

**Society of American Archivists
Council Meeting
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Chicago, Illinois**

Issue Brief: Congressional Records as Public Records
(Prepared by the SAA Committee on Public Policy)

BACKGROUND / DISCUSSION

Much of the public policy focus on federal records management traditionally has centered on the Executive Branch. This predilection ignores the fact that two branches of federal government – Congress and the Judiciary – do not have the same legal requirements to document their activities in records deemed to be the public property of the United States. For this reason the essential evidence of American government is unsecure and incomplete.

This brief is not intended to suggest a new mandate for the National Archives and Records Administration or alter the landscape of Congressional papers repositories, but rather to raise the issue that the Legislative Branch is not held to the same standards of accountability and transparency as the Executive Branch. It is time to acknowledge that members of Congress and their staffs, as public employees, have an obligation to manage their records as public records.

In drafting this issue brief, the Committee on Public Policy consulted with the Congressional Papers Section and the Government Records Section in 2015 and again in 2017. The Congressional Papers Section also provided feedback from the Associations of Centers for the Study of Congress Executive Committee in 2017. COPP members reviewed and considered all feedback received (see Appendix). In the end, few changes were made based on the 2017 feedback.

RECOMMENDATION

THAT the following issue brief on “Congressional Records as Public Records” be approved.

Issue Brief: Congressional Records as Public Records

SAA Position

Public records are any documentary materials, regardless of physical form or characteristics, made or received by a government entity in the conduct of public business that are preserved, or are appropriate for preservation, as evidence of that entity's organization, functions, policies, decisions, procedures, operations, or other activities, or because of the information contained therein.

Records of Congressional committees and individual Members of Congress that meet this threshold should be considered public records and the property of the United States of America. Further, such records should be managed and maintained in accordance with archival and records management best practices.

The Society of American Archivists (SAA) believes that all federal government records not under the authority of federal records law should be placed under such an authority.

The Congress should pass, and the President should sign, legislation that defines the difference between “public papers” and “personal papers” of Members of Congress and designates “public papers” as the property of the U.S. government.

The National Archives and Records Administration (NARA) should be provided with the authority and resources to properly oversee the disposition of these records.

In support of this position, SAA will:

- Advocate for pertinent legislation and the development of appropriate regulations that designate the public records of Congress and individual Members as the property of the U.S. government.
- Support the proper management of and access to the public records of individual Members of Congress and their staffs, especially those who serve in leadership positions.
- Encourage Members of Congress to proactively manage their active and inactive records and to plan for eventual deposit of those records in an appropriate, publicly accessible repository.

The Issues

Because the U.S. government, including Congress, answers to the American people and protects our liberties and interests, the people have a vested interest in ensuring that the documentary record of their government is complete and accurate. For the past forty years there has been an ongoing debate about the ownership of federal records pertaining to the Legislative Branch of government. Today the records of the Executive Branch unquestionably belong to the public. However, the same does not hold true for the records of Congress. Although records of official Congressional committees are physically held by the National Archives Center for Legislative Affairs, ownership of these records continues to reside with Congress, which also controls access to them.

Since 1974, Presidential records have been considered the legal property of the United States and administered by NARA under the Presidential Records Act. However, the records of Members of Congress are considered private property, and it is therefore at the discretion of each individual Member as to how – or if – his or her papers will be preserved. This means that activities conducted by Members and their staffs in their official capacity, such as research, conversations with constituents or interested parties, and casework, therefore are by law private actions, even though such functions are part of their official job duties as public servants. Since the 1970s, there

have been calls for public papers of the Legislative Branch to be declared public property, most notably in 1977 when the National Study Commission on Records and Documents of Federal Officials placed such a recommendation in its final report.

Although this recommendation has not been realized, strides have been made to provide Members with support for managing their active and inactive records, as well as assistance in locating a repository for long-term preservation and instructions for proper storage upon leaving office. In 2008, the House and Senate passed a nonbinding concurrent resolution, H. Con. Res. 307, that encouraged Members of both chambers to donate their records to public repositories for public use. In the five Congresses since the passage of H. Con. Res. 307, statistics provided by the House Office of Administration's Office Art and Archives to SAA's Congressional Papers Roundtable (now Congressional Papers Section) showed that only around half of the departing Members of the House of Representatives have used resources available to them for donating their records, and less than one percent of Members or their staff representatives have attended workshops on managing inactive files. With no mandate for Members to manage and preserve their records, it seems unlikely that these numbers will improve.

