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## **The White House: Off Limits to Historians?**

**By Meredith Fuchs**

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# The White House: Off Limits to Historians?

Meredith Fuchs\*

The President of the United States is often called the leader of the free world. It is no wonder that historians and political scientists consider the records related to presidential activities, policy, and decisionmaking so valuable for analyzing U.S. government policy at home and abroad. But over the last eight years there have been a series of moves by the current Administration that may ensure that the records of the White House and the federal offices and agencies that work closely with the White House will not be available to historians.

The problem is twofold. First, the George W. Bush Administration does not appear to value (or may even be hostile to) the preservation and disclosure of records. Second, we have seen advances in technology that have transformed the way in which we all communicate. The juxtaposition of these circumstances may mean that primary sources on the most important decisions and activities in the government may be lost, destroyed, or closed to the public. This Issue Brief focuses on the issues surrounding the preservation of presidential records, with Part I examining hostility towards public records access within the Bush Administration, Part II examining notions of executive privilege that undergird attempts to prevent disclosure, Part III describing the Presidential Records Act of 1978 (PRA), Part IV applying the PRA to past presidencies, and Part V concluding with some recommendations for future administrations.

## I. The Bush Administration and Public Records Access

This Administration's hostility towards public access to records has deep roots. Soon after becoming governor of Texas in 1995, George W. Bush signed a law that permitted former governors to send their records to institutions other than the Texas State Library and Archives, which had received the records of every former Texas governor since 1846. When the time came for Governor Bush to make use of the law at the end of his term, he sent his gubernatorial records to his father's presidential library at Texas A&M University. That move would have delayed and limited access to the records under Texas law. It was necessary for then-Texas Attorney General John Cornyn to rule that the records belonged to the state of Texas and remained subject to Texas open-government laws.<sup>1</sup> As a result, the records were returned to the Texas State Archives in Austin to prepare them for research use.<sup>2</sup>

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\* The author is the general counsel of the non-profit, non-governmental National Security Archive (the Archive) at George Washington University ([www.nsarchive.org](http://www.nsarchive.org)). The Archive was a plaintiff in *American Historical Ass'n v. Nat'l Archives and Records Admin.*, 516 F. Supp. 2d 90 (D.D.C. 2007), which challenged Executive Order 13,233 regarding the Presidential Records Act, resulting in invalidation of a portion of the executive order. It is also a plaintiff in *Nat'l Sec. Archive v. Executive Office of the President*, Civ. No. 07-1577 (D.D.C. filed Sept. 5, 2007), which challenges the destruction of White House e-mails. This article originally was published in substantially similar form in *PASSPORT – THE NEWSLETTER OF THE SOCIETY FOR HISTORIANS OF AMERICAN FOREIGN RELATIONS* (April 2008).

<sup>1</sup> Interpretation of Texas Government Code Section 441.201 Concerning the Official Records of a Former Governor, *Tex. Atty. Gen. Op. No. JC-0498* (May 3, 2002), <http://www.oag.state.tx.us/opinions/op49cornyn/jc-0498.htm>.

<sup>2</sup> See Texas Archival Resources Online, *Texas Governor George W. Bush: An Inventory of Executive Office Records at the State Archives*, <http://www.lib.utexas.edu/taro/tslac/60007/tsl-60007.html> (last visited Sept. 25, 2008).

Other senior Bush Administration officials have exhibited a similar attitude about the records of the presidency. In a tribute speech in honor of former President Gerald R. Ford, delivered at the Gerald R. Ford Presidential Library and Museum on September 14, 2007, Vice President Dick Cheney told an audience that:

this Museum, and the Ford Library in Ann Arbor, mean a great deal to me—not just personally but from the standpoint of history, because I was chief of staff in the Ford White House. I'm told researchers like to come and dig through my files, to see if anything interesting turns up. I want to wish them luck—(laughter)—but the files are pretty thin. I learned early on that if you don't want your memos to get you in trouble some day, just don't write any.<sup>3</sup>

The decision not to create records documenting government decisionmaking is in itself troubling. Its impact is compounded by the proliferation of BlackBerries, instant messaging, and other new means of communication that often do not leave traces unless specific efforts are made to preserve the communications. This issue came to light most prominently in news stories about White House officials' use of BlackBerries and e-mail accounts issued by the Republican National Committee.<sup>4</sup> But the problem is not limited to hot-button controversies at the White House. The use of BlackBerries, voicemail, instant messaging and other emergent technologies is spreading, while records management policies may not be keeping pace.

