No.

In the Supreme Court of the United States

PETER K. NAVARRO, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

Petition for a Writ of Certiorari

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QUESTIONS PRESENTED

The Presidential Records Act of 1978, 44 U.S.C. §§ 2201-2209, provides that the "United States shall reserve and retain complete ownership, possession, and control of Presidential records; and such records shall be administered with the provisions of this chapter." 44 U.S.C. § 2202. "Presidential records" is defined in part within the Presidential Records Act of 1978 as, "documentary materials. . . 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[,]" and requires covered employees to make broad in-the-moment determinations about the nature of materials that they created or received in order to determine if they are Presidential Records. 44 U.S.C. § 2202. The Presidential Records Act of 1978 (nor any amendment thereto) itself contains no mechanism for the United States to seek the return of Presidential records, instead providing as the only remedial action: "The intentional violation of [44 U.S.C. § 2209] (a). . . as determined by the appropriate supervisor, shall be a basis for disciplinary action in accordance with subchapter I, II, or V of chapter 75 of title 5, as the case may be." 44 U.S.C. § 2209(b).

The question presented is: Whether the United States may avail itself of unrelated state replevin statutes to seek the return of Presidential records.

All Proceedings

United States v. Peter K. Navarro, No. 22-cv-02292, United States District Court for the District of Columbia.
United States v. Peter K. Navarro, No. 23-5062, United States Court of Appeals for the District of Columbia Circuit.

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Opinions Below

1. *United States v. Peter K. Navarro*, No. 22-cv-02292, United States District Court for the District of Columbia. Judgment entered March 9, 2023. Appendix, *infra*, pp. 9a-38a.
2. *United States v. Peter K. Navarro*, No. 23-5062, United States Court of Appeals for the District of Columbia Circuit. Judgment entered April 1, 2024. Appendix, *infra*, pp. 1a-8a. Petitions for panel rehearing or rehearing *en banc* denied on May 23, 2024. Appendix, *infra*, pp. 39a-40a.

Jurisdiction

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on April 1, 2024. Petitions for panel rehearing or rehearing *en banc* were denied on May 23, 2024. On August 12, 2024, Chief Justice John Roberts granted an application to extend the time for Petitioner to file this petition for a writ of certiorari until October 5, 2024. *See Peter K. Navarro, Applicant, v. United States*, Docket 24-A201. On September 30, 2024, Chief Justice John Roberts granted a second motion to extend the time to file this petition for a writ of certiorari until October 20, 2024, and advised that no further extensions would be

granted in this matter. *See Peter K. Navarro, Applicant, v. United States*, Docket 24-A201.[1]

This court has jurisdiction pursuant to 28 U.S.C. § 1253, as it seeks direct appeal of a decision of a three-judge panel of a Federal Court.

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[1] Due to the Chief Justice's Order advising that no further extensions would be granted in this matter, Petitioner files this petition despite its current procedural posture as ongoing in lower court. Respectfully, the procedural issues which caused the Chief Justice to grant previous extensions have not been resolved, and therefore much of the case is not yet ripe for review. On October 11, 2024, the magistrate judge issued an order requiring Petitioner to justify why certain contents of his personal electronic mail account are not Presidential records as defined by the Presidential Records Act. For example, this Order specifically requires Petitioner to explain why he contends that emails which, "appear to be the equivalent of journal or diary entries recounting the events of Navarro's day and his thoughts on the same; some contain only links to, or excerpts from, online news articles[,]" are not Presidential records as defined by the Presidential Record Act. Order, at 4 *United States v. Peter K. Navarro*, 1:22-cv-02292 (CKK/GMH) (D.D.C.) (Oct. 11, 2024) (ECF No. 053). The Presidential Records Act explicitly states that "personal record," including "diaries, journals, or other personal notes serving as the functional equivalent of a diary or journal which are not prepared or utilized for, or circulated or communicated in the course of, transacting Government business." 44 U.S.C. § 2201(3)(A). The Presidential Records Act does not provide a vehicle for challenging the determination of whether a document is a "personal record" as defined in the Statute, nor does it provide what burden of proof (if any) applies to such a decision. Petitioner intends to appeal the magistrate's ruling.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The relevant provisions of the Presidential Records Act of 1978, 44 U.S.C. §§ 2201-2209, Pub. L. No. 95–591, 92 Stat. 2523, are reproduced in the appendix. Appendix, *infra*, pp. 41a-59a.

STATEMENT OF THE CASE

Petitioner Dr. Peter K. Navarro was a member of the Presidential Administration of Donald J. Trump. After his employment in the White House had ended, a representative for the National Archives and Records Administration ("NARA") contacted Dr. Navarro, alleging that Dr. Navarro had retained Presidential records – electronic mail exchanged on a personal account – as defined under the Presidential Records Act of 1978, 44 U.S.C. §§ 2201-2209 ("PRA"). Dr. Navarro initially sought to comply with the request, but was thereafter indicted for allegedly failing to provide documents from his White House tenure that were responsive to a congressional subpoena. *United States v. Peter K. Navarro*, No. 22-cr-00200, (D.D.C.). Given the related nature of the documents sought by NARA and the allegations against him, Dr. Navarro sought immunity for the production of Presidential records to avoid their use against him in the pending criminal matter.

Instead, on August 3, 2022, the United States filed a civil complaint against Dr. Navarro, seeking the recovery of Presidential Records through the replevin statutes found in Chapter 37 of the District

of Columbia Code. D.C. Code §§ 16-3701 – 16-3740. Complaint, *United States v. Peter K. Navarro*, 1:22-cv-02292 (D.D.C.), (Aug. 3, 2022) (ECF No. 001). Dr. Navarro's responsive arguments highlighted, *inter alia*, that the PRA did not create a right of action for the United States, that the PRA specifically did not authorize use of unrelated replevin statutes to vindicate the rights of the United States, that the portion of the PRA relating to the use of personal electronic mail accounts was constructed in a more limited manner than the rest of the PRA, and that the Fifth Amendment's act-of-production privilege protected Dr. Navarro from the compelled production sought by the United States. *See e.g.*, Memorandum in Opposition to Motion for Summary Judgment, *United States v. Peter K. Navarro*, 1:22-cv-02292 (D.D.C.) (Oct. 11, 2022) (ECF No. 011).

On March 9, 2023, the District Court for the District of Columbia granted summary judgment in favor of the United States. Appendix, *infra*, p. 9a-10a. Dr. Navarro timely pursued an appeal in the United States Court of Appeals for the District of Columbia Circuit. When stays of the judgment were denied, Dr. Navarro made efforts to comply according to the District Court's orders. As noted in the application seeking an extension of time to file this petition for writ of certiorari, this matter remains live in the District Court through post-judgment enforcement orders which are not yet ripe for review.

REASONS TO GRANT THE PETITION

Dr. Navarro respectfully submits that the decision of the Court of Appeals requires this Court to exercise its supervisory powers, as the Court of Appeals has sanctioned the District Court's significant departure from the accepted and usual course of judicial proceedings. The question presented in this case is of critical political significance, given that all former, current, and future covered employees as defined by the PRA could be subject to this exact same procedure should this judgment be affirmed. Despite these broad concerns, the District Court granted summary judgment, accepting the United States's novel theory that Congress intended state replevin statutes to serve as the enforcement mechanism that the text of the PRA otherwise lacks. Appendix, *infra*, p. 33a ("Finally, the Court agrees with the United States that the District of Columbia's replevin statute provides a cause of action for the return of Dr. Navarro's unlawfully retained documents."). The Court of Appeals affirmed.

It is beyond dispute that the text of the PRA lacks an enforcement mechanism or a cause of action for the compelled return of presidential records. *See e.g.,* Stefan Becket, Melissa Quinn, *What does the Presidential Records Act say, and how does it apply to Trump?*, CBS NEWS (last updated June 13, 2023) ("The Presidential Records Act includes no enforcement mechanism, and a former president has never been punished for violating the law."). One of the only times the United States sought the return of Presidential records was in *United States v.*

McElvenny, which dealt with Presidential records whose creation predated the PRA, involved someone who never had proper access to the government material at issue (rather than a former employee who would have created the Presidential record), and was resolved outside of court. *United States v. McElvenny*, 02-cv-3027, 2003 WL 1741422 (S.D.N.Y. Apr. 1, 2003). The District Court afforded significant weight to *McElvenny* in granting summary judgment. Appendix, *infra*, pp. 33a ("Where, as here, a party has wrongfully detained property belonging to the United States, the United States has sued for the return of the property. *See, e.g., United States v. McElvenny*, 02-cv-3027, 2003 WL 1741422, at*1 (S.D.N.Y. Apr. 1, 2003)" (District Court's parenthetical citation omitted)). The only other time such a dispute arose was during the criminal prosecution of former-President Donald J. Trump, for which the government sought, received, and executed a search warrant for Presidential records. *See e.g. Trump v. United States*, 54 F.4th 689, 695 (11th Cir. 2022) ("The magistrate judge issued a search warrant. . . and authorized the seizure of. . . [a]ny government and/or Presidential Records created between January 20, 2017, and January 20, 2021[.]"), *dismissed* 2022 U.S. Dist. LEXIS 225809 (S.D. Fla. Dec. 12, 2022). Accordingly, even the United States seemingly knows not how to properly seek the return of Presidential records.

