

**PANDEMICS, PUBLIC TRUST, AND PRESIDENTIAL
RECORDS: AMENDING THE PRESIDENTIAL RECORDS ACT
TO MINIMIZE THE RISK OF PUBLIC CORRUPTION DURING
TIMES OF NATIONAL CRISIS**

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COVID–19 is not just a health and economic crisis. It’s a corruption crisis. And one that we’re currently failing to manage.

Rubio¹

I. INTRODUCTION

Government officials hold positions of public trust.² Accordingly, public officials are expected to engage in behavior for the benefit of the common good, not the official’s private gain.³ Corruption, defined here as “the abuse of entrusted office for private gain,”⁴ is, in the words of United

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1. *CPI 2020: Global Highlights*, TRANSPARENCY INT’L (Jan. 28, 2021) (quoting Delia Ferreira Rubio, Chair, Transparency International), https://www.transparency.org/en/news/cpi-2020-global-highlights?utm_medium=social&utm_source=twitter&utm_campaign=cpi2020-secretariat [<http://web.archive.org/web/20210326174852/https://www.transparency.org/en/news/cpi-2020-global-highlights>].

2. See Robert G. Natelson, *The Constitution and the Public Trust*, 52 BUFF. L. REV. 1077, 1088 (2004).

3. *Id.*

4. *What is Corruption?*, TRANSPARENCY INT’L, <https://www.transparency.org/en/what-is-corruption> [<http://web.archive.org/web/20210326143758/https://www.transparency.org/en/what-is-corruption>] (last visited Mar. 26, 2021).

Nations Secretary-General António Guterres, “the ultimate betrayal of public trust.”⁵ Betrayals of public trust in the form of corruption tend to flourish during times of crisis, which expose any existing institutional weaknesses that create opportunities for corruption, and which may draw resources and efforts away from robust oversight.⁶ Accordingly, anti-corruption experts advise identifying the risks of corruption before a crisis strikes to minimize eroding the effectiveness of the government’s response to the public needs the crisis creates.⁷

The health crisis created by the COVID–19 pandemic has highlighted an array of opportunities for unscrupulous government officials, contractors, and even volunteers in the United States to abuse their positions for private gain,⁸ and the institutional weaknesses that have

5. *COVID–19 Response*, UNITED NATIONS, <https://www.un.org/en/coronavirus/statement-corruption-context-covid-19> [<http://web.archive.org/web/20210326144224/https://www.un.org/en/coronavirus/statement-corruption-context-covid-19>] (last visited Mar. 26, 2021).

6. *Corruption and the Coronavirus*, TRANSPARENCY INT’L (Mar. 18, 2020), <https://www.transparency.org/en/news/corruption-and-the-coronavirus> [<http://web.archive.org/web/20210326144635/https://www.transparency.org/en/news/corruption-and-the-coronavirus>].

7. *Id.*

8. *See, e.g.*, Sylvan Lane, *Four Senators Sold Stocks Before Coronavirus Threat Crashed Market*, THE HILL (Mar. 20, 2020), <https://thehill.com/homenews/senate/488593-four-senators-sold-stocks-before-coronavirus-threat-crashed-market> [<http://web.archive.org/web/20210326145245/https://thehill.com/homenews/senate/488593-four-senators-sold-stocks-before-coronavirus-threat-crashed-market>] (reporting that Senators Richard Burr, Dianne Feinstein, James Inhofe, and Kelly Loeffler “sold stocks shortly after a January [classified] briefing [by Trump administration officials] in the Senate on the novel coronavirus outbreak, unloading shares that plummeted in value a month later as the stock market crashed in the face of a global pandemic.” *Id.*); Jack Kelly, *Senators Accused of Insider Trading, Dumping Stocks After Coronavirus Briefing*, FORBES (Mar. 20, 2020), <https://www.forbes.com/sites/jackkelly/2020/03/20/senators-accused-of-insider-trading-dumping-stocks-after-coronavirus-briefings/?sh=53e99d7a4a45> [http://web.archive.org/web/20210326145812if_/https://www.forbes.com/sites/jackkelly/2020/03/20/senators-accused-of-insider-trading-dumping-stocks-after-coronavirus-briefings/?sh=464b0a094a45] (“[A] number of senators sold their stock holdings after being briefed about the coronavirus and the massive impact it will have upon the economy, jobs and the stock market. While telling the American public that there wasn’t much to worry about, they bailed out of their stock holdings to avoid large losses.”); Roger Sollenberger, *Three Kushner Family Companies Scored Millions in Coronavirus Bailout Funds*, SALON (July 8, 2020), <https://www.salon.com/2020/07/08/three-kushner-family-companies-scored-millions-in-coronavirus-bailout-funds/> [<http://web.archive.org/web/20210326150051/https://www.salon.com/2020/07/08/three-kushner-family-companies-scored-millions-in-coronavirus-bailout-funds/>] (reporting that three of the companies receiving emergency relief funds of more than \$150,000 under the government’s Paycheck Protection Program are owned by Trump’s son-in-law and Senior Advisor, Jared Kushner); Marcy Gordon, *Waichdog Raises Possible Kushner Link to \$700M Rescue Loan*, ASSOCIATED PRESS (Dec.

enabled corrupt conduct warrant inspection and remediation before the next national crisis—be it another pandemic, a natural disaster, or other event—hits America’s shores. This Article explores one such institutional weakness: the lack of oversight and enforcement mechanisms in the Presidential Records Act (PRA).⁹ More specifically, this Article seeks to fill a gap in the current literature by exploring whether Congress—to protect against the risk of increased government corruption during the next pandemic or other crisis—should consider amending the PRA to delineate additional requirements for presidential discretion regarding destruction of records, to include enforcement penalties for non-compliance, to provide broader scope for judicial intervention, to exercise greater oversight of records retention and management practices, or to adopt some combination thereof.¹⁰ The need for potential changes to the implementation of the PRA came to light, at least in part, because the White House’s response to the pandemic included forming a “shadow coronavirus task force” that used encrypted electronic messaging and unofficial email accounts, raising questions about whether task force members were complying with the requirements of the PRA.¹¹ To be sure,

10, 2020) <https://apnews.com/article/donald-trump-coronavirus-pandemic-trucking-jared-kushner-national-security-7e86f52d4bea1bdccfab30ac74767318> [<http://web.archive.org/web/20210326153751/https://apnews.com/article/donald-trump-coronavirus-pandemic-trucking-jared-kushner-national-security-7e86f52d4bea1bdccfab30ac74767318>] (reporting on congressional oversight of a \$700 million relief loan (described as “risky”) to a trucking company that owed millions of dollars to a private equity fund which had previously “lent \$184 million to Kushner’s family real estate company to help refinance its mortgage on a Chicago building . . .”).

9. The Presidential Records Act (PRA) of 1978, 44 U.S.C. §§ 2201–2209.

10. See *infra* Part IV.B. Most scholarship on the PRA focuses on the challenges of records management and usages in an age of social media, issues of executive privilege, or the role of Executive Orders in the implementation of the statute. See, e.g., Jessica de Perio Wittman, *A Trend You Can’t Ignore: Social Media as Government Records and Its Impact on the Interpretation of the Law*, 31 ALB. L.J. SCI. & TECH. 53 (2021) (discussing social media and interpretation of law); Daxton R. Stewart, *Killer Apps: Vanishing Messages, Encrypted Communications, and Challenges to Freedom of Information Laws When Public Officials “Go Dark”*, 10 CASE W. RESV. J.L. TECH. & INTERNET 1 (2019) (discussing legal compliance and new forms of electronic communications); Jonathan David Shaub, *The Executive’s Privilege*, 70 DUKE L.J. 1, 15–18 (2020) (discussing the use of executive orders and the invocation of the executive privilege exemption under the PRA); Eric Lane et al., *Too Big A Canon in the President’s Arsenal: Another Look at United States v. Nixon*, 17 GEO. MASON L. REV. 737 (2010) (discussing executive privilege); Jonathan Turley, *Presidential Papers and Popular Government: The Convergence of Constitutional and Property Theory in Claims of Ownership and Control of Presidential Records*, 88 CORNELL L. REV. 651 (2003) (discussing executive privilege).

