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The Presidential Records Act: Background and Recent Issues for Congress

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Summary

Presidential documents are historical resources that capture each incumbent's conduct in presidential office. Pursuant to the Presidential Records Act ((PRA) 44 U.S.C. §§2201-2207), the National Archives and Records Administration (NARA) collects most records of former Presidents and former Vice Presidents at the end of each Administration. They are then disclosed to the public—unless the Archivist of the United States, the incumbent President, or the appropriate former President requests the records be kept private.

The PRA is the primary law governing the collection and preservation of, and access to, records of a former President. Although the PRA has remained relatively unchanged since enactment in 1978, successive presidential Administrations have interpreted its meaning differently. Moreover, it is unclear whether the PRA accounts for presidential recordkeeping issues associated with increasing and heavy use of new and sometimes ephemeral technologies, like email, Facebook, Twitter, and YouTube, by the President and his immediate staff.

Presidential records are captured and maintained by the incumbent President and provided to NARA upon departure from office. The records are then placed in the appropriate presidential repository—usually a presidential library created by a private foundation, which is subsequently deeded or otherwise provided to the federal government. According to data from NARA, the volume of records created by Presidents has been growing exponentially, and the platforms used to create records are also expanding.

On his first full day in office, President Barack H. Obama issued an executive order that grants the incumbent President and relevant former Presidents 30 days to review records prior to their release to the public. E.O. 13489 changed the presidential record preservation policies promulgated by the George W. Bush Administration through E.O. 13233.

Congress has the authority to revise or enhance recordkeeping requirements for the incumbent Presidents, including requiring a more systematic method of collecting and maintaining email or Internet records. Congress might consider modifying the length of time an incumbent or former President has to review records and decide whether they should be released to the public. Congress might also act to examine whether the incumbent President is appropriately capturing all records in every available medium and whether NARA can appropriately retain these records and make them available to researchers and the general public in perpetuity.

In the 113th Congress, two bills that would amend the PRA have been introduced: H.R. 1233 and H.R. 1234. H.R. 1233 would codify a 60-day period of review for the incumbent or applicable former President to determine whether to protest the release of particular presidential records. H.R. 1234 would require the Archivist of the United States to promulgate and oversee the execution of regulations governing the incumbent President's records management processes. Both H.R. 1233 and H.R. 1234 would prevent the President and his immediate staff from using a “non-official electronic messaging account” to create federal records, unless that record was forwarded to an “official” email address. On June 25, 2013, both H.R. 1233 and H.R. 1234 were reported favorably, as amended, by the House Committee on Oversight and Government Reform. On January 14, 2014, H.R. 1233, as amended, unanimously passed the House. On January 15, the Senate received the bill and referred it to the Senate Committee on Homeland Security and Governmental Affairs. H.R. 1234 was placed on the House's Union Calendar after being reported favorably by the committee. No further action has been taken on either bill.

This report examines the provisions of the PRA, reviews the two most recent presidential interpretations of the PRA, and analyzes legislation seeking to amend the law. The report also explores the complexities of capturing all presidential records in a digital environment, providing potential policy options for Congress. The appendices of the report analyze a legal controversy over the PRA's applicability to certain records of the Vice President and provide a review of amendments that were introduced, but not enacted, during the 111th and the 112th Congresses that would have amended the PRA.

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Introduction

Enacted in 1978, the Presidential Records Act (PRA), as amended, instructs the collection and retention of—as well as codifies public access to—presidential records. Since the PRA’s enactment, some incumbent Presidents have issued executive orders that detail how they interpreted the law.

Presidential records are critical tools for understanding the powers and operations of the executive branch of the federal government. These records, however, may include information that, if released to the public, could endanger national security, adversely affect the nation’s economy, or result in an unwarranted invasion of personal privacy.

The PRA defines a *presidential record* as “documentary materials . . . created by the President or his immediate staff.”¹ In turn, the term *documentary materials* includes “all books, correspondence, memorandums, documents, papers, pamphlets, works of art, models, pictures, photographs, plats, maps, films, and motion pictures, including, but not limited to, audio, audiovisual, or other electronic or mechanical recordings.”²

The PRA details which presidential records and materials the National Archives and Records Administration (NARA) is to assume responsibility for at the end of a President’s Administration.³ According to the act, when a President leaves office, his official records remain property of the federal government, under the supervision of the Archivist of the United States.⁴ Once a location for a presidential library has been determined, and the facility is deeded or otherwise placed into the custody of the United States, the former President’s records are to be deposited there.⁵

The provisions of the PRA have remained relatively unchanged since the law’s 1978 enactment, except for several technical amendments.⁶ Incumbent Presidents, however, have varied widely in how they chose to interpret the PRA. Additionally, Presidents from both major political parties have faced questions and concerns about their abilities to maintain accurate, comprehensive, and accessible archives, especially considering their increasing use of electronic—and perhaps ephemeral—platforms like email, Facebook, Twitter, blogs, and YouTube. The PRA requires the collection of all presidential records, including those created on electronic platforms.⁷ The

¹ 44 U.S.C. §2201(2).

