IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON, *et al.*, Plaintiffs, v. DONALD J. TRUMP, in his official capacity as President of the United States, *et al.*, Defendants.	Case No. 19-cv-1333 (ABJ)

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' MOTION FOR A TEMPORARY RESTRAINING ORDER

INTRODUCTION

President Donald Trump, entrusted by law with safeguarding our nation's history, has instead adopted policies and practices that exclude records of his meetings and conversations with certain foreign leaders from the non-discretionary obligations the Presidential Records Act ("PRA") imposes on him. From their inception these actions have posed an unacceptable risk that valuable historical records will be permanently and irreparably lost. Recent revelations about the White House's handling of records of a conversation between President Donald Trump and the president of Ukraine further showcase the White House's disregard for its recordkeeping obligations. In the face of the palpable risk that presidential records will be irreparably lost to Plaintiffs and the American people, Defendants have refused to provide Plaintiffs with adequate assurances that pending the resolution of this lawsuit all relevant information will be preserved. Accordingly, Plaintiffs seek emergency relief from this Court enjoining Defendants to preserve: (1) all records reflecting Defendants' meetings, phone calls, and other communications with

foreign leaders; (2) all records reflecting policies and practices regarding recordkeeping of Defendants' meetings, phone calls, and other communications with foreign leaders; (3) all records reflecting White House or agency investigations of Defendants' recordkeeping policies and practices regarding meetings, phone calls, and other communications with foreign leaders; (4) all records reflecting Defendants' communication of recordkeeping polices or practices to other components of the executive branch; (5) all records reflecting instructions, guidance, or legal advice about recordkeeping requirements; and (6) all records of efforts by White House or other executive branch officials to return, "claw back," "lock down," or recall White House records reflecting Defendants' meetings, phone calls, and other communications with foreign leaders that were distributed to or otherwise shared with agency officials.

FACTUAL BACKGROUND

Plaintiffs' Complaint

As set forth in Plaintiffs' Opposition to Defendants' Motion to Dismiss (ECF No. 14), the President's refusal to create records of his highest-level meetings with certain foreign leaders and representatives and his interference with the ability of agencies to create and maintain such records already have had severe impacts on the historical record of this presidency. For example, as alleged in the Complaint, the absence of any written record of President Trump's five publicly reported meetings with Russian President Vladimir Putin has effectively shielded those conversations from the public and prevented even top U.S. officials from knowing fully what President Trump said to and/or promised President Putin, who heads a country that is one of the United States' main strategic adversaries. *See* Compl. ¶ 53.[1] Further, in President Trump's first

[1] In June 2019, after the Complaint was filed, President Trump met President Putin for a sixth time at the G20 summit in Osaka, Japan. Rosie Perper, 'Don't meddle in the election': Trump

reported face-to-face meeting with President Putin in Hamburg, Germany during the G20 Summit, President Trump reportedly confiscated his interpreter's notes after the meeting and ordered the interpreter not to disclose to anyone what he had heard, including to administration officials. *Id.* ¶ 42. With respect to phone calls between the two leaders, who talk "regularly" by phone, *id.* ¶ 55, presidential aides reportedly have been allowed to listen in on only some of these conversations, and often Russia has been the "first to disclose those calls when they occur and release statements characterizing them in broad terms favorable to the Kremlin." *Id.*

In light of this conduct, on May 7, 2019, Plaintiffs Citizens for Responsibility and Ethics in Washington, National Security Archive, and Society for Historians of American Foreign Relations filed this lawsuit against President Trump and the Executive Office of the President ("EOP") challenging (1) their failure to comply with the mandatory obligations the PRA imposes to create, classify, and preserve records, 44 U.S.C. §§ 2201-2209, and (2) their implementation of policies and practices that violate the PRA, the Federal Records Act ("FRA"), 44 U.S.C. §§ 3101, *et seq.*, and Article II, Section 3 of the Constitution (the "Take Care Clause"). In particular, the Complaint alleges that President Trump has a policy and practice of affirmatively failing to create and preserve records of the meetings and discussions the President and other senior White House staff have with certain foreign leaders, including Russian President Putin and North Korean leader Kim Jung-Un. Plaintiffs also allege that the President has interfered with the adequate and proper documentation of agency records of bilateral meetings.

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appears to joke with Putin as they meet at G20 summit for the first time since Mueller report, *Business Insider* (Jun. 28, 2019), *available at* https://bit.ly/2o3RqG3.

The Whistleblower Complaint

On September 18, 2019, the *Washington Post* reported that President Trump's communications with a foreign leader—subsequently identified as Ukrainian President Volodymyr Zelenskyy—were the subject of a whistleblower complaint filed with the Inspector General for the Intelligence Community ("IGIC"). Greg Miller, Ellen Nakashima, and Shane Harris, Trump's communications with foreign leader are part of whistleblower complaint that spurred standoff between spy chief and Congress, former officials say, *Washington Post* (Sept. 18, 2019), https://wapo.st/2kos98a. The IGIC deemed the complaint credible and a matter of "urgent concern," thereby triggering a requirement to notify the appropriate congressional oversight committees. *Id.* Most relevant for this case and the relief sought herein, recordkeeping access and procedures lie at the heart of the whistleblower complaint.

In the complaint, which was submitted to the IGIC on August 12, 2019, the whistleblower asserts that he or she has "received information from multiple U.S. Government officials that the President of the United States is using the power of his office to solicit interference from a foreign country in the 2020 U.S. election. This interference includes, among other things, pressuring a foreign country to investigate one of the President's main domestic political rivals." Whistleblower Compl. (Ex. A) at 1. The whistleblower complaint describes a pattern of conduct that raised ongoing concerns including a phone call between President Trump and President Zelenskyy on July 25, 2019, in which President Trump pressured Zelenskyy to "initiate or continue an investigation into the activities of former Vice President Joseph Biden and his son, Hunter Biden"; "assist in purportedly uncovering that allegations of Russian interference in the 2016 U.S. presidential election originated in Ukraine"; and "meet or speak with two people the President named explicitly as his personal envoys on these matters, Mr.

Giuliani and Attorney General Barr." *Id.* According to the *Wall Street Journal*, Secretary of State Mike Pompeo was among the officials who listened in on the July 25 phone call. Courtney McBride and Sadie Gurman, Pompeo Took Part in Ukraine Call, Official Says, *Wall Street Journal* (Sept. 30, 2019), *available at* https://on.wsj.com/2neJEcw.

The whistleblower complaint also raises the prospect that U.S. security assistance was suspended to place additional pressure on Zelenskyy and other Ukrainian officials. *Id.*, Classified Appendix at 2. A memorandum summarizing the call released by the White House corroborates the whistleblower's claims. Memorandum of Telephone Conversation, Ex. B.

Critical for this case, the whistleblower complaint further alleges that White House officials abused recordkeeping systems to conceal the President's actions. Officials reportedly were "deeply disturbed by what had transpired" on the July 25 phone call and there was "a 'discussion ongoing' with White House lawyers about how to treat the call because of the likelihood . . . that they had witnessed the President abuse his office for personal gain." Whistleblower Compl. at 3. According to the whistleblower complaint, although "approximately a dozen White House officials" and "a State Department official, Mr. T. Ulrich Brechbuhl," listened to the call and multiple State Department and Intelligence Community officials were "briefed on the contents of the call," *id.* at 3, in the days following the call, "*senior White House officials . . . intervened to 'lock down' all records of the phone call, especially the official word-for-word transcript of the call that was produced—as is customary—by the White House Situation Room.*" *Id.* (emphasis added). Specifically, the whistleblower complaint alleges that

> White House officials told me that they were "directed" by White House lawyers to remove the electronic transcript from the computer system in which such transcripts are typically stored for coordination, finalization, and distribution to Cabinet-level officials.

> Instead, the transcript was loaded into a separate electronic system that is otherwise used to store and handle classified information of an especially sensitive nature. One White House official described this act as an abuse of this electronic system because the call did not contain anything remotely sensitive from a national security perspective.

Id. at 3-4.

A classified appendix to the whistleblower complaint that is partially redacted provides further detail about these recordkeeping practices:

> According to multiple White House officials I spoke with, the transcript of the President's call with President Zelenskyy was placed into a computer system managed directly by the National Security Council (NSC) Directorate for Intelligence Programs. This is a standalone computer system reserved for codeword-level intelligence information, such as covert action. According to information I received from White House officials, some officials voiced concerns internally that this would be an abuse of the system and was not consistent with the responsibilities of the Directorate for Intelligence Programs. *According to White House officials I spoke with, this was "not the first time" under this Administration that a Presidential transcript was placed into this codeword-level system solely for the purpose of protecting politically sensitive—rather than national security sensitive—information.*

Id., Classified Appendix at 1 (emphasis added).

Public reporting based on interviews of former national security officials confirms that placing memoranda of routine conversations between the President and other world leaders in a "separate electronic system that is otherwise used to store and handle classified information of an especially sensitive nature," was highly unusual. Greg Sargent, The whistleblower alleged a Trump coverup. A former insider explains how it worked., *Washington Post* (Sept. 26, 2019), https://wapo.st/2mkMcFy; Natasha Bertrand and Daniel Lippman, White House 'lockdown' of transcript would be highly unusual, *Politico*, Sept. 26, 2019, *available at* https://politi.co/2m7euDp. According to Ned Price, a former senior director at the National Security Council, that system permits access to only a small number of individuals in the National Security Directorate for Intelligence Programs and is typically used to store the "most sensitive information within

our government's possession," such as "extraordinarily sensitive intelligence information that emanates from the most precious intelligence sources." Sargent, *Washington Post*, Sept. 26, 2019. Furthermore, Executive Order 13526, which "prescribes a uniform system for classifying, safeguarding, and declassifying national security information," specifically states that "[i]n no case shall information be classified, continue to be maintained as classified, or fail to be declassified in order to: (1) conceal violations of law, inefficiency, or administrative error; [or] (2) prevent embarrassment to a person, organization, or agency . . . ."

Alarmingly, public reporting in the wake of the release of the whistleblower complaint suggests that the White House has taken additional, unusual action with respect to records of President Trump's phone calls with foreign leaders. For instance, the *Washington Post* reported that "[a]t one point in 2018, Defense Department officials were asked to send back transcripts of calls to the White House after Trump aides grew worried they could be disclosed, according to former senior administration officials." Josh Dawsey and Carol D. Leonnig, Effort to shield Trump's call with Ukrainian leader was part of broader secrecy effort, *Washington Post* (Sept. 26, 2019), https://wapo.st/2mjte1V. Such efforts reportedly are the result of the President pressing aides to ensure that records do not become public. *Id.* Transferring records to the National Security Council's code-word-protected system reportedly requires a written request from a senior White House official such as the chief of staff or the national security adviser. *Id.* The *New York Times* reported that records of calls between President Trump and President Putin and between President Trump and Saudi Crown Prince Mohammed bin Salman are among the records that have been placed in a highly classified computer system. Julian E. Barnes, Michael Crowley, Matthew Rosenberg and Mark Mazzetti, White House Classified Computer System Is Used to Hold Transcripts of Sensitive Calls, *New York Times* (Sept. 27, 2019), https://nyti.ms/2mn

vo0K. *See also* Pamela Brown, Jim Sciutto and Kevin Liptak, White House restricted access to Trump's calls with Putin and Saudi crown prince, *CNN*, (Sept. 28, 2019), https://cnn.it/2lK3cVo.

After the whistleblower complaint was filed, the Acting Director of National Intelligence, the White House, and the Department of Justice ("DOJ") took steps to prevent Congress from accessing the complaint. On August 26, 2019, Inspector General Michael K. Atkinson disclosed the whistleblower complaint to Acting Director of National Intelligence Joseph Maguire. IGIC August 26, 2019 Letter to Acting Director Maguire, Ex. C at 1. Even though federal law requires the Director of National Intelligence ("DNI") to transmit to Congress a whistleblower complaint deemed by the inspector general to be a matter of urgent concern and credible, *see* 50 U.S.C. § 3033(k)(5), Acting Director Maguire failed to do so within the prescribed statutory deadline. Instead, Acting Director Maguire consulted the White House and DOJ's Office of Legal Counsel. Zachary Cohen, Acting spy chief tells Congress the 'whistleblower did the right thing', *CNN* (Sept. 26, 2019), https://cnn.it/2nbAAVB. As a result, the White House Counsel's office, which according to the whistleblower directed officials to move records from one computer system where it was normally stored to a classified information system, was consulted about whether to disclose to Congress a complaint concerning the President's actions. *See* Acting DNI Maguire Testifies on Whistleblower Complaint, *C-SPAN* (Sept. 26, 2019), https://cs.pn/2mRL8ZO.

In a September 9, 2019 letter to Chairman Adam Schiff and Ranking Member Devin Nunes of the Permanent Select Committee on Intelligence of the U.S. House of Representatives, Inspector General Atkinson advised the Committee of the Director's failure to transmit the whistleblower complaint and IGIC determination to Congress. IGIC Sept. 9, 2019 Letter to Schiff, Nunes, Ex. D. Inspector General Atkinson informed the Committee of his understanding

"that the Acting DNI has determined that he is not required to transmit my determination of a credible urgent concern or any of the Complainant's information to the congressional intelligence committees because the allegations do not meet the definition of an 'urgent concern' under the statute" and that "the Acting DNI's treatment of the Complainant's alleged 'urgent concern' does not appear to be consistent with past practice." *Id.* at 2. In a second letter, Inspector General Atkinson informed the Committee that he had received a letter from Jason Klitenic, the General Counsel for the Office of the Director of National Intelligence ("ODNI"), advising "that the Acting DNI had determined, after consulting with . . . DOJ, 'that no statute requires disclosure of the complaint to the intelligence committees' because 'the disclosure in this case did not concern allegations of conduct by a member of the Intelligence Community or involve an intelligence activity under the DNI's supervision.'" IGIC Sept. 17, 2019 Letter to Schiff, Nunes, Ex. E at 2. Inspector General Atkinson noted that he disagreed "with that determination, particularly DOJ's conclusion, and the Acting DNI's apparent agreement with the conclusion, that the disclosure in this case does not concern an intelligence activity within the DNI's authority, and that the disclosure therefore need not be transmitted to the congressional intelligence committees." *Id.* The DOJ Memorandum reaching that conclusion sidestepped the question of whether the attempt by White House officials to restrict access to records of the July 25 call was an intelligence activity within DNI's authority. *See* U.S. Dep't of Justice, Office of Legal Counsel, *Memorandum for Jason Klitenic, General Counsel, Office of the Director of National Intelligence*, Sept. 3, 2019, at 3 n.4, https://www.justice.gov/olc/page/file/1205151/download.

President Trump's Past Conduct to Create False Records to Conceal His Unlawful Conduct

This latest conduct by President Trump and the White House is part of a larger pattern of conduct to prevent the public from learning about the President's unlawful conduct. Volume II of Special Counsel Robert S. Mueller's Report on the Investigation into Russian Interference in the 2016 Presidential Election ("Mueller Report") describes in detail several episodes in January and February 2018 in which the President personally and through subordinates pressured former White House Counsel Don McGahn to create a false record of events.

