



CITIZENS FOR
RESPONSIBILITY &
ETHICS IN WASHINGTON

December 17, 2021

David S. Ferriero
Archivist of the United States
National Archives and Records Administration
700 Pennsylvania Avenue NW
Washington, DC 20408

Brett M. Baker
Inspector General
National Archives and Records Administration
8601 Adelphi Road, Room 1300
College Park, MD 20740

Re: Request for Action to Recover Presidential Records from Peter Navarro's Personal Email Accounts

Dear Messrs. Ferriero and Baker:

Citizens for Responsibility and Ethics in Washington respectfully requests that the National Archives and Records Administration ("NARA") and NARA's Office of Inspector General take immediate action to recover any alienated Presidential records from the personal email accounts of Peter Navarro, former Assistant to the President and Director of the White House Office of Trade and Manufacturing Policy under former President Trump. If Mr. Navarro refuses to voluntarily turn over alienated Presidential records in his possession, then NARA should promptly initiate an enforcement action through the Department of Justice ("DOJ") to recover them.

Recent findings by the House Select Subcommittee on the Coronavirus Crisis ("Select Subcommittee") indicate that Mr. Navarro possesses a substantial volume of Trump White House Presidential records in his personal email accounts that may not have been transferred to NARA as required by the Presidential Records Act ("PRA"). In a September 14, 2021 letter, Select Subcommittee Chairman James Clyburn described documents showing that Mr. Navarro and other Trump White House officials "communicated extensively about official business relating to the pandemic using private email accounts, including through encrypted ProtonMail accounts."¹ According to Chairman Clyburn, "[t]hese messages include discussions and memoranda relating to the Trump Administration's preparedness plans in the early weeks of the pandemic response, development of diagnostic testing and therapeutics, procurement of ventilators and PPE, and a call for a 'surge' in Intensive Care

¹ Letter from Chairman James E. Clyburn to Peter K. Navarro, Sept. 14, 2021, <https://coronavirus.house.gov/sites/democrats.coronavirus.house.gov/files/2021-09-14.Clyburn%20to%20Peter%20Navarro%20re%20Production%20Request.pdf>.

Unit capabilities in hospitals most likely to face large numbers of severe infections.”² Chairman Clyburn added that these communications “raise troubling questions about whether [Mr. Navarro] and other Trump Administration officials used personal accounts . . . to intentionally shield [their] official communications from public view,” and further suggest that Mr. Navarro currently “possess[es] documents and communications relevant to the Select Subcommittee’s investigations in private accounts and personal devices.”³

In a December 7 letter, Mr. Navarro stated he is categorically refusing to produce documents responsive to the Select Subcommittee’s subpoena “based on former President Trump’s invocation of executive privilege with respect to the very topic covered by the Subpoena.”⁴ Mr. Navarro did not dispute the Select Subcommittee’s findings that he routinely used personal email accounts for official White House business, nor did he claim these messages have been transferred to NARA as required by the PRA. In a December 11 letter to Mr. Navarro, Chairman Clyburn rebuked Mr. Navarro’s baseless assertions of executive privilege, as well as his refusal to describe “any steps that [he] took to timely comply with the Presidential Records Act” with respect to records from his personal accounts.⁵

Under the PRA, any Presidential records stored in Mr. Navarro’s personal electronic messaging accounts are the property of the United States and should be in NARA’s possession.⁶ The statute broadly defines “Presidential records” to include “documentary materials . . . created or received by . . . the President’s immediate staff . . . 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.”⁷ Such records “can be in any media, including textual, audiovisual, and electronic.”⁸ The PRA also prohibited Mr. Navarro from creating or sending Presidential records using “non-official electronic messaging accounts” unless he timely and completely preserved the records in an official White House account,⁹ and Trump White House policy warned staff that “[a]ny employee who intentionally fails to take these actions may be subject to administrative or even criminal penalties.”¹⁰

² *Id.*

³ *Id.*

⁴ Letter from Peter K. Navarro to Chairman James E. Clyburn, Dec. 7, 2021, <https://coronavirus.house.gov/sites/democrats.coronavirus.house.gov/files/Letter%20to%20Clyburn%20Committee%2012%207%2021.pdf>.

⁵ Letter from Chairman James E. Clyburn to Peter K. Navarro, Dec. 11, 2021, <https://coronavirus.house.gov/sites/democrats.coronavirus.house.gov/files/2021.12.11.Clyburn%20to%20Peter%20Navarro%20re%20Subpoena%20Compliance.pdf>.

⁶ See 44 U.S.C. § 2202 (“The United States shall reserve and retain complete ownership, possession, and control of Presidential records.”).

⁷ *Id.* § 2201(2).

⁸ NARA, *Guidance on Presidential Records*, <https://www.archives.gov/files/presidential-records-guidance.pdf>; see also 44 U.S.C. § 2201(1).

⁹ See 44 U.S.C. § 2209(a); see also S. Rep. 113-218, 113th Cong., 2d Sess., at 6 (2014) (noting that § 2209 was intended to “ensure that all Presidential records, even those sent from a personal electronic messaging account, are properly preserved and maintained in an official electronic messaging account”).

¹⁰ Memorandum from Stefan C. Passantino to All White House Personnel, Feb. 22, 2017, [https://www.archives.gov/files/foia/Memo%20to%20WH%20Staff%20Re%20Presidential%20Records%20Act%20\(Trump,%20002-22-17\)%20redacted%20\(1\).pdf](https://www.archives.gov/files/foia/Memo%20to%20WH%20Staff%20Re%20Presidential%20Records%20Act%20(Trump,%20002-22-17)%20redacted%20(1).pdf).

