

**Society of American Archivists
Council Meeting
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**DRAFT Issue Brief: Presidential Records Act
(Prepared by the Committee on Advocacy and Public Policy)**

This issue brief addresses the following priority within SAA's Advocacy Agenda, as adopted by the SAA Council in June 2012:

The Public's Right to Equal and Equitable Access to Government Information

American citizens have a right to know the actions and intentions of their government and its leaders. Government officials at all levels should assume that the public has the right of access to documents prepared by a government official or entity, including communications between government officials or entities. To ensure access, government officials have an obligation to preserve such records properly until they are appropriately reviewed, appraised, and declassified when appropriate. This preservation requirement applies to all records, regardless of format.

SUMMARY

SAA supports all efforts to strengthen the Presidential Records Act of 1978 to ensure that it:

- Is enforceable on both the President and Vice President,
- Adequately encompasses electronic as well as paper records and communications, and
- Cannot be altered at the whim of a sitting Chief Executive through the use of executive orders.

Therefore, in 2013 SAA strongly supports passage of H. R. 1234, Electronic Message Preservation Act and H.R. 1233, Presidential and Federal Records Act Amendments of 2013. *[Update for year and as new legislation is introduced.]*

THE ISSUE

The [Presidential Records Act \(PRA\) of 1978](#) (44 U.S.C. Chapter 22) governs the official records of Presidents and Vice Presidents created or received after January 20, 1981. The PRA changed the legal ownership of the official records of the President from private to public and established a new statutory structure under which Presidents must manage their records.

The PRA as adopted had a number of flaws, such as the gap arising from the power of former presidents to invoke executive privilege (§ 2204 [c][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.” A Senate report analyzing a House bill to reform the PRA identifies several of the remaining weaknesses in the PRA: “It has become clear to Congress that the PRA is not sufficiently clear with respect to its disclosure mandates. Without further Congressional action each successive President likely will issue his own executive order interpreting the original PRA, thus making the public's access to Presidential records contingent upon the will of the executive—the avoidance of which was the very goal of the original PRA.”

The PRA has also been challenged by the Vice President. During his term of office Vice President Dick Cheney advanced several arguments claiming that the records of the Office of the Vice President (OVP) were not Presidential Records as defined by the PRA, with the exception of records resulting directly from tasks explicitly given to the OVP by the EOP. He argued that other constitutionally mandated or implicit duties of the OVP were exempt from the requirements of the Act. This theory was tested in court. A judge ruled in January 2009 that although the PRA may well have been intended to cover the whole of the records of the OVP, the Act itself made no provision for its own enforcement (judicially or otherwise) and thus, in essence, the question of coverage was moot and Cheney could do as he wished with his papers.

THE SOLUTION

In 2013 two bills were introduced into the House of Representatives to improve the Presidential Records Act and Presidential recordkeeping: H. R. 1234, Electronic Message Preservation Act (summary at <https://www.govtrack.us/congress/bills/113/hr1234#summary/libraryofcongress>) and H.R. 1233, Presidential and Federal Records Act Amendments of 2013 (summary at <https://www.govtrack.us/congress/bills/113/hr1233#summary/libraryofcongress>). These two bills would strengthen definitions of electronic records, particularly email; clarify that only former Presidents and not their designees can make claims of executive privilege; and seek clarify that the PRA applies in all its provisions to the Office of the Vice President. Taken together, these two pieces of legislation would significantly mitigate, although not fully resolve, SAA’s concerns.

BACKGROUND

The impetus for the Presidential Records Act of 1978 came about as a result of legislation to prevent President Richard Nixon from destroying, selling, or taking a large tax break for donating his records and his secretly recorded White House conversations. Congress passed legislation establishing that all Presidential records relating to the duties of the office belong to the American people. This law ended the tradition of Presidential records belonging to former Presidents. Having dealt specifically with Nixon’s Presidential records, Congress enacted the Presidential Records Act (PRA) of 1978 (44 U.S.C. Chapter 22), applying it to all Presidents and Vice Presidents taking office after 1981. (Presidents Ford and Carter, like all of President Nixon's predecessors, owned their papers, as did all previous Vice Presidents.)

Under the PRA, all Presidential records are turned over to the Archivist of the United States who, after five years, makes the material available to the public -- although a former President is given the option to withhold the material for another seven years. Material that is security classified, or that falls into a few other narrow categories, is withheld from the public for longer periods still. Purely personal records are retained by the President.

Although the PRA states that Vice Presidential records are treated by the law in exactly the same way as Presidential records, the statute in fact allows an important exception (emphasis added below):

§ 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 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.