The risk of disappearance and destruction has also arisen with electronic communications that most people think are safely recorded and maintained for future disclosure—e-mails. The apparent large-scale loss of White House e-mails was first publicly disclosed on January 23, 2006, when prosecutors investigating the leak of Valerie Plame's identity as a Central Intelligence Agency (CIA) agent informed I. Lewis "Scooter" Libby's defense attorneys that "not all email records from the Office of the Vice President and the Executive Office of President for certain time periods in 2003 were preserved through the normal archiving process on the White House computer system."<sup>5</sup> In April 2007, it became clear that the problem was much larger, with potentially as many as five million e-mails deleted from the Executive Office of the President servers.<sup>6</sup> These may include e-mails from the Office of Management and Budget, the United States Trade Representative, the Council on Environmental Quality, and others, including the Office of the Vice President (OVP) and the National Security Council.

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<sup>3</sup> Vice President Dick Cheney, Remarks at the Gerald R. Ford Museum (Sept. 14, 2007), <http://www.whitehouse.gov/news/releases/2007/09/20070914-3.html>.

<sup>4</sup> See, e.g., Tom Hamburger, *GOP-issued Laptops Now a White House Headache*, L.A. TIMES, Apr. 9, 2007, available at <http://www.latimes.com/news/nationworld/world/la-na-laptops9apr09,0,4563806.story?coll=la-home-headlines>.

<sup>5</sup> Letter from Patrick J. Fitzgerald to William Jeffress, Theodore V. Wells, and Joseph A. Tate, Scooter Libby Defense Counsel, at 7 (Jan. 23, 2006), <http://www.fas.org/sgp/news/2006/02/fitz012306.pdf>.

<sup>6</sup> CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON, WITHOUT A TRACE: THE STORY BEHIND THE MISSING WHITE HOUSE E-MAILS AND THE VIOLATIONS OF THE PRESIDENTIAL RECORDS ACT (2007), available at <http://citizensforethics.org/files/041207WithoutATraceFullReport.pdf>; see also National Security Archive, *White House Admits No Backups Tapes for E-mail Before October 2003*, Jan. 16, 2008, <http://www.gwu.edu/~nsarchiv/news/20080116/index.htm>.

For records that may have survived these poor information management policies, there is a significant risk that they may never be accessible to historians because of a concerted campaign to impede the release of the remaining records with various hurdles, any one of which may prevent them from being subject to disclosure. For instance, records marked as classified—whether properly or improperly—will be less likely to be released, or their release will be delayed by the need to conduct declassification reviews, and there is evidence that at least within the OVP, classification-like markings were routinely used on materials that may not have merited classification under the terms of Executive Order 12,958, as amended by Executive Order 13,292.<sup>7</sup>

In addition, this Administration is attempting to transform agencies and records that would ordinarily be subject to disclosure laws into non-agencies and non-federal records that are no longer subject to requests under the principal public disclosure law, the Freedom of Information Act (FOIA). For example, the White House Office of Administration has long been acknowledged as a federal agency subject to the FOIA. It has processed FOIA requests for many years, has published its own FOIA regulations since 1980, had—until recently—an FOIA website, and submitted annual FOIA reports to Congress. Yet when the advocacy group Citizens for Responsibility and Ethics in Washington (CREW) sued the Office of Administration under the FOIA for records about the White House e-mail system, the office changed its tune and argued that it was not even an “agency” under the terms of the FOIA, so the suit should be dismissed.<sup>8</sup> The tactic of redefining a government entity’s status is not entirely new. During the Clinton Administration, the White House successfully took the position that the National Security Council (NSC) was not an “agency” under the Federal Records Act or the FOIA, resulting in NSC records being thereafter considered presidential in nature and managed under the requirements of the Presidential Records Act of 1978 (PRA).<sup>9</sup>