If Congress had intended the PRA to sanction such expansive action from NARA, Congress would have indicated as much. Here, in fashioning relief to obtain what is considered a just result, both the courts

below have violated the omitted-case canon of judicial construction: "The absent provision cannot be supplied by the courts. What the legislature 'would have wanted' it did not provide, and that is an end of the matter." Antonin Scalia and Bryan A. Garner, Reading Law: The Interpretation of Legal Texts, at 95 (2012 ed.). Here, neither the text of the statute (or its amendments) nor the Congressional record preceding its passage, indicate any intent by the Legislature to have the Executive seek the return of Presidential records through State replevin statutes.

Rejecting this novel theory is also consistent with the Major Questions Doctrine, which this Court has interpreted to require an agency to provide "clear congressional authorization" when seeking to expand its authority. *See e.g., West Virginia v. EPA*, 597 U.S. 697, 723 (2022) (citing *Utility Air Regulatory Group v. EPA*, 573 U.S. 302, 324 (2014)). Where an agency asserts broad authority over an issue of, "economic and political significance," this Court has used the Major Questions Doctrine to assert that courts should, "hesitate before concluding that Congress meant to confer such authority." *West Virginia*, 597 U.S. at 721 (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159-60 (2000)). While NARA has the authority over Presidential records to maintain them, preserve them, and eventually make them available for the public, the PRA explicitly does not confer in NARA the authority to invade a former employee's privacy to force the compelled production of Presidential records. Indeed, Dr. Navarro appears to be the only former covered employee that NARA has sued. This is a matter of vast political

significance, as to allow the PRA to be applied as it has in this case would sanction NARA's invasion of the privacy rights of former covered employees should NARA conclude, as it sees fit, that the employee possesses Presidential records.

For this reason, this Court should grant review.

CONCLUSION

Dr. Navarro respectfully requests that this Court grant the petition for a writ of certiorari.

Dated: October 20, 2024

Respectfully submitted,

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APPENDIX

Appendix to Peter K. Navarro's Petition for Writ of Certiorari

Appendix ....

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District Court Memorandum Opinion (Mar. 9, 2023) 11a

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Court of Appeals Denial of Petition for Rehearing *en banc* (May 13, 2024) 40a

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UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23-5062
September Term, 2023
Filed on: April 1, 2024

UNITED STATES OF AMERICA, Appellee

v.

PETER K. NAVARRO, Appellant

–

Appeal from the United States District Court for the District of Columbia
(No. 1:22-cv-02292)

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Before: Pillard, Childs, and Garcia, *Circuit Judges*.

Judgment

This appeal was considered on the record from the United States District Court for the District of Columbia and the briefs of the parties. See D.C. CIR. R. 34(j). The Court has afforded the issues full consideration and has determined that they do not warrant a published opinion. See D.C. CIR. R. 36(d). For the reasons stated below, it is hereby ORDERED and ADJUDGED that the district court's order be AFFIRMED.

This appeal concerns a single, narrow issue: Whether the United States government may use an

established common-law remedy to compel the return of materials that all agree are Presidential records under the Presidential Records Act of 1978 ("PRA"), 44 U.S.C. §§ 2201–2209. Applying long-settled legal principles, the district court ruled that the United States can do so. We affirm.

I.

The PRA states that the "United States shall reserve and retain complete ownership, possession, and control of Presidential records." *Id.* § 2202. Presidential records include documentary materials created or received by the President and those created or transmitted by covered employees in the course of their official duties. *Id.* § 2201(2). Under the PRA provisions relevant to this case, covered employees "may not create or send" a Presidential record "using a non-official electronic message account" unless the covered employee either "copies an official electronic messaging account" in the "original creation or transmission" of the record or "forwards a complete copy" of the record to the employee's official messaging account "not later than 20 days after the original creation or transmission." *Id.* § 2209(a). After a President leaves office, the Archivist of the United States "shall assume responsibility for the custody, control, and preservation of, and access to, the Presidential records of that President" and "shall have an affirmative duty to make such records available to the public as rapidly and completely as possible consistent with" the PRA. *Id.* § 2203(g)(1). The PRA does not explicitly address whether and how the United States may seek return of Presidential records.

Peter Navarro served in the Executive Office of the President in various roles from January 20, 2017, to January 20, 2021. During that time, he was a covered employee under the PRA. Navarro used at least one non- official email account to send and receive messages constituting Presidential records. Contrary to Section 2209(a), he did not copy those messages to his official account. He also retained some messages on his non-official account.

In December 2021, the National Archives and Records Administration ("NARA") requested that Navarro provide it with Presidential records that he retained on his personal email account. Navarro did not respond. The Department of Justice then requested the records from Navarro. At that point, Navarro, through counsel, engaged with the Department and NARA about which search terms he should use to determine which documents were Presidential records. On July 22, 2022, Navarro's counsel represented that NARA's search parameters had generated 1,700 documents, about 200 to 250 of which counsel identified as Presidential records. Navarro, through counsel, refused to produce the records without a guarantee that the records would not be used in Navarro's unrelated criminal prosecution for contempt of Congress.

The United States filed a complaint against Navarro seeking return of Presidential records under the District of Columbia's replevin statute, D.C. Code § 16-3701, which allows a plaintiff to "recover personal property to which the plaintiff is entitled, that is alleged to have been wrongfully taken by or to be in the possession of and wrongfully detained by the defendant." The United States moved for

summary judgment and Navarro moved to dismiss the complaint for failure to state a claim. Navarro argued that the United States could not use D.C.'s replevin statute because the PRA itself did not provide the government a cause of action. On March 9, 2023, the district court granted the United States's motion for summary judgment and denied Navarro's motion to dismiss. Navarro appealed. He then filed an emergency motion for stay pending appeal, which was denied by a panel of this court. *See* Order Denying Emergency Motion for Stay (Apr. 12, 2023). The district court proceeded to oversee the production of the relevant documents, which remains ongoing and disputed.

II.

We review the district court's grant of summary judgment and denial of the motion to dismiss *de novo*. *Montgomery v. Risen*, 875 F.3d 709, 713 (D.C. Cir. 2017); *Hurd v. District of Columbia*, 864 F.3d 671, 678 (D.C. Cir. 2017).

Navarro does not contest that he possessed Presidential records, that the Government owns those records under the PRA, or that the United States satisfied the elements of D.C.'s replevin statute. Instead, on appeal Navarro raises only—in his own words—the "narrow question" of whether the PRA "provides the United States with any vehicle by which to compel the production of Presidential records." Pet'r Br. 14. The sole issue in this appeal is therefore whether the United States may bring a replevin action to recover its property.[1]

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[1] 1 In his reply brief, Navarro belatedly raised arguments that the government failed to meet certain elements of D.C.'s

More specifically, Navarro argues that the United States cannot use D.C.'s replevin statute because the PRA itself has no express cause of action for the United States to seek the return of Presidential records. Rather, in Navarro's view, the United States's only enforcement mechanism is to discipline current employees possessing Presidential records under Section 2209, a mechanism the United States cannot use against Navarro because he is no longer an employee.

These arguments are without merit under clear, longstanding precedent. "As an owner of property," the United States has "the same right to have it protected by the local laws that other persons have" and "may bring suits to . . . protect [its] property." *Cotton v. United States*, 52 U.S. (11 How.) 229, 231 (1850); *see also Rex Trailer Co. v. United States*, 350 U.S. 148, 151 (1956) ("The Government has the right to make contracts and hold and dispose of property, and, for the protection of its property rights, it may resort to the same remedies as a private person."). Courts have accordingly recognized replevin as a proper vehicle for the United States to recover its property. *See, e.g.*, *United States v. Lindberg Corp.*, 882 F.2d 1158, 1164 (7th Cir. 1989); *United States v. Digit. Prods. Corp.*, 624 F.2d 690, 695 (5th Cir. 1980); *United States v. McElvenny*, No. 2 Civ. 3027, 2003 WL 1741422, at *1 (S.D.N.Y. Apr. 1, 2003).

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replevin statute. Pet'r Reply Br. 6–8. Because these arguments were not raised in Navarro's opening brief, they are forfeited. *See Al-Tamimi v. Adelson*, 916 F.3d 1, 6 (D.C. Cir. 2019).

For that reason, for Navarro to prevail, he would need to show that the PRA affirmatively abrogates the United States's general authority to pursue common law remedies. *See Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108 (1991) (explaining that statutes are presumed to incorporate longstanding, background legal principles unless a "statutory purpose to the contrary is evident" (quoting *Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 783 (1952))); *United States v. Texas*, 507 U.S. 529, 534 (1993) (same); *United States v. Moffitt, Zwerling & Kemler, P.C.*, 83 F.3d 660, 667 (4th Cir. 1996) ("[F]ederal statutes do not, by implication, abrogate the government's right to bring common law suits.").