² 44 U.S.C. §2201(1).

³ As a consequence of the Watergate incident, Congress passed the Presidential Recordings and Materials Preservation Act of 1974 (PRMPA; 44 U.S.C. §2111) to assure that the presidential papers of Richard M. Nixon were placed under federal custody. Though this act, which directly addresses presidential records, was passed prior to the 1978 Presidential Records Act, it governed only documents associated with the Nixon presidency.

⁴ Prior to leaving office, an incumbent President is required to collect and maintain his or her records as they are created to ensure that proper turnover of these records takes place upon his leaving office.

⁵ For more information on presidential libraries, see CRS Report R41513, *The Presidential Libraries Act and the Establishment of Presidential Libraries*, by Wendy Ginsberg and Erika K. Lunder.

⁶ Amendments to the act, for example, include P.L. 98-497, the National Archives and Records Administration Act of 1984, which established the National Archives and Records Administration as an independent entity and removed it organizationally from the General Services Administration; and P.L. 104-186, House of Representatives Administrative Reform Technical Corrections Act, which codified name changes to various committees and offices within the House of Representatives.

⁷ 44 U.S.C. §2201.

increasing volume of records created by incumbent Presidents may prompt further concerns about incumbent Presidents' abilities to appropriately collect and retain records.

Congress has the authority to revise or enhance recordkeeping requirements for incumbent Presidents, including requiring more systematic methods for collecting and maintaining email or Internet records. In the 113th Congress, Representative Elijah Cummings has introduced two bills that would amend the Presidential Records Act. One bill, H.R. 1233, would codify the length of time an incumbent or applicable former President has to review records and decide whether to challenge release to the public. H.R. 1234 would require the Archivist of the United States to promulgate regulations detailing the records management process for an incumbent President. Pursuant to H.R. 1234, the Archivist would also be charged with certifying whether the President's records management processes met regulatory requirements.

If H.R. 1234 were enacted, it would establish a new procedure that authorizes someone other than the President to manage and oversee the incumbent President's records management process. The official who would have this role, the Archivist, is appointed by the President with the advice and consent of the Senate. The Archivist may be removed by the President.⁸

Both H.R. 1233 and H.R. 1234 would prevent the President and his immediate staff from using a "non-official electronic messaging account" to create federal records, unless that record was forwarded to an "official" email address within five days. Neither bill defines "non-official electronic messaging account," nor does the PRA.

Congress might also elect to oversee whether all of the platforms used to create presidential records allow for appropriate capture, retention, and future access of those records.

This report discusses the PRA and its interpretations by successive Administrations. This report examines policy options related to the capture, maintenance, and use of presidential records—with a focus on electronic presidential records.

The Presidential Records Act

As noted above, the Presidential Records Act (PRA) was enacted in 1978, and the statute, as amended, instructs the collection and retention of—as well as codifies public access to—presidential records. Prior to the enactment of the PRA, "presidential records were under the control of the president whose administration generated them."⁹

Pursuant to the PRA, presidential records are collected and maintained by the incumbent President until he leaves office. When a President leaves office, his official records remain property of the federal government, under the supervision of the Archivist of the United States. The act applies to the records of Presidents dating back to Ronald Reagan.¹⁰

⁸ Pursuant to 44 U.S.C. §2103(a), the President may remove the Archivist, but must "communicate the reasons for any such removal to each House of the Congress."

⁹ Martha Joynt Kumar, "Executive Order 13233 Further Implementation of the Presidential Records Act," *Presidential Studies Quarterly*, vol. 32, no. 1 (March 2002), p. 196.

¹⁰ All presidential records in federal presidential libraries dedicated to the records of Presidents who served prior to Ronald Reagan (Herbert Hoover through Jimmy Carter) are materials donated to the libraries' collections. Those (continued...)

