



January 18, 2018

The Honorable David S. Ferriero
Archivist of the United States
U.S. National Archives and Records Administration
700 Pennsylvania Avenue, N.W.
Washington, D.C. 20408

Dear Archivist Ferriero:

I write to inform you of an urgent issue relating to the potential alienation and risk of destruction of presidential records that has become apparent during the course of our representation of Secretary Matthew Dunlap, the Secretary of State for the State of Maine and a commissioner on the Presidential Advisory Commission on Election Integrity (PACEI or the Commission).¹

As you likely know, the President terminated the Commission by Executive Order on January 3, 2018.² You may also be aware that, rather than providing members of the Commission with federal laptop computers and governmental electronic mail accounts with which to conduct Commission business, the Commission asked individual members of the Commission to use their own personal or work computers and email addresses to perform their responsibilities as commissioners. Of course, the use of non-governmental systems to conduct government business presents a serious risk that appointees will not comply with applicable statutory requirements for the preservation of presidential records.

From our case on behalf of Secretary Dunlap, we have become aware of a significant risk that at the time of the dissolution of the Commission there were a substantial number of records relating to Commission activities that remain solely in the possession of individual members of the Commission. Despite the diffusion of Commission records across the country, before taking the precipitous action of terminating the Commission the federal government appears to have taken no steps whatsoever to collect and archive records outside of its custody. According to court filings, Commission staff last undertook an effort to gather copies of records relating to the work of the Commission from individual commissioners at some point in September 2017. Consequently, the federal government does not have custody or control of records reflecting any work of individual members of the Commission performed after that date unless those records were copied to federal employees on the Commission's staff. This includes communications between individual commissioners regarding the Commission's work, any preparatory work or administrative work performed by individual commissioners, or communications with third parties such as potential witnesses or experts regarding the Commission's work.

¹ See *Dunlap v. Presidential Advisory Commission on Election Integrity et al.*, Civil Action No. 17-cv-2361-CKK (filed November 9, 2017).

² Executive Order No. 13820: Termination of Presidential Advisory Commission on Election Integrity (January 3, 2018).



As the federal government has recently acknowledged in our case, all of these records are Commission records that must be preserved under the Presidential Records Act. The Presidential Records Act requires the President to “take all such steps as may be necessary to assure that [presidential records] are preserved and maintained,”³ and “presidential records” are defined by the Act to include “documentary materials . . . created or received by . . . a unit . . . of the Executive Office of the President whose function is to advise or assist the President”⁴ such as the Commission.

Thus we were troubled when the federal government took the position in our case that, in light of the dissolution of the Commission, the individuals who were formerly commissioners no longer had any enforceable obligation to preserve their records relating to the work of the Commission or to return any such records to the federal government, and that their compliance with litigation holds to preserve the records or with a request by the federal government to return copies of the records would be entirely voluntary. Indeed, the government’s filing in our case indicates that, at least as of Tuesday, January 16th, nearly two weeks after the dissolution of the Commission, the federal government had taken no steps to secure the return of presidential records relating to the work of the Commission that might be in the sole possession of individual commissioners. The notion that the termination of the Commission freed individual commissioners to potentially refuse to return or even possibly to destroy copies of Commission records in their sole possession is deeply disturbing, as is the fact that no meaningful effort was made to secure these presidential records prior to the termination of the Commission.

We urge you to take all immediate steps necessary to ensure the preservation and return of these records as soon as possible, including by requesting that the Attorney General institute immediate legal action to require individual commissioners to return copies of any records in their possession relating to the work of the Commission. In light of the Department of Justice’s claim on behalf of the White House that it lacks authority to compel the former commissioners to preserve or return the records (dubious as that may be), the Archives stands in a unique position. Lawyers for the Department of Justice suggest an action in replevin may be brought by the Archives to recover the records.⁵

Absent immediate action to impose a clear legal obligation on individual commissioners to retain and return copies of all records related to the Commission’s work, there is a significant risk that presidential records will be permanently lost. Everyone is harmed when presidential records are improperly alienated from federal custody and possibly destroyed. The public loses its right to a complete record of American history; Congress, the media, law enforcement, and inspectors

³ 44 U.S.C. § 2203(a).

⁴ 44 U.S.C. § 2201(2).

⁵ *Dunlap v. Presidential Advisory Commission on Election Integrity et al.*, Civil Action No. 17-cv-2361-CKK, Defs.’ Response to Pl.’s Supp. Br. in Supp. of Mot. for TRO 18 (Jan. 16, 2018) (citing *Jackson v. United States*, 248 F. Supp. 3d 167, 170 n.2 (D.D.C. 2017); *United States v. McElvenny*, No. 02 Civ. 3027 (JSM), 2003 WL 1741422 (S.D.N.Y. Apr. 1, 2003)).

general lose the raw material to conduct proper oversight; and the presidency loses access to records of its own actions. Officials' candid communications and positions on issues of national importance—such as election integrity and potential evidence of voter fraud—are hidden from view, forever.

American Oversight is a non-profit organization dedicated to transparency, accountability, and ethics in government. Our mission is irreparably harmed by the Executive Office of the President's failure to comply with applicable record-keeping requirements. Unless immediate steps are taken to secure these presidential records, American Oversight—and the public more broadly—can have no faith that the searchable public record is complete, or ever will be.

We share a common mission to promote transparency in government, which necessarily depends upon a foundation of compliance with fundamental federal recordkeeping requirements. In light of these facts, it is incumbent on your office to take steps to ensure that government officials are not undermining that principle, whether negligently or willfully, and that presidential records are preserved and in the possession of the United States.

Thank you for your prompt attention to these important issues.

Sincerely,



Austin R. Evers
Executive Director
American Oversight

Cc: Attorney General Jeff Sessions
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

Elizabeth Shapiro
Deputy Director
Federal Programs Branch
Civil Division
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

Gary Stern
General Counsel
U.S. National Archives and Records Administration
700 Pennsylvania Avenue, N.W.
Washington, D.C. 20408