

STATEMENT
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to the
Subcommittee on Government Efficiency, Financial Management,
and Intergovernmental Relations
of the Committee on Government Reform
House of Representatives
Congress of the United States

On the Implementation and Effectiveness of the Presidential Records Act of 1978

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Chairman Horn, Congresswoman Schakowsky, members of the Subcommittee, and Subcommittee staff, I am John Carlin, Archivist of the United States, and I thank you for the opportunity to appear before you this morning on the implementation of the Presidential Records Act. Mr. Chairman, I particularly want to thank you for holding this hearing and for your continued interest in the programs and responsibilities of the National Archives and Records Administration. We are fully aware that with the jurisdiction of this subcommittee, attention to NARA is your job. However, you have taken a particular interest in our mission during your career in Congress and the people of NARA and our many constituent groups thank you for that interest.

In order to set the foundation for this dialogue today, I would like to set out the history of the Presidential Records Act and provide the Subcommittee with an overview of our implementation to date. The Presidential Records Act (PRA) was enacted in 1978 to establish public ownership of the records created by subsequent Presidents and their staffs and to establish procedures

governing the preservation and public availability of the records. As noted in the House Report accompanying the pending bill:

The legislation would terminate the tradition of private ownership of Presidential papers and the reliance on volunteerism to determine the fate of their disposition. Instead, the preservation of the historical record of future Presidents would be assured and public access to the materials would be consistent under standards affixed in law. The primary function of the Presidential libraries remains unchanged. The libraries are to continue to provide information about their holdings and to make records available to researchers upon request on an impartial basis.

H. Rep. 95-1487, at 2-3 (95th Cong., 2d Sess., Aug. 14, 1978).

The PRA mandates that the Presidential records of an Administration be transferred to the legal and physical custody of the National Archives and Records Administration (NARA) immediately upon the end of the President's last term of office. The Archivist of the United States is given the "responsibility for the custody, control, and preservation of, and access to, the Presidential records of th[e former] President." 44 U.S.C. § 2203(f)(1). The PRA also requires the Archivist to appoint a Library Director in "consultation with the former President." *Id.* § 2203(f)(2). The Library Director balances archival and public access considerations with national security, confidentiality, and privacy concerns.

Since its enactment, NARA has taken legal custody of the Presidential records of Presidents Ronald Reagan, George H.W. Bush, and William J. Clinton. The Reagan and Bush records are housed in Presidential Libraries in Simi Valley, California and College Station, Texas, respectively. The Clinton records are stored in a records storage facility in Little Rock, Arkansas, until they can be transferred to a Presidential Library that is being constructed by former President Clinton.

The PRA applies to all Vice-Presidential records in same manner as Presidential records, and affords the former Vice-Presidents the same authority as the former Presidents. Accordingly, all of the procedures and authorities that are ascribed in this testimony to the former Presidents also apply to the former Vice-Presidents (except that Vice-Presidential records may be stored at a separate location from the Presidential records).

Responsibilities of the Archivist of the United States Under the PRA

The PRA established Government control over Presidential records while codifying and preserving some of the basic practices that long existed with respect to the papers that Presidents had donated to the National Archives (dating back to President Hoover). As the House Report on the PRA bill stated: "It is anticipated that the Archivist will process the former Administration's papers in a manner roughly similar to current practices." H. Rep. 95-1487, at 15. The report also stated that "the determination whether access to a Presidential record or reasonably segregable portion thereof shall be restricted shall be made by the Archivist, in his discretion, after consultation with the former President." *Id.* § 2204(b)(3).

The PRA mandates that "[t]he 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 Act." *Id.* § 2203(f)(1). Overall, the PRA represents an effort to legislate a "careful balance between the public's right to know, with its vast implications to historians and other academic interests, and the rights of privacy and confidentiality of certain sensitive records generated by

the President and his staff during the course of their White House activities.” Floor Statement of Congressman Thompson, *Cong. Rec.*, Oct. 10, 1978, at 34897.

Presidential Papers and Materials Prior to the PRA

Prior to the PRA, and with the exception of the materials of former President Richard M. Nixon, the Presidential papers and materials maintained under NARA’s control at the Presidential Libraries of former Presidents Hoover, Roosevelt, Truman, Eisenhower, Kennedy, Johnson, Ford, and Carter are controlled by the terms of the deeds of gift by which the former Presidents donated their records to the National Archives. Each of these deeds has provisions outlining categories of records that may be withheld from public access for some period of time. All of them seek to protect information that could harm national security, invade personal privacy, or cause embarrassment or harassment. Some also seek to protect documents involving confidential communications directly with the President. The deeds of Presidents Ford and Carter model the restrictions on the PRA exemptions.

In all instances, the Director of the Presidential Library, who is appointed by NARA in close consultation with the former President or representative, was given the independent authority and discretion to process and open the papers, with very limited involvement by the former President or representative. Living former Presidents in some cases would establish priorities for the processing of particular subjects or series of records. In other cases, a representative or review board was established – such as for Presidents Roosevelt and Kennedy because they died in office, as well as for Truman and Eisenhower – that exercised limited control over the decisions

made by the Libraries. The boards' principal concern was with respect to the President's personal and family matters, and, in most cases, they disbanded after a short period of time.

Under these deeds of gift, NARA processed and opened Presidential materials based on the deeds and professional archival considerations. Moreover, because the materials at these Libraries were donated to the United States, they are not subject to request under the Freedom of Information Act (FOIA) or any other public access statute. This meant that the Library staff were able to process and open most records in an organized and systematic way based on how the records were filed or arranged. Such "systematic processing" is generally much more efficient and less time consuming than processing in response to FOIA requests. However, researchers have no legal recourse to challenge the withholding of records or delays in responding to requests.