The PRA defines a *presidential record* as “documentary materials . . . created by the President or his immediate staff.”¹¹ In turn, the term *documentary materials* includes “all books, correspondence, memorandums, documents, papers, pamphlets, works of art, models, pictures, photographs, plats, maps, films, and motion pictures, including, but not limited to, audio, audiovisual, or other electronic or mechanical recordings.”¹²

Pursuant to Chapter 22 of Title 44 of the *U.S. Code*, upon leaving office, an outgoing President may restrict access to certain of his archived records for up to 12 years.¹³ Certain presidential files and records may be exempted from public access indefinitely if they qualify under any of the six criteria delineated in 44 U.S.C. §2204:

1. the information is specifically exempted by an executive order for the purpose of national security or foreign policy,
2. the information is related to federal office appointments,
3. the information is explicitly exempted from disclosure by statute,
4. the information includes trade secrets and commercial or financial information obtained from a person that is privileged or confidential,
5. the information is a confidential communication that requests or submits advice between the President and his advisers—or between the advisers themselves, or
6. the information is personnel or medical files, and their disclosure would amount to an unwarranted invasion of personal privacy.¹⁴

According to the act, the Archivist of the United States—or, if there is a legal challenge, the federal courts—would have final determination over which records should be released to the public. The act also states that it is not to “be construed to confirm, limit, or expand any constitutionally-based privilege which may be available to an incumbent or former President.”¹⁵ The act does not define the parameters of this privilege.

Presidential Interpretations of the PRA

Although the PRA has remained relatively unchanged since enactment in 1978, successive presidential Administrations have interpreted its meaning differently.¹⁶ This section will examine and compare the most recent two presidential interpretations—one from the George W. Bush

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records are released according to the dictates of the applicable President (if he is living) or the dictates of the families of the former President (if he is deceased). For more information on presidential libraries, see CRS Report R41513, *The Presidential Libraries Act and the Establishment of Presidential Libraries*, by Wendy Ginsberg and Erika K. Lunder.

¹¹ 44 U.S.C. §2201(2).

¹² 44 U.S.C. §2201(1).

¹³ 44 U.S.C. §2204(a). After 12 years, Presidential records are subject to the Freedom of Information Act, which governs public access to agency records (5 U.S.C. §552).

¹⁴ *Ibid.*

¹⁵ 44 U.S.C. §2204.

¹⁶ See E.O. 12667; E.O. 13233; and E.O. 13489.

Administration and the other from the Obama Administration. These executive orders are pivotal in setting the context for understanding how presidential interpretations of this law may affect its implementation.

Executive Order 13233

On November 1, 2001, President George W. Bush issued E.O. 13233.¹⁷ This executive order gave the incumbent President, former Presidents, former Vice Presidents, and their designees broad authority to deny access to presidential documents after the termination of the 12-year access restriction and to delay the release of certain records indefinitely. Under the order, former Presidents had 90 days to review and decide whether documents requested for public release pursuant to a Freedom of Information Act (FOIA) request¹⁸ should be released—60 days longer than provided under earlier arrangements. Incumbent Presidents had the authority to extend the review period indefinitely, and the Archivist had no recourse to challenge the status of materials that had been withheld or remained in review.¹⁹

The executive order also changed the procedures for the disclosure of presidential records.²⁰ Prior to E.O. 13233, presidential records would be released at the termination of the 12-year access restriction period—unless the President, former President, or former Vice President asserted “constitutionally based privileges” to stop the disclosure.²¹ E.O. 13233, in contrast, required action by the President, former President, or former Vice President for records to be released. If, therefore, none of the designated officers acted to release presidential records, they could have remained unreleased even if the 12-year restriction period lapsed. Moreover, the executive order permitted representatives of a former President or Vice President to challenge the release of presidential or vice presidential records. Previously, all challenges to disclosure had to be made personally by the former President or former Vice President.²²

¹⁷ Executive Order 13233, “Further Implementation of the Presidential Records Act,” 66 *Federal Register* 56025, November 1, 2001, at <http://frwebgate2.access.gpo.gov/cgi-bin/PDFgate.cgi?WAISdocID=phq61G/29/2/0&WAISAction=retrieve>.

¹⁸ FOIA is codified at 5 U.S.C. §552. For more information on FOIA, see CRS Report R41933, *The Freedom of Information Act (FOIA): Background, Legislation, and Policy Issues*, by Wendy Ginsberg.

¹⁹ E.O. 13233 stated that “references in this order to a former President shall be deemed also to be references to the relevant former Vice President” (Sec. 11). A former Vice President, therefore, would have authority identical to a former President under E.O. 13233 to withhold certain records from disclosure.