Navarro cannot do so. Navarro points to Section 2209(b) of the PRA, which authorizes the United States to discipline or terminate employees for "intentional violation[s]" of Section 2209(a)'s requirement to either copy or forward Presidential records to an official electronic messaging account. 44 U.S.C. § 2209(b). He asks us to conclude that by prescribing this one specific remedy for intentional violations of the statute, Congress implicitly intended to foreclose any other remedies. We reject that request. That Congress provided the United States authority to discipline current employees for violating the PRA does not remotely suggest that Congress intended to foreclose the government from using other longstanding methods of protecting its property. *Cf. Moffitt, Zwerling & Kemler, P.C.*, 83 F.3d at 667. Moreover, if Navarro were correct, the statute would leave the United States with no ability to retrieve Presidential records from employees if they refuse to return Presidential records after being

disciplined or exiting federal employment. That result would be in serious tension with Section 2202's command that the United States "retain complete ownership, possession, and control" over Presidential records, 44 U.S.C. § 2202, and NARA's duty to "assume responsibility for the custody, control, and preservation of, and access to, the Presidential records" after a presidential term of office, *id.* § 2203(g)(1). The PRA's text and purpose are thus entirely consistent with the United States's use of replevin.

Navarro also invokes the major questions doctrine to argue that we should not assume Congress intended for the United States to use replevin statutes as an enforcement mechanism for a statute like the PRA that does not speak clearly to that issue. The major questions doctrine requires an agency to point to "clear congressional authorization" when it asserts an "enormous and transformative expansion" of its "regulatory authority" by making a decision of "vast 'economic and political significance.'" *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000)). This case, however, does not involve an agency's authority to regulate, much less a "transformative" claim of government power. *Id.*

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For the foregoing reasons, the district court's grant of the United States's motion for summary judgment and denial of Navarro's motion to dismiss is affirmed.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is

directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or rehearing *en banc*. *See* FED. R. APP. P. 41(b); D.C. CIR. R. 41(a)(1).

PER CURIAM

FOR THE COURT:
Mark J. Langer, Clerk
BY: /s/ Daniel J. Reidy Deputy Clerk

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, Plaintiff
v.

PETER K. NAVARRO, Defendant. Civil Action No.

22-2292 (CKK)

ORDER AND JUDGMENT
(March 9, 2023)

For the reasons stated in the accompanying Memorandum Opinion, it is hereby

ORDERED, that Defendant's [9] Motion to Dismiss is **DENIED**. It is further

ORDERED, that Plaintiff's [7] Motion for Summary Judgment is GRANTED. It is further

ORDERED, that Defendant shall produce to Plaintiff the 200 to 250 documents that his counsel has identified as Presidential records forthwith. It is further

ORDERED, that, on or before **thirty days** after the entry of this Order, the parties shall MEET AND CONFER to discuss the search terms and methodology used, or to be used, to unequivocally identify Presidential records in Defendant's possession. If the parties reach agreement on the search terms and methodology, their implementation to identify records should thereafter proceed, and all Presidential records identified thereby shall be expeditiously produced. Once the records search and production have been completed, Plaintiff shall file a notice indicating that the judgment entered herein

has been satisfied. If, however, the parties fail to reach agreement on search terms and methodology, the parties shall, no later than **seven days** after their meet-and-confer, file a joint status report explaining how they intend the Court to enforce the judgment entered herein.

SO ORDERED.
Date: March 9, 2023
/s/
COLLEEN KOLLAR KOTELLY
United States District Judge

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, Plaintiff
v.
PETER K. NAVARRO, Defendant. Civil Action No.

22-2292 (CKK)

MEMORANDUM OPINION
(March 9, 2023)

The United States has sued Defendant Peter K. Navarro ("Defendant" or "Dr. Navarro"), formerly Deputy Assistant to then-President Donald J. Trump, for the return of public records belonging to the United States. The Court agrees with the United States that there can be no dispute of material fact that Navarro retains such records, nor any legal dispute that the District of Columbia replevin statute, D.C. Code § 16-3702, provides a cause of action for their return. Accordingly, upon consideration of the briefing,[1] the relevant legal authorities, and the

[1] The court mainly considered:

- Plaintiff's Memorandum in Support of Motion for Summary Judgment ("MSJ"), ECF No. 7-1;
- Defendant's Motion to Dismiss ("MTD"), ECF No. 9;
- Defendant's Opposition to the United States' Motion for Summary Judgment ("MSJ Opp."), ECF No. 11;
- Plaintiff's Combined Reply in Support of Motion for Summary Judgment & Opposition to Defendant's Motion to Dismiss ("MTD Opp."), ECF No. 12;
- Defendant's Reply in Support of Motion to Dismiss ("MTD Repl."), ECF No. 14; and

entire record, the Court **GRANTS** the United States' [7] Motion for Summary Judgment and **DENIES** Defendant's [9] Motion to Dismiss. The Court further fashions injunctive relief that requires immediate compliance that the Court will oversee.

I. BACKGROUND

A. Factual and Procedural Background

This matter arises under the Presidential Records Act ("PRA") of 1978, 44 U.S.C. §§ 2201-2209, and the District of Columbia replevin statute, D.C. Code § 16–3702. The United States initiated suit against Defendant Peter K. Navarro seeking the return of certain emails created and/or received by him in a personal, encrypted email account that that he used in connection with his duties as a federal employee and adviser to the President of the United States. Dr. Navarro was employed by the White House in the Executive Office of the President from January 20, 2017 until January 20, 2021. He was Deputy Assistant to the President and Director of the National Trade Council from his hiring until April 29, 2017, when he was appointed Assistant to the President and Director of the Office of Trade and Manufacturing Policy. In addition to those responsibilities, in March 2020, then- President Trump appointed Dr. Navarro to coordinate the government's use of the Defense Production Act, 50

- Plaintiff's Statement of Undisputed Material Facts ("SMF"), ECF No. 7-2,

In an exercise of its discretion, the Court has concluded that oral argument would not assist in the resolution of this matter.

U.S.C. § 4501 et seq., to respond to the COVID-19 pandemic. SMF¶ 1-5.

Under the PRA, a Presidential record is a record generated or received by a covered employee[2] in the course of assisting with the discharge of the President's official duties. *See* 44 U.S.C. § 2201(2). Among other responsibilities, a covered employee must copy any Presidential record sent on a "non-official electronic message account" to his official government email account within 20 days, and to otherwise transfer Presidential records received on a non-official account to the National Archives and Records Administration ("NARA") at the end of each presidential administration. *See id.* § 2209*; id.* §§ 2202-03. At the end of a Presidential administration, pursuant to the PRA, the Archivist of the United States is required to "assume responsibility for the custody, control, and preservation" of Presidential records and to "make such records available to the public as rapidly and completely as possible consistent with the provisions of this chapter." *Id.* § 2203. The PRA differentiates "Presidential records" from "personal records," defining "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

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[2] For purposes of section 2209, "covered employee" means the immediate staff of the President or the Vice President, "a unit or individual of the Executive Office of the President whose function is to advise and assist the President," or "a unit or individual in the Office of the Vice President whose function is to advise and assist the Vice President." 44 U.S.C. § 2209(c)(1).

President." *Id.* § 2201 (3).

It is undisputed that Dr. Navarro was a covered employee under the statute. SMF ¶ 6. Therefore, under the PRA, the United States "retain[s] complete ownership, possession, and control of Presidential records" generated or received by him in the course of assisting with the discharge of the President's official duties. *See* 44 U.S.C. §§ 2201(2), 2202.

There is no issue with regard to Dr. Navarro's official email accounts. However, while serving in the White House, Dr. Navarro used at least one non-official email account—an account hosted by the encrypted email service Proton Mail—to send and receive messages constituting Presidential records. SMF ¶ 14. E-mail and other electronic messages, including electronic messages sent and received on non-official electronic message accounts, constitute Presidential records to the same extent as hard copy documents. 44 U.S.C. §§ 2201, 2209. The PRA is explicit with regard to Presidential records generated by non-official electronic accounts: It requires the President, the Vice President, and Covered Employees to "cop[y] their official electronic messaging account" when sending a communication using a non-official account or to "forward[] a complete copy" of an email sent on their non- official account to their "official electronic messaging account . . . not later than 20 days after the original creation or transmission" of the record. *Id.* § 2209(a)(1)-(2). In February 2017, the White House Counsel's Office issued a memorandum to White House personnel regarding the use of non-official

email accounts to conduct official business, which outlined the obligations of White House personnel under the PRA. The memorandum read, in part: "If you ever send or receive email that qualifies as a [P]residential record using any other account [*i.e.,* other than the official government account], you must preserve that email by copying it to your official EOP email account or by forwarding it to your official email account within twenty (20) days." SMF, ¶ 6; Compl. Ex. 1 at 2, ECF 1-2 (Memorandum for All Personnel, from Deputy White House Counsel Stefan C. Passantino, through Counsel to the President Donald F. McGahn (Feb. 22, 2017) ("WHCO Memorandum")). The memorandum also confirmed "that [P]residential records are the property of the United States. . . When you leave EOP employment, you may not take any presidential records with you." *Id.* at 2.

Dr. Navarro did not copy each email or message constituting Presidential records that was sent or received on his non-official account to his official government email account; he retained at least some of them in his personal email account. SMF ¶ 15. Moreover, when NARA learned of the personal account and requested that Dr. Navarro provide it with such Presidential records as he retained in his personal email account, Dr. Navarro ignored NARA's repeated requests. With no response to NARA's entreaties, the Department of Justice wrote him to request return of the records and advise him that failing such provision, suit would be brought against him. Only at that juncture did he even engage with the Department of Justice with regard to his email account.