11. Letter from Noah Bookbinder & Nikhel Sus to Jared Kushner, (Oct. 28, 2020), <https://www.citizensforethics.org/wp-content/uploads/2020/10/Kushner-Records-Preservation-Letter-2020.10.28-Final.pdf> [<http://web.archive.org/web/20210326031950/>]

amending the PRA or strengthening congressional oversight of presidential records management and retention will not, in itself, eliminate the risk of increased corruption when the next pandemic or other crisis hits the United States, but it would shore up a critical mechanism for transparency and accountability,¹² both in general and in relation to pandemic-specific concerns, including weaknesses revealed by the shadow task force relating to medical supplies and supply chains.¹³

In exploring this issue, this Article intends, primarily, to identify some potential problems with the scope of power under the PRA authorizing a president to make unilateral decisions to destroy records, even when that president (or his or her close advisors or immediate family members) may have conflicts of interest with respect to disclosure of those records, and to highlight questions warranting additional research, inquiry, and investigation. This is an issue that should be resolved before the next pandemic because leaving it unresolved makes it more likely that public corruption relating to medical supplies, such as personal protective equipment (e.g., masks, surgical gowns, gloves, and face shields) and ventilators; vaccine development and distribution; and supply chain issues will go undetected at even the highest levels of government.¹⁴ Other national crises will likely involve different, though perhaps overlapping, concerns, depending upon the nature of the crisis, but adopting mechanisms for administering the PRA in a way that ensures transparency

<https://www.citizensforethics.org/wp-content/uploads/2020/10/Kushner-Records-Preservation-Letter-2020.10.28-Final.pdf> [hereinafter Bookbinder to Kushner Letter].

12. Letter from American Oversight et al. to David S. Ferriero (Oct. 8, 2020), <https://whistleblower.org/letter/letter-to-nara-on-preservation-of-presidential-records/> [<http://web.archive.org/web/20210326162607/https://whistleblower.org/letter/letter-to-nara-on-preservation-of-presidential-records/>] (“Presidential records are one of the most important resources the public has to hold its government officials accountable.”). The letter also notes multiple examples of “the Trump administration’s failure to honor its legal responsibility to create and preserve records.” *Id.*

13. See, e.g., Letter from Noah Bookbinder to Emory A. Rounds, III (Apr. 28, 2020), <https://www.citizensforethics.org/wp-content/uploads/legacy/2020/04/Shadow-Task-Force-Letter-FINAL.pdf> [<http://web.archive.org/web/20210328155247/https://www.citizensforethics.org/wp-content/uploads/legacy/2020/04/Shadow-Task-Force-Letter-FINAL.pdf>] [hereinafter Bookbinder to Rounds Letter] (cataloging instances of duplicated operations and reported overreach by members of the shadow task force relating to distribution of medical supplies); Ashley Collman, *Jared Kushner’s Shadow Coronavirus Task Force Used a Spreadsheet Called ‘VIP Update’ to Procure PPE from Inexperienced Trump Allies Over Legitimate Vendors*, BUS. INSIDER (May 6, 2020), <https://www.businessinsider.com/jared-kushner-coronavirus-task-force-prioritized-ppe-trump-associates-nyt-2020-5> [<http://web.archive.org/web/20210326163247/https://www.businessinsider.com/jared-kushner-coronavirus-task-force-prioritized-ppe-trump-associates-nyt-2020-5>] (reporting politicization of decision-making relating to procurement of medical supplies and resulting “bad deals” for the U.S. government).

14. See generally TRANSPARENCY INT’L, *supra* note 6.

and accountability would apply regardless of the nature of the crisis, and, indeed, regardless of the presence of a crisis.¹⁵ The office of the president (and the offices of his or her advisors) are offices of public trust at any time, especially during periods of extensive public vulnerability, such as during a pandemic or other national crisis.¹⁶ The public should therefore be able to rely on legal frameworks that both promote decision-making in the public interest by government officials and instill confidence in the mechanisms of transparency and accountability to which government officials are subject. This precept applies to the PRA.

The argument proceeds as follows: Part II provides contextual background describing the shadow task force, the potential problems that its communications raise for implementing the PRA, and the opportunities for corruption that its composition and activities create.¹⁷ Part III discusses the relevant provisions of the PRA, including proposed amendments passed in the House in 2019 and currently pending in the Senate.¹⁸ Part III also briefly explores prior judicial interpretations of the PRA recognizing a president's broad powers regarding records management, recordkeeping, and discretion to destroy records, and limiting the role of the judiciary to intervene in disputes over these matters.¹⁹ Part IV considers potential mechanisms for addressing the oversight and enforcement gaps in the PRA.²⁰ Part V offers a brief conclusion.²¹

II. THE SHADOW TASK FORCE

The first known case of COVID-19 in the United States was reported on January 20, 2020.²² One year later, the United States had identified more than 24.2 million cases and had reported more than 400,000 deaths.²³

15. See Mark Fenster, *Populism and Transparency: The Political Core of an Administrative Norm*, 89 U. CIN. L. REV. 286, 286 (2021) (“Transparency has become a preeminent administrative norm with unimpeachable status as a pillar of democracy.” Furthermore, “[a]cademics and think tanks have developed and provided support for the claim that information disclosure can help solve political and social problems, while non-governmental organizations advocate nationally and transnationally on transparency’s behalf.” *Id.*).

16. See Natelson, *supra* note 2, at 1146–50, 1159.

17. See *infra* Part II.

18. See *infra* Part III.

19. *Id.*

20. See *infra* Part IV.

21. See *infra* Part V.

22. Michelle Holshue, et al., *First Case of 2019 Novel Coronavirus in the United States*, 382 NEW ENG. J. MED. 929, 929 (Jan 31, 2020).

23. Yasemin Saplakoglu, *1st COVID-19 Case in US Reported a Year Ago*, LIVESCIENCE (Jan. 20, 2021), <https://www.livescience.com/one-year-since-first-official-us-covid-case.html> [<http://web.archive.org/web/20210326164416/https://www>].

Both numbers would continue to mount.²⁴ In the interim, the federal government created not one, but two coronavirus task forces.²⁵ The first—the formal, official task force, headed first by then-Secretary for Health and Human Services Alex Azar,²⁶ and shortly thereafter by then-Vice President Mike Pence²⁷—was formed in January 2020 and included, among other government officials, medical specialists, public health experts, and national security advisors.²⁸ According to a White House press release, the purpose of the official Coronavirus Task Force was to “monitor, contain, and mitigate the spread of the virus, while ensuring that the American people have the most accurate and up-to-date health and travel information.”²⁹ The second—the informal, “shadow” task force, led by then-President Donald Trump’s son-in-law and Senior Advisor Jared Kushner—was created in March 2020 and reportedly was comprised of

livescience.com/one-year-since-first-official-us-covid-case.html].

24. As of February 24, 2021, the total number of reported COVID-19 cases had reached more than 28 million, and more than 500,000 deaths. *COVID Data Tracker*, UNITED STATES CTRS. FOR DISEASE CONTROL, https://covid.cdc.gov/covid-data-tracker/#cases_casesper100klast7days [https://web.archive.org/web/20210406031221/https://covid.cdc.gov/covid-data-tracker/#cases_casesper100klast7days] (last visited Mar. 26, 2021).

25. Allyson Chiu, *Jared Kushner’s Coronavirus Briefing Debut Sparks Outcry, Confusion*, WASH. POST (Apr. 3, 2020), <https://www.washingtonpost.com/nation/2020/04/03/jared-kushner-coronavirus-briefing/> [<http://web.archive.org/web/20210326164930/https://www.washingtonpost.com/nation/2020/04/03/jared-kushner-coronavirus-briefing/>].