On January 26, 2018, after the *New York Times* accurately reported that President Trump had ordered Special Counsel Mueller fired in June 2017, President Trump's "personal counsel called McGahn's attorney and said that the President wanted McGahn to put out a statement denying that he had been asked to fire the Special Counsel and that he had threatened to quit in protest. McGahn's attorney spoke with McGahn about that request and then called the President's personal counsel to relay that McGahn would not make a statement." Mueller Report, Vol. II, at 114. Less than two weeks later, on February 5, the President tried again. The Mueller report states that the President "directed [White House Secretary Rob] Porter to tell McGahn to create a record to make clear that the President never directed McGahn to fire the Special Counsel." Mueller Report, Vol. II, at 115. According to the Mueller Report, President Trump told Porter that "he wanted McGahn to write a letter to the file 'for our records' and wanted something beyond a press statement to demonstrate that the reporting was inaccurate." *Id.* According to the Mueller Report, Porter also "recalled the President saying something to the effect of, 'If he doesn't write a letter, then maybe I'll have to get rid of him.'" *Id.* at 115-116. Porter delivered the message and the threat, but McGahn resisted. *Id.* at 116.

On February 6, 2018, White House Chief of Staff John Kelley scheduled time for McGahn to meet with the President about the *Times* article. According to the Mueller Report:

> The President began the Oval Office meeting by telling McGahn that the New York Times story did not "look good" and McGahn needed to correct it. McGahn recalled the President said, "I never said to fire Mueller. I never said 'fire.' This story doesn't look good. You need to correct this. You're the White House counsel."
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> In response, McGahn acknowledged that he had not told the President directly that he planned to resign, but said that the story was otherwise accurate. The President asked McGahn, "Did I say the word 'fire'?" McGahn responded, "What you said is, 'Call Rod [Rosenstein], tell Rod that Mueller has conflicts and can't be the Special Counsel.'" The President responded, "I never said that." The President said he merely wanted McGahn to raise the conflicts issue with Rosenstein and leave it to him to decide what to do. McGahn told the President he did not understand the conversation that way and instead had heard, "Call Rod. There are conflicts. Mueller has to go." The President asked McGahn whether he would "do a correction," and McGahn said no. McGahn thought the President was testing his mettle to see how committed McGahn was to what happened. Kelly described the meeting as "a little tense."
>
> The President also asked McGahn in the meeting why he had told Special Counsel's Office investigators that the President had told him to have the Special Counsel removed. McGahn responded that he had to and that his conversations with the President were not protected by attorney-client privilege. The President then asked, "What about these notes? Why do you take notes? Lawyers don't take notes. I never had a lawyer who took notes." McGahn responded that he keeps notes because he is a "real lawyer" and explained that notes create a record and are not a bad thing. The President said, "I've had a lot of great lawyers, like Roy Cohn. He did not take notes."

Mueller Report, Vol. II at 116-17. According to McGahn, when the President stated that he "never had a lawyer who took notes," he was referring to the notes of Annie Donaldson, Don McGahn's chief of staff from January 2017 to December 2018. *Id.* at 117 n.824.

Communications Between the Parties Concerning Document Preservation

In light of these events, Plaintiffs' counsel sent a letter by email to Defendants' counsel on September 20, 2019, seeking confirmation that Defendants are preserving four general categories of records pertaining to Plaintiffs' claims as well as "any materials relating to the

ODNI whistleblower complaint and the underlying incident." Letter from Anne Weismann to Kathryn L. Wyer, Sept. 20, 2019, Ex. F. By a response letter dated and sent by email on September 23, 2019, Defendants' counsel described Plaintiffs' preservation request as seeking "privileged legal advice" not subject to discovery, suggested Plaintiffs had no "freestanding right to demand that defense counsel disclose preservation guidance outside of the discovery process," and described Plaintiffs' request as "particularly inappropriate" given the limitations Defendants claim courts have placed on judicial review of the claims brought here. Letter from Kathryn Wyer to Anne L. Weismann, Sept. 23, 2019, Ex. G. Defendants' letter went on to state that "we have appropriately advised our clients concerning their preservation obligations, as is our standard practice." *Id.*

Plaintiffs sent a second letter by email on September 25, 2019, pointing out that Defendants' letter mischaracterizes Plaintiffs' request which, far from seeking privileged legal advice, "simply ask[s] for confirmation that certain categories of records we have outlined will be preserved." Letter from Anne Weismann to Kathryn L. Wyer, Sept. 25, 2019, Ex. H. Plaintiffs also explained that the obligation to preserve relevant evidence "runs from the time that a party has notice or should have known that evidence is relevant to either pending or future litigation." *Id.* Further, Plaintiffs' letter explained the relevance of the documents for which Plaintiffs seek preservation assurances, given that they "likely contain evidence of the President's recordkeeping practices that lie at the heart of Plaintiffs' complaint." *Id.* Outlining the caselaw that spells out Plaintiffs' legal entitlement to "know the kinds and categories of records Defendants have been instructed to preserve and 'what specific actions [Defendants] were instructed to take to that end,'" Plaintiffs repeated their request for preservation assurances. *Id.* (citation omitted).

Defendants responded to this letter on September 27, 2019, reiterating their view that the assurances Plaintiffs seek "clearly implicate[] privileged legal advice." Letter from Kathryn Wyer to Anne L. Weismann, Sept. 27, 2019, Ex. I. Defendants further expressed the view, not supported by any caselaw or other authority, that the information Plaintiffs seek cannot be obtained outside of the discovery process. *See id.* Finally, notwithstanding the growing evidence of the President's malfeasance Defendants asserted that "nothing in your letter, or in the allegations of Plaintiffs' complaint, suggests that spoliation of relevant evidence is likely to occur." *Id.* Defendants closed with the assertion they would not respond to any further inquiries. *Id.*

ARGUMENT

I. CREW IS ENTITLED TO A TEMPORARY RESTRAINING ORDER.

A. Standards for Entry of a Temporary Restraining Order.

The standards for a temporary restraining order mirror those for a preliminary injunction, with the exception of the notice requirement for a preliminary injunction. *See* Fed. R. Civ. P. 65(a)(1); *Bean LLC v. John Doe Bank*, 291 F. Supp. 3d 34, 41 (D.D.C. 2018); *Sterling Comm. Credit—MI, LLC v. Phoenix Industries I, LLC*, 762 F. Supp. 2d 8, 13 (D.D.C. 2011); *Hall v. Johnson*, 599 F. Supp. 2d 1, 3 (D.D.C. 2009). For both, the movant "must establish (1) that he is likely to succeed on the merits, (2) that he is likely to suffer irreparable harm in the absence of preliminary relief, (3) that the balance of equities tips in his favor, and (4) that an injunction is in the public interest." *Aamer v. Obama*, 742 F.3d 1023, 1038 (D.C. Cir. 2014) (quoting *Winter v. Nat. Resources Def. Council, Inc.*, 555 U.S. 7, 20 2008)).

While the movant must demonstrate that all four factors weigh in favor of granting the relief, courts historically have used a "sliding scale" approach, which recognizes that courts may

award relief when one factor is particularly strong, "even if the showings in the other areas are rather weak." *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006). The D.C. Circuit has noted that the Supreme Court's decision in *Winter* "could be read to create a more demanding burden [on irreparable injury], although the decision does not squarely discuss whether the four factors are to be balanced on a sliding scale" and the Court in that case declined to "decide whether a stricter standard applies." *Davis v. Pension Ben. Guar. Corp.*, 571 F.3d 1288, 1292 (D.C. Cir. 2009). A recent decision from this court noted that also unresolved "is the related question of 'whether, in cases where the other three factors strongly favor issuing an injunction a plaintiff need only raise a serious legal question on the merits.'" *Mons v. McAleenan*, No. 19-1593, 2019 WL 4225322, at *3 (D.D.C. Sept. 5, 2019) (quoting *Aamer*, 742 F.3d at 1043).

Here, whether evaluated on the basis of all four factors equally or on a sliding-scale, Plaintiffs are entitled to the requested emergency relief.

B. Plaintiffs Are Likely to Prevail on the Merits.

Plaintiffs' lawsuit challenges the policy and practice of the President and other top White House officials of failing and/or refusing to create or preventing others from creating records of their meetings with foreign leaders in violation of the PRA. *See* Compl. ¶ 62. As such, it fits squarely within the types of challenges the D.C. Circuit recognized are subject to judicial review in *Armstrong v. Exec. Office of the President*, 1 F.3d 1274 (D.C. Cir. 1993) ("*Armstrong II*"), to preserve the careful balance Congress struck between a president's right to control decisions about the creation, management, and disposal of specific records while in office, and the public's right to a complete historical record of a president's actions and decisions upon leaving office. Far from challenging quotidian decisions about specific records that a previous decision declared

off-limits, *Armstrong v. Bush*, 924 F.2d 282 (D.C. Cir. 1991) ("*Armstrong I*"), the challenged conduct here concerns a broader policy and practice of excluding from the PRA an entire class of activities: top-level meetings and conversations between the President and certain foreign leaders.[2]

The challenged conduct also supports mandamus relief, because the PRA imposes on the President clear, ministerial duties. Those duties include the PRA's requirement that

> the President *shall* take *all* such steps . . . 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.

44 U.S.C. § 2203(a) (emphasis added). Although the PRA gives the President discretion to determine what steps to take, the statute's use of the word "shall" leaves the President no discretion to ignore the obligation to document his activities.

Further, the PRA dictates that the President "*shall*" categorize records as either "presidential" or "personal." 44 U.S.C. § 2203(b) (emphasis added). While the statute leaves to the President when to categorize records, it leaves the President no discretion on whether to categorize records. The PRA also instructs the President to "implement[] . . . records management controls . . . to assure that . . . [presidential] records are preserved and maintained, 44 U.S.C. § 2203(a), thereby imposing another non-discretionary duty on the President. Finally, the PRA imposes a litany of non-discretionary obligations on the President before presidential records may be destroyed. *See* 44 U.S.C. § 2203(c) (requirement to determine records no longer have value); *id.* at § 2203(c)(1) (requirement to obtain written views of the Archivist); *id.* at §

[2] For a fuller exposition of the legal merits of Plaintiffs' claims the Court is respectfully referred to Plaintiffs' Opposition to Defendants' Motion to Dismiss ("Ps' Opp.").

2203(c)(2) (requirement that Archivist state explicitly he or she does not intend to take any action).

Here, the President's failure to comply with these clear, non-discretionary duties or take these clear, non-discretionary, prescribed steps, as set forth in the Complaint, supports mandamus relief. Those failures include numerous instances where the President and top White House officials acted to exempt certain presidential activities from the scope of the PRA, improperly classified federal records as presidential records, and destroyed or ordered the destruction of presidential records without following the PRA's prescribed steps for such document disposal. *See* Ps' Opp. at 26-29.

Finally, Plaintiffs have raised a valid independent claim under the Constitution's Take Care Clause based on the President's failure to create records of certain presidential activities, which effectively amends the PRA by carving out an entire set of meetings and communications from its requirements. Likewise, Defendants have functionally amended the definition of a presidential record to impermissibly sweep in documents that qualify as federal records under the FRA, such as interpreter notes, and have prevented the State Department from complying with its own recordkeeping obligations under 44 U.S.C. § 3101. *See* Compl. ¶ 36; Ps' Opp. at 35-40.

Through a motion to dismiss, Defendants have raised a panoply of objections to these claims, including arguments that the PRA precludes judicial review, and that Plaintiffs have failed to establish the necessary elements for mandamus relief or Take Care Clause jurisdiction. Their arguments sound a now familiar refrain that the President enjoys unchecked power, free to disregard the PRA with impunity. To hold the President immune from any lawsuit seeking to make him accountable for his recordkeeping violations would, however, fly in the face of the text and purpose of the PRA, its historical context, and the congressional record. Quite simply

"[t]he Constitution does not confer upon [the president] any power to enact laws or to suspend or repeal such as the Congress enacts." *United States v. Midwest Oil Co.*, 236 U.S. 459, 505 (1915). Ignoring the will of Congress here as the Defendants request, would place this Court "in conflict with the legislative branch" and raise, not avoid, separation-of-powers concerns. *Ctr. for Auto Safety v. Nat'l Highway Traffic Safety Admin.*, 793 F.2d 1322, 1337 (D.C. Cir. 1986).

The revelation that there is, in fact, a record of President Trump's July 25 phone call with President Zelynskyy does not impact Plaintiff's likelihood of success on the merits. In fact, the gravest allegations in the Complaint—that President Trump failed to create records of bilateral in-person meetings with certain foreign leaders—would be bolstered by evidence that records were created of other forms of communication with foreign leaders, that there was a policy and practice of limiting the content of the documentation of those communications, and that there was a policy and practice of blocking federal agencies' access to such content where that content would normally result in an agency record being created or maintained.

C. Plaintiffs Will Suffer Irreparable Injury Absent the Requested Relief.

Plaintiffs brought this suit to challenge policies and practices that deprive the American people and Plaintiffs of a historical record that Congress requires the President to create, maintain, and—eventually—make available to the public via the Freedom of Information Act. As the Complaint explains, "The absence of records . . . when the President and his top advisers are exercising core constitutional and statutory powers causes real, incalculable harm to our national security and the ability of our government to effectively conduct foreign policy because the documentary record of this administration's foreign policy . . . will be unavailable to policy makers and forever lost to history." Compl. ¶ 8.

The credible whistleblower allegations that senior White House officials sought to "lock down" records of the July 25 telephone conversation between President Trump and President Zelenskyy and that this was "not the first time" that politically sensitive information was suppressed by White House officials are evidence of the Defendants' disregard for their recordkeeping responsibilities and the threat of irreparable injury that Plaintiffs and the public face absent this Court's intervention. As discussed below, evidence that is critical to substantiating the claims brought by Plaintiffs in this litigation is in danger of being lost; so too are the records of this administration's foreign policy that the Complaint alleges must be created, classified, and preserved for future generations. That interest is only heightened now that bilateral conversations between the President and the leader of a foreign country will undoubtedly be a matter of enormous historical concern and value.

Courts have recognized that in circumstances similar to those present here, injunctive relief requiring a government defendant to preserve documents is appropriate "where the parties dispute the adequacy of the government's record keeping procedures." *Armstrong v. Bush*, 807 F. Supp. 816, 823 (D.D.C. 1992); *see also Am. Friends Serv. Comm. v. Webster*, 485 F. Supp. 222 (D.D.C. 1980). For instance, in *Citizens for Responsibility and Ethics in Washington v. Executive Office of the President* ("*CREW v. EOP*"), which challenged the deletion of millions of email on White House servers, the district court entered a temporary restraining order requiring the Executive Office of the President to maintain back-up tapes pending resolution of the litigation. Order, *CREW v. EOP*, No. 07-cv-1707 (D.D.C. Nov. 12, 2007) (adopting Report and Recommendation, *CREW v. EOP*, No. 07-cv-1707 (D.D.C. Oct. 19, 2007)). In *CREW v. EOP*, the court issued injunctive relief despite the government's objection that "CREW should instead accept a declaration from an authorized official expressing the defendants' intention to preserve

all the backup media it has in its possession." Report and Recommendation, *CREW*, No. 07-cv-1707, at 2. Similarly, in *American Friends Service Committee*, the Court issued a preliminary injunction requiring the Archivist and the FBI to cease destruction of records until a retention plan and records control schedules were in place. *Am. Friends Serv. Comm.*, 485 F. Supp. at 236.