The OVP is also attempting to redefine itself. After traditionally reporting data about its records classification practices to the Information Security Oversight Office (ISOO), which is charged with oversight of the government-wide national security classification system, the OVP stopped providing the data in 2003 and refused to subject itself to an onsite audit by the ISOO. The rationale for evading records management oversight? The OVP contended it was not a part of the executive branch of government.<sup>10</sup>

A similar evasive tactic has been attempted with respect to categories of records. In response to suits brought by the *Washington Post* and CREW, the Administration has taken the

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<sup>7</sup> Michael Isikoff, *Challenging Cheney: A National Archives Official Reveals What the Veep Wanted to Keep Classified—and How He Tried to Challenge the Rules*, NEWSWEEK, Dec. 24, 2007, available at <http://www.newsweek.com/id/81883/output/print>.

<sup>8</sup> Center for Responsibility and Ethics in Washington, *CREW Files Opposition Brief in Office of Administration Suit*, Sept. 4, 2007, <http://www.citizensforethics.org/node/30038>.

<sup>9</sup> *Armstrong v. Executive Office of the President*, 90 F.3d 553 (D.C. Cir. 1996).

<sup>10</sup> Michael Isikoff, *Challenging Cheney: A National Archives Official Reveals What the Veep Wanted to Keep Classified—and How He Tried to Challenge the Rules*, NEWSWEEK, Dec. 24, 2007, available at <http://www.newsweek.com/id/81883/output/print>. Similarly, it has been reported that the OVP has exempted itself from reporting travel and related expenses to the Office of Government Ethics. See Center for Public Integrity, *Cheney Sidesteps Travel Disclosure Rules*, Nov. 16, 2005, <http://www.publicintegrity.org/lobby/report.aspx?aid=760>.

position that Secret Service visitor logs, which are created and maintained by the Secret Service and have traditionally been considered agency records, instead should be considered presidential records.<sup>11</sup>

White House records that are not missing, destroyed, misclassified as secret, or withdrawn from federal record status should eventually be considered for disclosure under the terms of the PRA. The Administration, however, has set up new hurdles for those records as well. This article addresses only one of these hurdles in depth—the undermining of the PRA. The PRA merits particular attention now because, mere months away from a presidential transition, the time left to preserve remaining records is limited. Additionally, at the time this article was written, a bill to return the PRA to its original standards for release of presidential records was pending in Congress. Despite overwhelming support in the House of Representatives, however, the bill has been subject to three holds, the most recent by Senator Jeff Sessions (R-Alabama), thus preventing a vote in the Senate.<sup>12</sup>

These controversies should matter to historians. As time marches on, the documentary records that reflect agency decisionmaking may be the best evidence of how decisions were reached, who made those decisions, whether they were good or bad decisions, and how they impacted the nation and the world. Without original source materials concerning the White House's role in instituting a war or transforming intelligence policy and military policy, the only story to tell will be the one the politicians in office choose to share with the public. That story is not the one that will help future leaders learn how to make better decisions or that will give the American public the information it needs to be an informed electorate.

## II. Preventing Disclosure Through Claims of Executive Privilege

Although the phrase “executive privilege” does not appear in the Constitution of the United States, presidential administrations often use it to explain why the president and his advisors have the right to withhold information from the courts, the Congress, and the public. It was used by our first president and in all administrations since, including the current one. It is the basis for the White House resisting subpoenas, refusing to testify in Congress, and refusing to disclose records of who visited the White House and when. And it lies at the heart of disputes regarding presidential records.

According to Mark Rozell, a professor at George Mason University who has authored two books on executive privilege, the term “executive privilege” was first used during the Eisenhower Administration, when the presidency had an expansive view of its reach. Most scholars describe the privilege as implied by Article II of the Constitution, although at least one scholar, Raoul Berger, has called it a myth. Today, with the privilege entrenched in case law, statutes and executive orders, it has become a potent weapon for the White House and high-level executive branch officials to fight off inquiry into their conduct.

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<sup>11</sup> Michael Abramowitz, *Secret Services Logs of White House Visitors are Records, Judge Rules*, WASH. POST, Dec. 18, 2007, at A2, available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/12/17/AR2007121701397.html>.