On June 16, 2022, counsel for Dr. Navarro contacted the Department of Justice and represented that they had retained a document review and analysis firm to aid them in evaluating the extent to which Dr. Navarro had PRA records in his possession, custody, or control. Compl. Ex. 4 at 1, ECF No. 1-5, Declaration of William J. Bosanko ("Bosanko Decl.") ¶ 8. Over the next several weeks, Dr. Navarro's counsel provided periodic updates on the status of their search and analysis process. In order to assist and expedite the search, on July 18, 2022, NARA's General Counsel provided Dr. Navarro's counsel with a list of search terms. NARA requested that Dr. Navarro prioritize the return of any PRA records responsive to those search terms.

By email dated July 22, 2022, Dr. Navarro's counsel represented that their application of the search parameters that NARA provided had generated over 1,700 documents. Thereafter, on July 25, 2022, Dr. Navarro's counsel estimated that, based on their review of these documents, between 200 and 250 of these 1,700 documents were PRA records. Bosanko Decl. ¶ 9. By letter dated July 29, 2022, Dr. Navarro's counsel refused to produce any PRA records to NARA absent a grant of immunity for the act of returning such records. Bosanko Decl. ¶ 9. This lawsuit was filed thereafter.

In brief, as detailed above, the United States' Complaint asserts that by virtue of his employment Dr. Navarro fell under the PRA, and that his personal email contains Presidential records that he has refused to provide. The Complaint contains two alternative claims for relief, first under the D.C. replevin statute, pursuant to Fed. R. Civ. P. 64, and,

alternatively, under federal common law of replevin. Compl., ECF No. 1, ¶¶ 39-50. Both claims seek the return of Presidential records that belong to the United States and that have been wrongfully detained by Dr. Navarro. *Id.*

B. Material Facts Not in Dispute

Pursuant to LCvR 7(h), each party submitting a motion for summary judgment must attach a statement of material facts to which that party contends there is no genuine issue, with specific citations to those portions of the record upon which the party relies in fashioning the statement. The party opposing such a motion must, in turn, provide "specific facts showing that there is a genuine issue for trial." *Id.* Where the opposing party fails to provide specific relevant facts in dispute, discharge this obligation, the Court may take all facts alleged by the movant as admitted. *Id.*

The Government's Statement of Material Facts Not in Dispute, ECF No. 7-2, contained sixteen proposed factual statements. Dr. Navarro expressly does not dispute twelve. *See* Def.'s Resp. to the Government's Statement of Undisputed Material Facts ¶¶ 1-8, 10, 12-14, ECF No. 11-1 ("SMF Resp.").

The Court will proceed to analyze the four disputed statements to determine whether they adduce "specific facts showing that there is a genuine issue for trial." *Matsushita Elec. Indus. Co., Ltd.*, 475 U.S. at 587.

1. SMF No. 9 states:

"E-mail and other electronic messages, including electronic messages sent and received on

non-official electronic message accounts, constitute Presidential records to the same extent as hard copy documents. 44 U.S.C. §§ 2201, 2209."

Dr. Navarro responded: "Disputed only to the extent that the statute is vague as to how and to what extent it applies to email records, which is discussed in Dr. Navarro's opposition. Dr. Navarro does not dispute, however, that e-mail and other electronic messages can constitute Presidential records." SMF Resp. at 3-4.

Dr. Navarro does not take issue with the core factual statement that "e-mail and other electronic messages can constitute Presidential records." His "dispute" seems to reduce to a general legal objection to the statute's specificity. Therefore, the core statement must be considered undisputed.

2. SMF No. 11 states:

"In February 2017, the White House Counsel's Office issued a memorandum to White House personnel regarding the use of non-official email accounts to conduct official business, writing: "If you ever send or receive email that qualifies as a presidential record using any other account [i.e., other than the official government account], you must preserve that email by copying it to your official EOP email account or by forwarding it to your official email account within twenty (20) days." Compl. Ex. 1 at 2, ECF No. 1-2 (Memorandum for All Personnel, from Deputy White House Counsel Stefan C. Passantino, through Counsel to the President Donald F. McGahn (Feb. 22, 2017)) (WHCO Memorandum))."

Dr. Navarro responded: "Disputed only to the extent that the memorandum interprets the law more broadly than the language of 44 U.S.C. 2209(a) in that it states that emails which are received must be forwarded to a government account." SMF Resp. at 4.

Dr. Navarro again tenders a legal objection. He disputes only that the direction he received is, in his view, broader than the statute. He does not dispute that the memorandum, as quoted, was issued. This fact of its issuance and receipt, as quoted, must also be considered as undisputed.

3. SMF No. 15 states:

"Defendant did not copy each email or message constituting Presidential records that was sent or received on his non-official account or accounts to his official government email account. Bosanko Decl. ¶ 5. Dr. Navarro responded: "Disputed in that the statute is vague as to whether the receipt of emails on a personal account creates a Presidential record and/or whether and to what extent the emails received on Dr. Navarro's email account were ever Presidential records. An audit is ongoing to determine the emails responsive to NARA's correspondence." SMF Resp. at 6.

Dr. Navarro does not respond in any substantive way to the Plaintiff's statement. Indeed, he does not deny the asserted fact. Rather, he objects to whether the statute can or does classify the records in his personal email account, and then evades the question by adverting to an audit that was partially completed but apparently still ongoing.

Absent a denial of the stated fact, the Court must consider the fact undisputed.

4. SMF No. 16 states:

"Defendant continues to have Presidential records in his possession, custody, and/or control. Bosanko Decl. ¶¶ 6-10 & Attachment A (July 29, 2022 letter from John S. Irving to Gary M. Stern) (acknowledging continued possession, custody, and/or control)."

Dr. Navarro responded: "Disputed in that the audit of Dr. Navarro's email is ongoing, so the extent of whether or what Presidential records are in his possession, custody, and/or control is unknown at this time." SMF Resp. at 6.

The Court again notes that this is not a denial of the stated fact, but an evasion. Dr. Navarro merely contends that because of the ongoing audit, notwithstanding the results of its initial search, he cannot say whether or what Presidential records are in his possession, custody and/or control. Nonetheless in view of the entire record, it is quite clear that this is an effort artificially to create a dispute where there is no factual basis for one. The Court considers the admission of Dr. Navarro's counsel, that 200 to 250 emails constituting Presidential records were discovered out of 1,700 potentially responsive documents in the initial email search, as evidencing the fact that Dr. Navarro has Presidential emails in his possession.[3] Bosanko Decl.

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[3] Statements and arguments by Dr. Navarro's counsel make plain, beyond his counsel's explicit admission, that his personal

¶ 9, ECF No. 1-5.

Therefore, notwithstanding the efforts to create disputed facts and avoid the consideration of summary judgment, the Court considers the facts to be undisputed, as discussed above.

II. LEGAL STANDARDS

A. Summary Judgment

The Court may grant summary judgment where, "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); *see also Moore v. Hartman*, 571 F.3d 62, 66 (D.C. Cir. 2009). Under the summary judgment standard, the moving party bears the "initial responsibility of informing the district court of the basis for [its] motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits which [it] believe[s] demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). In response, the non-moving party must "go beyond the pleadings and by [its] own affidavits, or depositions, answers to interrogatories, and admissions on file, 'designate' specific facts showing that there is a genuine issue for trial." *Id.* at 324 (internal citations

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emails contain records responsive to the requests by NARA and by the Department of Justice, but that they are withheld for other reasons. *See, e.g.,* MTD at 6 ("Dr. Navarro has asserted a privilege validly delaying the time within which he must produce *the records sought by the Archivist*" (emphasis added)).

omitted).

"Mere allegations or denials in the adverse party's pleadings are insufficient to defeat an otherwise proper motion for summary judgment." *Williams v. Callaghan*, 938 F. Supp. 46, 49 (D.D.C. 1996). The adverse party must do more than simply "show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). Instead, while the movant bears the initial responsibility of identifying those portions of the record that demonstrate the absence of a genuine issue of material fact, the burden shifts to the non-movant to "come forward with 'specific facts showing that there is a *genuine issue for trial.*'" *Id.* at 587 (citing Fed. R. Civ. P. 56(e)) (emphasis in original).

B. Motion to Dismiss for Failure to State a Claim

Dismissal pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure is "appropriate when a complaint fails 'to state a claim upon which relief can be granted.'" *Strumsky v. Wash. Post Co.*, 842 F. Supp. 2d 215, 217 (D.D.C. 2012) (quoting Fed. R. Civ. P.12(b)(6)). "[A] complaint must contain sufficient factual allegations that, if accepted as true, 'state a claim to relief that is plausible on its face.'" *United States ex rel. Scott v. Pac. Architects & Eng'rs, Inc.*, 270 F. Supp. 3d 146, 152 (D.D.C. 2017)(quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "'A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.'" *Id.* (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). In

evaluating a Rule 12(b)(6) motion to dismiss for failure to state a claim, the court must construe the complaint in a light most favorable to the plaintiff and must accept as true all reasonable factual inferences drawn from well-pleaded factual allegations. *In re United Mine Workers of Am. Employee Benefit Plans Litig.*, 854 F. Supp. 914, 915 (D.D.C. 1994).