Especially in light of the unfolding evidence that White House lawyers have aided and abetted the President by attempting to cover up evidence of his unlawful conduct, Plaintiffs should not have to rely solely on ill-defined assurances that records Defendants in their sole discretion deem relevant will be preserved, the position set forth in two letters from their counsel. *See* Exs. G and I. In *Armstrong v. Bush*, the Court issued a temporary restraining order precluding the President, Executive Office of the President, the Archivist, and the National Security Council from erasing material stored on an electronic communications system in part because the defendants were unwilling to guarantee that a wholesale purge of electronic records would not occur. *Armstrong*, 807 F. Supp. at 820. "Under these circumstances and mindful that the most compelling reason to grant injunctive relief is to prevent the judicial process from being rendered futile by a party's act or refusal to act," the court found "that the Plaintiffs [had] made a showing of immediate and irreparable harm." *Id.* at 821. *See also* Wright and Miller, Federal Practice and Procedure § 2947 (3d ed.) ("[T]he most compelling reason in favor of entering a Rule 65(a) order is the need to prevent the judicial process from being rendered futile by defendant's action or refusal to act.").

The irreparable harm Plaintiffs face in this matter is nearly identical: Plaintiffs can be afforded full and effective relief only if records that must be created, classified, and maintained are in fact maintained. Records documenting bilateral conversations or meetings between the President and other foreign leaders or the absence of records documenting the same are highly

probative evidence of Plaintiffs' claims, and likely to constitute discoverable evidence, *see* Fed. R. Civ P. 26 (b)(1), proving Plaintiffs' allegations that Defendants are engaging in a pattern and practice of failing to create, classify, and/or maintain presidential records as the law requires.

The allegations set forth in the whistleblower complaint as well as other evidence of recordkeeping irregularities in this administration also establish that irreparable harm is likely. First, the whistleblower complaint and the memorandum of President Trump's telephone conversation with Zelenskyy are powerful evidence that the President engaged in extraordinarily serious misconduct that appears to include the solicitation of a foreign power's interference in the 2020 presidential election and the withholding of military aid to ensure that country followed through. Whistleblower Compl.; Memorandum of Telephone Conversation. Second, in the face of similarly grave reports that he asked former White House Counsel McGahn to fire Special Counsel Mueller, President Trump responded by asking McGahn to falsely deny the report and to create a false record denying the report. Mueller Report at 115-17. Third, there are specific allegations -- allegations that have been deemed credible by the IGIC -- that records of bilateral conversations involving the President have already been mishandled. The whistleblower complaint alleges that "White House officials told [the whistleblower] that they were 'directed' by White House lawyers to remove the electronic transcript from the computer system in which such transcripts are typically stored." Whistleblower Compl. at 3. In addition, the whistleblower complaint alleges that "[a]ccording to White House officials [the whistleblower] spoke with, this was 'not the first time' under this Administration that a Presidential transcript was placed into this codeword-level system solely for the purpose of protecting politically sensitive—rather than national security sensitive—information." *Id.*, Appendix, at 1. The whistleblower's assertion that a codeword-level system was used to conceal records of calls between President Trump and

foreign leaders has been confirmed by at least three separate public reports. Dawsey and Leonnig, *Washington Post* (Sept. 26, 2019); Brown, Sciutto and Liptak, *CNN* (Sept. 28, 2019); Barnes, Crowley, Rosenberg and Mazzetti, *New York Times* (Sept. 27, 2019). Furthermore, public reporting indicates that at least once in 2018, "Defense Department officials were asked to *send back* transcripts of calls to the White House *after Trump aides grew worried they could be disclosed*." Dawsey and Leonnig, *Washington Post* (Sept. 26, 2019) (emphasis added). Fourth, other components of the Executive Branch, including the Director of National Intelligence, the Attorney General, and the Office of Legal Counsel already have taken concrete steps to try to conceal the existence and substance of the whistleblower complaint, *see* Exs. C, D, and E, which calls into question whether there are any effective checks on White House misconduct within the executive branch. In the face of this mounting evidence, the assertion of Defendants' counsel that Plaintiffs have not offered even a suggestion "that spoliation of relevant evidence is likely to occur," Ex. I, defies credibility.

In sum, the President: has engaged in extraordinary misconduct; has a history of hostility to accurate recordkeeping; has previously instructed his attorneys to lie and create false records; faces credible allegations of recordkeeping irregularities; and is now served by senior aides, attorneys, and executive branch components who are willing to take unlawful action on his behalf. In such circumstances, irreparable harm to the evidence that Plaintiffs and—eventually, the American people—are entitled to is at least likely.

The fact that the White House has already released a memorandum of telephone conversation of Trump's July 25 call with Zelenskyy does not undercut the potential harm to Plaintiffs for three reasons. First, additional records created of President Trump's communications with the Ukrainian president might help define the contours of President

Trump's policy and practice of not creating records of bilateral meetings with other foreign leaders. And even if adequate records of the President's communications with Zelenskyy were created as the PRA requires, they are evidence that Plaintiffs could use to demonstrate that equivalent records were not created of President Trump's bilateral conversations and meetings with other foreign leaders, including Russian President Putin and North Korean leader Kim Jung-Un. *See* Compl. ¶¶ 6, 39, 62-67, 75-76, 79-84.

Second, Plaintiffs also allege that the President has violated the PRA, the FRA, and his responsibilities under the Take Care Clause by preventing agencies from creating and maintaining records, by asserting unilateral and exclusive control over records of meetings with foreign leaders, by disposing of records without the prior written permission of the Archivist, and by interfering with the duty of federal agencies to make and preserve records. *See* Compl. ¶¶ 85-106. Public reporting suggests that White House officials have improperly asserted control over agency records maintained by the Department of Defense. Dawsey and Leonnig, *Washington Post*, Sept. 26, 2019. To the extent that White House attorneys sought to claw back records that were obtained by an agency and came into its possession in the legitimate conduct of its official duties, those actions would violate recordkeeping laws. *See U.S. Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 145 (1989).

Finally, there are credible allegations that the President's recordkeeping failures and irregularities may be more widespread than Plaintiffs have already alleged or that is otherwise publicly known. The whistleblower complaint contains a credible allegation that presidential records were misclassified on other occasions. Whistleblower Compl., Appendix at 1. The existence of one record from one meeting provides no assurance that the records Plaintiffs might

be entitled to discover in this litigation and that the American people ultimately are entitled to under the PRA and the Freedom of Information Act are being preserved.

D. Defendants Will Not Be Harmed by the Requested Relief.

The immediate relief that plaintiffs seek will require nothing more of the Defendants than what the law already mandates: the preservation of agency records under agency custody pursuant to the FRA, 44 U.S.C. §§ 3101, *et seq.*, and the preservation of presidential records under the president's custody pursuant to the PRA, 44 U.S.C. §§ 2201, *et seq*. Thus, requiring Defendants to comply with the law cannot properly be characterized as a burden. Indeed, courts have recognized in circumstances substantially similar to those present here that preliminary relief requiring document preservation is appropriate "where the parties dispute the adequacy of the government's record keeping procedures." *Armstrong*, 807 F. Supp. at 823; *see also Am. Friends Serv. Comm.*, 485 F. Supp. at 236. Defendants "cannot suffer harm from an injunction that merely ends an unlawful practice." *Open Cmtys. All. v. Carson*, 286 F. Supp. 3d 148, 179 (D.D.C. 2017) (quoting *Rodriguez v. Robbins*, 715 F.3d 1127, 1145 (9th Cir. 2013)); *accord R.I.L.-R v. Johnson*, 80 F. Supp. 3d 164, 191 (D.D.C. 2015).

Moreover, Plaintiffs simply seek to enforce preservation obligations to which Defendants already are subject. A party to litigation has an obligation "to preserve potentially relevant evidence . . . once that party anticipates litigation." *Zhi Chen v. District of Columbia*, 839 F. Supp. 2d 7, 12 (D.D.C. 2011) (citation omitted); *see also Zubulake v. UBS Warburg, LLC*, 220 F.R.D. 212 (S.D.N.Y. 2003). Consistent with that obligation, Plaintiffs sought assurances that Defendants were complying with their preservation obligations—assurances made all the more necessary by the nature of the challenged conduct here (failure to follow the PRA's mandatory record requirements) and the recent conduct of the President and White House officials. Nor can

Defendants credibly dispute the relevance of the evidence Plaintiffs seek to have preserved, as it lies at the heart of Plaintiffs' Complaint and fits into the larger pattern of conduct Plaintiffs are challenging. Requiring Defendants to comply with their preservation obligations during the pendency of this litigation simply reinforces an obligation they already bear.

E. The Balance of Equities and Public Interest Favor the Requested Relief.

The balance of equities and the public interest—which "merge" when "the [g]overnment is the opposing party," *Nken v. Holder*, 556 U.S. 418, 435 (2009)—weigh heavily in favor of a temporary restraining order.

Beyond the harm to Plaintiffs, the public interest also strongly favors a temporary restraining order. Congress enacted the PRA 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." 124 Cong. Rec. H34894 (daily ed. Oct. 10, 1978) (Statement of Rep. Brademas). Toward that end, the PRA vests the public with ownership rights in the records of a presidency and provides a process of public access to those papers once a president leaves office. *See* 44 U.S.C. § 2202. Recognizing the "immense historical value" of a president's papers, 124 Cong. Rec. S36843 (daily ed. Oct. 13, 1978) (Statement of Rep. Percy), Congress wanted to provide the people with a key to our past, in the hope it will shed light on the course we should chart for the future. It is self-evident that Defendants' non-compliance with the PRA's directives frustrates its purpose and intent and risks irreparable harm to Plaintiffs' efforts to enforce the FRA, PRA, and Take Care Clause. The public interest in upholding and protecting the rights the PRA confers is best served here by issuing the requested temporary restraining order.

CONCLUSION

Regrettably, Defendants were unwilling to provide Plaintiffs with adequate and appropriate assurances that all potentially relevant evidence in this case is being preserved. As a result, Plaintiffs have no other choice but to seek this Court's emergency intervention to ensure their rights, and the rights of the American people, can be vindicated. Accordingly, Plaintiffs respectfully request that the Court grant Plaintiffs' motion for a temporary restraining order.

Respectfully submitted,

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Counsel for Plaintiffs

Dated: October 1, 2019

EXHIBIT A

Plaintiffs' Motion for a Temporary Restraining Order

UNCLASSIFIED

August 12, 2019

The Honorable Richard Burr
Chairman
Select Committee on Intelligence
United States Senate

The Honorable Adam Schiff
Chairman
Permanent Select Committee on Intelligence
United States House of Representatives

Dear Chairman Burr and Chairman Schiff:

I am reporting an "urgent concern" in accordance with the procedures outlined in 50 U.S.C. §3033(k)(5)(A). This letter is UNCLASSIFIED when separated from the attachment.

In the course of my official duties, I have received information from multiple U.S. Government officials that the President of the United States is using the power of his office to solicit interference from a foreign country in the 2020 U.S. election. This interference includes, among other things, pressuring a foreign country to investigate one of the President's main domestic political rivals. The President's personal lawyer, Mr. Rudolph Giuliani, is a central figure in this effort. Attorney General Barr appears to be involved as well.

- Over the past four months, more than half a dozen U.S. officials have informed me of various facts related to this effort. The information provided herein was relayed to me in the course of official interagency business. It is routine for U.S. officials with responsibility for a particular regional or functional portfolio to share such information with one another in order to inform policymaking and analysis.
- I was not a direct witness to most of the events described. However, I found my colleagues' accounts of these events to be credible because, in almost all cases, multiple officials recounted fact patterns that were consistent with one another. In addition, a variety of information consistent with these private accounts has been reported publicly.

I am deeply concerned that the actions described below constitute "a serious or flagrant problem, abuse, or violation of law or Executive Order" that "does not include differences of opinions concerning public policy matters," consistent with the definition of an "urgent concern" in 50 U.S.C. §3033(k)(5)(G). I am therefore fulfilling my duty to report this information, through proper legal channels, to the relevant authorities.

- I am also concerned that these actions pose risks to U.S. national security and undermine the U.S. Government's efforts to deter and counter foreign interference in U.S. elections.

To the best of my knowledge, the entirety of this statement is unclassified when separated from the classified enclosure. I have endeavored to apply the classification standards outlined in Executive Order (EO) 13526 and to separate out information that I know or have reason to believe is classified for national security purposes.[1]

- If a classification marking is applied retroactively, I believe it is incumbent upon the classifying authority to explain why such a marking was applied, and to which specific information it pertains.

I. The 25 July Presidential phone call

Early in the morning of 25 July, the President spoke by telephone with Ukrainian President Volodymyr Zelenskyy. I do not know which side initiated the call. This was the first publicly acknowledged call between the two leaders since a brief congratulatory call after Mr. Zelenskyy won the presidency on 21 April.

Multiple White House officials with direct knowledge of the call informed me that, after an initial exchange of pleasantries, the President used the remainder of the call to advance his personal interests. Namely, he sought to pressure the Ukrainian leader to take actions to help the President's 2020 reelection bid. According to the White House officials who had direct knowledge of the call, the President pressured Mr. Zelenskyy to, inter alia:

- initiate or continue an investigation[2] into the activities of former Vice President Joseph Biden and his son, Hunter Biden;
- assist in purportedly uncovering that allegations of Russian interference in the 2016 U.S. presidential election originated in Ukraine, with a specific request that the Ukrainian leader locate and turn over servers used by the Democratic National Committee (DNC) and examined by the U.S. cyber security firm Crowdstrike,[3] which initially reported that Russian hackers had penetrated the DNC's networks in 2016; and
- meet or speak with two people the President named explicitly as his personal envoys on these matters, Mr. Giuliani and Attorney General Barr, to whom the President referred multiple times in tandem.

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[1] Apart from the information in the Enclosure, it is my belief that none of the information contained herein meets the definition of "classified information" outlined in EO 13526, Part 1, Section 1.1. There is ample open-source information about the efforts I describe below, including statements by the President and Mr. Giuliani. In addition, based on my personal observations, there is discretion with respect to the classification of private comments by or instructions from the President, including his communications with foreign leaders; information that is not related to U.S. foreign policy or national security—such as the information contained in this document, when separated from the Enclosure—is generally treated as unclassified. I also believe that applying a classification marking to this information would violate EO 13526, Part 1, Section 1.7, which states: "In no case shall information be classified, continue to be maintained as classified, or fail to be declassified in order to: (1) conceal violations of law, inefficiency, or administrative error; [or] (2) prevent embarrassment to a person, organization, or agency."

[2] It is unclear whether such a Ukrainian investigation exists. See Footnote #7 for additional information.