<sup>12</sup> National Coalition for History, *Senator Sessions Places Hold on Presidential Records Bill*, Jan. 23, 2008, <http://historycoalition.org/2008/01/23/senator-sessions-placest-hold-on-presidential-records-bill/>.

It is, however, a conditional privilege, so it can be overridden if there is a strong reason to dispense with it, such as when the president is under investigation for a crime. Thus, when President Nixon sought to protect the Watergate tapes that had been subpoenaed by the special prosecutor, the Supreme Court turned him down. The Court acknowledged “the valid need for protection of communications between high Government officials and those who advise and assist them in the performance of their manifold duties.”<sup>13</sup> Nevertheless, it held that the privilege is neither absolute nor strong enough to withstand the needs of the government and the defendants in a criminal prosecution. The tapes were turned over, and President Nixon resigned soon afterward.

### III. The Presidential Records Act of 1978

The fallout from the Watergate scandal changed the nation in many ways. Among congressional reactions to the scandal was the passage of the PRA.<sup>14</sup> The PRA alters the practice that had been in place for much of our nation’s history, which left the documentary materials generated during a president’s term in office largely subject to the president’s control both during and after his presidency. The PRA makes it clear that the records of the presidency belong to the public and must be turned over to the Archivist of the United States at the end of the president’s term. It limits presidential control over White House records and provides for public access to them after the president leaves office.

Although the PRA does not provide any public access for the first five years after the presidency, after that period the records become subject to information requests through the provisions of the FOIA. The outgoing president has the right to restrict certain categories of information for up to an additional seven years (twelve years in full). These categories include:

1. Classified national security information;
2. Information about federal appointments;
3. Information exempt from disclosure by statute;
4. Trade secrets and confidential commercial or financial information;
5. Confidential communications between the president and his advisors; and
6. Information that would invade personal privacy.

If the President extends the restriction on disclosure for these categories of information, then those records become subject to the provisions of the FOIA after twelve years. Though subject to the FOIA, the records are not subject to withholding under Exemption (b)(5) of the FOIA, which protects against disclosure of deliberative process or privileged information. Thus, after twelve years, presidential materials—including confidential communications between a president and his advisors or among his advisors—may not be withheld as deliberate executive branch communications, but instead must be released to the public unless the FOIA provides a different basis for withholding them (such as the national security classification of the materials).

The PRA does not leave former presidents without any safety valve concerning the release of information, however. It requires the Archivist of the United States to notify the

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<sup>13</sup> United States v. Nixon, 418 U.S. 683, 705-07 (1974).

<sup>14</sup> 44 U.S.C. §§ 2201-2207 (2000).

former president if any planned disclosure of records might “adversely affect any [of his] rights and privileges.” To implement its notification function, the National Archives and Records Administration (NARA) issued a regulation allowing the former president or his designated representative thirty days to assert any rights or privileges regarding the records. Under the regulation, as under the PRA, the Archivist is not bound to withhold the records on the basis of the former president’s assertion of rights or privileges. However, the regulation requires written notice to the former president if the Archivist rejects the assertion and provides time for him to seek judicial review. It also requires notice to the incumbent president.

The PRA took effect on January 20, 1981, making the records of President Ronald Reagan the first to be subject to its rules. Shortly before his term ended in 1989, President Reagan issued Executive Order 12,667, which set forth additional procedures regarding implementation of the PRA.<sup>15</sup> That order required the Archivist to identify any possible executive privilege issues, gave the incumbent president the authority to extend the review time for the records of a former president and asserted the right of the incumbent president to block the release of the records unless otherwise ordered by a court or sitting president.

#### IV. Applying the Presidential Records Act to the Records of Former Presidents

When President Reagan left office on January 20, 1989, the Archivist received his presidential records, which include almost forty-four million pages of documents, electronic records such as e-mail messages, and photographs and audiovisual materials. Before leaving office, Reagan exercised his right under the PRA to restrict for the maximum period of twelve years all materials falling within the restricted categories enumerated in the law. During the twelve-year period NARA opened up many records that did not fall into the categories of restricted information.

