

November 12, 2020

Pat Cipollone
White House Counsel
1600 Pennsylvania Avenue, N.W.
Washington, D.C. 20500

Re: Records Preservation Notice

Dear Mr. Cipollone:

Citizens for Responsibility and Ethics in Washington (“CREW”) writes to strongly urge that the White House Counsel’s Office ensures that all White House staff are aware of and comply with their obligations to maintain and preserve records in accordance with the Presidential Records Act (“PRA”), and reminds them that the willful destruction or concealment of such records is a federal crime punishable by fines and imprisonment. As the White House prepares for a transition, it is critical that all staff adhere closely to these critical records-preservation requirements.

As you know, the PRA “‘establish[es] the public ownership of records created by . . . presidents and their staffs in the course of discharging their official duties.’”¹ The statute broadly defines “Presidential records” to include “documentary materials, or any reasonably segregable portion thereof, created or received by the President, the President’s immediate staff, or a unit or individual of the Executive Office of the President whose function is to advise or assist the President, in the course of conducting activities which relate to or have an effect upon the carrying out of the constitutional, statutory, or other official or ceremonial duties of the President.”² Such records “can be in any media, including textual, audiovisual, and electronic.”³

The PRA restricts the disposal of Presidential records. It provides that the “President may dispose of . . . Presidential records . . . that no longer have administrative, historical, informational, or evidentiary value” only if two conditions are met: “(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 [regarding consultation with Congress about disposal decisions].”⁴ As the D.C. Circuit Court of Appeals has recognized, “[d]isposal decisions matter because [P]residential records—if not previously discarded, that is—become available for public release several years after a president leaves office.”⁵

¹ *CREW v. Trump*, 924 F.3d 602, 603 (D.C. Cir. 2019) (quoting H.R. Rep. No. 95-1487, 95th Cong. at 2 (1978)).

² 44 U.S.C. § 2201(2).

³ NARA, Guidance on Presidential Records, <https://www.archives.gov/files/presidential-records-guidance.pdf>.

⁴ 44 U.S.C. § 2203(c); *see also* NARA, Guidance on Presidential Records, at 6 (“The Archivist must provide his views in writing before the President and Vice President may dispose of any incumbent Presidential records.”).

⁵ *CREW*, 924 F.3d at 604 (citing 44 U.S.C. § 2204(b)(2)).

In February 2017, the White House Counsel issued a memorandum to “remind all [White House] personnel of their obligation to preserve and maintain [P]residential records, as required by the Presidential Records Act.”⁶ The memo confirms that “[P]residential records are the property of the United States. You may not dispose of [P]residential records. . . . The willful destruction or concealment of federal records is a federal crime punishable by fines and imprisonment.”⁷ Similarly, the memo makes clear that “[a]ny employee who intentionally fails to” ensure preservation of Presidential records from non-official accounts in accordance with the PRA “may be subject to administrative or even criminal penalties.”⁸

In September 2017, the White House Counsel reportedly sent another memo “sternly remind[ing]” White House staff “about proper use of communications and record-keeping responsibilities under the law,” stating that the “[u]se of personal email, text messages, instant messages, social networks, messaging apps (such as Snapchat, Confide, Slack or others) or other internet-based means of communication to conduct official business is not permitted.”⁹ The memo added that “all work-related communications’ must be done on official government email accounts—and any official communications received on a private email account must be forwarded to the work account.”¹⁰ “The willful destruction or concealment of federal records is a federal crime,” the memo reiterated.¹¹

The criminal statute referenced in the White House Counsel’s February and September 2017 memoranda is 18 U.S.C. § 2071. It provides that “[w]hoever willfully and unlawfully conceals, removes, mutilates, obliterates, or destroys, or attempts to do so, or, with intent to do so takes and carries away any record, proceeding, map, book, paper, document, or other thing, filed or deposited . . . in any public office . . . shall be fined under this title or imprisoned not more than three years, or both.”¹² The “essential element of the offense is the specific intent to destroy [government records] as records of a public office; or, in other words, to obliterate or conceal them as evidence of that which constitutes their value as public records, or to destroy or impair their legal effect or usefulness as a record of our governmental affairs.”¹³ The “statutory requirement of willfulness is satisfied if the accused acted intentionally, with knowledge that he was breaching the statute.”¹⁴ White House officials have been prosecuted under Section 2071.¹⁵

⁶ White House Memorandum, Presidential Records Act Obligations, Feb. 22, 2017, [https://www.archives.gov/files/foia/Memo%20to%20WH%20Staff%20Re%20Presidential%20Records%20Act%20\(Trump.%2002-22-17\)%20redacted%20\(1\).pdf](https://www.archives.gov/files/foia/Memo%20to%20WH%20Staff%20Re%20Presidential%20Records%20Act%20(Trump.%2002-22-17)%20redacted%20(1).pdf).