III. DISCUSSION

A. Presidential Records Act

1. PRA's Requirements

In opposing summary judgment and moving to dismiss, Dr. Navarro argues that the PRA does not impose an express statutory obligation on him to return Presidential records that he created or received during his tenure as a Presidential advisor, and that the PRA does not contain its own enforcement mechanism, therefore precluding the writ of replevin sought by the United States. *See* MSJ Opp. at 4-5; MTD at 7. Dr. Navarro further argues that the PRA lacks any statutory deadline by which he must turn over any Presidential records in his possession, and therefore the Government has no legal recourse. MSJ Opp. at 5; MTD at 5. These arguments ignore or contravene the statute's purpose, framework and provisions.

Dr. Navarro contends that he has no statutory duties under the PRA, *see* MSJ Opp. at 5. This position would defeat the entire purpose of the statute, *i.e.*, to ensure that Presidential records, as defined, are collected, maintained and made available to the public. 44 U.S.C. §§ 2201-2203. The PRA makes plain that Presidential advisors

such as Dr. Navarro are part and parcel of the statutory scheme in that they are required to preserve Presidential records during their tenure so that they can be transferred to NARA at the end of an administration. *See* 44 U.S.C. § 2203(g)(1) ("Upon the conclusion of a President's term in office . . . the Archivist of the United States shall assume responsibility for the custody, control, and preservation of, and access to, the Presidential records of that President."). Dr. Navarro was so advised when he began his employment. [1]

The PRA, in fact, provides that covered employees such as Dr. Navarro "may not create or send a Presidential record using a non-official electronic message account unless the President, Vice President, or covered employee (1) copies an official electronic messaging account in the original creation or transmission of the Presidential record or (2) forwards a complete copy of the Presidential . . . record to an official messaging account . . . not later

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[1] A White House Counsel memorandum sent early in Dr. Navarro's tenure expressly extended section 2209(a)'s requirement to copy or forward emails to apply to those emails received on a non-official email account. *See* Compl. Ex. 1 at 2, ECF No. 1-2 (instructing White House personnel that "[i]f you ever send or receive email that qualifies as a presidential record using any other account . . . , you must preserve that email by copying it to your official EOP email account or by forwarding it to your official email account within twenty (20) days."). The memorandum also confirmed "that [P]residential records are the property of the United States . . When you leave EOP employment, you may not take any presidential records with you." *Id.* at 2. Though Dr. Navarro now disputes the White House memorandum's interpretation of the reach of the statute, he does not contend that he was not so advised.

than 20 days after the original creation or transmission of the Presidential . . .record." 44 U.S.C. §§ 2209(a)(1)-(2). The Archivist is thereafter required to "make such records available to the public as rapidly and completely as possible consistent with the provisions of this chapter." *Id.* § 2203.

Dr. Navarro asserts that the request for emails regarding his White House duties that were received from others, rather than created by him, is outside the statute's scope, whether or not they were responsive to the emails he generated. This again evidences a misunderstanding of the statute's reach. Indeed, if the statute contemplates creating the full record of a covered employee's work, as it surely does, then wiping out part, if not half, of the record would contravene the intent of the statute. Moreover, contrary to Dr. Navarro's position, the PRA expressly defines Presidential records to include those "created *or received* by the President, the President's immediate staff, or a unit or individual of the Executive Office of the President") (emphasis added); 44 U.S.C. §§ 2202(2), 2203(a)-(b). All the emails in Dr. Navarro's personal email account, whether created or received, are therefore subject to being assessed as potential Presidential records if they arose out of his employment in the administration.

Dr. Navarro's other arguments under section 2209 are equally without merit. He argues that the United States cannot rely on section 2209 because no court has yet interpreted it. *See* MSJ Opp. at 5-7. If applied, this contention would render every new statute unenforceable because no court would ever be able to interpret it a first time absent another

court's also-prohibited first interpretation. The circularity of such a novel doctrine is self-evident.

It also has no merit in view of this Circuit's jurisprudence. *See CREW v. Cheney*, 591 F. Supp. 2d 194, 216 (D.D.C. 2009) ("[I]t it borders on the absurd to believe that Congress statutorily defined Vice–Presidential records and required the Vice President to implement steps to preserve them, but denied any judicial review to prevent the Vice President from using a different definition for Vice–Presidential records."). In *Am. Historical Ass'n v. Peterson*, 876 F. Supp. 1300, 1315 (D.D.C. 1995), the district court, in an action focused on the records of a former President, the court rejected the notion that judicial review was unavailable:

it borders on the absurd to posit that Congress – in passing a statute to preclude former Presidents from disposing of Presidential records at will, and affording Presidents no discretion to restrict access to records after leaving office – intended that a former President's post-term decisions regarding disposal of such records be immune from judicial review.

Id. at 1315.

This reasoning applies with equal force to the records of a former covered employee.[5]

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[5] Under *Armstrong v. Bush ("Armstrong I")*, 924 F.2d 282, 290-91 (D.C. Cir. 1991), the decisions of a sitting President with respect to his or her records were deemed not to be subject to judicial review under the PRA, which did not create a private

Accordingly, the Court declines to embrace an argument that would bar all judicial review of new statutes.

2. United States' Power to Enforce PRA's Requirements

Dr. Navarro also maintains that because the statute sets out a general disclosure requirement with no apparent enforcement mechanism (other than to discipline a wayward employee), there is no power in the United States to enforce the statute and require production of the detained Presidential records by any other method. MSJ Opp. at 7. In short, Defendant suggests that because there is no explicit statutory scheme for compelling the

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cause of action for enforcement. However, two years later, in *Armstrong v. Executive Office of the President ("Armstrong II")*, 1 F.3d 1274, 1293-94 (D.C. Cir. 1993) (per curiam), the court retreated from that position and held that although "the PRA impliedly precludes judicial review of the President's decisions concerning the creation, management, and disposal of presidential records during his term of office," courts "may review guidelines outlining what is, and what is not, a 'presidential record' " because to hold otherwise would "be tantamount to allowing the PRA to functionally render the FOIA a nullity." The court was clear in stating that "[t]he *Armstrong I* opinion does *not* stand for the unequivocal proposition that all decisions made pursuant to the PRA are immune from judicial review." *Id.* at 1293. (emphasis added). Subsequently, in *Peterson*, the court reviewed an agreement regarding a former President's personal electronic records and held that "judicial review may be available to ensure that Presidential records are not disposed of as personal records at the end of an Administration and that, instead, all Presidential records fall subject to the Archivist's "affirmative duty to make such records available to the public." 876 F. Supp. At 1314.

production of Presidential records wrongfully held by a former covered employee, the United States cannot prevail in seeking a writ of replevin. This approach, too, would nullify effectuation of the statute's purpose.

Dr. Navarro's argument appears to be a variation on the motion to dismiss in *CREW*. In that case, private plaintiffs pled several causes of action, but did not plead a cause of action under the PRA, although their subsequent motion papers did suggest that they were requesting the Court to imply a private cause of action under the PRA. 593
F. Supp. 2d at 217.

Although the PRA certainly creates ministerial obligations for the President and Vice– President, and although Plaintiffs are undoubtedly correct that the PRA was enacted to ensure the preservation of Presidential records for "scholars, journalists, researchers and citizens of our own and future generations," (quoting 124 Cong. Rec. H34894 (daily ed. Oct. 10, 1978) (Statement of Rep. Brademas)), the statute nevertheless does not contain language evincing a Congressional intent to allow suits by private plaintiffs proceeding directly thereunder. The Supreme Court has explained that the private right of action inquiry must focus on whether the *statutory text* "[is] 'phrased in terms of the persons benefitted.'" Here, Plaintiffs submit that the PRA defines "the persons benefitted" in 44 U.S.C. § 2202, the provision stating that *"[t]he United States shall reserve and retain complete ownership, possession, and control of Presidential records." Id.* at 218 (cleaned up).

Here, Dr. Navarro suggests that the United

States may not maintain an action to vindicate the purposes of the PRA. As the above makes clear, the United States—which "shall reserve and retain complete ownership, possession, and control of Presidential records"—is precisely the plaintiff to bring an action under the statute, as it did here in seeking a writ of replevin for Presidential records wrongfully retained.

Although the PRA sets out a statutory scheme, it is not in the Congress' ambit to envision every manner in which a person might seek to evade the requirements of a statute. And clearly, while the statute seeks to make plain that all Presidential records are to be provided to NARA, Congress did not delineate provisions to cover a situation where a former covered employee would (a) maintain a private, encrypted email account with official emails, (b) not follow the prescribed transfer of those emails to the official account, and (c) refuse to return those emails that constitute Presidential records. Enforcement of the statute by the government to assert its ownership rights militates that it must be free to utilize those legal processes available to it whether or not they are expressly provided for by statute. In this instance, the United States correctly invokes the Court's judicial power to require the return of the wrongfully retained emails.

3. Vagueness

Dr. Navarro also asserts that the statute is "vague" and unsettled and therefore "there exist genuine disputes of material fact as to whether any alleged actions Dr. Navarro engaged in were even a violation of the PRA." MSJ Opp. at 7. Apart from the legal objections raised in his Statement of

Undisputed Material Fact Response, Dr. Navarro asserts no credible challenge to the statutory scheme as it applies to his actions. The undisputed material facts and the clear language of the statute make it plain that the United States has made out an unchallenged factual case that Dr. Navarro wrongfully retains Presidential records that are the property of the United States. Absent some other compelling reason not to issue a writ of replevin, Dr. Navarro must return the withheld Presidential records.