²⁰ For additional analysis on the potential effects of E.O. 13233, see Martha Joynt Kumar, “Executive Order 13233 Further Implementation of the Presidential Records Act,” *Presidential Studies Quarterly*, vol. 32, no. 1 (March 2002).

²¹ E.O. 13233 stated that the President could assert executive privilege for records that reflected “military, diplomatic, or national security secrets (the state secrets privilege); communications of the President or his advisors (the presidential communications privilege); legal advice or legal work (the attorney-client or attorney work product privileges); and the deliberative process of the President or his advisors (the deliberative process privilege)” (Sec. 2).

²² Since George W. Bush issued E.O. 13233, seven bills have been introduced in Congress that sought to explicitly rescind it. In the 107th Congress, for example, Representative Stephen Horn introduced H.R. 4187, which sought—among other changes—to rescind E.O. 13233. The bill was reported by the House Committee on Government Reform and then placed on the Union Calendar. No further action was taken on the bill. In the 108th Congress Representative Doug Ose introduced H.R. 1493, which would have rescinded E.O. 13233. H.R. 1493 was referred to the House Committee on Oversight and Government Reform, which then referred it to the Subcommittee on Technology, Information Policy, Intergovernmental Relations and the Census. No further action was taken on the bill. S. 1517, a companion bill to H.R. 1493 was introduced by Senator Jeff Bingaman, the bill was referred to the Senate Committee on Homeland Security and Governmental Affairs. No further action was taken on the bill. H.R. 5073, introduced by Representative Henry A. Waxman, also sought to rescind E.O. 13233. It was concurrently referred to the House (continued...)

Executive Order 13489

During his first full day in office, President Barack Obama issued Executive Order 13489, which explicitly revoked E.O. 13233.²³ Under E.O. 13489, after termination of the 12-year access restriction, incumbent Presidents and former Presidents are granted 30 days to review presidential records to determine whether they should be released.²⁴ If an incumbent President claims executive privilege for the records of a former President, the Counsel to the President is required to notify the Archivist, the appropriate former President, and the Attorney General of the action. The Archivist is then prohibited from releasing those records—unless instructed to do so by a court order.

In contrast to claims of executive privilege made by an incumbent President, under E.O. 13489, claims of executive privilege made by a former President require the Archivist to consult with the Attorney General, the Counsel to the President, or other appropriate officials to determine the validity of the request. According to the executive order, the incumbent President may instruct the Archivist whether to release the records of a former President, and the Archivist is to “abide by” the President’s determination—unless directed otherwise by a court order.²⁵ If the Archivist denies a former President’s executive privilege claim and determines that records should be released, the incumbent President and appropriate former President are to be given 30 days’ notice of the records’ release.

E.O. 13489 vests much of the records disclosure authority in the hands of the incumbent President. This authority to determine which records of a former President should be released to the public may arguably stand in contrast to the designs of the Presidential Records Act, which places greater authority over records disclosure in the hands of the Archivist.²⁶ The executive order does not define the boundaries of executive privilege, but it does define a “*substantial question of executive privilege*” as a situation in which “NARA’s disclosure of Presidential

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Committee on Oversight and Government Reform and the House Committee on Homeland Security. The House Committee on Oversight and Government Reform subsequently referred H.R. 5073 to its Subcommittee on Technology, Information Policy, Intergovernmental Relations, and the Census. No further action was taken on the bill. On May 12, 2005 (the 109th Congress), Representative Waxman introduced H.R. 2331, which, in part, sought to statutorily rescind E.O. 13233 and require the application of E.O. 12667, the executive order governing presidential records that was issued by President Ronald Reagan on January 18, 1989. H.R. 2331 was concurrently referred to the House Committee on Government Reform and the House Committee on Homeland Security. No further action was taken on the bill. In the 110th Congress, Representative Waxman introduced H.R. 1255, which would have rescinded the E.O. 13233. The House passed H.R. 1255 under suspension on March 14, 2007, and the bill was eventually placed on the Senate Legislative Calendar. A companion bill (S. 886) was introduced in the Senate on March 14. S. 886 was reported by the Committee on Homeland Security and Governmental Affairs without amendment on June 20, 2007, and placed on the legislative calendar that same day. No further action was taken on either H.R. 1255 or S. 886. The remaining bill that sought to rescind E.O. 13233, H.R. 35 from the 111th Congress, is discussed in **Appendix B**.

²³ Executive Order 13489, “Presidential Records,” 74 *Federal Register* 4669, January 26, 2009, at <http://edocket.access.gpo.gov/2009/pdf/E9-1712.pdf>.