The twelve-year restriction period expired on January 20, 2001. By that time NARA had identified sixty-eight thousand pages of documents that were restricted solely because they were considered “confidential communications”—i.e., they were not classified or otherwise subject to continued withholding. Because the PRA provides that the “confidential communications” restriction only applies for twelve years, at the end of the twelve-year restriction period NARA notified both Reagan and the sitting president, George W. Bush, that the sixty-eight thousand pages were scheduled for disclosure.

NARA’s notice prompted then-White House Counsel Alberto Gonzales to twice instruct the Archivist to postpone any action regarding the sixty-eight thousand pages. A third communication from Mr. Gonzales to NARA indicated that the White House was considering various “constitutional and legal questions” and that NARA should continue to postpone any action.<sup>16</sup> Then, on November 1, 2001, President George W. Bush issued Executive Order 13,233 (the “Bush Order”), which superseded the Reagan executive order. The Bush Order sets forth procedures and standards governing the assertion of claims of executive privilege over “confidential communications” by both former and incumbent presidents following the expiration of the twelve-year restriction period. It specifically describes constitutional executive

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<sup>15</sup> Exec. Order No. 12,667, 54 Fed. Reg. 3403 (Jan. 18, 1989).

<sup>16</sup> Phillip Taylor, *Reagan’s White House Papers Stay Sealed*, 25 NEWS MEDIA & THE LAW 34 (2001).

privilege as including the common-law attorney-client and work-product privileges, the deliberative process privilege, and the state secrets privilege. It also places a burden on individuals seeking such records to demonstrate their need for them.

Procedurally, the Bush Order permits former presidents and the sitting president to delay indefinitely their review of the records scheduled for release by NARA. Essentially, it grants the former president the power to make the decision to withhold records absent “compelling circumstances.” And even if the sitting president finds compelling circumstances for releasing the records, they still cannot be released unless the former president agrees or a court mandates their release. The sitting president also has the authority to independently prevent disclosure of the records. Not only can the public be denied access to the records under this scheme, but the Archivist is not permitted to provide the records in response to a congressional or judicial subpoena unless the former president and the sitting president agree or a court orders access. The Bush Order also stipulates that former presidents can pass along their power to prevent disclosure to family members or designated representatives, and it grants former vice presidents the right to claim executive privilege independently and to prevent access to vice-presidential records on that basis.

The Bush Order led to a storm of controversy in the historical community. A lawsuit was filed in November 2001 by the American Historical Association, the Organization of American Historians, Vanderbilt University Professor Hugh Graham, University of Wisconsin Professor Stanley Kutler, the National Security Archive, Public Citizen and the Reporters’ Committee for Freedom of the Press. The lawsuit sought to challenge the Bush Order’s provisions permitting indefinite review of records that NARA determined were subject to release and the extension of authority to assert executive privilege to the heirs and designees of a former president and vice president.

Over many months, the original sixty-eight thousand records that NARA had scheduled for release were released, but it became apparent that additional records had been withheld from release. Parties to the lawsuit continued to seek access to these records. Eventually, the government announced that President Reagan’s representative had claimed a constitutional executive privilege to bar the release of seventy-four pages of the documents.<sup>17</sup> The incumbent president concurred in the decision to assert privilege because there was no circumstance that would have compelled him not to do so.

Meanwhile, in addition to Reagan presidential records, the presidential and vice-presidential records of George H.W. Bush have been subject to review under Executive Order 13,233, as have the records of Bill Clinton. The effect of the reviews called for by the Bush Order has been to delay substantially the release of materials in response to such requests. For instance, the Reagan Library’s estimated completion time frames increased from eighteen months in 2001 to an estimated seventy-eight months (six and a half years) in 2007.

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<sup>17</sup> Those seventy-four pages included several duplicates. Among the unique records were: Memorandum from Alfred H. Kingon, Assistant to the President, to Donald T. Regan, International Economic Issues (Mar. 13, 1986) (four pages); Memoranda from Arthur B. Culvahouse, Jr., Counsel to the President, to President Reagan, Pardon for Oliver L. North, John Poindexter, Joseph Fernandez (Nov. 22, 1988; Dec. 1, 1988) (two records, one totaling four pages and one totaling two pages).