4. Applicable Deadline for Compliance

Dr. Navarro contends that because the statute did not contemplate these circumstances, and therefore did not set out any deadline by which Presidential records held in a personal email account are to be returned, the United States may not have the Court compel their return under a writ of replevin. Rather, Dr. Navarro maintains that he has "asserted a privilege validly delaying the time within which he must produce the records sought by the Archivist." MSJ Opp. at 10; *see also* MTD at 6. In its present posture, this excuse, even if valid, has no obvious date of termination and therefore runs counter to the intent and provisions of the PRA.

It bears note that under the PRA Dr. Navarro's obligation to copy from or forward from his personal account to the official account was "no later than" twenty (20) days after the original creation or transmission.[6] Plainly, he did neither

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[6] The PRA requires the President, the Vice President, and Covered Employees to "cop[y] their "official electronic messaging account" when sending a communication using a non-official

during his tenure in the White House, nor has he forwarded Presidential record emails in the years since. In light of the statute's expectations and the lack of any cognizable justification for his delay in complying with the statute, the Court declines to accept the proposition that compliance is indefinitely delayed.

B. Fifth Amendment Production Privilege

Dr. Navarro asserts that his refusal to return the emails in question was justified because he "reasonably believed that the production of records to the United States risked the implication of his Fifth Amendment right against self-incrimination." MSJ Opp. at 3. But he goes no further, and does not explain in any way why production of the requested Presidential records would tend to incriminate him. He merely says so. It is precedent of long standing that he "is not exonerated from answering merely because he declares that in so doing he would incriminate himself—his say-so does not of itself establish the hazard of incrimination. It is for the court to say whether his silence is justified[.]" *See Hoffman v. United States*, 341 U.S. 479, 486 (1951) (citation omitted). "To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result. The trial judge in

account or to "forward[] a complete copy" of an email sent on their non-official account to their "official electronic messaging account . . . not later than 20 days after the original creation or transmission" of the record. 44 U.S.C. §§ 2209(a)(1), (a)(2).

appraising the claim 'must be governed as much by his personal perception of the peculiarities of the case as by the facts actually in evidence.'" *Id.* at 486-87.

In this setting, Dr. Navarro has been requested to return to the United States emails from his personal email account that constitute Presidential records and which were in all instances prepared during his tenure at the White House from 2017 to 2021. Producing these pre- existing records in no way implicates a compelled testimonial communication that is incriminating. *See United States v. Doe,* 465 U.S. 605, 612 n.10 ("If the party asserting the Fifth Amendment privilege has voluntarily compiled the document, no compulsion is present and the contents of the document are not privileged."); *Fisher v. United* States, 425 U.S. at 408 ("The Fifth Amendment does not independently proscribe the compelled production of every sort of incriminating evidence but applies only when the accused is compelled to make a Testimonial Communication that is incriminating."). Such "pre-existing, voluntarily prepared documents" are not covered by the Fifth Amendment. *See United States v. Hubbell*, 167 F.3d 552, 567-69 (D.C. Cir, 1999), *aff'd*, 530 U.S. 27 (2000).

Indeed, the production of these pre-existing emails "'does not compel oral testimony,' nor would it 'compel the [recipient] to restate, repeat, or affirm the truth of the contents of the documents sought.'" *SEC v. Karroum*, Misc. A. No. 15-590 (JEB), 2015 WL 8483246 *3 (D.D.C. Dec. 9, 2015) (quoting *Fisher v. United States*, 425 U.S. 391, 409 (1976)). In other words, the mere act of production is "not testimonial in nature." *Id.*

C. Replevin

Finally, the Court agrees with the United States that the District of Columbia's replevin statute provides a cause of action for the return of Dr. Navarro's unlawfully retained documents. Replevin "is, in general, an action in which the owner, or a person who has a general or special interest in some personalty either taken or detained by another, seeks to recover possession in specie, and, occasionally, the recovery of damages as an incident of the proceedings." Replevin, 7 American Law of Torts § 24:17 (West 2022). Federal Rule of Civil Procedure 64 expressly contemplates that federal courts will issue writs of replevin, or other corresponding or equivalent remedies, specifying that the law of a forum state will govern except insofar as federal law applies. District of Columbia law creates an action for replevin, allowing a Plaintiff "to recover personal property to which the plaintiff is entitled, that . . . [has] been wrongfully taken by or to be in the possession of and wrongfully detained by the defendant." D.C. Code 16-3701.4. The "essence" of a replevin action under D.C. law is the "wrongful withholding of the property in question." *Hunt v. DePuy Orthopedics, Inc.,* 729 F. Supp. 2d 231, 232 (D.D.C. 2010). Where, as here, a party has wrongfully detained property belonging to the United States, the United States has sued for the return of the property. *See, e.g.*, *United States v. McElvenny,* 02-cv-3027, 2003 WL 1741422, at*1 (S.D.N.Y. Apr. 1, 2003) (seeking a writ of replevin for map of Cuba bearing notations made by President John F. Kennedy during the Cuban Missile Crisis and a collection of President Kennedy's papers

regarding federal involvement in the integration of the University of Mississippi).

Courts in this Circuit considering a claim of replevin under the D.C. Code look to D.C. law, rather than any federal common law, to determine whether a party has stated a viable replevin claim. *BMO Harris Bank N.A. v. Dist. Logistics, LLC*, Civ. A. No. 20-3425 (KBJ/RMM), 2021 WL 7448012, at *4 (D.D.C. July 23, 2021). In the District of Columbia, replevin is a cause of action, "brought to recover personal property to which the plaintiff is entitled, that is alleged to have been wrongfully taken by or to be in the possession of and wrongfully detained by the defendant[.]" *BMO*, 2021 WL 7448012, at *4 (quoting *Hunt v. DePuy Orthopedics*, 729 F. Supp. 2d 231, 232 (D.D.C. 2010) (citing D.C. Code § 16-3701))).

The district of Columbia's replevin statute provides in relevant part:

> The plaintiff sues the defendant for (wrongly taking and detaining) (unjustly detaining) the plaintiff's goods and chattels, to wit: (describe them) of the value of [specified amount of] dollars. And the plaintiff claims that the same be taken from the defendant and delivered to him; or, if they are eloigned, that he may have judgment of their value and all mesne profits and damages, which he estimates at [specified amount of] dollars, besides costs.

D.C. Code § 16-3702 (emphasis added). Defendant contends that the United States has failed to plead a replevin action because it does not set forth the "value of" the Presidential records

detained by Dr. Navarro. MTD at 8, ECF No. 9.

Yet Dr. Navarro provides no support for the proposition that Courts must dismiss replevin actions whenever the plaintiff does not plead specific monetary damages. That information and the documents at present are solely in Dr. Navarro's possession. Its value becomes relevant only when the property at issue cannot be returned to the plaintiff and the alternative remedy sought is monetary damages. The remedy sought here is explicitly and solely the return of the wrongfully withheld property; the monetary value of the property is therefore irrelevant.

Pursuant to D.C. Code § 16–3702, a replevin plaintiff must demand *either* of two remedies: "[that the property] be taken from the defendant and delivered to him; *or, if they are eloigned*, that he may have judgment of their value and all mesne profits and damages, which he estimates at [a certain amount of] dollars, besides costs." D.C. Code § 16–3702 (emphasis added). The statute's use of the disjunctive makes plain that monetary value of property only becomes relevant when the property cannot be returned to the plaintiff, when compensation is the sole available remedy. This is consistent with the common law tradition that "[t]he primary relief sought in a replevin is the return of the identical property, and damages are merely incidental." 66 Am. Jur. 2d Replevin § 1.

Moreover, Defendant's reliance on *BMO Harris* is misplaced. In *BMO*, the bank failed to meet *either* requirement of the D.C. statute. It neither stated the value of the equipment at issue nor did it

claim that the equipment should be taken and delivered to it. *Id.* at *9. Here, the United States has plainly sought that emails be taken from Dr. Navarro and delivered to it. Having met one of the two prongs of the statute, the failure to state a monetary value for the emails—which remain in Defendant's control—is unnecessary to state a claim.

Dr. Navarro also contends that the emails are not subject to replevin, on the dubious ground that his possession was the "result of an innocent oversight and therefore not willful." As support, he maintains that once the "process" is complete (presumably at some future date following the audit of his emails, and the resolution of the House of Representatives' subpoena and his indictment for contempt of Congress), the records will be provided. MSJ Opp. at 8. In the context of his counsel's admission that there are between 200 and 250 Presidential records in the 1,700 emails reviewed, *see* Bosenko Decl. ¶ 9, this merely supports the view that the retention of the records is wrongful. The contention also fails as a threshold matter, as Dr. Navarro's *mens rea* is irrelevant. The clear record and undisputed fact that he created or received the emails on his private email account relating to and while performing duties for the administration, and neither included them in his official emails nor returned them to NARA upon request, therefore wrongfully detaining them, is the sole relevant inquiry.