⁷ *Id.* at 3.

⁸ *Id.*

⁹ Josh Dawsey and Bryan Bender, [National Archives warned Trump White House to preserve documents](https://www.politico.com/story/2017/10/17/national-archives-trump-documents-preserve-243888), *Politico*, Oct. 17, 2017, <https://www.politico.com/story/2017/10/17/national-archives-trump-documents-preserve-243888>.

¹⁰ *Id.*

¹¹ *Id.*

¹² 18 U.S.C. § 2071(a).

¹³ *United States v. Hisselberger*, 991 F. Supp. 2d 108, 124 (D.D.C. 2014) (quoting *United States v. Rosner*, 352 F. Supp. 915, 919 (S.D.N.Y. 1972)).

¹⁴ *United States v. Simpson*, 460 F.2d 515, 518 (9th Cir. 1972); accord *United States v. North*, 920 F.2d 940, 949-50 (D.C. Cir. 1990).

¹⁵ See, e.g., *United States v. North*, 708 F. Supp. 364, 368-69 & n.3 (D.D.C. 1988); *United States v. Poindexter*, 725 F. Supp. 13, 19-20 & n.7 (D.D.C. 1989).

Despite these repeated warnings, at least some White House officials have undertaken concerning recordkeeping practices. Senior Advisor to the President Jared Kushner, for example, has routinely used non-official messaging applications, including WhatsApp and Signal, to communicate about his White House business, according to multiple reports.¹⁶ Director of the White House Office of Trade and Manufacturing Policy Peter Navarro deleted his official Twitter account in October with no assurances that all Presidential records from the account were appropriately preserved.¹⁷ President Trump himself confiscated an interpreter's notes of a meeting with Russian President Vladimir Putin, and ripped up some of his papers.¹⁸

In addition to these concerns, we have broader doubts about the adequacy of the White House's records preservation policies. For example, counsel for Mr. Kushner informed members of Congress in December 2018 that he purportedly preserves Presidential records from his non-official WhatsApp account by taking "screenshots" of these communications and forward[ing] them to his official White House email account or to the National Security Council."¹⁹ But we have little confidence that this "screenshot" approach to records preservation complies with the law or that White House officials have systematically screenshotted each and every Presidential record from any of their non-official accounts.²⁰

While the White House Counsel's February and September 2017 memoranda reminded staff of their records-preservation obligations, it has been more than three years since those notices, many current staff members have joined the White House since then, and a transition can result in recordkeeping requirements being ignored or disregarded. White House staff must be reminded of their statutory obligations and again notified of potential criminal penalties for the willful destruction or concealment of Presidential records. White House policies must also be revised to ensure that all Presidential records stored in non-official accounts are completely and adequately preserved before the Trump administration concludes. We urge you to do so immediately.

Sincerely,



Noah Bookbinder
Executive Director

¹⁶ Letter from Noah Bookbinder to Jared Kushner, Oct. 28, 2018, <https://bit.ly/3pgFFra>; Letter from Rep. Elijah E. Cummings to Pat A. Cipollone, Mar. 21, 2019, <https://bit.ly/2IpZg7F>.

¹⁷ Letter from Noah Bookbinder to Pat Cipollone and David A. Ferriero, Oct. 16, 2020, <https://bit.ly/3kavzUY>.

¹⁸ Letter from 15 organizations to David A. Ferriero, Oct. 9, 2020, <https://bit.ly/3eMkrMI>.

¹⁹ Letter from Rep. Elijah E. Cummings to Pat A. Cipollone, Mar. 21, 2019.

²⁰ Letter from Noah Bookbinder to Jared Kushner, Oct. 28, 2018.