More worrisome is the House rule enacted during the 115th Congress (H.Res. 5, 2017-2018) which states, i.a., "Records created, generated, or received by the congressional office of a Member ... in the performance of official duties ... are exclusively the personal property of the individual member ... and such Member ... has control over such records." This rule effectively exempts a substantial portion of the records of an entire branch of government.

Under the current system, there is no requirement that the legislative functions of Members of Congress are documented. For example, the Speaker of the House of Representatives, second in line in Presidential succession, is not required to preserve nor provide access to any records. At a minimum, Members and their staffs who serve in any leadership capacity should be required to document their activities as public employees and provide critical evidence of the legislative function of government. Such Members include, but are not limited to, the Speaker of the House, the Majority and Minority Leaders in both Houses, and chairpersons and ranking members of standing committees.

NARA should be vested with the explicit authority and given the resources to oversee the proper disposition of these records. In addition, individual Members of Congress should be permitted to identify publicly accessible repositories to manage and provide access to their public records in accordance with relevant federal laws and regulations. The primary objectives should be to ensure that the legislative functions of individual Members of Congress are adequately documented and to guarantee access to the public records of Congress.

Additional Resources

Final report of the National Study Commission on Records and Documents of Federal Officials, 1977, <http://catalog.hathitrust.org/Record/007412697>.

Past newsletters of the Congressional Papers Roundtable, especially Fall/Winter 2011-2012; Fall, 2013; Fall/Winter, 2015, <http://www2.archivists.org/groups/congressional-papers-roundtable/past-newsletters>.

H.Res. 5, Adopting rules for the One Hundred Fifteenth Congress, adopted January 3, 2017, <https://www.congress.gov/115/bills/hres5/BILLS-115hres5eh.pdf>.

All sites accessed February 16, 2018.

Approved by the SAA Council, [date].

Support Statement: This issue brief supports SAA's Public Policy Agenda by providing members and other prospective audiences with SAA's considered opinion on the topic of federal records management, accountability, and transparency in the Legislative Branch.

Impact on Strategic Priorities: Addresses Goal 1: Advocating for Archives and Archivists, Strategy 1.1. Provide leadership in promoting the value of archives and archivists to institutions, communities, and society; Strategy 1.2. Educate and influence decision makers about the importance of archives and archivists; and Strategy 1.3. Provide leadership in ensuring the completeness, diversity, and accessibility of the historical record.

Fiscal Impact: Approval of the issue brief does not commit SAA to expend funds on any particular advocacy effort at this time.

Appendix

Feedback from Congressional Papers Section

Feedback from CPS, 2017:

Responses came from a mix of archivists specializing in congressional papers at large public institutions and a NARA committee archivist. In general, much like the 2015 discussion, comments centered around practicality and concerns for NARA staffing and oversight capabilities. Perhaps a mention of 2008 House Concurrent Resolution 307, which expresses "the sense of Congress that Members' Congressional papers should be properly maintained" and encourages Members "to take all necessary measures to manage and preserve these papers," may be useful.

If it would be helpful, mention of the 2015 discussion can be found on pages 4-5: https://www2.archivists.org/sites/all/files/cpr_newsletter_fallwinter2015.pdf

Current feedback from CPS members:

"However, individual Members of Congress should still be allowed to identify publicly accessible, non-governmental repositories to manage and provide access to their public papers."

Why?

You're reading a strong statement arguing that congressional papers should be considered formal government records, and then suddenly at the end is a very big "however" that is given no explanation and just sits there. It needs a reason. Why should this specific type of government record be exempt from being housed in a government archives?

One problem I see is that the antecedent of "these records" in the paragraph he refers to {see comment above} is not clear. The "these" seems to refer to leadership records. Does the statement mean to make a distinction between the records of leadership, under the authority of NARA, and those of other "individual members," which can be placed in non-governmental repositories?