Dr. Navarro's final argument is that Presidential records are not subject to replevin law because they are not personal property. "Personal property" is the complement to "real property," and

it is well-established that personal property encompasses "[a]ny moveable or intangible thing that is subject to ownership and not classified as real property." *Property*, Black's Law Dictionary (11th ed. 2019). The history of the PRA makes it plain that Presidential records plainly fall into this broad definition, whether they are physical objects (like the map sought in *United States v. McElvenny*) or electronic records (like the emails in *Karroum*). Therefore, in *Nixon v. United States,* the D.C. Circuit—prior to the enactment of the PRA—held that presidential materials were the President's personal property. 978 F.2d 1269, 1284 (D.C. Cir. 1992). The passage of the PRA in 1978 changed the ownership of Presidential records, converting them from being the personal property of the president into the personal property of the United States. See 44 U.S.C. § 2202. Their fundamental character as Presidential records is as personal property. That these records are electronic as opposed to paper make no difference to their character. *See Armstrong*, 1 F.3d at 1283 (emails are records under the Presidential Records Act and therefore constitute personal property).

Dr. Navarro's contrary argument is based on a district court case finding that airline frequent flyer miles are not personal property, *see* MSJ Opp. at 8 (citing *Ficken v. AMR Corp.*, 578 F. Supp. 2d 134, 143 (D.D.C. 2008)); MTD 9-10 (same). The Court is unpersuaded. Frequent flyer miles are different in kind from Presidential records. The *Ficken* court's finding that frequent flyer miles "amounted to credit with the airline" and represented an "intangible right" rather than "personal property," 578 F. Supp.

2d at 143, is distinct. Presidential records are not intangible credits issued by a third-party, but, as discussed above, personal property wholly within the ambit of the statutory scheme.

IV. CONCLUSION

For the foregoing reasons, Court **GRANTS** the United States' [7] Motion for Summary Judgment and **DENIES** Defendant's [9] Motion to Dismiss. An appropriate Order setting out the relief awarded accompanies this Memorandum Opinion.

Date: March 9, 2023

/s/______________________________
COLLEEN KOLLAR-KOTELLY
United States District Judge

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23-5062
September Term, 2023 1:22-cv-02292-CKK
Filed on: May 23, 2024

UNITED STATES OF AMERICA, Appellee

v.

PETER K. NAVARRO, Appellant

BEFORE: Pillard, Childs, and Garcia, Circuit Judges

ORDER

Upon consideration of appellant's petition for panel rehearing filed on May 13, 2024, it is **ORDERED** that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer
BY: /s/ Daniel J. Reidy Deputy Clerk

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23-5062
September Term, 2023 1:22-cv-02292-CKK
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UNITED STATES OF AMERICA, Appellee

v.

PETER K. NAVARRO, Appellant

BEFORE: Srinivasan, Chief Judge; Henderson, Millett, Pillard, Wilkins, Katsas*, Rao, Walker, Childs, Pan, and Garcia, Circuit Judges

ORDER

Upon consideration of appellant's petition for rehearing en banc, and the absence of a request of any member of the court for a vote, it is
ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer
BY: /s/ Daniel J. Reidy Deputy Clerk

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* Circuit Judge Katsas did not participate in this matter.

PRESIDENTIAL RECORDS ACT
United States Code, Title 44, Chapter 22

44 U.S.C. § 2201 – Definitions As used in this chapter—

(1) The term "documentary material" 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.

(2) The term "Presidential records" means documentary 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. Such term—

(A) includes any documentary materials relating to the political activities of the President or members of the President's staff, but only if such activities relate to or have a direct effect upon the carrying out of constitutional, statutory, or other official or ceremonial duties of the President; but

(B) does not include any documentary materials that are (i) official records of an

agency (as defined in section 552(e) [1] of title 5, United States Code); (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.

(3) The term "personal records" means all documentary materials, or any reasonably segregable portion therof,[2] 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. Such term includes—

(A) diaries, journals, or other personal notes serving as the functional equivalent of a diary or journal which are not prepared or utilized for, or circulated or communicated in the course of, transacting Government business;

(B) materials relating to private political associations, and having no relation to or direct effect upon the carrying out of constitutional, statutory, or other official or ceremonial duties of the President; and

(C) materials relating exclusively to the President's own election to the office of the Presidency; and materials directly relating to the election of a particular individual or individuals to Federal, State, or local office, which have no relation to or direct effect upon the carrying out of constitutional, statutory, or other official or ceremonial

duties of the President.

(4) The term “Archivist” means the Archivist of the United States.

(5) The term “former President”, when used with respect to Presidential records, means the former President during whose term or terms of office such Presidential records were created.

44 U.S.C. § 2202 - Ownership of Presidential records

The 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.

44 U.S.C. § 2203 – Management and custody of Presidential records

(a) Through the implementation of records management controls and other necessary actions, the President shall 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 pursuant to the requirements of this section and other provisions of law.

(b) Documentary materials produced or received by the President, the President’s staff, or units or individuals in the Executive Office of the President the function of which is to

advise or assist the President, shall, to the extent practicable, be categorized as Presidential records or personal records upon their creation or receipt and be filed separately.

(c) During the President's term of office, the President may dispose of those Presidential records of such President that no longer have administrative, historical, informational, or evidentiary value if—

(1) the President obtains the views, in writing, of the Archivist concerning the proposed disposal of such Presidential records; and

(2) the Archivist states that the Archivist does not intend to take any action under subsection (e) of this section.

(d) In the event the Archivist notifies the President under subsection (c) that the Archivist does intend to take action under subsection (e), the President may dispose of such Presidential records if copies of the disposal schedule are submitted to the appropriate Congressional Committees at least 60 calendar days of continuous session of Congress in advance of the proposed disposal date. For the purpose of this section, continuity of session is broken only by an adjournment of Congress sine die, and the days on which either House is not in session because of an adjournment of more than three days to a day certain are excluded in the computation of the days in which Congress is in continuous session.

(e) The Archivist shall request the advice of the

Committee on Rules and Administration and the Committee on Governmental Affairs of the Senate and the Committee on House Oversight and the Committee on Government Operations of the House of Representatives with respect to any proposed disposal of Presidential records whenever the Archivist considers that—

(1) these particular records may be of special interest to the Congress; or

(2) consultation with the Congress regarding the disposal of these particular records is in the public interest.

(f) During a President's term of office, the Archivist may maintain and preserve Presidential records on behalf of the President, including records in digital or electronic form. The President shall remain exclusively responsible for custody, control, and access to such Presidential records. The Archivist may not disclose any such records, except under direction of the President, until the conclusion of a President's term of office, if a President serves consecutive terms upon the conclusion of the last term, or such other period provided for under section 2204 of this title.

(g)

(1) Upon the conclusion of a President's term of office, or if a President serves consecutive terms upon the conclusion of the last term, the Archivist of the United States shall assume responsibility for the custody, control, and preservation of, and access to, the Presidential records of that

President. The Archivist shall have an affirmative duty to make such records available to the public as rapidly and completely as possible consistent with the provisions of this chapter.

(2) The Archivist shall deposit all such Presidential records in a Presidential archival depository or another archival facility operated by the United States. The Archivist is authorized to designate, after consultation with the former President, a director at each depository or facility, who shall be responsible for the care and preservation of such records.

(3) When the President considers it practicable and in the public interest, the President shall include in the President's budget transmitted to Congress, for each fiscal year in which the term of office of the President will expire, such funds as may be necessary for carrying out the authorities of this subsection.

(4) The Archivist is authorized to dispose of such Presidential records which the Archivist has appraised and determined to have insufficient administrative, historical, informational, or evidentiary value to warrant their continued preservation. Notice of such disposal shall be published in the Federal Register at least 60 days in advance of the proposed disposal date. Publication of such notice shall constitute a final agency action for purposes of review under chapter 7 of title 5, United States

Code.

44 U.S.C. § 2204 - Restrictions on access to Presidential records

(a) Prior to the conclusion of a President's term of office or last consecutive term of office, as the case may be, the President shall specify durations, not to exceed 12 years, for which access shall be restricted with respect to information, in a Presidential record, within one or more of the following categories:

(1)

(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and

(B) in fact properly classified pursuant to such Executive order;

(2) relating to appointments to Federal office;

(3) specifically exempted from disclosure by statute (other than sections 552 and 552b of title 5, United States Code), provided that such statute (A) requires that the material be withheld from the public in such a manner as to leave no discretion on the issue, or

(B) establishes particular criteria for withholding or refers to particular types of material to be withheld;

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) confidential communications requesting or submitting advice, between the President

and the President's advisers, or between such advisers; or

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

(b)

(1) Any Presidential record or reasonably segregable portion thereof containing information within a category restricted by the President under subsection (a) shall be so designated by the Archivist and access thereto shall be restricted until the earlier of—

(A)

(i) the date on which the former President waives the restriction on disclosure of such record,

(ii) or the expiration of the duration specified under subsection (a) for the category of information on the basis of which access to such record has been restricted; or

(B) upon a determination by the Archivist that such record or reasonably segregable portion thereof, or of any significant element or aspect of the information contained in such record or reasonably segregable portion thereof, has been placed in the public domain through publication by the former President, or the President's agents.

(2) Any such record which does not contain information within a category restricted by

the President under subsection (a), or contains information within such a category for which the duration of restricted access has expired, shall be exempt from the provisions of subsection (c) until the earlier of—

(A) the date which is 5 years after the date on which the Archivist obtains custody of such record pursuant to section 2203(d)(1); [1] or

(B) the date on which the Archivist completes the processing and organization of such records or integral file segment thereof.