More importantly, Presidents may invoke executive privilege as a way to avoid the law's intent. President Ronald Reagan began a tradition of issuing executive orders for how the law would be interpreted. President Bush's EO 13233 (2001) was seen by SAA and many in Congress from both parties as an attempt to effectively repeal the PRA. Legislative attempts to amend the PRA to nullify EO 13233 were stymied. President Obama's EO 13489 (January 2009) rescinded his predecessor's order.

During the Bush administration, several additional issues arose that continued to significantly undermine the clear intent of Congress in passing the PRA. In October 2005 the White House Office of Administration (OA) discovered that email messages produced by individuals and offices in the Executive Office of the President (EOP) may not have been archived properly. OA's detailed analysis revealed hundreds of days between January 3, 2003, and July 28, 2005, when email messages were missing for one or more EOP individuals or offices, totaling approximately 5 million distinct emails.

On April 12, 2007, Citizens for Responsibility and Ethics in Washington (CREW) released a report, *Without a Trace*, detailing the loss of the more than 5 million emails. CREW later supplemented this report in August 2010 with *Untold Stories of the Bush White House Emails*. In September 2007 the National Security Archive filed suit against the EOP and others for recovery of the missing emails, followed by a similar lawsuit filed by CREW in the same month. In November 2007 Judge Henry Kennedy of the U.S. District Court for the District of Columbia consolidated the two cases and granted a temporary restraining order, directing EOP to preserve all email backup media in its possession.

In response to court orders, some \$12 million was spent by the EOP in efforts to recover the missing emails from backup tapes and other media. On January 22, 2009, the EOP filed a second notice of compliance, providing the Court with an inventory of 70,000 disaster recovery tapes and informing the Court that it had transferred to the National Archives a 6- terabyte database containing a list of every file contained on 26,000 back-up tapes that were copied as part of email recovery efforts. On December 14, 2009, the parties settled the case, with EOP/OA agreeing to restore at least 33 additional calendar days' worth of email identified by plaintiffs, complete its production of records relevant to the dispute, and provide a written description of the current EOP email system that could be released to the public. The National Archives and Records Administration (NARA) agreed to maintain all restored email in separate collections of federal and Presidential records that would be searched in response to records requests under existing law and procedures. NARA also agreed to retain for a period of 12 years a set of the backup tapes for the period during which the email problems existed.

Although the missing emails may have been inadvertently lost (and it is not clear to this day whether all have been recovered), another glaring loophole in the PRA was exploited intentionally by former Vice President Cheney. During his term of office, Cheney advanced several arguments claiming that the records of the Office of the Vice President (OVP) were not Presidential Records as defined by the PRA, with the exception of records resulting directly from tasks explicitly given to the OVP by the EOP. He argued that other constitutionally mandated or implicit duties of the OVP were exempt from the requirements of the Act. This position was tested in Federal court. In the end, a judge ruled in January 2009 that although the PRA may well have been intended to cover the whole of the records of the OVP, the Act itself made no provision for its own enforcement (judicially or otherwise) and thus, in essence, the question of coverage was moot and Cheney could do as he wished with his papers (some of which, it should be noted, had already been turned over to NARA). The same judicial logic does not seem to have applied to the suits related to EOP email, in which the Federal court did choose to enforce the PRA.

ADDITIONAL REFERENCE SOURCES

The Presidential Records Act of 1978, with Executive Orders of Presidents Reagan, Bush, and Obama: <http://www.archives.gov/presidential-libraries/laws/1978-act.html>

Senate report on HR 35, the Presidential Records Act Amendments of 2009:

http://thomas.loc.gov/cgi-bin/cpquery/?&dbname=cp111&sid=cp111ose4T&refer=&r_n=sr021.111&item=&&&sel=TOC_3607&

Citizens for Responsibility and Ethics in Washington (CREW) reports on missing EOP emails:

<http://www.citizensforethics.org/files/041207WithoutATraceFullReport.pdf>;

http://www.citizensforethics.org/files/CREW%20Bush%20White%20House%20Email%20Report_0.pdf

National Security Archive chronology of missing EOP emails:
<http://www.gwu.edu/~nsarchiv/news/20080417/chron.htm>

CREW v Cheney complaint: [http://www.citizensforethics.org/files/Document%20\(9-15-08\)%20Amended%20Complaint_0.pdf](http://www.citizensforethics.org/files/Document%20(9-15-08)%20Amended%20Complaint_0.pdf)

CREW v Cheney decision:
<http://www.citizensforethics.org/files/Kotelly%20Jan%2019%20Opinion.pdf>

H.R. 1233 Presidential and Federal Records Act Amendments of 2013:
<https://www.govtrack.us/congress/bills/113/hr1233/text>

H.R. 1234 Electronic Message Preservation Act (2013):
<https://www.govtrack.us/congress/bills/113/hr1234/text>

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