In October 2007, a federal District Court in the District of Columbia ruled that one part of the Bush Order was invalid. Specifically, the court held that the Archivist of the United States acts arbitrarily, capriciously, and contrary to law by relying on E.O. 13,233 in delaying the release of the records of former presidents.<sup>18</sup> Unfortunately, the court did not consider the issue of whether it was permissible for President Bush to extend the authority over disclosure of presidential papers to a former president's heirs or to former vice presidents, nor did it rule on the substantive changes effected by the Bush Order, such as its expansive notions of executive privilege. The court put those issues off for another court at another time, holding that they are not ripe for review. For historians and political scientists, this is bad news. It has long been understood that executive privilege is not only conditional; it also dissipates over time.<sup>19</sup> Indeed, this is the basis for the PRA provision that allows confidential communications of the former president to be subject to release under the FOIA after twelve years. Furthermore, the possibility that some records could be withheld forever on the basis of private citizens asserting executive privilege is alarming, and the creation of vice presidential privilege dramatically expands the universe of potentially withheld records.

Challenging these provisions may have to wait until a former president, former vice president, or their children or grandchildren overreach and claim the privilege for materials that should not be protected. Until then, the Bush Order, like the law he signed in Texas that allowed him initially to send his records to the George H.W. Bush Presidential Library instead of the Texas Archives, puts a gaping hole in the United States' records disclosure mandates.

## V. Thoughts for A New Administration

The Presidential Records Act was designed to ensure that the records of the presidency would ultimately be turned over to the American people and made available through the orderly procedures of the FOIA. President Bush's Executive Order 13,233 has delayed the release of presidential records, and Congress's attempt to override it is stuck in the Senate because one senator objects to it coming to a vote.

Given the importance of presidential records to the American public and Congress's determination in the PRA that they are public papers, the policies and procedures for maintenance, preservation, and public access to presidential records should not be set by each administration and subject to the whims of the president in office at the time. The PRA, as implemented by NARA, already establishes the necessary framework to protect the president's interest, the former president's interest, and the public's interest.

Thus, the next president should swiftly revoke E.O. 13233 and restore integrity, transparency, and accountability to the preservation and disclosure of historical presidential records. Upon this revocation, existing NARA regulations governing the release of presidential records will remain in effect and provide procedures for management of presidential records and

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<sup>18</sup> The National Security Archive, *Court Rules Delay in Release of Presidential Papers is Illegal*, Oct. 1, 2007, <http://www.gwu.edu/~nsarchiv/news/20071001/index.htm>.

<sup>19</sup> See *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425 (1977) (allowing the transmission of recordings to archivists less than three years after Nixon left office); *Nixon v. Freeman*, 670 F.2d 346 (D.C. Cir. 1982) (permitting Nixon recordings to be made available to the public eight years after he left office).

appropriate notification of former presidents before records are made public. These regulations, 36 CFR § 1270, provide procedures for the incumbent president to dispose of records after obtaining the views of the Archivist. They offer an outgoing president the opportunity to restrict certain types of records from disclosure for 12 years. Importantly, they also provide for notice to a former president before records are disclosed and procedures for a former president to assert claims that the records are privileges and should not be disclosed.

In addition, while a reversal of Executive Order 13,233 is critical to restoring the PRA's protections, it is not enough. It is becoming increasingly apparent that the PRA might not be comprehensive enough in preserving records. With a focus on record disclosure after the fact, the present scheme provides very limited controls on how presidential records should be maintained prior to the end of a presidency. The White House e-mail problems of the Clinton and now the Bush Administration demonstrate that without some standards and oversight for the preservation of records, a critical part of the documentary history of the U.S. government may remain forever beyond reach. The next president should promptly demonstrate his commitment to accountability by being the first president to effectively preserve all presidential records of historical, administrative, informational or evidentiary value and commit the administration to working together with Congress to pass permanent legislation to guide the preservation of presidential records.

The upcoming change in administration offers the incoming president and Congress an opportunity to demonstrate their commitment to the public by seriously addressing White House recordkeeping and by safeguarding for the public and for future generations an accurate and complete documentary history of the presidency.