[3] I do not know why the President associates these servers with Ukraine. (See, for example, his comments to *Fox News* on 20 July: "And Ukraine. Take a look at Ukraine. How come the FBI didn't take this server? Podesta told them to get out. He said, get out. So, how come the FBI didn't take the server from the DNC?")

The President also praised Ukraine's Prosecutor General, Mr. Yuriy Lutsenko, and suggested that Mr. Zelenskyy might want to keep him in his position. (Note: Starting in March 2019, Mr. Lutsenko made a series of public allegations—many of which he later walked back—about the Biden family's activities in Ukraine, Ukrainian officials' purported involvement in the 2016 U.S. election, and the activities of the U.S. Embassy in Kyiv. See Part IV for additional context.)

The White House officials who told me this information were deeply disturbed by what had transpired in the phone call. They told me that there was already a "discussion ongoing" with White House lawyers about how to treat the call because of the likelihood, in the officials' retelling, that they had witnessed the President abuse his office for personal gain.

The Ukrainian side was the first to publicly acknowledge the phone call. On the evening of 25 July, a readout was posted on the website of the Ukrainian President that contained the following line (translation from original Russian-language readout):

- "Donald Trump expressed his conviction that the new Ukrainian government will be able to quickly improve Ukraine's image and complete the investigation of corruption cases that have held back cooperation between Ukraine and the United States."

Aside from the above-mentioned "cases" purportedly dealing with the Biden family and the 2016 U.S. election, I was told by White House officials that no other "cases" were discussed.

Based on my understanding, there were approximately a dozen White House officials who listened to the call—a mixture of policy officials and duty officers in the White House Situation Room, as is customary. The officials I spoke with told me that participation in the call had not been restricted in advance because everyone expected it would be a "routine" call with a foreign leader. I do not know whether anyone was physically present with the President during the call.

- In addition to White House personnel, I was told that a State Department official, Mr. T. Ulrich Brechbuhl, also listened in on the call.
- I was not the only non-White House official to receive a readout of the call. Based on my understanding, multiple State Department and Intelligence Community officials were also briefed on the contents of the call as outlined above.

II. Efforts to restrict access to records related to the call

In the days following the phone call, I learned from multiple U.S. officials that senior White House officials had intervened to "lock down" all records of the phone call, especially the official word-for-word transcript of the call that was produced—as is customary—by the White House Situation Room. This set of actions underscored to me that White House officials understood the gravity of what had transpired in the call.

- White House officials told me that they were "directed" by White House lawyers to remove the electronic transcript from the computer system in which such transcripts are typically stored for coordination, finalization, and distribution to Cabinet-level officials.

- Instead, the transcript was loaded into a separate electronic system that is otherwise used to store and handle classified information of an especially sensitive nature. One White House official described this act as an abuse of this electronic system because the call did not contain anything remotely sensitive from a national security perspective.

I do not know whether similar measures were taken to restrict access to other records of the call, such as contemporaneous handwritten notes taken by those who listened in.

III. Ongoing concerns

On 26 July, a day after the call, U.S. Special Representative for Ukraine Negotiations Kurt Volker visited Kyiv and met with President Zelenskyy and a variety of Ukrainian political figures. Ambassador Volker was accompanied in his meetings by U.S. Ambassador to the European Union Gordon Sondland. Based on multiple readouts of these meetings recounted to me by various U.S. officials, Ambassadors Volker and Sondland reportedly provided advice to the Ukrainian leadership about how to "navigate" the demands that the President had made of Mr. Zelenskyy.

I also learned from multiple U.S. officials that, on or about 2 August, Mr. Giuliani reportedly traveled to Madrid to meet with one of President Zelenskyy's advisers, Andriy Yermak. The U.S. officials characterized this meeting, which was not reported publicly at the time, as a "direct follow-up" to the President's call with Mr. Zelenskyy about the "cases" they had discussed.

- Separately, multiple U.S. officials told me that Mr. Giuliani had reportedly privately reached out to a variety of other Zelenskyy advisers, including Chief of Staff Andriy Bohdan and Acting Chairman of the Security Service of Ukraine Ivan Bakanov.[4]
- I do not know whether those officials met or spoke with Mr. Giuliani, but I was told separately by multiple U.S. officials that Mr. Yermak and Mr. Bakanov intended to travel to Washington in mid-August.

On 9 August, the President told reporters: "I think [President Zelenskyy] is going to make a deal with President Putin, and he will be invited to the White House. And we look forward to seeing him. He's already been invited to the White House, and he wants to come. And I think he will. He's a very reasonable guy. He wants to see peace in Ukraine, and I think he will be coming very soon, actually."

IV. Circumstances leading up to the 25 July Presidential phone call

Beginning in late March 2019, a series of articles appeared in an online publication called *The Hill*. In these articles, several Ukrainian officials—most notably, Prosecutor General Yuriy Lutsenko—made a series of allegations against other Ukrainian officials and current and former U.S. officials. Mr. Lutsenko and his colleagues alleged, inter alia:

[4] In a report published by the Organized Crime and Corruption Reporting Project (OCCRP) on 22 July, two associates of Mr. Giuliani reportedly traveled to Kyiv in May 2019 and met with Mr. Bakanov and another close Zelenskyy adviser, Mr. Serhiy Shefir.

- that they possessed evidence that Ukrainian officials—namely, Head of the National Anticorruption Bureau of Ukraine Artem Sytnyk and Member of Parliament Serhiy Leshchenko—had "interfered" in the 2016 U.S. presidential election, allegedly in collaboration with the DNC and the U.S. Embassy in Kyiv;[5]
- that the U.S. Embassy in Kyiv—specifically, U.S. Ambassador Marie Yovanovitch, who had criticized Mr. Lutsenko's organization for its poor record on fighting corruption—had allegedly obstructed Ukrainian law enforcement agencies' pursuit of corruption cases, including by providing a "do not prosecute" list, and had blocked Ukrainian prosecutors from traveling to the United States expressly to prevent them from delivering their "evidence" about the 2016 U.S. election;[6] and
- that former Vice President Biden had pressured former Ukrainian President Petro Poroshenko in 2016 to fire then Ukrainian Prosecutor General Viktor Shokin in order to quash a purported criminal probe into Burisma Holdings, a Ukrainian energy company on whose board the former Vice President's son, Hunter, sat.[7]

In several public comments,[8] Mr. Lutsenko also stated that he wished to communicate directly with Attorney General Barr on these matters.[9]

The allegations by Mr. Lutsenko came on the eve of the first round of Ukraine's presidential election on 31 March. By that time, Mr. Lutsenko's political patron, President Poroshenko, was trailing Mr. Zelenskyy in the polls and appeared likely to be defeated. Mr. Zelenskyy had made known his desire to replace Mr. Lutsenko as Prosecutor General. On 21 April, Mr. Poroshenko lost the runoff to Mr. Zelenskyy by a landslide. See Enclosure for additional information.

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[5] Mr. Sytnyk and Mr. Leshchenko are two of Mr. Lutsenko's main domestic rivals. Mr. Lutsenko has no legal training and has been widely criticized in Ukraine for politicizing criminal probes and using his tenure as Prosecutor General to protect corrupt Ukrainian officials. He has publicly feuded with Mr. Sytnyk, who heads Ukraine's only competent anticorruption body, and with Mr. Leshchenko, a former investigative journalist who has repeatedly criticized Mr. Lutsenko's record. In December 2018, a Ukrainian court upheld a complaint by a Member of Parliament, Mr. Boryslav Rozenblat, who alleged that Mr. Sytnyk and Mr. Leshchenko had "interfered" in the 2016 U.S. election by publicizing a document detailing corrupt payments made by former Ukrainian President Viktor Yanukovych before his ouster in 2014. Mr. Rozenblat had originally filed the motion in late 2017 after attempting to flee Ukraine amid an investigation into his taking of a large bribe. On 16 July 2019, Mr. Leshchenko publicly stated that a Ukrainian court had overturned the lower court's decision.

[6] Mr. Lutsenko later told Ukrainian news outlet *The Babel* on 17 April that Ambassador Yovanovitch had never provided such a list, and that he was, in fact, the one who requested such a list.

[7] Mr. Lutsenko later told *Bloomberg* on 16 May that former Vice President Biden and his son were not subject to any current Ukrainian investigations, and that he had no evidence against them. Other senior Ukrainian officials also contested his original allegations; one former senior Ukrainian prosecutor told *Bloomberg* on 7 May that Mr. Shokin in fact was not investigating Burisma at the time of his removal in 2016.

[8] See, for example, Mr. Lutsenko's comments to *The Hill* on 1 and 7 April and his interview with *The Babel* on 17 April, in which he stated that he had spoken with Mr. Giuliani about arranging contact with Attorney General Barr.

[9] In May, Attorney General Barr announced that he was initiating a probe into the "origins" of the Russia investigation. According to the above-referenced OCCRP report (22 July), two associates of Mr. Giuliani claimed to be working with Ukrainian officials to uncover information that would become part of this inquiry. In an interview with *Fox News* on 8 August, Mr. Giuliani claimed that Mr. John Durham, whom Attorney General Barr designated to lead this probe, was "spending a lot of time in Europe" because he was "investigating Ukraine." I do not know the extent to which, if at all, Mr. Giuliani is directly coordinating his efforts on Ukraine with Attorney General Barr or Mr. Durham.

- It was also publicly reported that Mr. Giuliani had met on at least two occasions with Mr. Lutsenko: once in New York in late January and again in Warsaw in mid-February. In addition, it was publicly reported that Mr. Giuliani had spoken in late 2018 to former Prosecutor General Shokin, in a Skype call arranged by two associates of Mr. Giuliani.[10]
- On 25 April in an interview with *Fox News*, the President called Mr. Lutsenko's claims "big" and "incredible" and stated that the Attorney General "would want to see this."

On or about 29 April, I learned from U.S. officials with direct knowledge of the situation that Ambassador Yovanovitch had been suddenly recalled to Washington by senior State Department officials for "consultations" and would most likely be removed from her position.

- Around the same time, I also learned from a U.S. official that "associates" of Mr. Giuliani were trying to make contact with the incoming Zelenskyy team.[11]
- On 6 May, the State Department announced that Ambassador Yovanovitch would be ending her assignment in Kyiv "as planned."
- However, several U.S. officials told me that, in fact, her tour was curtailed because of pressure stemming from Mr. Lutsenko's allegations. Mr. Giuliani subsequently stated in an interview with a Ukrainian journalist published on 14 May that Ambassador Yovanovitch was "removed…because she was part of the efforts against the President."

On 9 May, *The New York Times* reported that Mr. Giuliani planned to travel to Ukraine to press the Ukrainian government to pursue investigations that would help the President in his 2020 reelection bid.

- In his multitude of public statements leading up to and in the wake of the publication of this article, Mr. Giuliani confirmed that he was focused on encouraging Ukrainian authorities to pursue investigations into alleged Ukrainian interference in the 2016 U.S. election and alleged wrongdoing by the Biden family.[12]
- On the afternoon of 10 May, the President stated in an interview with *Politico* that he planned to speak with Mr. Giuliani about the trip.
- A few hours later, Mr. Giuliani publicly canceled his trip, claiming that Mr. Zelenskyy was "surrounded by enemies of the [U.S.] President…and of the United States."

On 11 May, Mr. Lutsenko met for two hours with President-elect Zelenskyy, according to a public account given several days later by Mr. Lutsenko. Mr. Lutsenko publicly stated that he had told Mr. Zelenskyy that he wished to remain as Prosecutor General.

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[10] See, for example, the above-referenced articles in *Bloomberg* (16 May) and OCCRP (22 July).

[11] I do not know whether these associates of Mr. Giuliani were the same individuals named in the 22 July report by OCCRP, referenced above.

[12] See, for example, Mr. Giuliani's appearance on *Fox News* on 6 April and his tweets on 23 April and 10 May. In his interview with *The New York Times*, Mr. Giuliani stated that the President "basically knows what I'm doing, sure, as his lawyer." Mr. Giuliani also stated: "We're not meddling in an election, we're meddling in an investigation, which we have a right to do… There's nothing illegal about it… Somebody could say it's improper. And this isn't foreign policy – I'm asking them to do an investigation that they're doing already and that other people are telling them to stop. And I'm going to give them reasons why they shouldn't stop it because that information will be very, very helpful to my client, and may turn out to be helpful to my government."

Starting in mid-May, I heard from multiple U.S. officials that they were deeply concerned by what they viewed as Mr. Giuliani's circumvention of national security decisionmaking processes to engage with Ukrainian officials and relay messages back and forth between Kyiv and the President. These officials also told me:

- that State Department officials, including Ambassadors Volker and Sondland, had spoken with Mr. Giuliani in an attempt to "contain the damage" to U.S. national security; and
- that Ambassadors Volker and Sondland during this time period met with members of the new Ukrainian administration and, in addition to discussing policy matters, sought to help Ukrainian leaders understand and respond to the differing messages they were receiving from official U.S. channels on the one hand, and from Mr. Giuliani on the other.

During this same timeframe, multiple U.S. officials told me that the Ukrainian leadership was led to believe that a meeting or phone call between the President and President Zelenskyy would depend on whether Zelenskyy showed willingness to "play ball" on the issues that had been publicly aired by Mr. Lutsenko and Mr. Giuliani. (Note: This was the general understanding of the state of affairs as conveyed to me by U.S. officials from late May into early July. I do not know who delivered this message to the Ukrainian leadership, or when.) See Enclosure for additional information.

Shortly after President Zelenskyy's inauguration, it was publicly reported that Mr. Giuliani met with two other Ukrainian officials: Ukraine's Special Anticorruption Prosecutor, Mr. Nazar Kholodnytskyy, and a former Ukrainian diplomat named Andriy Telizhenko. Both Mr. Kholodnytskyy and Mr. Telizhenko are allies of Mr. Lutsenko and made similar allegations in the above-mentioned series of articles in *The Hill*.

On 13 June, the President told *ABC*'s George Stephanopoulos that he would accept damaging information on his political rivals from a foreign government.

On 21 June, Mr. Giuliani tweeted: "New Pres of Ukraine still silent on investigation of Ukrainian interference in 2016 and alleged Biden bribery of Poroshenko. Time for leadership and investigate both if you want to purge how Ukraine was abused by Hillary and Clinton people."

In mid-July, I learned of a sudden change of policy with respect to U.S. assistance for Ukraine. See Enclosure for additional information.

ENCLOSURE: Classified appendix

~~TOP SECRET/~~[redacted]

August 12, 2019

(U) CLASSIFIED APPENDIX

(U) Supplementary classified information is provided as follows:

(U) Additional information related to Section II

(~~TS/~~[redacted]) According to multiple White House officials I spoke with, the transcript of the President's call with President Zelenskyy was placed into a computer system managed directly by the National Security Council (NSC) Directorate for Intelligence Programs. This is a standalone computer system reserved for codeword-level intelligence information, such as covert action. According to information I received from White House officials, some officials voiced concerns internally that this would be an abuse of the system and was not consistent with the responsibilities of the Directorate for Intelligence Programs. According to White House officials I spoke with, this was "not the first time" under this Administration that a Presidential transcript was placed into this codeword-level system solely for the purpose of protecting politically sensitive—rather than national security sensitive—information.

