents that official papers were their own private property. The days have long past when presidents carry off records for private use or personal gain.[4] The struggles with Richard Nixon over his records proved transformative when Congress finally called the bluff of the White House and passed The Presidential Recordings and Materials Preservation Act of 1974. Four years later, Congress went further in the enactment of the PRA, requiring that the government "reserve and retain complete ownership, possession, and control of Presidential records."[5] That material includes:

> "All books, correspondence, memoranda, documents, papers, pamphlets, works of art, models, pictures, photographs, plats, maps, films, and motion pictures, including but not limited to, audio and visual records, or other electronic or mechanical recordations, whether in analog, digital or any other form."[6]

For its part, the FRA defines "records" to include "all recorded information...made or received by a Federal agency under Federal law or in connection with the transaction of public business."[7] That broad scope, however, does not include personal materials, which can create uncertainty with new communication technologies and platforms.[8]

There was a reasonable accommodation for presidents in keeping material sealed to assure allies and aides that they do not operate in a fishbowl of exposure in dealing with the challenges of governance. Accordingly, prior to the conclusion of a president's term of office, a president can "specify durations, not to exceed 12 years, for which access shall be restricted with respect to information, in a Presidential record."[9] That authority, however, is not absolute and there are compelling reasons to override the assertions of a former president in the interest of disclosure.

The PRA has long met with presidential resistance. Starting most famously with Richard Nixon, presidents have used executive authority to modify access to the papers of their predecessors. George Bush did so in limiting access to the papers of Ronald Reagan. I was highly critical of that executive order,[10] which was later rescinded by President Barack Obama in his first executive order.[11]

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3 *See supra* note 1, Turley, Presidential Records and Popular Government.

4 See generally Bruce P. Montgomery, *Presidential Materials: Politics and the Presidential Records Act*, 66 The Am. Archivist 102-104 (2003).

5 Presidential Records Act, 44 U.S.C. § 2202 (1978) (amended 2014).

6 *Id.*at § 2201.

7 4 U.S.C. § 3301(a)(1)(A).

8 *Id.*at § 2201(excluding "official records of an agency ... personal records ... stocks of publications and stationary ... or extra copies of documents produced only for convenience of reference.").

9 44 U.S.C. § 2204.

10 Jonathan Turley, *An Odious Roadblock to History*, L.A. Times, May 5, 2002, available at https://www.latimes.com/archives/la-xpm-2002-may-05-oe-turley5-story.html.

11 Executive Order 13489, available at https://www.govinfo.gov/content/pkg/FR-2009-01-26/pdf/E9-1712.pdf.

The recent controversy over the removal of material by former President Donald Trump, including possible classified material, has magnified those concerns. As I stated publicly, such a removal would be in violation of not just the PRA but classification laws.[12] While, as president, Trump held the ultimate declassification authority, he had no authority to remove such documents after the inauguration of his successor. There were vulnerabilities highlighted in the controversy. The process took too long, roughly one-year, and the removal of some of these documents clearly should never have occurred. Still, we should not allow the perfect to be the enemy of the good. As concerning as these stories are, they show that the PRA did ultimately work in retrieving and protecting the material that was flagged. Classified material is subject to separate statutes and regulations in terms of unauthorized removal, storage, and access. We should address what occurred in this controversy, but it is equally important to address long-standing shortcomings in the federal law. The more important work under the Act can be found on issues relating to social media, electronic records, and contemporary recordkeeping.

The Committee should also review how the recent conflict over access to Trump records may warrant additional changes to the process. That is not to say that the actions were unwarranted. To the contrary, the recent overriding of President Trump's objections to the release of material sought in the investigation of January 6th was both lawful and justified.[13] January 6th remains one of the most traumatic and disgraceful days in our national history; a desecration of our Constitutional process.[14] Nevertheless, Congress should be concerned how such overrides could be used in the future and how this threat might chill communications by current or future presidents. It is possible that future committees or presidents will seek similar overrides to release records soon after the departure of a president. The PRA was designed to hamper such efforts, but the Committee may want to consider whether the balancing of these interests can be clarified and strengthened.