26. Press Release, White House, Statement from the Press Secretary Regarding the President’s Coronavirus Task Force (Jan. 29, 2020), <https://trumpwhitehouse.archives.gov/briefings-statements/statement-press-secretary-regarding-presidents-coronavirus-task-force/> [<http://web.archive.org/web/20210326170322/https://trumpwhitehouse.archives.gov/briefings-statements/statement-press-secretary-regarding-presidents-coronavirus-task-force/>].

27. Monica Alba et al., *Coronavirus Task Force Role Puts Pence — and His Future — on the Line*, NBC NEWS (Apr. 3, 2020), <https://www.nbcnews.com/politics/politics-news/coronavirus-task-force-role-puts-pence-his-future-line-n1176161> [<http://web.archive.org/web/20210326170710/https://www.nbcnews.com/politics/politics-news/coronavirus-task-force-role-puts-pence-his-future-line-n1176161>].

28. Jeanine Santucci, *What We Know about the White House Coronavirus Task Force Now That Mike Pence is in Charge*, USA TODAY (Feb. 27, 2020), <https://www.usatoday.com/story/news/politics/2020/02/27/coronavirus-what-we-know-mike-pence-and-task-force/4891905002/> [<http://web.archive.org/web/20210326171019/https://www.usatoday.com/story/news/politics/2020/02/27/coronavirus-what-we-know-mike-pence-and-task-force/4891905002/>].

29. Statement from the Press Secretary Regarding the President’s Coronavirus Task Force, *supra* note 26.

bankers, business representatives, and other private industry professionals, though its exact composition remains unknown.³⁰

Why the shadow task force was formed as a separate unit rather than integrating its functions into the official task force also remains opaque.³¹ Among its reported goals were establishing drive-through testing locations and delivering healthcare supplies.³² A few short weeks after its formation, however, a former volunteer member of the shadow task force filed a complaint with the House Oversight Committee, alleging that incompetence and political favoritism were impeding efforts to deliver personal protective equipment (PPE) and other supplies to frontline healthcare workers.³³ Moreover, the members of the shadow task force were operating “off the books” and, in many instances, using private email accounts to conduct task force business, practices that government watchdog groups and anti-corruption experts hail as warning signs of potential public corruption.³⁴ For example, Noah Bookbinder, Executive Director of Citizens for Responsibility and Ethics in Washington (CREW), in an April 28, 2020, letter to Emery A. Rounds, III, Director of the United States Office of Government Ethics, requesting investigation of the

30. Yasmeen Abutaleb et al., *Kushner Coronavirus Team Sparks Confusion, Plaudits Inside White House Response Efforts*, WASH. POST (Mar. 18, 2020), https://www.washingtonpost.com/politics/kushner-coronavirus-team-sparks-confusion-plaudits-inside-white-house-response-efforts/2020/03/18/02038a16-6874-11ea-9923-57073adce27c_story.html [http://web.archive.org/web/20210326171532/https://www.washingtonpost.com/politics/kushner-coronavirus-team-sparks-confusion-plaudits-inside-white-house-response-efforts/2020/03/18/02038a16-6874-11ea-9923-57073adce27c_story.html].

31. *See id.*

32. *Id.*

33. Yasmeen Abutaleb & Ashley Parker, *Kushner Coronavirus Effort Said to be Hampered by Inexperienced Volunteers*, WASH. POST (May 5, 2020), https://www.washingtonpost.com/politics/kushner-coronavirus-effort-said-to-be-hampered-by-inexperienced-volunteers/2020/05/05/6166ef0c-8e1c-11ea-9e23-6914ee410a5f_story.html [http://web.archive.org/web/20210326171848/https://www.washingtonpost.com/politics/kushner-coronavirus-effort-said-to-be-hampered-by-inexperienced-volunteers/2020/05/05/6166ef0c-8e1c-11ea-9e23-6914ee410a5f_story.html]. News outlets also reported that only a few dozen of the thousands of promised drive-through testing sites had opened. *See, e.g., id.*

34. *Id.* *See also* Press Release, CREW, Ethics Review Needed into Kushner Shadow Task Force (Apr. 28, 2020), <https://www.citizensforethics.org/news/press-releases/news-ethics-corruption-ethics-review-needed-kushner-shadow-task-force/> [http://web.archive.org/web/20210308054215/https://www.citizensforethics.org/news/press-releases/news-ethics-corruption-ethics-review-needed-kushner-shadow-task-force/] (on file with Citizens for Responsibility and Ethics in Washington) (last visited March 26, 2021) (“Despite little information publicly being known about the team Kushner has assembled, many members of Kushner’s shadow task force are private sector individuals with massive financial interests that likely pose serious conflicts of interest and have yet to be fully disclosed to the public.”).

shadow task force, wrote that task force members had undertaken “critical governmental functions” during a major public health crisis, and that they were “making life and death decisions” using the vast financial power of the federal government without any oversight, thereby “leaving the public in the dark about whether they [were] acting in [the public’s] best interests or their own.”³⁵

One source that could help shed light on the shadow task force’s activities, its failures, and any potential malfeasance in responding to the pandemic—a source that could aid Congress in passing legislation to minimize future misconduct during times of national crisis, including the next pandemic—is the trove of its members’ communications, including email correspondence and exchanges on other electronic platforms.³⁶ According to the complaint filed with the House Oversight Committee, the task force members’ use of private, rather than government, email accounts hindered their ability to develop effective relationships with PPE manufacturers and brokers, thereby undercutting their efforts to obtain the needed supplies and to secure efficient and reliable supply chains.³⁷ At least some of these communications are subject to federal recordkeeping requirements, such as the PRA.³⁸ The task force’s use of personal email accounts, however, not only makes compliance with the preservation

35. Bookbinder to Rounds Letter, *supra* note 13; see also Robinson Meyer, *Exclusive: Kushner Firm Built the Coronavirus Website Trump Promised*, ATLANTIC (Mar. 30, 2020), <https://www.theatlantic.com/politics/archive/2020/03/kushner-coronavirus-testing-oscar-company/609139/> [<http://web.archive.org/web/20210326172702/https://www.theatlantic.com/politics/archive/2020/03/kushner-coronavirus-testing-oscar-company/609139/>] (reporting on the development of government website to help the public locate coronavirus testing sites by a company with close family and financial ties to Kushner).

36. Letter from Noah Bookbinder to Hon. Pat Cipollene (Mar. 27, 2020), <https://www.citizensforethics.org/wp-content/uploads/legacy/2020/03/2020-3-27-WH-Counsel-letter-PRA-FACA.pdf> [<http://web.archive.org/web/20210326214645/https://www.citizensforethics.org/wp-content/uploads/legacy/2020/03/2020-3-27-WH-Counsel-letter-PRA-FACA.pdf>] [hereinafter Bookbinder to Cipollene Letter] (“[The public] must have access in the future to a full record of how the President and his staff handled this crisis to learn from any mistakes made and improve on how we address future pandemics.”); see also Rep. Raja Krishnamoorthi (D-IL), Opinion, *Enforcing the Presidential Records Act is Essential for Preserving Our Democracy’s Transparency, History*, THE HILL (Dec. 3, 2020), <https://thehill.com/blogs/congress-blog/politics/528516-enforcing-the-presidential-records-act-is-essential-for> [<http://web.archive.org/web/20210326173255/https://thehill.com/blogs/congress-blog/politics/528516-enforcing-the-presidential-records-act-is-essential-for>] (“COVID–19 will not be the last pandemic, and records from this time period will allow us to analyze the Trump administration’s successes and failures in combating the coronavirus. Without those records, future public health officials and politicians risk repeating the flawed pandemic response that we have seen this year.”).