(U) Additional information related to Section IV

[redacted] Information Relating To Classified Intelligence Community Reporting & Analysis

(~~S/~~[redacted]) I would like to expand upon two issues mentioned in Section IV that might have a connection with the overall effort to pressure the Ukrainian leadership. As I do not know definitively whether the below-mentioned decisions are connected to the broader efforts I describe, I have chosen to include them in the classified annex. If they indeed represent genuine policy deliberations and decisions formulated to advance U.S. foreign policy and national security, one might be able to make a reasonable case that the facts are classified.

- (~~S/~~[redacted]) I learned from U.S. officials that, on or around 14 May, the President instructed Vice President Pence to cancel his planned travel to Ukraine to attend President

[redacted] Information Relating to Classified Intelligence Community Reporting & Analysis

Zelenskyy's inauguration on 20 May; Secretary of Energy Rick Perry led the delegation instead. According to these officials, it was also "made clear" to them that the President did not want to meet with Mr. Zelenskyy until he saw how Zelenskyy "chose to act" in office. I do not know how this guidance was communicated, or by whom. I also do not know whether this action was connected with the broader understanding, described in the unclassified letter, that a meeting or phone call between the President and President Zelenskyy would depend on whether Zelenskyy showed willingness to "play ball" on the issues that had been publicly aired by Mr. Lutsenko and Mr. Giuliani.

- (~~S/~~[redacted]) On 18 July, an Office of Management and Budget (OMB) official informed Departments and Agencies that the President "earlier that month" had issued instructions to suspend all U.S. security assistance to Ukraine. Neither OMB nor the NSC staff knew why this instruction had been issued. During interagency meetings on 23 July and 26 July, OMB officials again stated explicitly that the instruction to suspend this assistance had come directly from the President, but they still were unaware of a policy rationale. As of early August, I heard from U.S. officials that some Ukrainian officials were aware that U.S. aid might be in jeopardy, but I do not know how or when they learned of it.

EXHIBIT B

Plaintiffs' Motion for a Temporary Restraining Order

~~SECRET//ORCON/NOFORN~~

UNCLASSIFIED

[PkgNumberShort]

Declassified by order of the President

September 24, 2019

~~EYES ONLY~~
~~DO NOT COPY~~

MEMORANDUM OF TELEPHONE CONVERSATION

SUBJECT: ~~(C)~~ Telephone Conversation with President Zelenskyy of Ukraine

PARTICIPANTS: President Zelenskyy of Ukraine

Notetakers: The White House Situation Room

DATE, TIME AND PLACE: July 25, 2019, 9:03 - 9:33 a.m. EDT
Residence

~~(S/NF)~~ The President: Congratulations on a great victory. We all watched from the United States and you did a terrific job. The way you came from behind, somebody who wasn't given much of a chance, and you ended up winning easily. It's a fantastic achievement. Congratulations.

~~(S/NF)~~ President Zelenskyy: You are absolutely right Mr. President. We did win big and we worked hard for this. We worked a lot but I would like to confess to you that I had an opportunity to learn from you. We used quite a few of your skills and knowledge and were able to use it as an example for our elections and yes it is true that these were unique elections. We were in a unique situation that we were able to

CAUTION: A Memorandum of a Telephone Conversation (TELCON) is not a verbatim transcript of a discussion. The text in this document records the notes and recollections of Situation Room Duty Officers and NSC policy staff assigned to listen and memorialize the conversation in written form as the conversation takes place. A number of factors can affect the accuracy of the record, including poor telecommunications connections and variations in accent and/or interpretation. The word "inaudible" is used to indicate portions of a conversation that the notetaker was unable to hear.

Classified By: 2354726
Derived From: NSC SCG
Declassify On: 20441231

UNCLASSIFIED

~~SECRET//ORCON/NOFORN~~

achieve a unique success. I'm able to tell you the following; the first time, you called me to congratulate me when I won my presidential election, and the second time you are now calling me when my party won the parliamentary election. I think I should run more often so you can call me more often and we can talk over the phone more often.

~~(S/NF)~~ The President: [laughter] That's a very good idea. I think your country is very happy about that.

~~(S/NF)~~ President Zelenskyy: Well yes, to tell you the truth, we are trying to work hard because we wanted to drain the swamp here in our country. We brought in many many new people. Not the old politicians, not the typical politicians, because we want to have a new format and a new type of government. You are a great teacher for us and in that.

~~(S/NF)~~ The President: Well it's very nice of you to say that. I will say that we do a lot for Ukraine. We spend a lot of effort and a lot of time. Much more than the European countries are doing and they should be helping you more than they are. Germany does almost nothing for you. All they do is talk and I think it's something that you should really ask them about. When I was speaking to Angela Merkel she talks Ukraine, but she doesn't do anything. A lot of the European countries are the same way so I think it's something you want to look at but the United States has been very very good to Ukraine. I wouldn't say that it's reciprocal necessarily because things are happening that are not good but the United States has been very very good to Ukraine.

~~(S/NF)~~ President Zelenskyy: Yes you are absolutely right. Not only 100%, but actually 1000% and I can tell you the following; I did talk to Angela Merkel and I did meet with her. I also met and talked with Macron and I told them that they are not doing quite as much as they need to be doing on the issues with the sanctions. They are not enforcing the sanctions. They are not working as much as they should work for Ukraine. It turns out that even though logically, the European Union should be our biggest partner but technically the United States is a much bigger partner than the European Union and I'm very grateful to you for that because the United States is doing quite a lot for Ukraine. Much more than the European Union especially when we are talking about sanctions against the Russian Federation. I would also like to thank you for your great support in the area of defense. We are ready to continue to cooperate for the next steps specifically we are almost ready to buy more Javelins from the United States for defense purposes.

~~(S/NF)~~ The President: I would like you to do us a favor though because our country has been through a lot and Ukraine knows a lot about it. I would like you to find out what happened with this whole situation with Ukraine, they say Crowdstrike… I guess you have one of your wealthy people… The server, they say Ukraine has it. There are a lot of things that went on, the whole situation. I think you're surrounding yourself with some of the same people. I would like to have the Attorney General call you or your people and I would like you to get to the bottom of it. As you saw yesterday, that whole nonsense ended with a very poor performance by a man named Robert Mueller, an incompetent performance, but they say a lot of it started with Ukraine. Whatever you can do, it's very important that you do it if that's possible.

~~(S/NF)~~ President Zelenskyy: Yes it is very important for me and everything that you just mentioned earlier. For me as a President, it is very important and we are open for any future cooperation. We are ready to open a new page on cooperation in relations between the United States and Ukraine. For that purpose, I just recalled our ambassador from United States and he will be replaced by a very competent and very experienced ambassador who will work hard on making sure that our two nations are getting closer. I would also like and hope to see him having your trust and your confidence and have personal relations with you so we can cooperate even more so. I will personally tell you that one of my assistants spoke with Mr. Giuliani just recently and we are hoping very much that Mr. Giuliani will be able to travel to Ukraine and we will meet once he comes to Ukraine. I just wanted to assure you once again that you have nobody but friends around us. I will make sure that I surround myself with the best and most experienced people. I also wanted to tell you that we are friends. We are great friends and you Mr. President have friends in our country so we can continue our strategic partnership. I also plan to surround myself with great people and in addition to that investigation, I guarantee as the President of Ukraine that all the investigations will be done openly and candidly. That I can assure you.

~~(S/NF)~~ The President: Good because I heard you had a prosecutor who was very good and he was shut down and that's really unfair. A lot of people are talking about that, the way they shut your very good prosecutor down and you had some very bad people involved. Mr. Giuliani is a highly respected man. He was the mayor of New York City, a great mayor, and I would like him to

call you. I will ask him to call you along with the Attorney General. Rudy very much knows what's happening and he is a very capable guy. If you could speak to him that would be great. The former ambassador from the United States, the woman, was bad news and the people she was dealing with in the Ukraine were bad news so I just want to let you know that. The other thing, There's a lot of talk about Biden's son, that Biden stopped the prosecution and a lot of people want to find out about that so whatever you can do with the Attorney General would be great. Biden went around bragging that he stopped the prosecution so if you can look into it… It sounds horrible to me.

~~(S/NF)~~ President Zelenskyy: I wanted to tell you about the prosecutor. First of all I understand and I'm knowledgeable about the situation. Since we have won the absolute majority in our Parliament, the next prosecutor general will be 100% my person, my candidate, who will be approved by the parliament and will start as a new prosecutor in September. He or she will look into the situation, specifically to the company that you mentioned in this issue. The issue of the investigation of the case is actually the issue of making sure to restore the honesty so we will take care of that and will work on the investigation of the case. On top of that, I would kindly ask you if you have any additional information that you can provide to us, it would be very helpful for the investigation to make sure that we administer justice in our country with regard to the Ambassador to the United States from Ukraine as far as I recall her name was Ivanovich. It was great that you were the first one who told me that she was a bad ambassador because I agree with you 100%. Her attitude towards me was far from the best as she admired the previous President and she was on his side. She would not accept me as a new President well enough.

~~(S/NF)~~ The President: Well, she's going to go through some things. I will have Mr. Giuliani give you a call and I am also going to have Attorney General Barr call and we will get to the bottom of it. I'm sure you will figure it out. I heard the prosecutor was treated very badly and he was a very fair prosecutor so good luck with everything. Your economy is going to get better and better I predict. You have a lot of assets. It's a great country. I have many Ukrainian friends, their incredible people.

~~(S/NF)~~ President Zelenskyy: I would like to tell you that I also have quite a few Ukrainian friends that live in the United States. Actually last time I traveled to the United States, I stayed in New York near Central Park and I stayed at the Trump

Tower. I will talk to them and I hope to see them again in the future. I also wanted to thank you for your invitation to visit the United States, specifically Washington DC. On the other hand, I also want to ensure you that we will be very serious about the case and will work on the investigation. As to the economy, there is much potential for our two countries and one of the issues that is very important for Ukraine is energy independence. I believe we can be very successful and cooperating on energy independence with United States. We are already working on cooperation. We are buying American oil but I am very hopeful for a future meeting. We will have more time and more opportunities to discuss these opportunities and get to know each other better. I would like to thank you very much for your support

~~(S/NF)~~ The President: Good. Well, thank you very much and I appreciate that. I will tell Rudy and Attorney General Barr to call. Thank you. Whenever you would like to come to the White House, feel free to call. Give us a date and we'll work that out. I look forward to seeing you.

~~(S/NF)~~ President Zelenskyy: Thank you very much. I would be very happy to come and would be happy to meet with you personally and get to know you better. I am looking forward to our meeting and I also would like to invite you to visit Ukraine and come to the city of Kyiv which is a beautiful city. We have a beautiful country which would welcome you. On the other hand, I believe that on September 1 we will be in Poland and we can meet in Poland hopefully. After that, it might be a very good idea for you to travel to Ukraine. We can either take my plane and go to Ukraine or we can take your plane, which is probably much better than mine.

~~(S/NF)~~ The President: Okay, we can work that out. I look forward to seeing you in Washington and maybe in Poland because I think we are going to be there at that time.

~~(S/NF)~~ President Zelenskyy: Thank you very much Mr. President.

~~(S/NF)~~ The President: Congratulations on a fantastic job you've done. The whole world was watching. I'm not sure it was so much of an upset but congratulations.

~~(S/NF)~~ President Zelenskyy: Thank you Mr. President bye-bye.

-- End of Conversation --

EXHIBIT C

Plaintiffs' Motion for a Temporary Restraining Order

~~TOP SECRET~~//[redacted]

OFFICE OF THE INSPECTOR GENERAL OF THE INTELLIGENCE COMMUNITY
WASHINGTON, D.C. 20511

This Letter is ~~TOP SECRET~~/[redacted] when detached from the Enclosures

August 26, 2019

VIA HAND DELIVERY

The Honorable Joseph Maguire
Director of National Intelligence (Acting)
Office of the Director of National Intelligence
Washington, D.C. 20511

Dear Acting Director Maguire:

(U) On Monday, August 12, 2019, the Office of the Inspector General of the Intelligence Community (ICIG) received information from an individual (hereinafter, the "Complainant") concerning an alleged "urgent concern," pursuant to 50 U.S.C. § 3033(k)(5)(A). The law requires that, "[n]ot later than the end of the 14-calendar-day period beginning on the date of receipt from an employee of a complaint or information under subparagraph A, the Inspector General shall determine whether the complaint or information appears credible."[1] For the reasons discussed below, among others, I have determined that the Complainant has reported an "urgent concern" that "appears credible."

(U) As you know, the ICIG is authorized to, among other things, "receive and investigate . . . complaints or information from any person concerning the existence of an activity within the authorities and responsibilities of the Director of National Intelligence constituting a violation of laws, rules, or regulations, or mismanagement, gross waste of funds, abuse of authority, or a substantial and specific danger to the public health and safety."[2] In connection with that authority, "[a]n employee of an element of the intelligence community, an employee assigned or detailed to an element of the intelligence community, or an employee of a contractor to the intelligence community who intends to report to Congress a complaint or information with respect to an urgent concern may report such complaint or information" to the ICIG.[3]

Classified By: [redacted]
Derived From:
Declassify On:

[1] (U) *Id.* at § 3033(k)(5)(B).

[2] (U) *Id.* at § 3033(g)(3).

[3] (U) *Id.* at § 3033(k)(5)(A).

(U) The term "urgent concern" is defined, in relevant part, as:

> (U) A serious or flagrant problem, abuse, violation of law or Executive order, or deficiency relating to the funding, administration, or operation of an intelligence activity within the responsibility and authority of the Director of National Intelligence involving classified information, but does not include differences of opinions concerning public policy matters.[4]

(U//~~FOUO~~) The Complainant's identity is known to me. As allowed by law, however, the Complainant has requested that the ICIG not disclose the Complainant's identity at this time.[5] For your information, the Complainant has retained an attorney, identified the attorney to the ICIG, and requested that the attorney be the Complainant's point of contact in subsequent communications with the congressional intelligence committees on this matter.

(U//~~FOUO~~) As part of the Complainant's report to the ICIG of information with respect to the urgent concern, the Complainant included a letter addressed to The Honorable Richard Burr, Chairman, U.S. Senate Select Committee on Intelligence, and The Honorable Adam Schiff, Chairman, U.S. House of Representatives Permanent Select Committee on Intelligence (hereinafter, the "Complainant's Letter"). The Complainant's Letter referenced a separate, Classified Appendix containing information pertaining to the urgent concern (hereinafter, the "Classified Appendix"), which the Complainant also provided to the ICIG and which the Complainant intends to provide to Chairmen Burr and Schiff. The ICIG attaches hereto the Complainant's Letter, addressed to Chairmen Burr and Schiff, and the Classified Appendix. The ICIG has informed the Complainant that the transmittal of information by the Director of National Intelligence related to the Complainant's report to the congressional intelligence committees, as required by 50 U.S.C. § 3033(k)(5)(C), may not be limited to Chairmen Burr and Schiff.