{the first commenter} makes a good point and I think the ambiguity reflects some of the discussion in 2015. I believe we heard representatives of NARA indicating that the workload involved was beyond their capabilities, or that others believed that colleges and universities and public policy centers could raise sufficient funding to make these collections available more quickly. I think others were very much in support of government transparency and applying public records laws to these materials so that a more complete record of the member's work would be made accessible?

Given the challenges of raising private moneys for this work and the prohibition of applying federal grant funds to these materials, I have to wonder whether privatized member's papers really can generate enough investment to enable processing and prompt access? Conversely, in our experience have we often seen problems with inappropriate destruction of public records and or unjustifiable access restrictions?

If I am understanding this correctly, the main directive would essentially treat personal congressional papers as committee papers? If that is so, it might not actually lead to more archiving being done. Let's assume this position gets officially adopted by congress. They likely will not increase the NARA staff necessary to address a workload that's increased at least 10X. So, in the end, NARA will have less practical oversight, and it will take the pressure off congressmembers to address the longevity of their records. Right now, the possibility of donating records to their home state or alma mater, having something with their name on it, a possible teaching position, appeals to the vanity of many members and allows them to give a final service to their districts. Right now, even if only a minority of members donate their papers, it means each of those collections is being professional archived and made available in the near future, as opposed to possibly sitting in NARA storage while the staff struggle to address the enormous volume of new materials.

I liked the point about members with leadership positions, and I think that should be expanded. Perhaps, those individuals should be required to address archiving in some concrete way: hire an archivist, designate a repository within a year of attaining leadership, etc. I've long advocated for a system of detailees or fellows from NARA to work in individual offices for a year or two to set up archiving systems and train staffers to continue without a full time archivist. The individual offices I worked in as an archivist, former staffers have told me that they've advocated for archiving in their new jobs, just by virtue of having worked with an archivist on staff for a year. So even if having a year with an archivist does nothing to convince a Member, a staffer might take that knowledge to their next office and encourage it there with more success.

If you are open to additions, I would propose mandatory trainings at specific points in congressional careers: end of 1st term, first 10 years, end of 1st year in leadership, and of course conclusion of service. I would require an interview be done by the Member with the House or Senate historian at one of those points. I would say after 10 years, someone on the staff should be designated to handle archiving, either a trained professional archivist or a staffer who goes through the NARA training for congressional staffers.

Feedback from CPS, 2015 (which related to a much different document from which the current draft evolved)

4. Additional legislation should be passed that strengthens the definition of "public papers" of members of Congress and federal judges as property of the U.S. government. NARA should be provided the authority and resources to properly oversee the disposition of these records.

● Recognizing that this may be impossible to achieve minus some huge scandalous catalytic event similar to circumstances that led to the Presidential Records Act, it could be time to assess the status of members' records preservation and look for ways to move the process forward. Defining records as public does not necessarily lead to either the creation or the preservation of permanently valuable records.

● I think this item is an outlier because it deals with members of congress rather than government agencies. Members will be very reluctant to make their papers public property. Drawing the line between public and private can be messy when looking at campaign records. I appreciate the desire for transparency and the need to prevent members from sanitizing their collections. Typically members want their papers made available in the district where their constituency can easily get access to them, sending them to a regional NARA facility will not be well received. I believe the main problem here is lack of funding. I would support a statement calling for a federal funding source to do this work promptly so papers are made accessible.

Perhaps a new category of NHPRC funding would work, and that might also create some enduring support amongst the members if their legacies were associated with support for NHPRC.