37. Abutaleb & Parker, *supra* note 33.

38. Bookbinder to Cipollene Letter, *supra* note 36.

requirements of any communications subject to the PRA difficult to monitor, but also gives cover to any potential wrongdoing.³⁹

The PRA itself has limited oversight mechanisms and limited enforcement mechanisms, relying almost wholly on the good-faith compliance by a president and other executive branch officials.⁴⁰ Initially, the White House claimed that its practice of “screenshotting” communications from unofficial accounts, rather than forwarding them to official accounts, complied with the PRA, raising the possibility that the full complement of the shadow task force’s communications would remain beyond public scrutiny.⁴¹ More recently, the new Administration under President Joseph R. Biden has confirmed that the full records (not merely screenshots) are, in fact, subject to the recordkeeping and disclosure requirements of the PRA.⁴² Nevertheless, the extent to which a President possesses unilateral authority under the PRA to determine whether particular records may be destroyed, escaping preservation and disclosure, remains problematic, partly because such authority seems to presume that a president (and those advising him) will always act in good faith, with no conflicts of interest, and without corrupt intent.⁴³

Such a presumption rested on shaky foundations even before the failures of the shadow task force during the pandemic, and those foundations have crumbled even further since then.⁴⁴ In other words, even under normal conditions, a president may corruptly deem potentially damning records to be outside the scope of the PRA and therefore order them destroyed.⁴⁵ Because the risk of government corruption increases during times of crisis, including (and perhaps especially) public health crises,⁴⁶ the potential for inappropriately removing records from the scope of the PRA as a means of hiding wrongdoing also increases. Absent significant revisions to a wide range of legal and ethical requirements,

39. Abutaleb & Parker, *supra* note 33. (“[B]y using private email accounts, we have no assurances that their emails are being preserved. . . . This doesn’t prove anything nefarious is going on, but if something nefarious [were] going on, this is how they would do it.” (quoting CREW Spokesperson Jordan Libowitz)).

40. *See infra* Parts III–IV.

41. Bookbinder to Kushner Letter, *supra* note 11.

42. Press Release, CREW, White House Reverses Trump Records Policy, Confirms WhatsApp Messages Saved (Feb. 11, 2021), <https://www.citizensforethics.org/news/press-releases/white-house-reverses-trump-records-policy-confirms-whatsapp-messages-saved/> [<https://web.archive.org/web/20210326224556/https://www.citizensforethics.org/news/press-releases/white-house-reverses-trump-records-policy-confirms-whatsapp-messages-saved/>].

43. *See infra* Parts III–IV.

44. *See infra* Section III.C.

45. *See infra* Section III.C.

46. TRANSPARENCY INT’L, *supra* note 6.

many of which, including the PRA, are toothless in the face of noncompliance, the next pandemic or other national crisis will offer similar opportunities for government graft or malfeasance, and there is no reason to assume that any sitting president at any given time will necessarily behave ethically.

III. THE PRESIDENTIAL RECORDS ACT

For most of the nation's history, presidential records were considered the private property of the President.⁴⁷ Consequently, the preservation of, and public access to, such records depended solely on the President's own determination about which, if any, records would be preserved and made publicly available.⁴⁸ Not until 1978, several years after the Watergate scandal of the Richard M. Nixon Administration, and reports that President Nixon sought to destroy inculcating evidence of his role in the cover up,⁴⁹ did Congress enact legislation declaring presidential records to be public records owned by the United States, and setting forth requirements for their retention and management.⁵⁰ Designed primarily as a bill to create a historical preservation record, it also serves as an anti-corruption mechanism by requiring public transparency and enabling

47. Meghan M. Stuessy, *The Presidential Records Act: An Overview (R46129)*, CONG. RSCH. SERV., at 1 (Dec. 17, 2019), <https://crsreports.congress.gov/product/pdf/R/R46129/5> [<https://web.archive.org/web/20210407181300/https://crsreports.congress.gov/product/pdf/R/R46129/5>].

48. *Presidential Transition Directory*, U.S. GEN. SERVS. ADMIN., <https://www.gsa.gov/governmentwide-initiatives/presidential-transition-directory/records-management-guidelines/presidential-records> [<https://web.archive.org/web/20210326224628/https://www.gsa.gov/governmentwide-initiatives/presidential-transition-directory/records-management-guidelines/presidential-records>] (last visited Oct. 30, 2020) (“The PRA changed the legal ownership of the official records of the President from private to public and established a new statutory structure under which Presidents must manage their records.”).

49. David S. Ferrero, *NARA's Role under the Presidential Records Act and the Federal Records Act*, 49 PROLOGUE MAGAZINE, no. 2, (2017), at 1, <https://www.archives.gov/publications/prologue/2017/summer/archivist-pra-fra> [<https://web.archive.org/web/20210326224726/https://www.archives.gov/publications/prologue/2017/summer/archivist-pra-fra>]. Before enacting the PRA, and in direct response to President Nixon's efforts to destroy the Watergate tapes, Congress first passed the Presidential Recordings and Materials Preservation Act in 1974, enabling the seizure of the Nixon recordings and documents and their placement in the National Archives. *Id.*

50. Stuessy, *supra* note 47, at 1. Pursuant to The Presidential Records Act of 1978, 44 U.S.C. § 2202, “[t]he United States shall reserve and retain complete ownership, possession, and control of Presidential records; and such records shall be administered in accordance with the provisions of this chapter.” *Id.*

accountability for wrongdoing by government officials.⁵¹ This Part first reviews the basic structure and pertinent provisions of the PRA, as amended in 2014,⁵² and then summarizes the most recent congressional effort to modernize the PRA’s recordkeeping retention and management requirements in the Electronic Message Preservation Act, passed in the House in 2019 and pending Senate action as of this writing.⁵³ Finally, this Part briefly reviews judicial interpretation and application of the PRA.⁵⁴

A. The Presidential Records Act of 1978

The Presidential Records Act, in addition to asserting public ownership of presidential records,⁵⁵ imposes a duty on an incumbent President to create, maintain, and manage such records.⁵⁶ More specifically, the PRA requires an incumbent President to “take all such steps as may be necessary to assure that the activities, deliberations, decisions, and policies that reflect the performance of the President’s constitutional, statutory, or other official or ceremonial duties are adequately documented” and to ensure “that such records are preserved and maintained as Presidential records pursuant to the requirements of this section and other provisions of law.”⁵⁷ The statute defines “Presidential records” as follows:

[D]ocumentary materials, or any reasonably segregable portion thereof, created or received by the President, the President’s immediate staff, or a unit or individual of the Executive Office of the President whose function is to advise or assist the President, in the course of conducting activities which relate to or have an effect upon the carrying out of the constitutional, statutory, or other official or ceremonial duties of the President.⁵⁸

51. Bookbinder to Cipollene Letter, *supra* note 36 (noting, in light of the pandemic: “Now, more than ever, we must be vigilant in complying with laws like the PRA . . . that were enacted to protect our nation’s interest in transparency and a full historic record.”)

52. *See infra* Section III.A.

53. *See infra* Section III.B.

54. *See infra* Section III.C.

55. 44 U.S.C. § 2202.

56. 44 U.S.C. § 2203(a).

57. *Id.*

58. 44 U.S.C. § 2201(2). Vice presidential records also fall within the scope of the PRA, and an incumbent Vice President is subject to the same recordkeeping and management requirements for vice presidential records as an incumbent President is for presidential records. *Id.* § 2207.

The term “documentary materials,” in turn, means “all books, correspondence, memoranda, documents, papers, pamphlets, works of art, models, pictures, photographs, plats, maps, films, and motion pictures, including, but not limited to, audio and visual records, or other electronic or mechanical recordations, whether in analog, digital, or any other form.”⁵⁹ The PRA’s recordkeeping requirements do not include a President’s personal records.⁶⁰

Records that otherwise fall within the scope of the PRA, and are therefore eventually made available to the public, may nevertheless be subject to delayed public disclosure.⁶¹ Before the end of each term in office, a President may designate certain materials to be protected from public access for a period of up to twelve years if the materials fall into at least one of six categories.⁶² These categories include records that (1) have been properly classified pursuant to the criteria set forth in an Executive Order specifically authorizing the records to be kept secret “in the interest of national defense or foreign policy[;]”⁶³ (2) pertain to “appointments to federal office;”⁶⁴ (3) are specifically exempted by another statute if such statute leaves “no discretion on the issue” of whether to make the record publicly available and establishes the criteria under which the record is to be withheld;⁶⁵ (4) are privileged or confidential, that are obtained from a person, and that contain trade secrets, commercial, or financial information;⁶⁶ (5) contain confidential communications giving or receiving advice “between the President and the President’s advisers, or between such advisers;”⁶⁷ or (6) are personnel, medical, or other similar files “the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.”⁶⁸ These restrictions are themselves subject to certain exceptions under the PRA, which sets forth the procedures by

59. 44 U.S.C. § 2201(1).