The records of President Nixon are governed by the Presidential Recordings and Materials Preservation Act (PRMPA), 44 U.S.C. § 2111, note, which was passed by Congress in 1974 to ensure government control over the Nixon papers and tapes. The PRMPA also established a National Study Commission on Records and Documents of Federal Officials, which was charged with studying, among other things, "whether the historical practice regarding the records and documents produced by or on behalf of Presidents of the United States should be rejected or accepted and whether such practice should be made applicable with respect to all federal officials." Pub. L. 93-526, 88 Stat. 1695 (December 19, 1974), sec. 202. That commission produced a final report in 1977, and its recommendations were considered by Congress in drafting the PRA. *See* Hearings before a Subcommittee of the Committee on Government

Operations on H.R. 10998 (the Presidential Records Act of 1978) and Related Bills, 95th Cong., 2d Sess., (Feb. 23, 28, Mar. 2, 7, 1978) (PRA Hearings).

Public Access to Presidential Records

Presidential records are not subject to public access requests during the President's term of office, and may be made available only by decision of the incumbent President. After the President leaves office, the records are also not available to public access requests for five years, unless NARA has processed an integral file segment sooner than five years. This five year period was intended principally to give NARA an opportunity to organize the records and begin systematic archival processing. At the end of the five year period, all Presidential records are subject to public access requests in accordance with the FOIA. However, for a period not to exceed 12 years from when the President leaves office, the President is authorized, but not required, to impose up to six Presidential restrictions (which must be imposed before the President leaves office and which are not subject to judicial review).

In addition, the PRA establishes that eight of the nine FOIA exemptions shall apply to Presidential records, which stay in effect after the Presidential restrictions expire. Congress specifically excluded Presidential records from the FOIA (b)(5) exemption concerning the deliberative process and other recognized privileges. Four of the six presidential restrictions are identical to corresponding FOIA exemptions: exemptions 1, for classified national security information; exemptions 3, for information protected by other statute; exemptions 4, for trade secrets and confidential business information; and exemptions 6, for unwarranted invasions of personal privacy. Presidential exemption 2 ("P2"), for "appointments to Federal office," has no

FOIA counterpart, but is subsumed, in large part, under FOIA exemption (b)(6). Presidential exemption 5 ("P5"), concerning "confidential communications requesting or submitting advice, between the President and his advisers, or between such advisers," is similar to FOIA exemption (b)(5), and protects the disclosure of presidential communications, deliberations, and other information that could be subject to a common law or constitutionally-based privilege.

Because the PRA subjects all Presidential records to public access through the FOIA, PRA Libraries open records almost exclusively in response to FOIA requests (or mandatory declassification review requests under Executive Order 12958 on Classified National Security Information), and have very little opportunity to conduct systematic processing of records after the first five years. Moreover, Congressional and grand jury investigations and other litigation has significantly limited systematic processing even during the first five years.

PRA Restrictions

The PRA does not mandate the Presidential restrictions, but rather makes clear that they may be narrowed or waived any time after the President leaves office. Moreover, in the legislative history, Congress anticipated that the Archivist to do just that:

It is also expected that the Archivist will follow past practice in applying the restrictive categories in former Presidents' deeds of gift, and negotiate with the ex-President or his representative on an on-going basis to lessen the number of years chosen for particular mandatory restriction categories, to eliminate entire categories, or to permit release of particular records otherwise restricted.

H. Rep. 95-1487, at 15. Former Presidents Reagan and Bush have both narrowed the application of PRA exemptions P2 and P5 to their records, allowing significantly more records to be opened

than what might otherwise be authorized. NARA will work with former President Clinton and his representative regarding the application of these exemptions as well.

The PRA also removes the authority to withhold Presidential records under FOIA exemption (b)(5) after the expiration of the P5 exemption. The elimination of a statutory exemption in no way prevents a proper assertion of Executive privilege by the former or incumbent President. As the PRA itself notes, the incumbent and former Presidents have clear legal authority to assert an Executive privilege over the Presidential records of former Presidents: "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." 44 U.S.C. § 2204(c)(2). This provision reflects the holding by the Supreme Court that the constitutionally based privileges available to a President "survive[] the individual President's tenure." *Nixon v. Administrator of General Services*, 433 U.S. 425, 449 (1977). Although the Supreme Court also noted the privileges are "subject to erosion over time after an administration leaves office." *Id.* at 451.

Special Access to Presidential Records

In addition to establishing procedures for public access, the PRA also establishes procedures for what NARA calls "special access" to Presidential records that are otherwise closed from public access. These special access provisions are designed to accommodate requests by Congressional investigators, Federal prosecutors, other parties in litigation, and the incumbent President for the ongoing business of the current Administration. However, prior to providing such access, NARA must notify the former and incumbent Presidents and provide them an opportunity to review the records and consider whether to assert any constitutionally-based privilege. Accordingly, either House of Congress, or a Committee or Subcommittee with appropriate

jurisdiction, may request access to Presidential records. Similarly, Federal prosecutors may seek access through a grand jury subpoena, and other parties in litigation may seek access through court orders. The incumbent President may also obtain access to the records of a predecessor on behalf of his staff, such as the NSC, or any other agency, "for the conduct of current business." 44 U.S.C. § 2205(2)(B). The former President and his designated representative are always entitled to access to the Presidential records of his Administration.

That concludes my formal statement, Mr. Chairman, and I would be happy to answer any questions at the appropriate time.