- Such legislation would encompass a high number of individuals over the years whose records tend to occupy a tremendous amount of space. I would strongly urge that any legislation on public property would absolutely require appropriations of an amount sufficient to store, process, and manage the records. Otherwise, public accessibility would decrease from current levels. It would seem that such appropriations would be extremely unlikely and that Congress would be apt to pass the public property legislation to assuage public concerns. The results would be a disaster for NARA and researchers. I would urge SAA not to include this clause in the issue brief. Finally, if such legislation occurred, what would happen to all the congressional and judicial papers in private repositories? I assume they would not replevin older collections that received when they were considered private property, but what about current office holders who have already given a portion of their papers to repositories? Would they be transferred to NARA? If so, would repositories be compensated for labor and supplies? Finally, the congressional papers are usually given to repositories in the district/state that was represented by the Member. They are a treasure of local and state history. Held by NARA (even at regional sites) would be cost prohibitive for many users.
- First, should the papers (beyond the Committee records) held in Congressional offices be reclassified as "public"? I think they absolutely should. One needs to look no further than the language used--by Congress--to define the public records of the president: ("any documentary materials relating to the political activities of the President or members of his 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"). All of those duties carried out by a Member (or Judge) and their staff in their capitol and state offices easily fall into the enumerated categories above. Be it casework, campaign materials, issue correspondence, etc., these records document the very foundation of our representative democracy--the relationship between constituents and their elected officials.

Even if many Members are choosing to donate their records to a repository, many of the records come sanitized or incomplete (by choice or by a function of the incomplete processes used to archive and export their electronic records, particularly in the case of their constituent management software systems). Legal protection is a vital and necessary first step to begin protecting the documentation, transparency, and accurate legacy of the Legislative branch. Going about achieving this will be (has been?) an uphill battle--but that doesn't mean we shouldn't advocate for it. I think there is a growing public awareness of this issue, and the time is right to ride that momentum.

Further, I don't think it's necessary for NARA to house all the records of Congress which would overwhelm the agency. Rather, giving them "authority and resources to properly oversee the disposition" of the records allows room for NARA to delegate custody of the records to a vetted institution with professional staff to manage the records (like member institutions of CPR have been doing for decades). This caveat could be included to offset realistic and understandable concerns about these voluminous records.

However, in the explanation portion of the brief on this point, I think we can reference the 1977 Report, but should use it as a general guideline rather than advocating that we "act on all the Commission's recommendations." The report is more than 35 years old, and we have much newer and refined recommendations we can point to without getting caught up in the anachronistic nuances that exist in that document. It will also be necessary to continue to cultivate the good

relationships with Members (as the CPR and other interested parties have been doing), as well as continuing to educate them (and the public) about the value of their papers to the historic record.

- I would make two points. First, I fully concur with [name]'s well-reasoned response to make this a separate issue brief. To quote [name], "Clearly the major issue of public ownership of the records produced by Members' offices still needs to be resolved, which can only be done by legislation passed by Congress. A strategy utilizing past achievements within the context of all the commission's recommendations may greatly improve the possibility of producing such legislation." Having read the full issue brief, it basically hangs its hat on a 40 year old report, Final Report of the National Study Commission on Records and Documents of Federal Officials, 1977, and a great deal has happened in those 40 years. Let's see how/if NARA can handle the increased level of enforcement and responsibility suggested in #1-2, and 5 before taking any action on #4. My second point would be that if Council wishes to move forward with a plan to "strengthen" the definition of "public papers" they should urge Congress to establish a new National Study Commission on Records and Documents of Federal Officials. The landscape has changed dramatically in the last 40 years; the accomplishments that [name] outlined need to be considered; the impact of such a mandate on current and future record-keeping also needs to be considered. The issues of appraisal, storage, management and, most importantly, proper digital preservation of electronic records are all aspects of this that merit far more consideration. One can argue correctly that the definition of public papers should be determined regardless of their format, but clearly the ability to handle such records responsibly is affected by their format. I would be very uncomfortable with the idea of urging legislation to change the definition of these records without examining the current environment of electronic records and without seeking recommendations that not only apply to the current environment, but attempt to anticipate the impact and feasibility of enacting such a recommendation going forward. To do anything else would be irresponsible. If Council feels strongly about moving forward on this, then let's put the real work in to examine the situation now, rather than relying on 40 year old recommendations. While giving a new working group or commission time to address these very important issues in the current environment, we could also assess whether giving NARA the teeth to enforce proper record-keeping within executive agencies that it is currently working with might work. We could assess how NARA handles these added responsibilities with executive records and that would be an excellent indicator of NARA's preparedness to take on the even greater responsibilities of an expanded definition of public records. It would also provide an opportunity to assess the feasibility of a public/hybrid model.
- Redefining those papers created in congressional offices as "public papers" and putting in place protections for those records should certainly be explored. However, NARA is not necessarily the most appropriate repository for these records. A huge portion of congressional offices' work is done for constituents in the home state or district and is significant to state and local issues and history. NARA would need a significant increase in funds, personnel, and space to deal with the volume of records generated by all congressional offices in order to make them accessible in a reasonable amount of time.
- Not only would NARA need additional resources, but that the Senate Historical Office and the House Office of Art and Archives staff would also need additional resources to deal with the change in status of Members' papers.
- 1. This statement is incongruous from the other four. The disposition of members' and judges' papers is separate from the enforcement authority of NARA and the records management requirements for executive agencies. This is my biggest problem with this part of the issue brief. If we want NARA to get teeth, which it needs, let's work on strengthening the agency within the current bounds of the Federal Records Act as opposed to trying to expand that as well as NARA