²⁴ The 30-day review period is identical to the review period established by President Ronald Reagan in E.O. 12667.

²⁵ E.O. 13489, p. 4670.

²⁶ For a longer discussion about the role of the Archivist in providing access to presidential records, see Martha Joynt Kumar, “Executive Order 13233 Further Implementation of the Presidential Records Act,” *Presidential Studies Quarterly*, vol. 32, no. 1 (March 2002).

records might impair national security (including the conduct of foreign relations), law enforcement, or the deliberative processes of the executive branch.”²⁷

Maintaining Electronic Records

Capturing Records Across Multiple Platforms

Although the PRA was written prior to the use of electronic platforms²⁸ to create records, the law appears to require collection and maintenance of—and accessibility to—the records of former Presidents, which today are largely created electronically. As new technologies are introduced and increasingly utilized by Presidents, NARA must continuously ensure that widely used and perhaps ephemeral electronic records can be collected, maintained, and accessed, regardless of format. Archiving presidential use of social networking sites like Facebook or Twitter, for example, may pose different archival challenges than email.²⁹

Pursuant to the PRA, NARA is responsible for the custody, control, and preservation of the records of former Presidents. Incumbent Presidents, however, are responsible for managing and archiving their records during the tenure of their Administrations.³⁰ NARA has worked with incumbent Presidents as they prepare to leave office to ensure the capture and preservation of records generated through social media. Examples may be found in the preserved *whitehouse.gov* content available through the websites of the Clinton and George W. Bush Libraries.³¹

To meet the task of accepting, preserving, and making available presidential records, including those created electronically, NARA created an Executive Office of the President (EOP) system within its Electronic Records Archive (ERA) to maintain and make available such records. According to NARA, the ERA is currently used to preserve the electronic records from the George W. Bush Administration, including the electronic records of former Vice President Dick

²⁷ E.O. 13489, p. 4669.

²⁸ For more information on collecting records in a variety of electronic and social media platforms, including lists of some of those platforms, see U.S. National Archives and Records Administration, *Guidance on Managing Records in Web 2.0/Social Media Platforms*, Washington, DC, October 20, 2010, at <http://www.archives.gov/records-mgmt/bulletins/2011/2011-02.html>.

²⁹ In August 2012, the Office of Management and Budget, in consultation with NARA, released guidance to federal agencies to clarify and amend recordkeeping policies, including those related to electronic recordkeeping. This guidance does not apply to the Executive Office of the President. See Jeffrey D. Zients and David S. Ferriero, *Managing Government Records Directive*, Office of Management and Budget and the National Archives and Records Administration, Washington, DC, August 24, 2012, at <http://www.whitehouse.gov/sites/default/files/omb/memoranda/2012/m-12-18.pdf>. For more information on electronic records management, see CRS Report R43165, *Retaining and Preserving Federal Records in a Digital Environment: Background and Issues for Congress*, by Wendy Ginsberg.

³⁰ Similar to the President, the Vice President has discretion to determine which of his records qualify as presidential records under the PRA. 44 U.S.C. §2204 explicitly places the same recordkeeping duties and responsibilities on the Vice President as are placed on the President. As discussed in **Appendix A**, a federal district court held that the Vice President “has discretion concerning the decision to create or dispose of Vice-Presidential records, and even how he chooses to preserve them,” however he does not have “discretion in is his ability to *change* the definition of Vice-Presidential records provided by Congress when exercising his obligations under the PRA.” *Washington v. Cheney*, 593 F. Supp. 2d 194, 220-21 (D. D.C. 2009). Vice presidential records are not explicitly defined in the PRA.

³¹ Information provided electronically to the author by NARA on March 21, 2014. The George W. Bush websites archive is at <http://georgewbush-whitehouse.archives.gov>, and the William J. Clinton websites archive is at http://clintonlibrary.gov/_previous/archivesearch.html.

Cheney, and it is used by archivists to review these records to make them available to the public. ERA is not yet used to preserve the electronic records of the Clinton Administration.³² Although NARA will not be given archival control of President Obama's records until after his tenure in office ends, the National Archives said the ERA "has the capability to manage the electronic records of any given administration."³³ NARA has said that the "Administration has consulted with NARA regarding the records status of PRA content on social media sites and technical approaches to managing them."³⁴

At a May 3, 2011, House Oversight and Government Reform Committee hearing, Brook M. Colangelo, chief information officer of the Office of Administration in the EOP, testified that "the EOP has been able to rely on an automated system that archives email sent and received on the EOP system." The commercial, off-the-shelf product used to capture all EOP emails "archives inbound and outbound email messages in near real time and in original format with attachments, whether sent or received from EOP computers or EOP BlackBerries."³⁵ Mr. Colangelo also testified that Short Message Service (SMS) texts and Personal Identification Number (PIN) messaging are also automatically archived by commercial software.