The greater focus, however, should be on new technological challenges and realities. The new communication technology that is so popular in our society has served to undermine the public-private distinction that is so central to the administration of the PRA and FRA. Indeed, social media and other dominant forms of communication have brought us full circle where we are again debating whether material is the personal property of a president or staff. This is not a unique problem to the PRA. Repeated scandals involving unsecure servers and e-mail systems have presented challenges to our laws and regulations governing classified information. Likewise, new media platforms used by federal employees have raised questions under the FRA and state preservation laws. This includes the use of WhatsApp and other platforms to deal with issues ranging from Customs and Border Protection communications,[15] to district business in

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12 *See, e.g.,* Jonathan Turley, *Trump Accused of Taking Top Secret Material to Mar-A-Lago*, Res Ipsa (JonathanTurley.org), Feb. 11, 2022.

13 H.R. 503, § 4(a), 117th Cong. (2021) (empowering the special committee to "investigate the facts, circumstances, and causes relating to" the January 6 attack; "identify, review, and evaluate the causes of and the lessons learned from" the attack; and "issue a final report to the House containing such findings, conclusions, and recommendations for corrective measures . . . as it may deem necessary.").

14 *See* Jonathan Turley, *A Desecration of Democracy,* The Hill, Jan. 7 2021, available at https://thehill.com/opinion/judiciary/533084-a-desecration-of-our-democracy; Jonathan Turley, *The Case for Censuring Trump*, The Hill, Jan. 11, 2021, available at https://thehill.com/opinion/white-house/533693-the-case-for-censuring-trump.

15 *Crew Sues for Records of CBP Contract with Wickr*, *"Auto-burn" Encrypted Messaging App,* CREW, March 2, 2022, available at https://www.citizensforethics.org/legal-

Washington.[16] The use of such technology is a personal choice by federal employees in their private communications. However, it also allows for easy evasion of both the PRA and FRA.

While I would be happy to discuss other proposals and issues, I would like to briefly discuss six possible areas of reform that would further advance the purposes of these laws.

1. Addressing New Technology. The PRA was first enacted when records were almost entirely reduced to paper form. Electronic and digital forms created major challenges for the Archives. The Congress enacted the Presidential and Federal Records Act Amendments of 2014, in part, to address such technology. The PRA expressly states that:

> (a) IN GENERAL.—The President, the Vice President, or a covered employee may not create or send a Presidential or Vice Presidential record using a non-official electronic message account unless the President, Vice President, or covered employee—
> (1) copies an official electronic messaging account of the President, Vice President, or covered employee in the original creation or transmission of the Presidential record or Vice Presidential record; or
> (2) forwards a complete copy of the Presidential or Vice Presidential record to an official electronic messaging account of the President, Vice President, or covered employee not later than 20 days after the original creation or transmission of the Presidential or Vice Presidential record.[17]

However, "adverse actions" only applies to intentional acts and are left to "an appropriate supervisor" for appropriate "disciplinary action."[18] The FRA has a similar standard.[19] The result is a loosely defined and loosely enforced standard.

Likewise, in 2021, Congress enacted the Electronic Message Preservation Act (EMPA), which requires the Archivist to promulgate regulations regarding agency preservation of electronic messages to "require the electronic capture, management, and preservation of such electronic records."[20] It adds that the Archivist "to the extent practicable" should extend these efforts to "other electronic records," a vague standard on the scope and mandate.[21]

This ambiguity magnifies the erosion of these standards in the face of new social media technology. Social media has become the dominant means of communication today, including for political speech.[22] There are over three billion social media users, each of whom spend an

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action/lawsuits/crew-sues-for-records-on-cbp-contract-with-wickr-auto-burn-encrypted-messaging-app/.

16 Martin Austermuhle, *D.C. Officials Using WhatsApp For City Business May Skirt Open Records Law*, National Public Radio, Oct. 9, 2019, available at https://www.npr.org/local/305/2019/10/09/768529012/d-c-officials-using-whats-app-for-city-business-may-skirt-open-records-laws?t=1570705980449.

17 44 U.S.C 2209 (a).

18 Id. at 2209 (b).

19 44 U.S.C. 2911 (a, b).

20 44 U.S.C. 2912 (a).