authority. Sometimes, one bird with one stone is better.

2. Members papers, when prepared for voluntary donation, are already screened not just for privacy and personal information, but also for national security reasons and, more importantly for this point, for political purposes- preserving one's positive legacy over maintaining a purely factual, less biased documentary record. My fear is that, if pressed, the nature of members' collections would change and be even more "selective" than they already are.

3. As raised in the CPR business meeting, if this did pass, it would only do so with the implementation of the current Senate and House restriction periods of 20, 30 and 50 years, respectively. This condition would probably come about as simplicity of procedure, but would put a longer access restriction then tends to exist in member collections currently (from what I've heard, the upper limit on many is 20 years... better as a ceiling than a floor)

- I believe this section should be removed. Members of Congress are highly unlikely to support what they will view as an attack on their powers. The public doesn't care. And, NARA seems poorly equipped to take on additional responsibilities nor does it seek this additional duty. Also, I would prefer SAA advocate for a more limited range of issues. Rather than bundle a host of items into two or three initiatives, pick 3-5 items that we most want to support, and make a concentrated effort to achieve those reforms, and as we have success, move lesser to the forefront. These current initiatives are so broad it will dissipate our advocacy effort and make success much less likely.
- Yes I agree.
- The Center for Legislative Archives is out of space, even with 40 sites. Adding what are currently labeled private papers would be a huge burden and require more space, staff, resources, etc.
- We collect papers to make them available for researchers as soon as possible. If Congress agrees with making their papers public, they may/will be treated the same as committee records and would be closed for the terms of 20 and 30 years, based on chamber.

ACSC Executive Committee Responses

I concur with the definition of public records and the inclusion of Senate committee records that meet that definition.

I would exclude the records of individual Members of Congress from that definition because it is unrealistic to think that NARA could take control of these materials at this time, and because there is an existing precedent for these materials to go to an institution of the member's home state and we have a good track record (in the Senate I believe it's around 90%) of member's selecting a repository for their Congressional records. I also think that changing individual member records into public records would detract from rather than improve application of good records management practices in member offices as there would be a greater incentive to staff to sanitize their work accounts. Finally, the existence of a number of excellent political centers in place throughout the country suggests to me that these materials are being handled well and to make significant changes to that process at this time is not a pressing need.

I would suggest that inclusion of committee records only, at least as a starting point with a provision to revisit the distinction between committee and member records in another ten years, might be a prudent approach as that would allow some time to make such a change and assess its

impact on NARA and the quality of committee records sent there as public records, before making a significant decision changing the status of members' papers. – *a senate archivist*

I also was posed the following questions/comment:

I understand that SAA takes positions on all sorts of issues, but I also wonder what the point is if there's no plan or hope of making it a reality?

I also worry that some of our fellow archivists, without experience with congressional papers and donors, will take this issue up and make matters worse.

Does COPP have a timeline for releasing this statement? Do you think it would be worthwhile to invite Dennis to the CPS day or business meeting at SAA to discuss with actual congressional papers archivists? ---*political papers archivist at a large state institution*