The Obama Administration is the first to extensively use public websites like Facebook, Twitter, and YouTube, as well as other social networking media. Mr. Colangelo testified that there is no software to "offer a sufficiently comprehensive, reliable, and affordable" method of automatic archiving of presidential use of social networking sites.³⁶ Archiving the presidential use of sites like Twitter and Facebook, therefore, "is handled on a component-by-component basis" using a "combination of traditional manual archiving techniques (like saving content in an organized folder structure) and automated techniques (such as Real Simple Syndication (RSS) feeds and Application Programming Interfaces (APIs))."³⁷ Mr. Colangelo said the White House would continue to search for a comprehensive automatic archiving option for social media.

Mr. Colangelo also said EOP employees are instructed to conduct all work-related communications on their EOP email accounts, except in emergency circumstances when they cannot access the EOP system and must accomplish time-sensitive work.

If EOP employees do perform work on non-work email accounts or other platforms, they are required to forward such records to the proper destinations for archiving.³⁸

³² Information provided electronically to the author by NARA on March 21, 2014.

³³ Ibid.

³⁴ Ibid.

³⁵ U.S. Congress, House Committee on Oversight and Government Reform, *Presidential Records in the New Millennium: Updating the Presidential Records Act and Other Federal Recordkeeping Statutes to Improve Electronic Records Preservation*, 112th Cong., 1st sess., May 3, 2011, at http://oversight.house.gov/images/stories/Testimony/5-3-11_Colangelo_Testimony.pdf, p. 31.

³⁶ Ibid, p. 32.

³⁷ Ibid.

³⁸ Ibid, p. 31.

The Growth of Presidential Records

Pursuant to the PRA, presidential records are provided to NARA at the end of each presidential administration.³⁹ As a result, NARA has tracked the increasing volume and varied electronic formats employed by each administration.

According to NARA's *Report on Alternative Models for Presidential Libraries*, "Presidential Libraries ... experienced an explosive growth in the volume of electronic records, especially White House email."⁴⁰ The report continued:

Presidential Library holdings in electronic form are now much larger than the paper holdings. Indeed, the email system for the George W. Bush Administration alone is many times larger than the entire textual holdings of any other Presidential Library. These electronic holdings bring new challenges to processing and making available Presidential records. The sheer volume exponentially increases what archivists have to search and isolate as relevant to a request, a lengthy process in and of itself before the review begins. Once review begins, the more informal communication style embodied in Presidential record emails often blends personal and record information in the same email necessitating more redactions.

In that same report, NARA noted that the Administration of William J. Clinton provided NARA 20 million presidential record emails at the conclusion of the President's eight-year tenure.⁴¹

In June 2010, the Government Accountability Office (GAO) submitted testimony to the House Committee on Oversight and Government Reform's Subcommittee on Information Policy, Census, and National Archives on "The Challenges of Managing Electronic Records."⁴² GAO stated that the "[h]uge volumes of electronic information" were a "major challenge" in agency record management.⁴³

Electronic information is increasingly being created in volumes that pose a significant technical challenge to our ability to organize it and make it accessible. An example of this growth is provided by the difference between the digital records of the George W. Bush administration and that of the Clinton administration: NARA has reported that the Bush administration transferred 77 terabytes⁴⁴ of data to the [National] Archives [and Records Administration] on leaving office, which was about 35 times the amount of data transferred by the Clinton administration.⁴⁵

On April 25, 2013, a NARA blog post provided additional details on the records being transferred to the George W. Bush Library and Museum in Dallas, TX—"more than 70 million pages of

³⁹ 44 U.S.C. §§2201-2207. NARA is to be provided the universe of qualifying presidential records at the end of each administration.

⁴⁰ National Archives and Records Administration, *Report on Alternative Models for Presidential Libraries*, Washington, DC, September 25, 2009, p. 25, at <http://www.archives.gov/presidential-libraries/reports/report-for-congress.pdf>.

⁴¹ *Ibid.*

⁴² U.S. Government Accountability Office, *Information Management: The Challenges of Managing Electronic Records*, GAO-10-838T, June 17, 2010, at <http://gao.gov/assets/130/124883.pdf>.