21 44 U.S.C. 2912 (b).

22 *See generally* Jonathan Turley, *Harm and Hegemony: The Decline of Free Speech in the United States*, 45 Harvard Journal of Law and Public Policy (2021).

average of two hours and twenty-four minutes a day on such sites.[23] That includes politicians and, most famously, former President Donald Trump, who had almost 90 million followers on Twitter before he was banned.[24] These platforms are now the primary form of communication, surpassing telephonic and mail communications by an overwhelming and growing margin.[25] Social media platforms have combined with a common desire of some officials to evade the requirements of the PRA, to effectively go "offline" in their communications. That risk is most evident in ephemeral messaging that is designed to delete itself like Telegram, WhatsApp, Wickr, and Confide.[26] Confide specifically markets the lack of a record in the use of its app.[27] One state report explained the challenge by Confide:

> "Confide is a messaging application or 'app' for smart phones. While messaging over Confide is substantially similar in many ways to ordinary text messaging, Confide has three principal features that distinguish it from ordinary texting. First, Confide immediately and automatically deletes messages once the recipient has read them, and those messages cannot be recovered. Second, the recipient of a Confide message cannot view the entire message at once but instead can view only several words at a time by scrolling his or her finger over the text. This feature is intended to prevent the retention of Confide messages by taking screen shots of the messages. Third, Confide advertises that it uses powerful encryption methods to preserve the security of messages." [28]

The use of such sites could effectively gut the PRA and FRA by creating off-grid options for officials seeking to evade disclosure or retention rules. As the Court in *Citizens for Responsibility and Ethics in Washington v. Trump*, stated "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."[29] It would be impractical and illogical to

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[23] *How Much Time Do People Spend on Social Media in 2021*? TechJury, Nov. 1, 2021 (available at https://techjury.net/blog/time-spent-on-social-media/).

[24] *Twitter Permanently Suspends Trump's Account*, BBC, available at https://www.bbc.com/news/world-us-canada-55597840.

[25] *Id.*

[26] These apps have been defined as "[a] messaging application that causes the sent message or video to disappear in the recipient's device after a short duration." PC MAG, *Definition of Ephemeral Message App*, available at https://www.pcmag.com/encyclopedia/term/ephemeral-message-app. *See also* Caroline Madison Pope, *Ephemeral Messaging Applications and the Presidency: How To Keep the President From Blocking the Sunshine*, 23 N.C. J.L. & Tech. 166 (2021).

[27] CONFIDE, https://getconfide.com/ ("Discuss sensitive topics, brainstorm ideas or give unfiltered opinions without fear of the Internet's permanent, digital record and with no copies left behind.").

[28] DARRELL MOORE ET AL., FINAL REPORT: AGO INQUIRY INTO USE OF CONFIDE BY STAFF OF THE GOVERNOR'S OFFICE (2018); *see also Kurt Starman, Now You See It, Now You Don't: The Emerging Use of Emerging Messaging Apps By State and Local Officials,* 4 Concordia L. Rev. 213 (2019). These apps have also raised similar issues on corporate governance. *See* Laura Palk, *Gone But Not Forgotten: Does (or Should) The Use of Self-Destructing Messaging Applications Trigger Corporate Governance Duties*, Harvard Bus. L. Rev. 115 (2017).

[29] *Citizens for Responsibility and Ethics in Washington v. Trump*, 924 F.3d 602, 604 (D.C. Cir. 2019).

ban all electronic messaging despite the challenge for the Archives.[30] However, Congress can bar the use of message-deleting or ephemeral messaging apps unless they are approved by NARA as modified to allow for preservation of messaging. The use of such an app to send a covered communication should be treated as a "creation decision" that documents "presidential activities"[31] and an automatic "disposal decision."[32] Absent such modified apps, the use of ephemeral systems for covered communications should be treated as an act of destruction of official records.