Upon conclusion of a President's term of office, the PRA provides that the Archivist "shall assume responsibility for the custody, control, and preservation of, and access to, the Presidential records of that President."¹¹ The statute adds that the "Archivist shall have an affirmative duty to make such records available to the public as rapidly and completely as possible consistent with the provisions of this chapter."¹²

"As the lawful custodian of archival . . . Presidential records, the Archivist is . . . authorized under 44 U.S.C. § 2905(a) and 44 U.S.C. § 3106 to pursue replevin actions to recover records alienated from Federal custody that . . . should have been in NARA's custody," if the "current holder of the records does not agree to voluntarily return the records to NARA."¹³ Specifically, the PRA authorizes NARA to invoke the same enforcement mechanism set forth in the Federal Records Act,¹⁴ which begins with a request to the Attorney General to bring a civil action to recover the missing records.¹⁵ In deciding whether to pursue such an enforcement action, NARA Directive 1462 requires the agency to consider whether (1) "[t]he content and the context of the alienated record or records clearly fit into a series of records or into a record group legally owned by the National Archives," (2) "[t]he record can easily be identified as Federal in nature," (3) there is "no reason to believe the record left government custody in accordance with authorized disposition instructions," and (4) "[t]he record has sufficient special value to justify the replevin effort."¹⁶

Here, there is a clear factual predicate for NARA to act: the Select Subcommittee has identified voluminous evidence that Mr. Navarro and other Trump White House officials used personal email accounts to communicate about the government's coronavirus response. And Mr. Navarro has refused to answer questions about whether these records were timely and completely preserved in official White House accounts as required by the PRA. Pursuant to NARA's statutory "responsibility for the custody, control, and preservation of, and access to, the Presidential records" of the Trump White House, the agency must promptly investigate this matter and take action to recover any non-accessioned Presidential records stored in Mr. Navarro's personal electronic messaging accounts. To be clear, any claim of privilege Mr. Navarro believes may apply to the disclosure of these records to Congress has no bearing on his legal duty to ensure that the records were properly preserved and transferred to NARA in accordance with the PRA.

If Mr. Navarro refuses to voluntarily turn over any alienated Presidential records to NARA, the criteria outlined in NARA Directive 1462 strongly support initiating a recovery action through DOJ. First, the records "clearly fit into a series of records . . . legally owned by the National Archives"—namely, Presidential records of the Trump White House—and likewise "can easily be identified as Federal in nature." Indeed, Mr. Navarro can hardly dispute classifying the documents as Presidential records given his own attempts (however legally baseless) to assert executive privilege over them. There is also no indication that any

¹¹ *Id.* § 2203(g)(1)

¹² *Id.*

¹³ NARA Directive 1462, *Recovery of Alienated Archival Materials*, §§ 1462.2.b, 1462.9.b(2), Sept. 28, 2006. As used in NARA Directive 1462, "alienation" means the "improper transfer or loss of custody of records/archives by their original custodian or owner to someone not legally entitled to them." *Id.* § 1462.3.a.

¹⁴ 44 U.S.C. § 2112(c); see also *United States v. McElvenny*, 2003 WL 1741422 (S.D.N.Y. April 1, 2003) (NARA replevin action to recover map of Cuba annotated by President John F. Kennedy during the Cuban Missile Crisis).

¹⁵ 44 U.S.C. § 3106.

¹⁶ NARA Directive 1462, § 1462.10.a-d.

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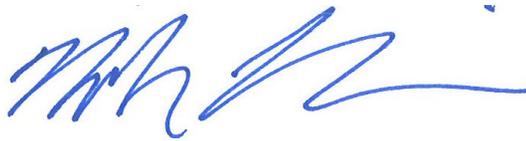
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“authorized disposition instructions” permit alienation of the records from NARA’s custody. Finally, the Presidential records stored in Mr. Navarro’s personal accounts plainly have “sufficient special value to justify the replevin effort.” The records likely contain highly valuable “informational or evidential content” regarding the Trump White House’s response to the catastrophic public health crisis posed by the coronavirus pandemic.¹⁷ The Select Subcommittee has already “identified a series of critical failures in the Trump Administration’s pandemic response that cost American lives,” and found that Mr. Navarro was “intimately involved in these poorly managed efforts.”¹⁸ It is imperative that this essential historical evidence be collected from Mr. Navarro and preserved by NARA as the PRA requires.

Presidential records are the property of the public, and their collection and preservation are among NARA’s chief responsibilities. We therefore request that you fully utilize your statutory authority to recover any alienated Presidential records stored in Mr. Navarro’s personal electronic messaging accounts, including by promptly initiating a recovery action through DOJ if necessary. We respectfully request a response to this letter by January 31, 2022, with a description of any efforts undertaken by NARA to investigate this matter and recover any alienated Presidential records from Mr. Navarro.

Please direct any communications about this matter to Nikhel Sus at nsus@citizensforethics.org.

Sincerely,



Noah Bookbinder
President



Nikhel Sus
Senior Counsel

CC: Gary M. Stern
General Counsel, NARA

¹⁷ See *id.* § 1462.11.b(1)-(4) (“Some indicators of special value are: (1) Association with an important person, place, thing, issue, or historical event; (2) The informational or evidential content of the record; (3) The record’s format or media, such as unique art, graphics, or other factors that give the record exhibit potential inherent in the original record; and (4) Appeal to researchers or other special communities of users of NARA holdings . . .”).

¹⁸ Chairman Clyburn Letter, Sept. 14, 2021.