(3) During the period of restricted access specified pursuant to subsection (b)(1), the determination whether access to a Presidential record or reasonably segregable portion thereof shall be restricted shall be made by the Archivist, in the Archivist's discretion, after consultation with the former President, and, during such period, such determinations shall not be subject to judicial review, except as provided in subsection (e) of this section. The Archivist shall establish procedures whereby any person denied access to a Presidential record because such record is restricted pursuant to a determination made under this paragraph, may file an administrative appeal of such determination. Such procedures shall provide for a written determination by the Archivist or the

Archivist's designee, within 30 working days after receipt of such an appeal, setting forth the basis for such determination.

(c)

(1) Subject to the limitations on access imposed pursuant to subsections (a) and (b), Presidential records shall be administered in accordance with section 552 of title 5, United States Code, except that paragraph (b)(5) of that section shall not be available for purposes of withholding any Presidential record, and for the purposes of such section such records shall be deemed to be records of the National Archives and Records Administration. Access to such records shall be granted on nondiscriminatory terms.

(2) Nothing in this Act shall be construed to confirm, limit, or expand any constitutionally-based privilege which may be available to an incumbent or former President.

(d) Upon the death or disability of a President or former President, any discretion or authority the President or former President may have had under this chapter, except section 2208, shall be exercised by the Archivist unless otherwise previously provided by the President or former President in a written notice to the Archivist.

(e) The United States District Court for the District of Columbia shall have jurisdiction

over any action initiated by the former President asserting that a determination made by the Archivist violates the former President's rights or privileges.

(f) The Archivist shall not make available any original Presidential records to any individual claiming access to any Presidential record as a designated representative under section 2205(3) of this title if that individual has been convicted of a crime relating to the review, retention, removal, or destruction of records of the Archives.

44 U.S.C. § 2205 - Exceptions to restricted access

Notwithstanding any restrictions on access imposed pursuant to sections 2204 and 2208 of this title—

(1) the Archivist and persons employed by the National Archives and Records Administration who are engaged in the performance of normal archival work shall be permitted access to Presidential records in the custody of the Archivist;

(2) subject to any rights, defenses, or privileges which the United States or any agency or person may invoke, Presidential records shall be made available—

(A) pursuant to subpoena or other judicial process issued by a court of competent jurisdiction for the purposes of any civil or criminal investigation or proceeding;

(B) to an incumbent President if such records contain information that is needed for the conduct of current business of the incumbent President's office and that is not

otherwise available; and

(C) to either House of Congress, or, to the extent of matter within its jurisdiction, to any committee or subcommittee thereof if such records contain information that is needed for the conduct of its business and that is not otherwise available; and

(3) the Presidential records of a former President shall be available to such former President or the former President's designated representative.

44 U.S.C. § 2206 – Regulations

The Archivist shall promulgate in accordance with section 553 of title 5, United States Code, regulations necessary to carry out the provisions of this chapter. Such regulations shall include—

(1) provisions for advance public notice and description of any Presidential records scheduled for disposal pursuant to section 2203(f)(3);

(2) provisions for providing notice to the former President when materials to which access would otherwise be restricted pursuant to section 2204(a) are to be made available in accordance with section 2205(2);

(3) provisions for notice by the Archivist to the former President when the disclosure of particular documents may adversely affect any rights and privileges which the former President may have; and

(4) provisions for establishing procedures for consultation between the Archivist and

appropriate Federal agencies regarding materials which may be subject to section 552(b)(7) of title 5, United States Code.

44 U.S.C. § 2207 - Vice-Presidential records

Vice-Presidential records shall be subject to the provisions of this chapter in the same manner as Presidential records. The duties and responsibilities of the Vice President, with respect to Vice-Presidential records, shall be the same as the duties and responsibilities of the President under this chapter, except section 2208, with respect to Presidential records. The authority of the Archivist with respect to Vice- Presidential records shall be the same as the authority of the Archivist under this chapter with respect to Presidential records, except that the Archivist may, when the Archivist determines that it is in the public interest, enter into an agreement for the deposit of Vice- Presidential records in a non-Federal archival depository. Nothing in this chapter shall be construed to authorize the establishment of separate archival depositories for such Vice-Presidential records.

44 U.S.C. § 2208 - Claims of constitutionally based privilege against disclosure

(a)

(1) When the Archivist determines under this chapter to make available to the public any Presidential record that has not previously been made available to the public, the Archivist shall—

(A) promptly provide notice of such

determination to—

(i) the former President during whose term of office the record was created; and

(ii) the incumbent President; and

(B) make the notice available to the public.

(2) The notice under paragraph (1)—

(A) shall be in writing; and

(B) shall include such information as may be prescribed in regulations issued by the Archivist.

(3)

(A) Upon the expiration of the 60-day period (excepting Saturdays, Sundays, and legal public holidays) beginning on the date the Archivist provides notice under paragraph (1)(A), the Archivist shall make available to the public the Presidential record covered by the notice, except any record (or reasonably segregable part of a record) with respect to which the Archivist receives from a former President or the incumbent President notification of a claim of constitutionally based privilege against disclosure under subsection (b).

(B) A former President or the incumbent President may extend the period under subparagraph (A) once for not more than 30 additional days (excepting Saturdays, Sundays, and legal public holidays) by filing with the Archivist a statement that such an extension is necessary to allow an adequate review

of the record.

(C) Notwithstanding subparagraphs (A) and (B), if the 60-day period under subparagraph (A), or any extension of that period under subparagraph (B), would otherwise expire during the 6-month period after the incumbent President first takes office, then that 60-day period or extension, respectively, shall expire at the end of that 6-month period.

(b)

(1) For purposes of this section, the decision to assert any claim of constitutionally based privilege against disclosure of a Presidential record (or reasonably segregable part of a record) must be made personally by a former President or the incumbent President, as applicable.

(2) A former President or the incumbent President shall notify the Archivist, the Committee on Oversight and Government Reform of the House of Representatives, and the Committee on Homeland Security and Governmental Affairs of the Senate of a privilege claim under paragraph (1) on the same day that the claim is asserted under such paragraph.

(c)

(1) If a claim of constitutionally based privilege against disclosure of a Presidential record (or reasonably segregable part of a record) is asserted under subsection (b) by a former

President, the Archivist shall consult with the incumbent President, as soon as practicable during the period specified in paragraph (2)(A), to determine whether the incumbent President will uphold the claim asserted by the former President.

(2)

(A) Not later than the end of the 30-day period beginning on the date on which the Archivist receives notification from a former President of the assertion of a claim of constitutionally based privilege against disclosure, the Archivist shall provide notice to the former President and the public of the decision of the incumbent President under paragraph (1) regarding the claim.

(B) If the incumbent President upholds the claim of privilege asserted by the former President, the Archivist shall not make the Presidential record (or reasonably segregable part of a record) subject to the claim publicly available unless—

(i) the incumbent President withdraws the decision upholding the claim of privilege asserted by the former President; or

(ii) the Archivist is otherwise directed by a final court order that is not subject to appeal.

(C) If the incumbent President determines not to uphold the claim of privilege asserted by the former President, or fails to make the determination under paragraph

(1) before the end of the period specified in subparagraph (A), the Archivist shall release the Presidential record subject to the claim at the end of the 90-day period beginning on the date on which the Archivist received notification of the claim, unless otherwise directed by a court order in an action initiated by the former President under section 2204(e) of this title or by a court order in another action in any Federal court.

(d) The Archivist shall not make publicly available a Presidential record (or reasonably segregable part of a record) that is subject to a privilege claim asserted by the incumbent President unless—

(1) the incumbent President withdraws the privilege claim; or

(2) the Archivist is otherwise directed by a final court order that is not subject to appeal.

(e) The Archivist shall adjust any otherwise applicable time period under this section as necessary to comply with the return date of any congressional subpoena, judicial subpoena, or judicial process.

44 U.S.C. § 2209 - Disclosure requirement for official business conducted using non-official electronic messaging accounts

(a) In General.—The President, the Vice President, or a covered employee may not create or send a Presidential or Vice

Presidential record using a non-official electronic message account unless the President, Vice President, or covered employee—

(1) copies an official electronic messaging account of the President, Vice President, or covered employee in the original creation or transmission of the Presidential record or Vice Presidential record; or

(2) forwards a complete copy of the Presidential or Vice Presidential record to an official electronic messaging account of the President, Vice President, or covered employee not later than 20 days after the original creation or transmission of the Presidential or Vice Presidential record.

(b) Adverse Actions.—The intentional violation of subsection (a) by a covered employee (including any rules, regulations, or other implementing guidelines), as determined by the appropriate supervisor, shall be a basis for disciplinary action in accordance with subchapter I, II, or V of chapter 75 of title 5, as the case may be.

(c) Definitions.—In this section:

(1) Covered employee.—The term "covered employee" means—

(A) the immediate staff of the President;

(B) the immediate staff of the Vice President;

(C) a unit or individual of the Executive Office of the President whose function is to advise and assist the President; and

(D) a unit or individual of the Office of the Vice President whose function is to advise and assist the Vice President.

(2) Electronic messages.—The term “electronic messages” means electronic mail and other electronic messaging systems that are used for purposes of communicating between individuals.

(3) Electronic messaging account.—The term “electronic messaging account” means any account that sends electronic messages.