2. Deterring the Use of Unofficial Accounts for Official Business. On May 18, 2015, President Barack Obama sent out the first presidential tweet when he declared "Hello, Twitter! It's Barack. Really! Six years in, they're finally giving me my own account."[33] It has only been roughly seven years, but the plethora of social media sites and apps have created a nightmare for archivists. This problem is magnified by the casual use of such sites by people in their private lives. The movements between private and public systems can blur the status and protections governing certain messaging. Moreover, with the courts,[34] foreign powers,[35] and the White House[36] treating social media postings by a president as official statements, there is no categorical exclusion of such messaging by their conveyance in social media. Indeed, agencies now use social media and various messaging apps to explain policies and notify the public of important governmental decisions and programs.[37] Most individual officials move between private and public messaging systems repeatedly in any given day.

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30 NARA itself acknowledged this point: "Simply prohibiting the use of electronic messaging accounts to conduct agency business is difficult to enforce and does not acknowledge the way employees communicate." NARA Bulletin 2015-02, available at https://www.archives.gov/records-mgmt/bulletins/2015/2015-02.html.

31 44 U.S.C. § 2203(a).

32 44 U.S.C. §§ 2203(c)-(e).

33 President Obama, (@POTUS44), Twitter (May 18, 2015 11:38 AM), https://twitter.com/potus44/ status/600324682190053376?lang=en.

34 Jonathan Turley, *Supreme Court Upholds Travel Ban*, Res Ipsa (www.jonathanturley.org), June 26, 2018 (discussing the reliance on President Trump's tweets as official statements), available at https://jonathanturley.org/2018/06/26/supreme-court-rules-in-favor-of-travel-ban-in-major-victory-for-the-trump-administration/.

35 Sabra Ayres, *When Trump Tweets, Putin Is Briefed*, L.A. TIMES (Dec. 12, 2017, 9:30 PM), available at https://www.latimes.com/politics/washington/la-na-pol-essential-washington-updates-when-trump-tweets-putin-is-briefed-1513094902-html.

36 Elizabeth Landers, *White House: Trump's Tweets are 'Official Statements'*, CNN (June 6, 2017, 4:37 PM) ("The President is the President of the United States, so they're considered official statements by the President of the United States.") available at https://www.cnn.com/2017/06/06/politics/trump-tweets-official-statements/index.html.

37 *See* AI-MEI CHANG & P.K. KANNAN, IBM CTR. FOR THE BUS. OF GOV'T, LEVERAGING WEB 2.0 IN GOVERNMENT 28 (2008), http://www.businessofgovernment.org/sites/default/files/LeveragingWeb.pdf.

Despite scandals involving various prior officials from Hillary Clinton[38] to Jared Kushner,[39] officials continue to use unapproved servers and platforms for conducting of official business. While laws governing classified information bar such use, those laws have rarely been enforced in terms of criminal charges against officials in egregious cases.[40] There is clearly a lack of deterrence for high-ranking officials who seem to operate on the theory that it is always better "to ask forgiveness than permission." We need to strengthen the monitoring and reporting of such uses, including placing the onus on federal officials to disclose the use of such accounts for official business. This can be done by requiring annual certifications from top officials that they are not using such accounts. Such certifications not only remind officials to be wary of such practices but constitute a statement to federal officials that can be the basis for legal action if it contains false or misleading information.

3. Mandating Agency Adoption of Capstone Policies. NARA has long advocated the use of systems in which senior officials have their messages automatically preserved under what are commonly known as "Capstone" policies.[41] Under that system, "retention periods are determined by the role or position of the individual, rather than by the content of each email message."[42] Capstone would impose a tiered system under which the communications of high-level (or "capstone") officials would be maintained permanently by the agency while mid-level officials would be preserved for seven years, and lower-level officials would be preserved for shorter periods.[43] NARA and the General Accounting Office have pushed for the adoption of Capstone policies.[44] It is not clear why such systems should remain optional rather than mandatory. There

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38 Roselind S. Helderman & Tom Hamburger, *Clinton, on her Private Server, Wrote 104 Emails the Government Says are Classified*, Wash. Post, March 5, 2016, available at https://www.washingtonpost.com/politics/clinton-on-her-private-server-wrote-104-emails-the-government-says-are-classified/2016/03/05/11e2ee06-dbd6-11e5-81ae-7491b9b9e7df_story.html.