60. 44 U.S.C. § 2201(2)(B). The PRA defines personal records as “all documentary materials, or any reasonably segregable portion thereof, of a purely private or nonpublic character which do not relate to or have an effect upon the carrying out of the constitutional, statutory, or other official or ceremonial duties of the President.” *Id.* § 2201(3). Also excluded are “(i) official records of an agency [as defined in the Freedom of Information Act]; (ii) personal records; (iii) stocks of publications and stationery; or (iv) extra copies of documents produced only for convenience of reference when such copies are clearly so identified.” *Id.* § 2201(2)(B).

61. 44 U.S.C. § 2204(a).

62. *Id.*

63. 44 U.S.C. § 2204(a)(1)(A).

64. 44 U.S.C. § 2204(a)(2).

65. 44 U.S.C. § 2204(a)(3). This category carves out an exception to the exemption for certain records subject to the Freedom of Information Act. *Id.*

66. 44 U.S.C. § 2204(a)(4).

67. 44 U.S.C. § 2204(a)(5).

68. 44 U.S.C. § 2204(a)(6).

which Congress, the judiciary, and later presidential administrations may, subject to constitutional rights and privileges, obtain special access to restricted records that remain unavailable to the public at large.⁶⁹

Most significantly for purposes of this Article is the power granted to the incumbent President to dispose of any of his or her presidential records that have lost their “administrative, historical, informational, or evidentiary value”⁷⁰ Before an incumbent President disposes of such records, however, the PRA directs him or her to consult with and obtain the written opinion of the Archivist concerning the proposed disposal.⁷¹ Under these circumstances, the Archivist is to make a determination about whether to seek the advice of Congress concerning the proposed disposal.⁷² The President may proceed with disposal only if the Archivist states that the advice of Congress will not be sought. If, however, the Archivist determines that the particular presidential records are of special interest to Congress, or that consulting with Congress before disposing of them would be in the public interest, the PRA requires the Archivist to “request the advice” of specific committees in each House of Congress.⁷³ If the Archivist informs the President of the Archivist’s intent to seek the advice of Congress, then the President may nevertheless dispose of the specified records but must submit “copies of the disposal schedule . . . to the appropriate Congressional Committees at least 60 calendar days of continuous session of Congress in advance of the proposed disposal date.”⁷⁴

The structure and substance of the PRA leave significant gaps in its implementation scheme, most notably of which are the lack of oversight and enforcement mechanisms.⁷⁵ The absence of such mechanisms from the statutory scheme have resulted in the creation of what is effectively an honor system for compliance.⁷⁶ A meaningful revision to the PRA would

69. 44 U.S.C. § 2205. The Archivist and relevant employees of the National Archives and Records Administration are also afforded access to otherwise restricted records. *Id.*

70. 44 U.S.C. § 2203(c).

71. *Id.*

72. 44 U.S.C. §§ 2203(c)–(e).

73. 44 U.S.C. § 2203(e). Under the relevant circumstances, the Archivist must request advice from the Committee on Rules and Administration and the Committee on Governmental Affairs of the Senate and from the Committee on House Oversight and the Committee on Government Operations of the House of Representatives. *Id.*

74. 44 U.S.C. § 2203(d).

75. *See infra* Section IV.A.

76. As Director of George Washington University’s National Security Archive Thomas Blanton observes, “[T]he Presidential Records Act [is] a kind of honor system that is really outdated.” *See* Bryan Naylor, *Off The Record: Trump Administration Criticized For How It Keeps Documents*, NPR (Feb. 24, 2020), <https://www.npr.org/2020/02/24/808214593/off-the-record-trump-administration-criticized-for-how-it-keeps-documents> [https://web.

eliminate reliance on nothing more than the good faith of those subject to its provisions for compliance.⁷⁷

B. The Electronic Message Preservation Act (Passed by the House)

In March 2019, the House passed House Bill 1582, the most recent effort by Congress to update the PRA.⁷⁸ The measure would require the National Archives and Records Administration (NARA) to promulgate regulations establishing recordkeeping and records management standards for preserving electronic presidential records economically and efficiently during a President's term of office. Such regulations must include, among other records management controls, "a process to ensure the electronic records management system to be used by the President for the purposes of complying with the [other electronic records management requirements set forth in the bill]."⁷⁹

In addition, the Electronic Message Preservation Act would require NARA to provide annual certification of whether an incumbent President's electronic records management methods comply with the standards of the Presidential Records Act, and, within a year after a President's term of office has ended, provide a report regarding electronic records "deposited into that President's Presidential archival depository" and whether electronic records management methods met specified requirements.⁸⁰

In his Statement for the Record on the Electronic Message Preservation Act, Chairman Elijah E. Cummings offered his perspective

[archive.org/web/20210125233635/https://www.npr.org/2020/02/24/808214593/off-the-record-trump-administration-criticized-for-how-it-keeps-documents](https://www.npr.org/2020/02/24/808214593/off-the-record-trump-administration-criticized-for-how-it-keeps-documents)].

77. See *infra* Part IV.

78. Electronic Message Preservation Act, H.R. 1582, 116th Cong. (2019). Introducing the bill on the House floor, Representative Elijah E. Cummings, then-Chair of the House Committee on Oversight and Reform, and the Bill's sponsor, stated that the goal of the bill was to "moderniz[e]" the Federal Records Act and the Presidential Records Act. Elijah E. Cummings, Chairman, House Comm. on Oversight & Reform, Statement for the Record on H.R. 1582, Electronic Message Preservation Act (Mar. 12, 2019), <https://oversight.house.gov/sites/democrats.oversight.house.gov/files/Statement%20for%20the%20Record%20EEC%20EMPA.pdf> [<http://web.archive.org/web/20210319075113/https://oversight.house.gov/sites/democrats.oversight.house.gov/files/Statement%20for%20the%20Record%20EEC%20EMPA.pdf>]; Press Release, House Comm. on Oversight & Reform, House Passes Cummings Bill to Require Agencies and the White House to Preserve Email Records (Mar. 13, 2019), <https://oversight.house.gov/news/press-releases/house-passes-cummings-bill-to-require-agencies-and-the-white-house-to-preserve> [<http://web.archive.org/web/20210318005514/https://oversight.house.gov/news/press-releases/house-passes-cummings-bill-to-require-agencies-and-the-white-house-to-preserve>].

79. H.R. 1582.

80. *Id.*

on the potential for improved accountability under the PRA: “This legislation would provide accountability to encourage every president to have the controls in place that are necessary to preserve emails and other electronic records.”⁸¹ Unfortunately, Chairman Cummings’ statement seems more aspirational for what he wanted the amendments to accomplish than descriptive of what they likely would, in fact, accomplish insofar as encouraging the conduct of future Presidents. First, and most importantly, the amendments add no penalties for failure to comply.⁸² Second, the amendments add no direct oversight or enforcement provisions.⁸³ They add reporting requirements after the fact, but they do not change the disposal power of an incumbent President, and they do not apply to non-electronic records.⁸⁴ Accordingly, even with the proposed amendments, the execution of the PRA would continue to operate primarily as an honor system.⁸⁵

C. Judicial Treatment of the Presidential Records Act

Judicial interpretations of the PRA reinforce problems with reliance on the honor system for implementation of the statute. The courts have consistently held that an incumbent President has plenary power over management of presidential records during his or her term of office, including broad discretion in determining which records to preserve or destroy.⁸⁶ In addition, the courts have recognized only a very limited role for judicial policing of issues related to the PRA’s implementation.⁸⁷ A few narrow legal issues are amenable to judicial intervention, including, for example, reviewing guidelines about what records qualify as a

81. Cummings, *supra* note 78.

82. See H.R. 1582.

83. See *id.*

84. See *id.*

85. See *infra* Part IV. If a President acts in good faith, in the best interests of the public, an honor system works tolerably well. If, however, a President acts in bad faith, in his or her own best interests, or those of his or her family members or close aides, an honor system sows the seeds of not only its own destruction, but the destruction of the very institutions designed to hold wrongdoing public officials to account.

