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Presidential Records Management: Preservation and Disposal

Presidential records provide an essential window into many of the most consequential actions and decisions of the American government. The Presidential Records Act (PRA; 44 U.S.C. §§2201-2209) sets forth requirements regarding the maintenance, access, and preservation of presidential and vice presidential information during and after a presidency.

The PRA provides records maintenance requirements and permissions that vary depending on whether a presidency is in progress or has concluded. These matters may be of particular interest to Congress as it carries out its oversight activities and ensures presidential records are effectively collected and controlled during and after a presidency.

This In Focus provides information on what constitutes a presidential record; the roles and responsibilities the PRA assigns to the President, National Archives and Records Administration (NARA), and Department of Justice (DOJ); and the PRA's application to the preservation and disposal of presidential records during and after a presidency. It includes information on NARA's ability to request a DOJ investigation.

For more information about the PRA generally, see CRS Report R46129, *The Presidential Records Act: An Overview*, by Meghan M. Stuessy.

What Are Presidential Records?

The PRA governs the collection and retention of records created or received by the President, immediate presidential staff, and certain units or individuals within the Executive Office of the President. Presidential records include, among other types of information, documentary materials relating to certain political activities as well as information that relates to the constitutional, statutory, or other official or ceremonial duties of the President. Presidential records are the property of the United States and are not considered the

Definition of Presidential Records

The Presidential Records Act at 44 U.S.C. §2201(3) defines *presidential records* as “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.”

private property of the President (44 U.S.C. §2202). However, not all materials created by the President or presidential advisors are considered records.

Compared to presidential records, which must be preserved and maintained in accordance with the PRA, personal records do not require such retention. Personal records of a purely private or nonpublic character include such things as diaries or journals but also include (1) materials relating exclusively to the President’s own election and materials directly relating to the election of a particular individual or individuals to federal, state, or local office that “have no relation to or direct effect upon the carrying out of constitutional, statutory, or other official or ceremonial duties of the President” and (2) materials relating to private political associations (44 U.S.C. §2201(3)).

All presidential records are initially considered appropriate for permanent preservation. However, the PRA provides a process for the incumbent President to dispose of presidential records by obtaining the Archivist’s written approval. This process is further described below.

Roles and Responsibilities

The PRA specifies roles and responsibilities for the implementation and enforcement of presidential records policy to the President, NARA, and DOJ.

The PRA requires the President to 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” (44 U.S.C. §2203(a)). The President is further directed to implement records management controls and may consult NARA and DOJ on how to best comply with the statute.

NARA provides advice and assistance to the White House on records management practices upon request throughout a presidential transition and a presidency and to former Presidents. The PRA requires the head of NARA, the Archivist of the United States (hereinafter, the Archivist), to consult with Congress and particular congressional committees regarding presidential requests for the disposal of such records deemed to be of special congressional interest.

DOJ provides guidance to the executive branch on how to comply with the legal requirements of government information policy, of which records maintenance policy, including presidential records, is a part.

Presidential Records Preservation

During a presidency, the incumbent President is exclusively responsible for custody, control, and access to presidential records, and the Archivist may maintain and preserve the records on behalf of the President (44 U.S.C. §2203(f)). NARA notes that the agency is available for the President to consult with regarding records management practices upon request, although the PRA does not require such consultation. In its *Guidance on Presidential Records*, NARA recommends that an incoming Administration designate an attorney in the White House Counsel's Office to serve as contact with NARA on all PRA issues. The agency writes:

Because the Administration faces an ongoing array of PRA issues, it is essential for NARA to have a primary point of contact in the White House Counsel's Office as soon as possible. This is particularly important for responding to special access requests that NARA receives from Congress and the Courts for the Presidential records of former Presidents.

After a presidency, the responsibility for the custody, control, preservation, and access to presidential records shifts to the Archivist (44 U.S.C. §2208).

Presidential Records Disposal

All presidential records are initially considered permanent records. However, the PRA provides a process for the incumbent President to seek a change in the disposal schedule of the President's own records by obtaining the Archivist's written approval. As is routine with federal records created by agencies, an incumbent President may seek the disposal of records that no longer have administrative, historical, informational, or evidentiary value. For more information on federal records, see CRS In Focus IF11119, *Federal Records: Types and Treatments*, by Meghan M. Stuessy.

Presidential records may be disposed of if the President submits copies of the intended disposal schedule at least 60 calendar days before the proposed disposal date to the statutorily specified committees (44 U.S.C. §2203(d)).

If the Archivist considers the identified records in the President's proposed disposal schedule to be of special interest to Congress or determines that consultation with Congress is necessary to assess the disposal request, the Archivist shall request the advice of the specified committees (44 U.S.C. §2203(e)).

The PRA does not provide the former President with a process for disposing of presidential records. In contrast to the disposal request process for incumbent Presidents, the Archivist may dispose of a former President's presidential records if the Archivist deems them to have insufficient value to warrant their continued preservation. The Archivist must publish a notice in the *Federal Register* at least 60 days in advance of the proposed disposal date (44 U.S.C. §2203(g)(4)).

Improper Disposal Investigations

In the event of unlawful removal, defacing, or erasure of records, the statute requires the Archivist to initiate action through the Attorney General for the recovery of the records (44 U.S.C. §3106). Furthermore:

In any case in which the head of a Federal agency does not initiate an action for such recovery or other redress within a reasonable period of time after being notified of any such unlawful action described in subsection (a), or is participating in, or believed to be participating in any such unlawful action, the Archivist shall request the Attorney General to initiate such an action, and shall notify the Congress when such a request has been made.

Thus, investigation of the unlawful removal or destruction of government and presidential records requires the joint cooperation of NARA and DOJ. The Archivist may not independently initiate action without the Attorney General.

NARA provides information on missing records and efforts to retrieve materials at <https://www.archives.gov/research/recover/help-recover.html>.

Penalties for Improper Disposal

Anyone found guilty of "willfully and unlawfully" concealing, removing, mutilating, obliterating, destroying, or attempting to do any such action against a record can be fined and imprisoned for up to three years (18 U.S.C. §2071). Anyone holding federal office who is convicted of this crime, in addition to fines and possible imprisonment, can lose his or her position and be disqualified from holding federal office in the future.

Presidential Records Act Enforcement and Issues for Congress

On February 9, 2022, the *Washington Post* reported that NARA asked the DOJ to investigate the Trump Administration's handling of presidential records. In an email statement, Archivist David Ferriero confirmed the transport of 15 boxes of presidential records in Florida to NARA's custody in January 2022 and noted that the PRA "mandates that all Presidential records must be properly preserved by each Administration so that a complete set of Presidential records is transferred to the National Archives at the end of the Administration." Most recently in a series of letters, on February 24, 2022, the House Committee on Oversight requested additional information from NARA on its efforts to retrieve presidential records materials no later than March 17, 2022.

Congress may wish to consider whether NARA has sufficient ability to oversee the management of presidential records during a presidency and whether White House staff are sufficiently trained on segregating presidential records from personal records.

Congress might also assess the relationship between NARA and DOJ with regard to investigations of records removal and if either entity is helped or hampered by their joint relationship as currently required in statute.

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