39 Philip Bump, *But Their Emails: Seven Members of Trump's Team Have Used Unofficial Communication Tools*, Wash. Post, March 21. 2019, available at https://www.washingtonpost.com/politics/2019/03/21/their-emails-seven-members-trumps-team-have-used-unofficial-communications-tools/.

40 Jonathan Turley, *Trump Accused of Taking Top Secret Material to Mar-o-Lago*, Res Ipsa (www.jonathanturley.org), Feb. 11, 2022, (discussing past controversies), available at https://jonathanturley.org/2022/02/11/trump-accused-of-removing-top-secret-material-to-mar-a-lago/.

41 *See, e.g.,* NARA, *White Paper on The Capstone Approach and Capstone GRS* (April 2015), available at https://www.archives.gov/files/records-mgmt/email-management/final-capstone-white-paper.pdf.

42 NARA, "Capstone Forms," available at https://www.archives.gov/records-mgmt/rcs/schedules/capstone-forms.

43 *Id*.

44 General Accounting Office, *Information Management: Selected Agencies Need to Fully Address Federal Electronic Recordkeeping Requirements*,
Report to the Permanent Subcommittee on Investigations, Committee on Homeland Security and Governmental Affairs, U.S. Senate, Feb. 2020, 24 ("NARA's Capstone approach offers agencies the option of using a more simplified and automated approach to managing email that allows for the categorization and scheduling of email based on the work and/or position of the email account owner"), available at https://www.gao.gov/assets/710/706782.pdf.

should be a consistent system for senior officials across the various agencies in preserving electronic messages and records covered under either the PRA or FRA.

4. Eliminate Disposal Discretion. The role of the archivist on disposal policies remains more limited under the PRA than the FRA. Under the FRA, an Archivist not only has greater unilateral powers to address improper disposal plans but can enlist the Attorney General to stop such practices.[45] Much of the PRA still relies to an uncomfortable degree on the good intentions and actions of a president. A president is required 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."[46] However, a president can negate these protections and "dispose of those Presidential records ... that no longer have administrative, historical, informational, or evidentiary value."[47] The most the PRA does is force a delay of 60 days and notice to Congress.[48] While the schedule for such disposal is noticed under federal law with the Archivist, there remains a degree of fluidity in the protection of such material.[49]

Just as mandating a Capstone approach can produce greater uniformity and compliance, Congress can close the loophole under 44 U.S.C. §§ 2203(c)(e) for the designation of records as unworthy of preservation. That provision allows presidents to dispose of records that he or she deems as lacking significance. Under the current law, the Archivist can seek intervention from Congress on such disposal but that is no guarantee of preservation.[50] Given the easy storage of such records, it is not clear why these records should not be preserved and left to the Archivist to make such decisions. The historical or informational value of material may not be fully evident until years later. Indeed, it may not be evident to a president or White House staff. It is not clear why preservation is such a burden to risk the loss of potentially valuable records. The whole purpose of the PRA is to allow archivists to protect records and not leave such preservation determinations to presidents. This is loophole that only undermines that purpose.

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45 44 U.S.C. 2905(a) ("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."); *see also Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 148 (1980) ("The Attorney General may bring suit to recover the record").

46 44 U.S.C. § 2203.

47 *Id.* at § 2203(c)(e).

48 *Id.* at 2203(c)-(d).

49 *Id*. at § 2203. The provisions states:

(c)During the President's term of office, the President may dispose of those Presidential records of such President that no longer have administrative, historical, informational, or evidentiary value if—

(1) the President obtains the views, in writing, of the Archivist concerning the proposed disposal of such Presidential records; and

(2) the Archivist states that the Archivist does not intend to take any action under subsection (e) of this section.

50 *Id.* at § 2203 (d) ("copies of the disposal schedule are submitted to the appropriate Congressional Committees at least 60 calendar days of continuous session of Congress in advance of the proposed disposal date").