86. See Citizens for Resp. & Ethics in Wash. v. Trump, 302 F. Supp. 3d 127 (D.D.C. 2018), *aff’d*, 924 F.3d 602 (D.C. Cir. 2019); Jud. Watch, Inc. v. United States Secret Serv., 726 F.3d 208 (D.C. Cir. 2013); Armstrong v. Bush, 924 F.2d 282 (D.C. Cir. 1991).

87. See Armstrong v. Bush, 139 F.R.D. 547 (D.D.C. 1991) (following the understanding that the PRA does not allow judicial review); Armstrong v. Exec. Off. of the President, Off. of Admin., 1 F.3d 1274 (D.C. Cir. 1993) (noting that while the PRA precludes judicial review, some presidential records may be subject to review under the Freedom of Information Act).

presidential record under the PRA.⁸⁸ Because the PRA creates no private right of action, however, judicial review of private-party challenges to a President's general compliance with the PRA would disrupt the finely-wrought balance Congress achieved by giving a President fulsome control over presidential records while in office, on the one hand, and public ownership and access to records after the end of the President's term, on the other.⁸⁹

Between the nearly complete control that the courts have recognized a President exercises over presidential records during his or her term in office and the limitations that the judicial branch has concluded apply to its power to intervene, the courts—like the law itself—seem to presume good faith on the part of the relevant institutional actors.⁹⁰ Such a presumption is misplaced.

IV. ELIMINATING THE HONOR SYSTEM AS THE PRIMARY BASIS FOR COMPLIANCE

A legal framework that relies solely, or even primarily, on the honor system for its administration fails to recognize that corruption and conflicts of interest flourish in the absence of meaningful oversight and enforcement mechanisms.⁹¹ This is particularly true during times of national crisis.⁹² This Part explores whether Congress should consider adopting measures that would not depend primarily on a President's good faith implementation of the PRA.

The PRA presents numerous weaknesses needing attention before the next pandemic or other national crisis. Some potential amendments may be politically unviable. Some may implicate separation of powers concerns. This Article leaves extended discussion of such difficulties for another day, focusing instead on first-line questions concerning the need for possible changes to the PRA to minimize the opportunities for unchecked corruption.

A. Gaps in Oversight and Enforcement

Although the PRA's language is written in mandatory terms, the execution of the statute's provisions relies on the good faith of all relevant

88. See *Citizens for Resp. & Ethics in Wash. v. Cheney*, 593 F. Supp. 2d 194, 215 (D.D.C. 2009).

89. See *Armstrong*, 924 F.2d at 290.

90. See *CREW v. Trump*, 302 F. Supp. 3d at 127; *Jud. Watch*, 726 F.3d at 208; *Armstrong*, 924 F.2d at 282.

91. See *supra* Part I.

92. *Id.*

institutional actors, in particular the incumbent President, the Archivist, and the congressional members on the pertinent committees.⁹³ First, the PRA contains no mechanism for enforcing provisions requiring the President to document, preserve, and maintain presidential records, as defined by the statute.⁹⁴ More specifically, the PRA mandates that a President implement “records management controls and other necessary actions” to “take all such steps as may be necessary to assure that the activities, deliberations, decisions, and policies that reflect the performance of the President’s constitutional, statutory, or other official or ceremonial duties are adequately documented and that such records are preserved and maintained as Presidential records”⁹⁵ The determination of what “steps . . . may be necessary” to assure that the statutory list of subjects within the scope of the PRA “are adequately documented and that such records are preserved and maintained as Presidential records,” however, falls solely to an incumbent President.⁹⁶ The statute offers neither any additional guidelines—other than the equally ill-defined phrase, “[t]hrough the implementation of records management controls and other necessary actions”⁹⁷—nor any potential sanction which may be imposed upon a President who fails, whether by accident or by design, to take necessary steps to adequately document, preserve, and maintain presidential records.

Accordingly, for example, the communications of White House Senior Advisor Jared Kushner’s shadow task force members, some of which occurred using an encrypted application that erases messages once

93. Courts and other commentators have made similar observations. *See, e.g., Armstrong*, 924 F.2d at 290 (“In declining to give outsiders the right to interfere with White House recordkeeping practices, Congress presumably relied on the fact that subsequent Presidents would honor their statutory obligations to keep a complete record of their administrations.”); Kel McClanahan, *Trump and the Demise of the Presidential Records Honor System*, JUST SEC. (Mar. 22, 2019), <https://www.justsecurity.org/63348/trump-and-the-demise-of-the-presidential-records-honor-system/> [<https://web.archive.org/web/20210326025403/https://www.justsecurity.org/63348/trump-and-the-demise-of-the-presidential-records-honor-system/>] (referring to the PRA as an “honor system”); Letter from American Oversight et al., *supra* note 12 (stating that the signatories were “alarmed and deeply concerned by the Trump administration’s failure to honor its legal responsibility to create and preserve records.”); Krishnamoorthi, *supra* note 36 (“In practice, . . . the PRA is essentially an honor system”).

94. 44 U.S.C. § 2203.

95. 44 U.S.C. § 2203(a).

96. *Id.* *See also* Citizens for Resp. & Ethics in Wash. v. Trump, 924 F.3d 602, 603–04 (D.C. Cir. 2019) (noting that that PRA “provides that the President, during his term in office, shall assume ‘exclusive[] responsib[ility] for custody, control, and access to such Presidential records,’”).

97. 44 U.S.C. § 2203(a).

they have been read,⁹⁸ may have created an opportunity to avoid documentation, preservation, and maintenance of information that could reveal potential wrongdoing related to medical supplies and supply chains simply because those individuals responsible for ensuring such recordkeeping may have had the approval—tacit or otherwise—of the incumbent President not to comply with the PRA. A President who wishes to avoid the requirements of the PRA, both as a general matter and with respect to future national crises, such as the next pandemic, would seem to be under no obligation, as a practical matter, to preserve potentially inculpatory records, nor, for that matter, would any aides or advisors who are acting under the President’s direction or with his or her approval.⁹⁹

Second, the PRA contains neither any mechanism for enforcing the provision requiring a President to obtain the Archivist’s views in writing concerning the proposed disposal of presidential records, nor any penalty for failing to do so.¹⁰⁰ Consequently, as a practical matter, a President enjoys unfettered discretion in determining whether to obtain the Archivist’s written views before disposing of presidential records, and whether to ignore any such views he does obtain in determining what records to document, preserve, and maintain. The statute places only three limitations on a President’s decision to dispose of presidential records: (1) the records must “no longer have administrative, historical, informational, or evidentiary value[;]”¹⁰¹ (2) the President must “obtain[] the views, in writing, of the Archivist concerning the proposed disposal of such Presidential records;”¹⁰² and (3) the Archivist must provide a statement indicating that he or she does not intend to seek the advice of Congress.¹⁰³ The statute makes no provision for standards against which to measure whether particular records have “administrative, historical, informational, or evidentiary value[;]” and the standards applied by a person operating in good faith and in the public interest will likely differ greatly from one operating in bad faith and in his or her own private interest.¹⁰⁴ Moreover, in light of the absence of an investigatory or enforcement power vested in NARA or elsewhere,¹⁰⁵ and of the supervisory relationship of the President

98. Bookbinder to Kushner Letter, *supra* note 11.

99. See *CREW*, 924 F.3d at 603–04.

100. See 44 U.S.C. § 2203.

101. 44 U.S.C. § 2203(c).

102. 44 U.S.C. § 2203(c)(1).

103. 44 U.S.C. § 2203 (c)(2).