(U) The Complainant's Letter and Classified Appendix delineate the Complainant's information pertaining to the urgent concern. According to the Complainant's Letter, "the actions described [in the Complainant's Letter and Classified Appendix] constitute 'a serious or flagrant problem, abuse, or violation of law or Executive Order,'" consistent with the definition of an "urgent concern" in 50 U.S.C. § 3033(k)(5)(G).

(U//~~FOUO~~) Upon receiving the information reported by the Complainant, the ICIG conducted a preliminary review to determine whether the report constituted "an urgent concern" under 50 U.S.C. § 3033(k)(5). As part of the preliminary review, the ICIG confirmed that the Complainant is "[a]n employee of an element of the intelligence community, an employee

[4] (U) *Id.* at § 3033(k)(5)(G)(i).

[5] (U) *Id.* at § 3033(g)(3)(A).

assigned or detailed to an element of the intelligence community, or an employee of a contractor to the intelligence community."[6] The ICIG also confirmed that the Complainant intends to report to Congress the Complainant's information relating to the urgent concern.[7]

(~~TS~~/[redacted]) As stated above, to constitute an "urgent concern" under 50 U.S.C. § 3033(k)(5)(G)(i), the information reported by the Complainant must constitute "[a] serious or flagrant problem, abuse, violation of law or Executive order, or deficiency relating to the funding, administration, or operation of an intelligence activity within the responsibility and authority of the Director of National Intelligence involving classified information."[8] Here, the Complainant's Letter alleged, among other things, that the President of the United States, in a telephone call with Ukrainian President Volodymyr Zelenskyy on July 25, 2019, "sought to pressure the Ukrainian leader to take actions to help the President's 2020 reelection bid." U.S. laws and regulations prohibit a foreign national, directly or indirectly, from making a contribution or donation of money or other thing of value, or to make an express or implied promise to make a contribution or donation, in connection with a Federal, State, or local election.[9] Similarly, U.S. laws and regulations prohibit a person from soliciting, accepting, or receiving such a contribution or donation from a foreign national, directly or indirectly, in connection with a Federal, State, or local election.[10] Further, in the ICIG's judgment, alleged conduct by a senior U.S. public official to seek foreign assistance to interfere in or influence a Federal election would constitute a "serious or flagrant problem [or] abuse" under 50 U.S.C. § 3033(k)(5)(G)(i), which would also potentially expose such a U.S. public official (or others acting in concert with the U.S. public official) to serious national security and counterintelligence risks with respect to foreign intelligence services aware of such alleged conduct.

(U) In addition, the Director of National Intelligence has responsibility and authority pursuant to federal law and Executive Orders to administer and operate programs and activities related to potential foreign interference in a United States election.[11] Among other

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[6] (U) *Id.* at § 3033(k)(5)(A).

[7] (U) *Id.*

[8] (U) The Complainant's Classified Appendix appears to contain classified information involving an alleged "serious or flagrant problem, abuse, violation of law or Executive order, or deficiency relating to the funding, administration, or operation of an intelligence activity within the responsibility and authority of the Director of National Intelligence," as required by 50 U.S.C. § 3033(k)(5)(G)(i).

[9] (U) *See, e.g.,* 52 U.S.C. § 30121(a)(1)(A); 11 C.F.R. § 110.20(b).

[10] (U) *See, e.g.,* 52 U.S.C. § 30121(a)(2); 11 C.F.R. § 110.20(g).

[11] (U) *See, e.g.*, National Security Act of 1947, as amended; Exec. Order No. 12333, as amended, *United States Intelligence Activities*; Exec. Order No. 13848, *Imposing Certain Sanctions in the Event of Foreign Influence in a United States Election* (Sept. 12, 2018).

responsibilities and authorities, subject to the authority, direction, and control of the President, the Director of National Intelligence "shall serve as the head of the Intelligence Community, act as the principal adviser to the President, to the [National Security Council], and to the Homeland Security Council for intelligence matters related to national security, and shall oversee and direct the implementation of the National Intelligence Program and execution of the National Intelligence Program budget."[12] Further, the United States Intelligence Community, "under the leadership of the Director [of National Intelligence]," shall "collect information concerning, and conduct activities to protect against, . . . intelligence activities directed against the United States."[13]

(U) More recently, in issuing Executive Order 13848, *Imposing Certain Sanctions in the Event of Foreign Influence in a United States Election* (Sept. 12, 2018), President Trump stated the following regarding foreign influence in United States elections:

> I, DONALD J. TRUMP, President of the United States of America, find that the ability of persons located, in whole or in part, outside the United States to interfere in or undermine public confidence in United States elections, including through the unauthorized accessing of election and campaign infrastructure or the covert distribution of propaganda and disinformation, constitutes an unusual and extraordinary threat to the national security and foreign policy of the United States.[14]

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[12] (~~TS~~/[redacted]) Exec. Order No. 12333 at § 1.3. In the Complainant's Classified Appendix, the Complainant reported that officials from the Office of Management and Budget, in the days before and on the day after the President's call on July 25, 2019, allegedly informed the "interagency" that the President had issued instructions to suspend all security assistance to Ukraine. The Complainant further alleges in the Classified Appendix that there might be a connection between the allegations concerning the substance of the President's telephone call with the Ukrainian President on July 25, 2019, and the alleged action to suspend (or continue the suspension of) all security assistance to Ukraine. If the allegedly improper motives were substantiated as part of a future investigation, the alleged suspension (or continued suspension) of all security assistance to Ukraine might implicate the Director of National Intelligence's responsibility and authority with regard to implementing the National Intelligence Program and/or executing the National Intelligence Program budget.

[13] (U) Exec. Order No. 12333 at § 1.4.

[14] (U) Among other directives, the Executive Order requires the Director of National Intelligence, in consultation with the heads of any other appropriate executive departments and agencies, not later than 45 days after the conclusion of a United States election, to "conduct an assessment of any information indicating that a foreign government, or any person acting as an agent of or on behalf of a foreign government, has acted with the intent or purpose of interfering in that election," and the "assessment shall identify, to the maximum extent ascertainable, the nature of any foreign interference and any methods employed to execute it, the persons involved, and the foreign government or governments that authorized, directed, sponsored, or supported it." Exec. Order No. 13848 at § 1.(a).

(U) Most recently, on July 19, 2019, as part of the Director of National Intelligence's responsibility and authority to administer and operate programs and activities related to potential foreign interference in a United States election, the Director of National Intelligence announced the establishment of the Intelligence Community Election Threats Executive. In the words of then-Director of National Intelligence Daniel R. Coats, who announced the establishment of the new position within the Office of the Director of National Intelligence (ODNI), "Election security is an enduring challenge and a top priority for the IC."[15] A few days later, in an internal announcement for the ODNI, then-Director Coats stated, "I can think of no higher priority mission than working to counter adversary efforts to undermine the very core of our democratic process."[16]

(U) As a result, I have determined that the Complainant's information would constitute an urgent concern, as defined in 50 U.S.C. § 3033(k)(5)(G)(i), provided that I also determine that the information "appears credible," as required by 50 U.S.C. § 3033(k)(5)(B).

(~~TS~~/[redacted]) Based on the information reported by the Complainant to the ICIG and the ICIG's preliminary review, I have determined that there are reasonable grounds to believe that the complaint relating to the urgent concern "appears credible." The ICIG's preliminary review indicated that the Complainant has official and authorized access to the information and sources referenced in the Complainant's Letter and Classified Appendix, and that the Complainant has subject matter expertise related to much of the material information provided in the Complainant's Letter and Classified Appendix. The Complainant's Letter acknowledges that the Complainant was not a direct witness to the President's telephone call with the Ukrainian President on July 25, 2019. Other information obtained during the ICIG's preliminary review, however, supports the Complainant's allegation that, among other things, during the call the President "sought to pressure the Ukrainian leader to take actions to help the President's 2020 reelection bid." Further, although the ICIG's preliminary review identified some indicia of an arguable political bias on the part of the Complainant in favor of a rival political candidate, such evidence did not change my determination that the complaint relating to the urgent concern "appears credible," particularly given the other information the ICIG obtained during its preliminary review.

(~~TS~~/[redacted]) As part of its preliminary review, the ICIG did not request access to records of the President's July 25, 2019, call with the Ukrainian President. Based on the sensitivity of the alleged urgent concern, I directed ICIG personnel to conduct a preliminary review of the Complainant's information. Based on the information obtained from the ICIG's preliminary review, I decided that access to records of the telephone call was not necessary to make my

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[15] (U) ODNI News Release, *Director of National Intelligence Daniel R. Coats Establishes Intelligence Community Election Threats Executive* (July 19, 2019).

[16] (U) Memorandum from Daniel R. Coats, Director of National Intelligence, entitled, *Designation of Intelligence Community Election Threats Executive and Assistant Deputy Director for Mission Integration* (July 23, 2019).

determination that the complaint relating to the urgent concern "appears credible." In addition, given the time consumed by the preliminary review, together with lengthy negotiations that I anticipated over access to and use of records of the telephone call, particularly for purposes of communicating a disclosure to the congressional intelligence committees, I concluded that it would be highly unlikely for the ICIG to obtain those records within the limited remaining time allowed by the statute. I also understood from the ICIG's preliminary review that the National Security Council had already implemented special handling procedures to preserve all records of the telephone call.

(~~TS~~/[redacted]) Nevertheless, the ICIG understands that the records of the call will be relevant to any further investigation of this matter. For your information, the ICIG has sent concurrently with this transmittal a notice of a document access request and a document hold notice to the White House Counsel to request access to and the preservation of any and all records related to the President's telephone call with the Ukrainian President on July 25, 2019, and alleged related efforts to solicit, obtain, or receive assistance from foreign nationals in Ukraine, directly or indirectly, in connection with a Federal election. The document access request and document hold notice were issued pursuant to the ICIG's authority to conduct independent investigations and reviews on programs and activities within the responsibility and authority of the Director of National Intelligence, which includes the authority for the ICIG to have "direct access to all records, reports, audits, reviews, documents, papers, recommendations, or other materials that relate to the programs and activities with respect to which the Inspector General has responsibilities under this section."[17]

(U) Having determined that the complaint relating to the urgent concern appears credible, I am transmitting to you this notice of my determination, along with the Complainant's Letter and Classified Appendix. Upon receipt of this transmittal, the Director of National Intelligence "shall, within 7 calendar days of such receipt, forward such transmittal to the congressional intelligence committees, together with any comments the Director considers appropriate."[18]

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[17] (U) 50 U.S.C. § 3033(g)(2)(C). The ICIG's statutory right of access to those records is consistent with the statutory right of access to such records provided to the Director of National Intelligence. *See* 50 U.S.C. § 3024(b) ("Unless otherwise directed by the President, the Director of National Intelligence shall have access to all national intelligence and intelligence related to the national security which is collected by any Federal department, agency, or other entity, except as otherwise provided by law or, as appropriate, under guidelines agreed upon by the Attorney General and the Director of National Intelligence.").

[18] (U) *See* 50 U.S.C. § 3033(k)(5)(C). The ICIG notes that if the ICIG had determined the complaint was not an "urgent concern" or did not "appear[] credible," the statute would require the Director of National Intelligence to transmit the same information to the same congressional intelligence committees in the same time period, and provides the Complainant with the right "to submit the complaint or information to Congress by contacting either or both of the congressional intelligence committees directly," *id.* at § 3033(k)(5)(D)(i), subject to direction from the Director of National Intelligence, through the ICIG, "on how to contact the congressional intelligence committees in accordance with appropriate security practices," *id.* at § 3033(k)(5)(D)(ii).

Because the ICIG has the statutory responsibility to "notify an employee who reports a complaint or information" to the ICIG concerning an urgent concern "of each action taken" with respect to the complaint or information "not later than 3 days after any such action is taken,"[19] I respectfully request that you provide the ICIG with notice of your transmittal to the congressional intelligence committees not later than 3 days after the transmittal is made to them. In addition, as required by the statute, the ICIG is required to notify the Complainant not later than 3 days after today's date of my determination that the complaint relating to the urgent concern appears credible and that the ICIG transmitted on today's date notice of that determination to the Director of National Intelligence, along with the Complainant's Letter and Classified Appendix.

(U) If you have any questions or require additional information concerning this matter, please do not hesitate to contact me.

Sincerely yours,

Michael K. Atkinson
Inspector General
of the Intelligence Community

(U) Enclosures (Complainant's Letter and Classified Appendix) (Documents are ~~TS~~/[redacted])

This Letter is ~~TOP SECRET~~/[redacted] when detached from the Enclosures

[19] (U) 50 U.S.C. § 3033(k)(5)(E).

EXHIBIT D

Plaintiffs' Motion for a Temporary Restraining Order

INSPECTOR GENERAL OF THE INTELLIGENCE COMMUNITY
WASHINGTON, D.C. 20511

September 9, 2019

VIA ELECTRONIC TRANSMISSION

The Honorable Adam Schiff
Chairman
Permanent Select Committee on Intelligence
U.S. House of Representatives
Washington, D.C. 20515

The Honorable Devin Nunes
Ranking Member
Permanent Select Committee on Intelligence
U.S. House of Representatives
Washington, D.C. 20515

Dear Chairman Schiff and Ranking Member Nunes:

(U//FOUO) On August 12, 2019, the Office of the Inspector General of the Intelligence Community (ICIG) received a disclosure from an individual (hereinafter "the Complainant") regarding an alleged "urgent concern," pursuant to 50 U.S.C. § 3033(k)(5)(A).[1] The term "urgent concern" is defined, in relevant part, as:

> (U) A serious or flagrant problem, abuse, violation of the law or Executive order, or deficiency relating to the funding, administration, or operation of an intelligence activity within the responsibility and authority of the Director of National Intelligence involving classified information, but does not include differences of opinions concerning public policy matters.[2]

[1] (U) 50 U.S.C. § 3033(k)(5)(A) provides that an "employee of an element of the intelligence community, an employee assigned or detailed to an element of the intelligence community, or an employee of a contractor to the intelligence community who intends to report to Congress a complaint or information with respect to an urgent concern may report such complaint or information" to the ICIG.

[2] (U) 50 U.S.C. § 3033(k)(5)(G)(i).