5. Greater Transparency and Enforcement. One of the most helpful aspects of the *American Records Act of 2022* is the increased requirements of quarterly certifications, as well as the availability of a private right of action for citizens. Ironically, the PRA is based on the important principle that presidential records are public, not personal, property. Yet, the public does not have the clear ability to protect its interests in such preservation. Instead, it must largely rely on Congress or NARA for disclosures and enforcement. The use of private attorneys general has long been vital in assuring enforcement of federal laws and negating any partisan bias or administrative reluctance within the government. That is particularly valuable in laws designed to inform the public. The D.C. Circuit noted in *American Friends Service Committee v. Webster* that the legislative history of the FRA "supports a finding that Congress intended, expected, and positively desired private researchers...to have access to the documentary history of the federal government."[51]

This private right of action, however, is only meaningful if citizens are given a basis for a lawsuit. Courts routinely reject complaints deemed speculative or based on mere conjecture.[52] These laws were not conceived for citizen enforcement. As the Supreme Court noted in *Kissinger v. Reporters Committee for Freedom of the Press*, the FRA's legislative history "reveals that [its] purpose was not to benefit private parties, but solely to benefit the agencies themselves and the Federal Government as a whole."[53] For private actions to have a true deterrent effect, the law must require the publication of evidence of possible violations. Otherwise, a complaint could be opposed as insufficiently supported in a motion to dismiss. Clearly, there must be some ability for NARA and a White House or agency to "work things out" without turning every disagreement into a public controversy. Yet, if the private right to action is to succeed, reports and policies must be more readily available to the public if private legal actions are to function effectively.

6. Strengthening Protections for Former Presidents. The five prior suggestions largely add restrictions to the Executive Branch in terms of compliance and reporting. It is also possible to balance those changes with added safeguards against legislative overreach. While I agree with the demand for records to investigate what occurred on January 6th, I have reservations on the scope of some of those demands and have concern for the use of this rationale in the future. There is a legitimate concern over political opponents in Congress or the White House using the statute to strip away needed confidentiality protections or nondisclosure periods. The PRA was designed to conform to the constitutional concerns laid out in *Nixon v. GSA* in protecting the need for presidential confidentiality and conferral.[54] The tension over such privilege claims has continued in dealings between incumbent presidents, former presidents, and the Archivist. During the Reagan Administration, the Office of Legal Counsel at the Department of Justice triggered litigation when it took that deference to an extreme degree in arguing that both the Archivist and an incumbent president must yield to the views of a former president on the status of documents and need for disclosure. That opinion would have gutted the NARA interpretation giving the Archivist the authority to reject such arguments. The Archivist's authority ultimately prevailed in court in *Public Citizen v. Burke*, which also reaffirmed that the incumbent president

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51 720 F.2d 29, 55 (D.C. Cir. 1983).

52 However, researchers have been successful in establishing standing in some critical cases on issues like disposal policies. *See American Friends Serv. Comm. v. Webster*, 720 F.2d 29, 57 (D.C. Cir. 1983), and *Armstrong v. Bush*, 924 F.2d 282, 288 (D.C. Cir. 1991).

53 445 U.S. 136, 149 (1980).

54 *Nixon v. General Services Administration*, 433 U.S 425 (1977).

"is the constitutional superior of the Archivist" and "has the constitutional power to direct the Archivist, not [the former president]."[55]

Incumbent presidents have tended to support their predecessors, regardless of party affiliation, in the withholding of records under claims of privilege. In *Nixon v. General Services Administration*, the Supreme Court rejected the control of these records from a former president but did recognize that a former president can raise privilege assertions over the release of such material. It, however, stressed that "[t]he expectation of the confidentiality of executive communications thus has always been limited and subject to erosion over time after an administration leaves office." NARA itself recognizes its legal obligation not "[to] disclose any presidential record without first providing notice to both the former and incumbent presidents, through their designated representatives, so that they both have the opportunity to review the records in order to decide whether to assert a constitutionally based privilege."[56]

President Biden departed from that pattern but emphasized that the January 6th investigation represented an extraordinary circumstance. The question is whether Congress should consider a further protection to limit such exceptions and encourage that such extraordinary demands be based on broad support within Congress.

Under current law, access may be given to "either House of Congress, or, to the extent of matter within its jurisdiction, to any committee or subcommittee thereof if such records contain information that is needed for the conduct of its business and that is not otherwise available."[57] If Congress wanted to add an accommodation for former presidents, it could require a vote of both houses to override a former president's privilege assertion in the first four years following the end of his or her administration. As the Supreme Court noted, privilege concerns are at their apex in the years immediately after an administration and erode with time.