104. 44 U.S.C. § 2203(c).

105. The Archivist and the United States Attorney General do share authority under 44 U.S.C. § 3106 to investigate the unlawful removal or destruction of presidential records, but that authority does not extend to disposal decisions by a President relating to

over the Archivist,¹⁰⁶ an incumbent President has wide latitude to elect not to obtain the Archivist's views, to ignore the Archivist's views, or even to install a loyalist in the position to ensure that any written views the incumbent President does secure from the Archivist will be consistent the President's own preferences.¹⁰⁷

A crisis management task force that operates without transparency, as Kushner's pandemic shadow task force did, not only raises issues of public trust, but also fosters an environment in which corruption and graft thrive.¹⁰⁸ For example, because the shadow task force reportedly gave priority to tips and bids on medical supplies from "VIP" individuals with political ties to Trump or who gained Trump's personal attention or favor rather than relying on open processes with legitimate and experienced suppliers, the government entered into several reported "botched deals."¹⁰⁹ In addition, government watchdog groups have expressed concern about the "substantial potential for conflicts of interest" among shadow task force members "and the risk that they may use their government positions for private gain."¹¹⁰

The American public should have access to the communications giving rise to the shadow task force's operations, deal-making, and decision-making in order to avoid similar potential conflicts of interest and malfeasance during any future national crisis overseen by an incumbent President and his or her close advisors who may not act in the public's best interest.¹¹¹ The provisions of the PRA, however, simply provide no

presidential records because of the President's virtually unchecked disposal power of such records under 44 U.S.C. § 2203.

106. Ferriero, *supra* note 49.

107. The President, "with the advice and consent of the Senate[.]" appoints the National Archivist. 44 U.S.C. § 2103(a).

108. *See supra* Part I.

109. Collman, *supra* note 13 (reporting that among the more egregious dead-end deals was a \$69 million contract awarded to a Silicon Valley engineer for 1,000 ventilators to be sent to New York after he caught Trump's attention by tweeting at him; that the engineer never delivered, and New York was forced to try to recoup the costs).

110. Bookbinder to Rounds Letter, *supra* note 13 (citing public reports documenting only "limited vetting of private companies' and executives' financial interests," which has "rais[ed] questions about the motivations and potential conflicts" of the [shadow task force]" (quoting Adam Cancryn & Dan Diamond, *Behind the Scenes, Kushner Takes Charge of Coronavirus Response*, POLITICO (Apr. 1, 2020), <https://politi.co/3eiSJH3> [<https://web.archive.org/web/20210409195027/https://www.politico.com/news/2020/04/01/jared-kushner-coronavirus-response-160553>])).

111. Bookbinder to Cipollene Letter, *supra* note 36 ("[W]e must have access in the future to a full record of how the President and his staff handled this crisis to learn from any mistakes made and improve on how we address future pandemics."); Krishnamoorthi, *supra* note 36 ("The PRA may seem like an administrative detail, and in practice it is, but it allows us to save our history and learn from our past.").

guarantee that any or all relevant records will have escaped destruction under the authority conferred upon a President to make disposal decisions without meaningful oversight or threat of sanctions for failing to honor the limitations set forth in the statute.¹¹²

Third, the PRA contains only vague guidelines for when the Archivist should consult Congress regarding the proposed disposal of particular presidential records of an incumbent President, and it contains no mechanism for enforcing the consultation provision, or for imposing any penalty for the Archivist's failure to do so.¹¹³ Whenever the Archivist determines that the proposed disposal of materials involve presidential records that may be "of special interest to the Congress" or that "consultation with the Congress regarding the disposal of these particular records is in the public interest," the PRA requires the Archivist to "request the advice" of specified committees in the House and the Senate.¹¹⁴

In responding to a President's request for views on disposing of presidential records, the Archivist, like the President, is expected, as a government official holding an office of public trust, to make his or her determinations in good faith.¹¹⁵ The Archivist is generally unlikely to have a direct interest in the disposal or preservation of any particular presidential records on which an incumbent President has sought his or her advice, and is therefore less likely to subvert the process to advance his or her own personal interest. As an employment matter, however, the subordinate role of the Archivist to the President may implicate the Archivist's interests indirectly. The Archivist reports to the President, and could come under undue pressure, including threat of dismissal, from a President seeking to dispose of certain records without complying with the procedures set forth by the PRA.¹¹⁶ Subtle pressure might lead the Archivist to determine that, absent concrete guidelines, the records at issue are not of special interest to Congress or that consulting with Congress would not be in the public interest. More direct pressure might cause an Archivist to avoid requesting the advice of Congress, even if he or she believes that he or she should do so. In either scenario, neither the President nor the Archivist is subject to any sanction under the PRA.¹¹⁷

112. See 44 U.S.C. § 2203.

113. 44 U.S.C. §§ 2203(c)–(e).

114. 44 U.S.C. § 2203(e).

115. Natelson, *supra* note 2 at 1088.

116. The President may remove the Archivist pursuant to 44 U.S.C. § 2103, and is required to "communicate the reasons for any such removal to each House of the Congress." 44 U.S.C. § 2103(a). The statute does not require good cause for removal, however. See *id.*

117. See 44 U.S.C. § 2203.

If the Archivist does inform the President of his or her intent to request advice from Congress about the proposed disposal, the only obligation the President has at that point is to notify Congress within certain specified timeframes in advance of the schedule for disposal.¹¹⁸ Again, the PRA imposes no penalty if the President does not comply. In addition, the PRA imposes no obligation on Congress to act.¹¹⁹

Nothing in the public record suggests that the presidential records relating to the shadow task force have involved the role of the Archivist or Congress in disposal determinations, but little imagination is required to predict how an unscrupulous President seeking to hide his or her wrongdoing, or the wrongdoing of close advisors, during a time of national crisis could corrupt the role of the Archivist under the PRA. Moreover, setting aside the consultation provisions of the PRA, the statute confers no direct oversight power upon the Archivist or another official at NARA even to monitor White House compliance with the PRA, let alone enforce it.¹²⁰ Rather, NARA's role is one of providing "advice and assistance to the White House on records management practices upon request."¹²¹

With only an advisory role for the Archivist and NARA, and a toothless mandate under the PRA to document and preserve presidential records, future Presidents who dispose of records that potentially show a President's own wrongdoing or that of his or her close advisors would face no penalty. Relying on the good faith of those responsible for executing the PRA at any time, but especially during a pandemic or other national crisis, is no longer enough (assuming it ever was). Indeed, well before the pandemic outbreak and the resulting formation of the shadow task force, with Kushner at the helm, the communications practices of Trump's son-in-law and Senior Advisor prompted the House of Representatives to pass the Electronic Message Preservation Act, a bill addressing—to some extent—the lack of oversight and enforcement provisions in the PRA amid fears that at least some White House officials were not properly creating and preserving presidential records.¹²²

118. 44 U.S.C. § 2203(d).

119. *See* 44 U.S.C. 2203.

120. Ferriero, *supra* note 49.

121. *Id.*

122. This concern is not a new one. Congress has made multiple attempts to amend the PRA over the years, and each time, the measure has died. *See* McClanahan, *supra* note 93. The Electronic Message Preservation Act appears similarly ill fated, as the bill languished in the Senate for the duration of the 116th Congress after referral to the Senate Committee on Homeland Security and Governmental Affairs, and it has not been taken up anew in the 117th Congress. *See* H.R. 1582.

B. Categories for Institutional Restructuring

The foregoing considerations suggest the need for review of four general categories of institutional restructuring to increase oversight and establish enforcement mechanisms. The first category concerns the roles of the Archivist and NARA. Congress should consider conferring enhanced rulemaking, oversight, and enforcement authority on NARA, directing the Archivist to promulgate specific standards that a President must follow for records management and preservation of electronic records, as would be required by the Electronic Message Preservation Act,¹²³ and other, non-electronic, records. The Archivist should also be granted power to establish specific standards against which to measure whether records of which a President has proposed disposal “may be of special interest to Congress” or are “in the public interest.”¹²⁴ Congress should also consider whether to insulate an Archivist from undue pressure by a President who may be making disposal decisions based on his or her own best interest rather than the public’s best interest. One option in this regard would be to establish an independent review board to make disposal decisions; another would be to remove the Archivist from the President’s supervision or to permit removal only for good cause. As an enforcement matter, Congress should consider empowering the Archivist, or another oversight entity, such as the NARA Office of Inspector General (NARA OIG), to sue for access to all presidential records to prevent disposal.