(U//FOUO) After receiving the Complainant's disclosure, the ICIG was required within 14 calendar days to determine whether the information alleged by the Complainant with respect to an urgent concern appeared credible.[3] During that 14-day time period, the ICIG conducted a preliminary review of the disclosure. As a result of that preliminary review, I determined that the Complainant's disclosure met the definition of an urgent concern, *i.e.*, a "serious or flagrant problem, abuse, violation of the law or Executive order, or deficiency relating to the funding, administration, or operation of an intelligence activity within the responsibility and authority of the Director of National Intelligence involving classified information."[4] I also determined that there were reasonable grounds to believe that information relating to the urgent concern appeared credible.[5]

(U//FOUO) On August 26, 2019, I forwarded the Complainant's disclosure and accompanying materials, along with my determination that the Complainant's information appeared credible, to the Acting Director of National Intelligence (Acting DNI). Pursuant to the urgent concern statute, upon receipt of the ICIG's transmittal, the Acting DNI within seven calendar days is required to forward such transmittal to the congressional intelligence committees along with any comments he considers appropriate.[6]

(U//FOUO) It is my understanding that the Acting DNI has determined that he is not required to transmit my determination of a credible urgent concern or any of the Complainant's information to the congressional intelligence committees because the allegations do not meet the definition of an "urgent concern" under the statute, and has not made the transmission as of today's date. Although I believe and appreciate that the Acting DNI is acting in good faith, the Acting DNI's treatment of the Complainant's alleged "urgent concern" does not appear to be consistent with past practice. As you know, the ICIG has on occasion in the past determined that, for a variety of reasons, disclosures submitted to the ICIG under the urgent concern statute did not constitute an urgent concern. In those cases, even though the ICIG determined that those disclosures did not meet the definition of an urgent concern, the DNI nevertheless provided direction to the ICIG to transmit the ICIG's determination and the complainants' information to the congressional intelligence committees. In each of those cases, the ICIG followed the DNI's direction and transmitted the ICIG's determination along with the complainants' information to the congressional intelligence committees. That past practice permitted complainants in the Intelligence Community to contact the congressional intelligence committees directly, in an authorized and protected manner, as intended by the urgent concern statute.

(U//FOUO) I am continuing my efforts to obtain direction from the Acting DNI regarding how the Complainant may bring the Complainant's concerns to the congressional intelligence

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[3] (U) *Id.* at § 3033(k)(5)(B).

[4] (U) *Id.* at § 3033(k)(5)(G)(i).

[5] (U) *Id.* at § 3033(k)(5)(B).

[6] (U) *Id.* at § 3033(k)(5)(C).

committees in an authorized and protected manner, and "in accordance with appropriate security practices."[7] I intend to reach back out to you in the near future to discuss my attempts to resolve outstanding issues relating to this matter.

(U) Please contact me if you have any questions.

Sincerely yours,

Michael K. Atkinson
Inspector General
of the Intelligence Community

cc: The Honorable Joseph Maguire
Director of National Intelligence (Acting)

[7] (U) *Id.* at § 3033(k)(5)(D)(ii).

EXHIBIT E

Plaintiffs' Motion for a Temporary Restraining Order

INSPECTOR GENERAL OF THE INTELLIGENCE COMMUNITY
WASHINGTON, D.C. 20511

September 17, 2019

VIA ELECTRONIC TRANSMISSION

The Honorable Adam Schiff
Chairman
Permanent Select Committee on Intelligence
U.S. House of Representatives
Washington, D.C. 20515

The Honorable Devin Nunes
Ranking Member
Permanent Select Committee on Intelligence
U.S. House of Representatives
Washington, D.C. 20515

Dear Chairman Schiff and Ranking Member Nunes:

(U//FOUO) In a previous letter to you dated September 9, 2019, I informed you that I was continuing my efforts to obtain direction from the Acting Director of National Intelligence (Acting DNI) concerning a disclosure from an individual (hereinafter, "the Complainant") regarding an alleged "urgent concern," pursuant to 50 U.S.C. § 3033(k)(5)(A).[1] The statute that established and authorized the Office of the Inspector General of the Intelligence Community (ICIG) provides that if the ICIG is unable "to resolve . . . differences with the Director [of National Intelligence] affecting the execution of the duties or responsibilities of the Inspector General," the ICIG should immediately notify, and submit a report to, the congressional intelligence committees on such matters.[2] Although I had hoped that the Acting DNI would provide direction, through me, on how the Complainant can contact the congressional intelligence committees directly "in accordance with appropriate security practices,"[3] I have now determined that the Acting DNI and I are at an

[1] (U) 50 U.S.C. § 3033(k)(5)(A) provides that an "employee of an element of the intelligence community, an employee assigned or detailed to an element of the intelligence community, or an employee of a contractor to the intelligence community who intends to report to Congress a complaint or information with respect to an urgent concern may report such complaint or information to the Inspector General."

[2] (U) *Id.* at § 3033(k)(3)(A)(i).

[3] (U) *Id.* at § 3033(k)(5)(D)(i) and (ii).

impasse over this issue, which necessitates this notification and report on our unresolved differences.

(U//FOUO) On September 13, 2019, I received a copy of a letter, dated the same day, sent from Jason Klitenic, General Counsel, Office of the Director of National Intelligence, to the Chair and Vice Chair of the Senate Select Committee on Intelligence, and to you, as the Chair of the House Permanent Select Committee on Intelligence (HPSCI), and as the Ranking Member of the HPSCI. In that letter, Mr. Klitenic informed the congressional intelligence committees that the Acting DNI had determined, after consulting with the Department of Justice (DOJ), "that no statute requires disclosure of the complaint to the intelligence committees" because "the disclosure in this case did not concern allegations of conduct by a member of the Intelligence Community or involve an intelligence activity under the DNI's supervision." I understand that I am bound by the determination reached as a result of the Acting DNI's consultations with DOJ, and the ICIG will continue to abide by that determination.

(U//FOUO) I, nevertheless, respectfully disagree with that determination, particularly DOJ's conclusion, and the Acting DNI's apparent agreement with the conclusion, that the disclosure in this case does not concern an intelligence activity within the DNI's authority, and that the disclosure therefore need not be transmitted to the congressional intelligence committees. In a letter sent on today's date to DOJ, a copy of which I provided to the Acting DNI, I outlined my reasons for disagreeing with DOJ's analysis of the facts presented in the instant case and the conclusions reached regarding the same. I set forth the reasons for my concluding that the subject matter involved in the Complainant's disclosure not only falls within the DNI's jurisdiction, but relates to one of the most significant and important of the DNI's responsibilities to the American people. Because of the disagreement that exists between myself, DOJ, and the Acting DNI, I have requested authorization from the Acting DNI to disclose, at the very least, the general subject matter of the Complainant's allegations to the congressional intelligence committees. To date, however, I have not been authorized to disclose even that basic information to you, in addition to the important information provided by the Complainant that is also being kept from the congressional intelligence committees.

(U//FOUO) In addition, it appears to me that the Acting DNI has no present intention of providing direction to the Complainant, through me, on how the Complainant can contact the congressional intelligence committees directly "in accordance with appropriate security practices."[4] Although I appreciate that the Acting DNI has provided his personal assurance that the Complainant will be protected if the Complainant's identity becomes known and the Complainant is reprised against, or threatened with reprisal, for making the disclosure, such personal assurance is not the legally enforceable statutory protection previously available to whistleblowers in the Complainant's situation.

(U//FOUO) As it now stands, my unresolved differences with the Acting DNI are affecting the execution of two of my most important duties and responsibilities as the Inspector General of

[4] (U) *Id.* at § 3033(k)(5)(D)(i) and (ii).

the Intelligence Community. First, the differences are affecting what I view as my significant responsibilities toward the Complainant, an employee, detailee, or contractor in the Intelligence Community, who wants to disclose to Congress in an authorized and protected manner information that involves classified information that the Complainant believes in good faith is "with respect to an urgent concern."[5]

(U//FOUO) Second, the unresolved differences are affecting the execution of the ICIG's statutory responsibility to ensure that the congressional intelligence committees are kept currently and fully informed of "significant problems and deficiencies relating to programs and activities within the responsibility and authority of the Director of National Intelligence."[6] The DNI's decision not to transmit my determination or any of the Complainant's information to the congressional intelligence committees, for reasons other than awaiting a classification review or asserting appropriate privileges, may reflect a gap in the law that constitutes a significant problem and deficiency concerning the DNI's responsibility and authority – or perceived responsibility and authority – relating to intelligence programs or activities.

(U//FOUO) Further, the resulting inability for an employee, detailee, or contractor in the Intelligence Community to receive direction from the Acting DNI, through the Inspector General, on how to contact the congressional intelligence committees directly in accordance with appropriate security practices concerning what appear to be good faith and credible allegations "with respect to an urgent concern,"[7] even if it is later determined by others that the alleged conduct falls outside the definition of "urgent concern," may itself constitute a significant problem and deficiency concerning the DNI's responsibility and authority relating to intelligence programs or activities. In addition, the Complainant's current predicament, where an individual used the urgent concern process in good faith, but in the future might not be statutorily protected from reprisal or the threat of reprisal for making the disclosure, may also constitute a significant problem and deficiency concerning the DNI's responsibility and authority relating to intelligence programs or activities.[8]

(U) I remain committed to ensuring that individuals in the Intelligence Community who disclose allegations of wrongdoing in good faith and in an authorized manner to the ICIG receive consistent, effective, and enforceable protections from actions constituting a reprisal, or threat of reprisal, for making such a disclosure. I will also continue my efforts to ensure individuals in the

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[5] (U) *Id.* at § 3033(k)(5)(A).

[6] (U) *Id.* at § 3033(b)(4).

[7] (U) *Id.* at § 3033(k)(5)(A).

[8] (U//FOUO) DOJ's legal opinion may have significant implications for whistleblower rights and protections for all Executive Branch departments and agencies, as well as the government contracting industry. The ICIG has asked DOJ to clarify, among other things, whether the Complainant and those individuals similarly situated to the Complainant, now or in the future, are protected from actions constituting a reprisal, or threat of reprisal, in response to reporting an alleged urgent concern, or other allegations of waste, fraud, or abuse, that may later be determined to fall outside the jurisdiction of the individual's department or agency.

Intelligence Community have a consistent, authorized, and effective means to report such allegations to the congressional intelligence committees. Please do not hesitate to contact me if you have any questions regarding this important matter.

Sincerely yours,

Michael K. Atkinson
Inspector General
of the Intelligence Community

cc: The Honorable Joseph Maguire
Director of National Intelligence (Acting)

EXHIBIT F

Plaintiffs' Motion for a Temporary Restraining Order

CREW | citizens for responsibility and ethics in washington

Katheryn L. Wyer
Federal Programs Branch
U.S. Department of Justice, Civil Division
1100 L Street, N.W., Room 12014
Washington, DC 20005

BY EMAIL: kathryn.wyer@usdoj.gov

Re: Parties' Duty to Preserve Documents in Pending Litigation
CREW v. Trump, Case No. 19-cv-1333 (D.D.C. May 7, 2019)

Dear Ms. Wyer:

On May 7, 2019, Plaintiffs Citizens for Responsibility and Ethics in Washington ("CREW"), National Security Archive, and Society for Historians of American Foreign Relations filed a lawsuit against Donald J. Trump and the Executive Office of the President ("EOP") challenging (1) their compliance with mandatory obligations imposed by the Presidential Records Act, 44 U.S.C. §§ 2201–2209 ("PRA"), to create, classify, and preserve records, and (2) their implementation of policies and practices that violate the PRA, the Federal Records Act ("FRA"), 44 U.S.C. §§ 3101, et seq., and the Take Care Clause of the Constitution, Art. II, Sec, 3. In particular, Plaintiffs allege that the President has a policy and practice of affirmatively failing to create and preserve records of the meetings and discussions the President and other senior White House staff have with certain foreign leaders, including Russian President Vladimir Putin and North Korean leader Kim Jung Un. Plaintiffs have also alleged that the President has interfered with the adequate and proper documentation of agency records of bilateral meetings.

As you are no doubt aware, parties to litigation are under clear obligations to preserve documents in their possession, custody, or control. Further, discovery may extend to "any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case . . . ." Fed. R. Civ. P. 26. For these reasons, we are assuming that Defendants have already taken steps to preserve the following categories of records[1] that are relevant to Plaintiffs' claims in this litigation:

1. All records reflecting Defendants' meetings, phone calls, and other communications with foreign leaders;

[1] Plaintiffs' identification of specific categories does not serve to reduce or limit Defendants' obligation to preserve all documents covered by Rule 26 of the Federal Rules of Civil Procedure. Defendants' litigation hold should, at a minimum, include preservation notices to President Trump and to all components and personnel at EOP with relevant recordkeeping responsibilities, follow-up reminders to those individuals about their responsibilities under the litigation hold, notification of records custodians at the EOP and/or White House, and the suspension of any automated deleting systems and processes that could impact relevant records.

2. All records reflecting policies and practices regarding recordkeeping of Defendants' meetings, phone calls, and other communications with foreign leaders;

3. All records reflecting White House or agency investigations of Defendants' recordkeeping policies and practices regarding meetings, phone calls, and other communications with foreign leaders; and

4. All records reflecting Defendants' communication of recordkeeping polices or practices to other components of the executive branch.

In light of recent reports that the inspector general ("IG") of the Intelligence Community found that a whistleblower complaint regarding President Trump's communications with foreign leader was credible and a matter of "urgent concern,"[2] and the refusal of the Office of the Director of National Intelligence ("ODNI") to disclose documentation of the IG's findings or the whistleblower complaint to Congress as the law requires, *see* 50 U.S.C. § 3033(k)(5), we write to establish a mutual understanding of Defendants' obligations in the above-referenced lawsuit as they pertain to this reported incident.

The disagreement between the Acting Director of ODNI and the Inspector General of the Intelligence Community over the scope of agency jurisdiction relates to the allegations in our Complaint that Defendants in this action are improperly asserting control over records that are central to Plaintiffs' claims. Further, as reported, the whistleblower complaint likely contains evidence of the President's recordkeeping practices that lie at the heart of Plaintiffs' Complaint and that would be subject to discovery. For example, in the weeks preceding the whistleblower's complaint, President Trump had at least one phone conversation with President Putin and news reports raised questions about whether it was adequately documented. Similarly, Plaintiffs' Complaint concerns at least five separate meetings President Trump had with President Putin that he failed to document, contrary to the requirements of the PRA. Compl. ¶ 7, *CREW v. Trump*, No. 19-cv-1333 (D.D.C. May 7, 2019).

We therefore ask that you confirm that in addition to the aforementioned categories of records, the Defendants are preserving any materials relating to the ODNI whistleblower complaint and the underlying incident, which would be subject to discovery pursuant to Rule 26.

Please provide me written confirmation **no later than 5 p.m. on Monday, September 23, 2019** that Defendants have implemented a litigation hold that covers these materials. If you are unable or unwilling to provide such assurances, we may be compelled to request court intervention at this early stage in the litigation.

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[2] Greg Miller, Ellen Nakashima, and Shane Harris, Trump's communications with foreign leader are part of whistleblower complaint that spurred standoff between spy chief and Congress, former officials say, *Washington Post*, Sept. 18, 2019, *available at* https://wapo.st/2kos98a; Nicholas Fandos, Eileen Sullivan, Julian E. Barnes and Matthew Rosenberg, Watchdog Refuses to Detail Whistle-Blower Complaint About Trump, *N.Y. Times*, Sept. 19, 2019, *available at* https://nyti.ms/2mqYpbx.

We look forward to and appreciate your cooperation in his matter.