Congress could also require a greater showing for such overrides of presidential privilege assertions. Such standards are common in areas where constitutional values collide with oversight or investigative demands. A good example is the typical shield law protecting journalistic privilege where prosecutors must show that the material sought is "(i) is highly material and relevant; (ii) critical or necessary to the maintenance of a party's claim . . . and (iii) is not obtainable from any alternative source."[58] Unlike presidential privilege, journalistic privilege was largely rejected in court conflicts before the creation of shield laws. I have supported such shield laws on the state and federal levels for that reason.[59] If such protection is warranted for journalists, former presidents could argue that they should be afforded the same deference – at least for a defined period after they leave office.

A requirement of a bicameral override would simply add greater deliberation and consensus on such a move, even if both houses are controlled by the same party. To be sure, this is a significant accommodation, and it is not compelled by the Constitution. However, if Congress wanted to preserve the original effort to balance transparency and confidentiality, such a bicameral vote requirement would advance that purpose.

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55 *Public Citizen v. Burke*, 843 F.2d 1473, 1478 (D.C. Cir. 1988).

56 National Archives and Records Administration, *Background on the Presidential Records Act*, available at https://www.archives.gov/files/foia/background%20on%20PRA.pdf.

57 44 U.S.C. 2205 (2)(c).

58 *See, e.g.,* New York Shield Law, N.Y. Civil Rights Law 79-h(c).

59 United States House of Representatives, Permanent Select Committee on Intelligence, *The Media and The Publication of Classified Information*, May 26, 2006 (testimony of Professor Jonathan Turley).

In conclusion, as a Madisonian scholar, I would like to claim a point of personal privilege and end by noting that tomorrow is the birthday of James Madison, our greatest Framer, and the genius behind our Constitution. If he were alive today, he would be 271 and we would all be the better for it. In his absence, however, I will appropriate his famous observation that "[a] popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps, both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives."[60] In reality, Madison was speaking of the importance of public education, not public information per se, but he was drawing a nexus between a fully educated public and popular government.[61] These laws are premised on the belief, as stated in Shakespeare's *The Tempest*, that "what is past is prologue" – words inscribed at the very entrance of the National Archives.[62] Like an uneducated public, an uninformed public promises little more than the replication of past mistakes. That is a farce and a tragedy that we should all strive to avoid.

Thank you for the opportunity to speak with you today. I am happy to answer any questions that you might have at this time.

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60 *Letter from James Madison to W.T. Barry* (August 4, 1822), in The Writings of James Madison (Gaillard Hunt ed.), available at https://founders.archives.gov/documents/Madison/04-02-02-0480.

61 The quote is taken from a letter to William T. Barry, the Lieutenant Governor of the State of Kentucky, and the line before his famous quote makes clear the context of Madison's remarks: "The liberal appropriations made by the Legislature of Kentucky for a general system of Education cannot be too much applauded." Thus, it cannot be said that it was a prophetic statement on the need for public information guarantees like the Freedom of Information Act. However, I do not agree that it is not relevant to such public information debate. Madison was speaking of the need to have an educated and informed electorate:

> "The American people owe it to themselves, and to the cause of free Government, to prove by their establishments for the advancement and diffusion of Knowledge, that their political Institutions…are as favorable to the intellectual and moral improvement of Man, as they are conformable to his individual & social Rights."

He also stresses how "Learned Institutions ought to be favorite objects with every free people. They throw that light over the public mind which is the best security against crafty & dangerous encroachments on the public liberty." When Madison was writing, not only was government much smaller with only a few agencies but such governmental information was exceptionally limited. However, Madison spent his life advocating for means to keep governments in check to protect individual liberty. In a separate letter on education, Madison referred to the "diffusion of knowledge" as "the only Guardian of true liberty." *Letter From James Madison to George Thompson*, June 30, 1825, available at https://founders.archives.gov/documents/Madison/04-03-02-0562. I expect, like public education, Madison would view public information as the same guardian, or at least a co-guardian, of true liberty.

62 National Archives, Blog, *Larger Than Life Statues*, May 22, 2018.