⁴³ *Ibid.*, p. 10.

⁴⁴ A terabyte is about 1 trillion bytes, or 1000 gigabytes.

⁴⁵ GAO stated in its written testimony that it did not independently verify these reported volumes of records.

textual records, 43,000 artifacts, 200 million emails (totaling roughly 1 billion pages), and 4 million digital photographs (the largest holding of electronic records of any of our libraries).⁴⁶ This amounts to a 3,500% increase in the volume of electronic records created when comparing one two-term administration to the next—an eight-year period.⁴⁷

The rapid increase in the volume of electronic presidential records does not present challenges in terms of demands on physical space for storage. Electronic records, however, may present challenges in terms of the collection of and perpetual access to the diverse and often ephemeral platforms used to create the records.⁴⁸

Congressional Activity in the 113th Congress

Members of Congress have introduced amendments to the PRA in previous Congresses, but none has been enacted. The PRA has not been substantially amended since its enactment, but a number of bills in this and previous Congresses have been introduced with provisions that express concern that Presidents may not have been appropriately interpreting the law.⁴⁹

H.R. 1233 and H.R. 1234

In the 113th Congress, Representative Elijah Cummings has introduced two bills that address the creation of, collection of, retention of, and access to presidential records: H.R. 1233 and H.R. 1234. H.R. 1233, among other things, would amend the PRA to provide a 60-day presidential record review period to the incumbent or applicable former President any time the Archivist intended to release previously unreleased presidential records. Pursuant to the bill's language, the review period could be extended for an additional 30 days if the Archivist provided a statement that "such an extension is necessary to allow an adequate review of the record." The bill also would codify the requirement that any claim of executive privilege must be made by the applicable former President or by the incumbent President.⁵⁰ Furthermore, it would prohibit anyone convicted of inappropriately using, removing, or destroying NARA records from accessing presidential records.

H.R. 1234 contains several provisions that would amend the sections of the PRA that apply to the creation of, retention of, collection of, and access to federal records, generally. Additionally, H.R. 1234 would authorize the Archivist to promulgate regulations that establish "standards necessary for the economical and efficient management of electronic Presidential records during the President's term in office."⁵¹ The regulations would focus on "the capture, management, and

⁴⁶ U.S. National Archives and Records Administration, "Prologue: Pieces of History," April 25, 2013, at <http://blogs.archives.gov/prologue/?p=12073>.

⁴⁷ The George H.W. Bush Presidential Library and Museum, by comparison, contains 1 million photographs and 10,000 videotapes. See George H.W. Bush Presidential Library and Museum, "FAQs," at <http://bushlibrary.tamu.edu/research/faq.php>.

⁴⁸ For more information on the challenges of electronic records management, see CRS Report R43165, *Retaining and Preserving Federal Records in a Digital Environment: Background and Issues for Congress*, by Wendy Ginsberg.

⁴⁹ For more information on legislation in previous congresses, see **Appendix B**.

⁵⁰ H.R. 1144 and H.R. 3071, both introduced in the 112th Congress, included similar provisions.

⁵¹ H.R. 1234, §2206.

preservation of electronic records,” the electronic retrieval of electronic messages, and the creation of a process to certify the President’s records management system. Pursuant to §2208 of H.R. 1234, the Archivist would be required to certify annually that the incumbent President was meeting the Archivist’s records management requirements. The Archivist would also be required annually to report to Congress on the President’s records management certification status. In the report to accompany H.R. 1234, the committee stated that the bill seeks to address provisions in current law that have been “rendered antiquated” by the “rapid migration ... toward electronic communication and recordkeeping.”⁵²

Language in both H.R. 1233 and H.R. 1234 would prohibit “an officer or employee” from creating a presidential record on “a non-official electronic messaging account, unless” copies of the message are forwarded to an “official electronic messaging account” within five working days. H.R. 1233 and H.R. 1234 would authorize the use of disciplinary action—including suspension, removal, reduction in grade level, reduction in pay, or furlough—against any employee or official who violates the provision.⁵³

According to the report to accompany H.R. 1234, the non-official email prohibition “shifts the onus of recordkeeping onto the record and not the media it is contained in” to facilitate the management of “growing amounts of electronic communication.”⁵⁴

On June 25, 2013, both H.R. 1233 and H.R. 1234 were reported favorably, as amended, by the House Committee on Oversight and Government Reform. On January 14, 2014, H.R. 1233, as amended, unanimously passed the House. On January 15, the Senate received H.R. 1233 and referred it to the Senate Committee on Homeland Security and Governmental Affairs. No further action has been taken on H.R. 1233. After being reported favorably by the committee, H.R. 1234 was placed on the House’s Union Calendar. No further action has been taken on H.R. 1234.