Sincerely,

Anne Weismann
Chief FOIA Counsel

EXHIBIT F

Plaintiffs' Motion for a Temporary Restraining Order

CREW | citizens for responsibility and ethics in washington

Katheryn L. Wyer
Federal Programs Branch
U.S. Department of Justice, Civil Division
1100 L Street, N.W., Room 12014
Washington, DC 20005

BY EMAIL: kathryn.wyer@usdoj.gov

Re: Parties' Duty to Preserve Documents in Pending Litigation
CREW v. Trump, Case No. 19-cv-1333 (D.D.C. May 7, 2019)

Dear Ms. Wyer:

On May 7, 2019, Plaintiffs Citizens for Responsibility and Ethics in Washington ("CREW"), National Security Archive, and Society for Historians of American Foreign Relations filed a lawsuit against Donald J. Trump and the Executive Office of the President ("EOP") challenging (1) their compliance with mandatory obligations imposed by the Presidential Records Act, 44 U.S.C. §§ 2201–2209 ("PRA"), to create, classify, and preserve records, and (2) their implementation of policies and practices that violate the PRA, the Federal Records Act ("FRA"), 44 U.S.C. §§ 3101, et seq., and the Take Care Clause of the Constitution, Art. II, Sec, 3. In particular, Plaintiffs allege that the President has a policy and practice of affirmatively failing to create and preserve records of the meetings and discussions the President and other senior White House staff have with certain foreign leaders, including Russian President Vladimir Putin and North Korean leader Kim Jung Un. Plaintiffs have also alleged that the President has interfered with the adequate and proper documentation of agency records of bilateral meetings.

As you are no doubt aware, parties to litigation are under clear obligations to preserve documents in their possession, custody, or control. Further, discovery may extend to "any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case . . . ." Fed. R. Civ. P. 26. For these reasons, we are assuming that Defendants have already taken steps to preserve the following categories of records[1] that are relevant to Plaintiffs' claims in this litigation:

1. All records reflecting Defendants' meetings, phone calls, and other communications with foreign leaders;

[1] Plaintiffs' identification of specific categories does not serve to reduce or limit Defendants' obligation to preserve all documents covered by Rule 26 of the Federal Rules of Civil Procedure. Defendants' litigation hold should, at a minimum, include preservation notices to President Trump and to all components and personnel at EOP with relevant recordkeeping responsibilities, follow-up reminders to those individuals about their responsibilities under the litigation hold, notification of records custodians at the EOP and/or White House, and the suspension of any automated deleting systems and processes that could impact relevant records.

2. All records reflecting policies and practices regarding recordkeeping of Defendants' meetings, phone calls, and other communications with foreign leaders;

3. All records reflecting White House or agency investigations of Defendants' recordkeeping policies and practices regarding meetings, phone calls, and other communications with foreign leaders; and

4. All records reflecting Defendants' communication of recordkeeping polices or practices to other components of the executive branch.

In light of recent reports that the inspector general ("IG") of the Intelligence Community found that a whistleblower complaint regarding President Trump's communications with foreign leader was credible and a matter of "urgent concern,"[2] and the refusal of the Office of the Director of National Intelligence ("ODNI") to disclose documentation of the IG's findings or the whistleblower complaint to Congress as the law requires, *see* 50 U.S.C. § 3033(k)(5), we write to establish a mutual understanding of Defendants' obligations in the above-referenced lawsuit as they pertain to this reported incident.

The disagreement between the Acting Director of ODNI and the Inspector General of the Intelligence Community over the scope of agency jurisdiction relates to the allegations in our Complaint that Defendants in this action are improperly asserting control over records that are central to Plaintiffs' claims. Further, as reported, the whistleblower complaint likely contains evidence of the President's recordkeeping practices that lie at the heart of Plaintiffs' Complaint and that would be subject to discovery. For example, in the weeks preceding the whistleblower's complaint, President Trump had at least one phone conversation with President Putin and news reports raised questions about whether it was adequately documented. Similarly, Plaintiffs' Complaint concerns at least five separate meetings President Trump had with President Putin that he failed to document, contrary to the requirements of the PRA. Compl. ¶ 7, *CREW v. Trump*, No. 19-cv-1333 (D.D.C. May 7, 2019).

We therefore ask that you confirm that in addition to the aforementioned categories of records, the Defendants are preserving any materials relating to the ODNI whistleblower complaint and the underlying incident, which would be subject to discovery pursuant to Rule 26.

Please provide me written confirmation **no later than 5 p.m. on Monday, September 23, 2019** that Defendants have implemented a litigation hold that covers these materials. If you are unable or unwilling to provide such assurances, we may be compelled to request court intervention at this early stage in the litigation.

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[2] Greg Miller, Ellen Nakashima, and Shane Harris, Trump's communications with foreign leader are part of whistleblower complaint that spurred standoff between spy chief and Congress, former officials say, *Washington Post*, Sept. 18, 2019, *available at* https://wapo.st/2kos98a; Nicholas Fandos, Eileen Sullivan, Julian E. Barnes and Matthew Rosenberg, Watchdog Refuses to Detail Whistle-Blower Complaint About Trump, *N.Y. Times*, Sept. 19, 2019, *available at* https://nyti.ms/2mqYpbx.

We look forward to and appreciate your cooperation in his matter.

Sincerely,

Anne Weismann
Chief FOIA Counsel

EXHIBIT G

Plaintiffs' Motion for a Temporary Restraining Order

U.S. Department of Justice
Civil Division
Federal Programs Branch

Mailing Address
P.O. Box 883
Washington, D.C. 20044

Overnight Delivery Address
1100 L St, NW, Room 12014
Washington, D.C. 20005

Kathryn Wyer
Senior Trial Counsel

Tel: (202) 616-8475
Fax: (202) 616-8470
kathryn.wyer@usdoj.gov

September 23, 2019

Via Electronic Mail

Anne L. Weisman
Citizens for Responsibility and Ethics in Washington
1101 K Street, NW
Washington, DC 20005

Re: *CREW v. Trump*, No. 1:19-cv-1333 (D.D.C.)

Dear Ms. Weisman:

This letter responds to your letter sent to me by e-mail dated September 20, 2019. Your letter requests Defendants' assurances that certain specific categories of records will be preserved pending a decision in this case. It also requests that we describe to you certain aspects of the preservation advice that we have provided to our clients in this matter.

I of course cannot share with you the privileged legal advice that we have conveyed to our clients regarding their preservation obligations arising from this lawsuit. As you are no doubt aware, most courts hold that litigation hold notices are considered privileged and protected by the attorney-client privilege or work product doctrine. *E.g.*, *Greenberger v. IRS*, 283 F. Supp. 3d 1354, 1373 n.15 (N.D. Ga. 2017) ("litigation hold letters are generally privileged"); *see also Cannata v. Wyndham Worldwide Corp.*, No. 10-68, 2011 WL 3495987, at *2 (D. Nev. 2011) ("In general, unless spoliation is at issue, a litigation hold letter is not discoverable . . . ."). Even those courts that have suggested that parties may probe basic information about preservation have said only that parties may do so as part of discovery proceedings. *See id.* That authority does not create a freestanding right to demand that defense counsel disclose preservation guidance outside of the discovery process, before a defendant has even filed a response to the complaint. Finally, Plaintiffs' inquiries into Defendants' recordkeeping practices are particularly inappropriate in light of the fact that the Presidential Records Act does not "allow courts, at the behest of private citizens, to rule on the adequacy of the President's records management practices or overrule his records creation, management, and disposal decisions." *Armstrong v. Bush*, 924 F.2d 282, 290 (D.C. Cir. 1991).

I can assure you, however, that we have appropriately advised our clients concerning their preservation obligations, as is our standard practice. Our hope is therefore that you will withdraw your request that Defendants disclose their preservation advice and refrain from filing baseless motions with the Court. Should you nevertheless elect to draw the Court into this dispute, we will be prepared to explain the numerous reasons why you are not entitled to the relief that you are seeking — including, as set out in our motion to dismiss, the fact that judicial review is not available over any of the claims that you have asserted in this case.

I trust that this is responsive to your concerns. If you wish to discuss this further, please feel free to contact me.

Sincerely,

/s/

Kathryn Wyer
(202) 616-8475

EXHIBIT H

Plaintiffs' Motion for a Temporary Restraining Order

CREW | citizens for responsibility and ethics in washington

September 25, 2019

BY EMAIL: kathryn.wyer@usdoj.gov

Katheryn L. Wyer
Federal Programs Branch
U.S. Department of Justice, Civil Division
1100 L Street, N.W., Room 12014
Washington, DC 20005

Re: *CREW v. Trump*, Case No. 19-cv-1333 (D.D.C. May 7, 2019)

Dear Ms. Wyer:

Thank you for your letter of September 23, 2019, responding to our letter of September 20, 2019, seeking assurances that Defendants will preserve specified categories of records pending the conclusion of this litigation. We are disappointed that rather than provide those assurances you have mischaracterized our request as seeking privileged legal advice and ignored the obligations Rule 26 of the Federal Rules of Civil Procedure imposes on Defendants.

First, Plaintiffs did not and are not requesting privileged legal advice, including the content of any preservation hold you have imposed. As our previous letter makes clear, we are simply asking for confirmation that certain categories of records we have outlined will be preserved. Defendants can certainly respond to this request without disclosing any legal advice you have provided them as their counsel, and that is all that we ask.

Second, as you know, the obligation to preserve relevant evidence through a litigation hold does not commence with the start of discovery, but runs from the time that a party has notice or should have known that evidence is relevant to either pending or future litigation. *See, e.g.*, *Zhi Chen v. District of Columbia*, 839 F. Supp. 2d 7, 12 (D.D.C. 2011) (confirming that a party has an obligation "to preserve potentially relevant evidence . . . once that party anticipates litigation") (citation omitted); *Zubulake v. UBS Warburg, LLC*, 220 F.R.D. 212 (S.D.N.Y. 2003) (same). That, as your letter states, we are asking for assurances that you have taken appropriate preservation steps "before a defendant has even filed a response to the complaint," does not alter this obligation.

Third, it cannot legitimately be questioned that we seek the preservation of relevant evidence. The complaint rests on allegations that President Trump has a pattern and practice of affirmatively refusing to create and preserve records of his communications and meetings with certain foreign leaders in violation of his non-discretionary obligations under the Presidential Records Act ("PRA"), and that he has asserted control over agency records improperly treating them as presidential records. Recent revelations about President Trump's conversations with the president of Ukraine in which he has admitted applying pressure on the Ukrainian government to investigate Hunter Biden, the son of one of his political rivals in the upcoming 2020 presidential

election, and the existence of a whistleblower complaint about this and other incidents, likely contain evidence of the President's recordkeeping practices that lie at the heart of Plaintiffs' complaint. Moreover, the fact that the White House is negotiating with Congress over the release of the whistleblower complaint – a record of the Office of the Director of National Intelligence – raises serious questions about the White House's role in controlling access to agency records, additional conduct that mirrors that alleged in our complaint. Both existing documents and evidence that the Defendants failed to create certain documents are properly subject to discovery here, reinforcing the need that they be preserved pending the outcome of this litigation.

Fourth, your statement that Department of Justice attorneys "have appropriately advised our clients concerning their preservation obligations, as is our standard practice," falls far short of what courts have required parties to disclose when faced with requests similar to that in our September 20 letter. Most fundamentally, Plaintiffs are entitled to know the kinds and categories of records Defendants have been instructed to preserve and "what specific actions [Defendants] were instructed to take to that end." *Cannata v. Wyndham Worldwide Corp.*, No. 10-68, 2011 WL 3495987, at *3 (D. Nev. Aug. 10, 2010). *See also United States ex rel. Barko v. Halliburton Co.*, 74 F. Supp. 3d 183, 190 (D.D.C. 2014) (citing *In re eBay Seller Antitrust Litigation*, 2007 WL 2852364, at *2 (N.D. Cal. Oct. 2, 2007) ("[a] party may discover the steps the opposing party has taken to preserve relevant information.")). Our letter seeks precisely that information. Moreover, you have offered no explanation for your "standard practice," making it impossible to determine whether you have met your legal obligations.

The serious violations of law that we allege in our complaint concern a failure, if not outright refusal, to follow the mandatory recordkeeping requirements of the PRA. Given this context it is critical that we receive assurances that all relevant information has been and will be preserved. Your letter falls far short of those assurances. We therefore our request that you confirm the kinds and categories of records Defendants have been instructed to preserve no later than 5 p.m. on Friday, September 30, 2019.

Sincerely,

Anne L. Weismann
Chief FOIA Counsel

EXHIBIT I

Plaintiffs' Motion for a Temporary Restraining Order

U.S. Department of Justice
Civil Division
Federal Programs Branch

Mailing Address
P.O. Box 883
Washington, D.C. 20044

Overnight Delivery Address
1100 L St, NW, Room 12014
Washington, D.C. 20005

Kathryn Wyer
Senior Trial Counsel

Tel: (202) 616-8475
Fax: (202) 616-8470
kathryn.wyer@usdoj.gov

September 27, 2019

Via Electronic Mail

Anne L. Weisman
Citizens for Responsibility and Ethics in Washington
1101 K Street, NW
Washington, DC 20005

Re: *CREW v. Trump*, No. 1:19-cv-1333 (D.D.C.)

Dear Ms. Weisman:

This letter responds to your letter sent to me by e-mail dated September 25, 2019, which in turn followed earlier correspondence from you dated September 20, 2019, and my response dated September 23, 2019. While disclaiming any intent to seek privileged legal advice concerning Defendants' litigation hold obligations, including the content of any litigation hold, your most recent letter again asks the government to confirm that specific categories of information are being preserved. That clearly implicates privileged legal advice.

In support of your request, you recite generic pronouncements regarding parties' preservation obligations, as well as two decisions that allowed a party to seek information regarding the opposing party's preservation efforts during discovery, in light of the specific facts of the case. Of course, the holdings of those cases are inapplicable here because we have not entered into any discovery process in this case. Rather, Defendants' motion to dismiss is not yet fully briefed. Regardless of what information regarding an opposing party's preservation efforts might legitimately be sought in discovery in a particular circumstance, you have identified no instance where a party was deemed entitled to such information at the outset of a case, while a motion to dismiss is pending, and before any discovery has taken place. Indeed, the Federal Rules of Civil Procedure provide no mechanism to ask the Court to compel an opposing party to provide information outside the discovery process. *See* Fed. R. Civ. P. 37(a)(3)(A)-(B) (indicating that a party can prevail on a motion to compel only where the opposing party "fails to make a disclosure required by Rule 26(a)" or has failed to respond to a discovery request such as an interrogatory or a request for production). Your attempt to conduct informal discovery here is premature, and particularly inappropriate when the Court's subject matter jurisdiction over this action remains in dispute—even more so when Plaintiffs' opposition brief essentially concedes that governing D.C. Circuit authority in *Armstrong v. Bush*, 924 F.2d 282 (D.C. Cir. 1991), does not allow judicial

review of Plaintiffs' Presidential Records Act claims.

I previously assured you that we have appropriately advised our clients of their preservation obligations. Those obligations of course include the obligation to preserve all evidence relevant to the claims and defenses in this case. But the advice provided about how to carry out that obligation is privileged. Moreover, nothing in your letter, or in the allegations of Plaintiffs' complaint, suggests that spoliation of relevant evidence is likely to occur. Absent any authority supporting the unprecedented disclosures that you request at this early stage of the case, Defendants do not intend at this time to respond further to your inquiries about the content of their preservation hold.

Sincerely,

/s/

Kathryn Wyer