The second category requiring review involves the judicial branch. In light of the limitations on the judiciary to adjudicate private lawsuits seeking to enforce the PRA,¹²⁵ Congress should consider expanding the role of the courts to allow for enforcement of records retention and management and to prevent unilateral disposition of presidential records by a President, while still preventing public access to the records until after the expiration of a President’s term of office. In this regard, in addition to authorizing prophylactic lawsuits by the Archivist or the NARA OIG to prevent a President from unilaterally disposing of presidential records, Congress might consider specific and robust whistleblower provisions pertaining directly to the disposal by a President of any presidential records without prior input from the Archivist and, where relevant, without notification to Congress, under the PRA.¹²⁶

123. H.R. 1582.

124. 44 U.S.C. § 2203(e).

125. *See supra* Section III.C.

126. *See* 44 U.S.C. §§ 2203(c)–(e).

Of course, at present, a President enjoys wide latitude to dispose of presidential records.¹²⁷ Accordingly, the third category for congressional consideration is the erection of sturdier guardrails to protect against a President's unilateral ability to destroy records while in office. In addition to the possibility of allowing the Archivist or the NARA OIG to sue to prevent unlawful disposal, Congress might consider removing the disposal decision-making power from a President altogether. One option in this regard would be to require a President to turn over all records to NARA, or perhaps, to an independent, nonpartisan body for review, with disposal decisions made in accordance with specified standards—including a publicly released report documenting the records that are to be destroyed and a period for public comment.

The fourth, and final, PRA category that is ripe for congressional review is the lack of any sanction or penalty for a President's failure to comply with the current mandates of the PRA. At present, for example, though the PRA directs the President to obtain written confirmation from the Archivist that specified records may be destroyed, no penalty attaches for a President's failure to do so or for ignoring the Archivist's advice, recommendation, or direction to the contrary.¹²⁸ Unless Congress or the voters are willing to hold such a President accountable, then potentially inculpatory records may remain forever hidden from public scrutiny, and potential evidence of corruption may go undetected. Neither Congress nor voters, however, can exercise their respective accountability mechanisms if they have no window into the content, or even the existence, of the destroyed records. The Electronic Message Preservation Act seeks to impose some measure of accountability in the form of a report the Archivist would be required to issue after a President has left office confirming whether the departed President has complied with the preservation requirements of the PRA.¹²⁹ A report indicating that a departed President has not so complied could, theoretically, trigger additional investigation, but would not necessarily do so.

One possible amendment that would be more likely to ensure strict compliance is subjecting a noncompliant President to criminal sanctions. A relevant criminal statute that could be made applicable to a President provides, in pertinent part:

127. *See, e.g.*, *Citizens for Resp. & Ethics in Wash. v. Trump*, 924 F.3d 602, 603-04 (D.C. Cir. 2019); *Citizens for Resp. & Ethics in Wash. v. Trump*, 302 F. Supp. 3d 127 (D.D.C. 2018); *Jud. Watch, Inc. v. United States Secret Serv.*, 726 F.3d 208 (D.C. Cir. 2013); *Armstrong v. Bush*, 924 F.2d 282 (D.C. Cir. 1991).

128. *See* 44 U.S.C. § 2203.

129. Electronic Message Preservation Act, H.R. 1582, 116th Cong. (2019).

[w]hoever willfully and unlawfully conceals, removes, mutilates, obliterates, or destroys, or attempts to do so, or, with intent to do so takes and carries away any record, proceeding, map, book, paper, document, or other thing, filed or deposited . . . in any public office . . . shall be fined under this title or imprisoned not more than three years, or both.¹³⁰

The plenary power granted by the PRA to a President over the creation, management, and disposal of his or her presidential records, including the power to determine which records to destroy currently renders this provision null against a President (and perhaps also against any staff or advisors who act at the President's behest or with his or her approval). It is one thing to bar public disclosure of certain presidential records under one of the statutory exemptions.¹³¹ It is another thing entirely to allow for the unilateral destruction of presidential records. Congress should consider filling this gap by removing the power of a President to destroy or otherwise dispose of presidential records without sanction, regardless of whether he or she complies with the PRA's requirements to obtain the Archivist's opinion. Relatedly, Congress should consider requiring the President to abide by the Archivist's recommendation or prohibiting the disposal of presidential records without the express consent of Congress.

V. CONCLUSION

Viewing the purposes of the PRA as nothing more than normal recordkeeping or preservation of the historical record—as important as those features are—misses its broader significance for the public interest, especially when records created during a time of national crisis, such as a pandemic, may provide important information about areas of governance that need more effective structures or processes of transparency, oversight, or accountability.¹³² For the government to be able to plan appropriately

130. 18 U.S.C. § 2071(a). Under current Department of Justice legal interpretation, a sitting President cannot be criminally charged. However, a former President may be subject to criminal prosecution. *See A Sitting President's Amenability to Indictment & Criminal Prosecution*, 24 Op. O.L.C. 222 (2000), <https://www.justice.gov/olc/opinion/sitting-president%E2%80%99s-amenability-indictment-and-criminal-prosecution> [<https://web.archive.org/web/20210409215848/https://www.justice.gov/olc/opinion/sitting-president%E2%80%99s-amenability-indictment-and-criminal-prosecution>].

131. *See supra* Part III.A; *see also* 44 U.S.C. § 2204(a).

132. As John Adams, writing on the importance of transparency to the preservation of democratic self-governance, stated, “liberty cannot be preserved without a general knowledge among the people, who have a right, . . . an indisputable, unalienable, indefeasible, divine right to that most dreaded and envied kind of knowledge, I mean, of

for future crises and to prevent, or at least minimize, future opportunities for corruption, and for the public to be able to hold wrongdoers to account, the importance of access to previously hidden communications cannot be overstated.¹³³

The Framers believed that government officials held positions of public trust, but they were also clear-eyed about the nature of humankind and the temptations of power and greed to abandon the public trust in pursuit of private gain.¹³⁴ They understood the danger posed by public corruption to democratic self-governance.¹³⁵ Accordingly, they designed the Constitution to provide a bulwark against corruption by government officials.¹³⁶ In reckoning with statutory frameworks governing the conduct of a President, reliance on an honor system for compliance ignores the realities of human nature that were of such sufficient concern to the Founders that they constitutionalized mechanisms to minimize its effects on our democracy. The time has come to revisit the underlying presumptions of good faith upon which the Presidential Records Act is based so that our nation is more well prepared to stave off potential corruption by a President or his or her close advisors during the next pandemic or other national crisis.¹³⁷

the characters and conduct of their rulers.” JOHN ADAMS, A DISSERTATION ON THE CANON AND FEUDAL LAW (1765), *reprinted in* THE REVOLUTIONARY WRITINGS OF JOHN ADAMS 19, 27 (C. Bradley Thompson, ed., 2000).

133. Bookbinder to Cipollene Letter, *supra* note 36 (“[The public] must have access in the future to a full record of how the President and his staff handled this crisis to learn from any mistakes made and improve on how we address future pandemics.”).

134. Natelson, *supra* note 2.

135. *Id.*

136. See generally Zephyr Teachout, *The Anti-Corruption Principle*, 94 CORNELL L. REV. 341 (2009).

137. Although this Article has focused on the infirmities of the PRA from an anti-corruption perspective during times of crisis, this perspective also provides a useful heuristic for other areas of the national legal framework. Similar inquiries are therefore warranted into—inter alia—Inspectors General protections, whistleblower protections, Hatch Act violations, security clearance powers, and anti-nepotism rules.