Legislation that sought to amend the PRA that was introduced in the 111th and 112th Congresses is discussed in **Appendix B**.

Analysis of Legislation

Records Management Consistency vs. Potential Oversight Tensions

H.R. 1234’s requirement for the Archivist to promulgate records management regulations for the incumbent President and to oversee the incumbent President’s adherence to these regulations could prompt more consistent records management practices across presidential administrations. The provision might better ensure consistent and thorough upkeep of a presidential records archive—even prior to records transfers to NARA.

⁵² U.S. Congress, House Committee on Oversight and Government Reform, *Electronic Message Preservation Act*, report to accompany H.R. 1234, 113th Cong., 1st sess., June 15, 2013, H.Rept. 112-128 (Washington: GPO, 2013), p. 4.

⁵³ Both bills cite the authority to use applicable adverse actions against members of the Senior Executive Service who would violate the provision. These adverse actions are found at Chapter 75, Subchapter V, in Title 5 of the *U.S. Code*.

⁵⁴ U.S. Congress, House Committee on Oversight and Government Reform, *Presidential and Federal Records Act Amendments of 2013*, report to accompany H.R. 1233, 113th Cong., 1st sess., June 25, 2013, H.Rept. 113-127 (Washington: GPO, 2013), p. 5.

As noted earlier in this report, pursuant to current law NARA is responsible for the custody, control, and preservation of the records of former Presidents. Sitting Presidents, however, are responsible for managing and archiving their records during the tenure of their Administrations. If H.R. 1234 were enacted, it would appear to mark the first time someone other than the incumbent President—the Archivist—was formally authorized to oversee the management of the incumbent President’s records. The bill would also require the Archivist to report to Congress on the recordkeeping operations of the incumbent President. The Archivist is appointed by the President, with the advice and consent of the Senate, “without regard to political affiliations and solely on the basis of the professional qualifications required to perform the duties and responsibilities of the office,” and he or she serves at the pleasure of the President.⁵⁵ H.R. 1234 would, therefore, authorize an official who can be removed by the President to oversee and report to Congress on the actions of the President. Such an arrangement might prompt tensions between the President and the Archivist or might arguably complicate or politicize the appointment of future Archivists.

Use of Alternative Email Addresses

As noted above, both H.R. 1233 and H.R. 1234 would prohibit the use of a “non-official electronic messaging account” to create a presidential record. Neither H.R. 1233 nor H.R. 1234 define “non-official electronic messaging account.” Additionally, no definition is provided for “official electronic messaging account.” The definition of *presidential record*, as noted above, includes all materials “created by the President or his immediate staff.”⁵⁶ The PRA then lists potential types of presidential records,⁵⁷ but it does not specifically list or limit the platforms on which these records may be created.⁵⁸ The existing provisions would seem to suggest that the sender and content of the message created on an electronic messaging account would determine whether the message qualified as a presidential record. The terms “official electronic messaging account” and “non-official electronic messaging account,” therefore, might have no effect over whether a particular record qualifies as a presidential record pursuant to the PRA. Alternatively, the Archivist could issue an interpretive rule in the *Federal Register* that could provide a definition for “non-official electronic messaging account” that could clarify the legislative language.

In many cases, only the .gov email addresses of the President and his immediate staff are equipped with automated email archiving technologies. If H.R. 1233 and H.R. 1234 seek to

⁵⁵ Pursuant to 44 U.S.C. §2103(a), the President may remove the Archivist, but must “communicate the reasons for any such removal to each House of the Congress.”

⁵⁶ 44 U.S.C. §2201(2).

⁵⁷ These, as noted earlier in the report, include “books, correspondence, memorandums, documents, papers, pamphlets, works of art, models, pictures, photographs, plats, maps, films, and motion pictures, including, but not limited to, audio, audiovisual, or other electronic or mechanical recordings.” (44 U.S.C. §2201(1))

⁵⁸ Similarly, the Federal Records Act, which defines federal record, does not include a list of potential platforms that may be used to create federal records. Federal records are defined in 44 U.S.C. §3301 as follows:

Records include all books, papers, maps, photographs, machine-readable materials, or other documentary materials, regardless of physical form or characteristics, made or received by an agency of the United States Government under Federal law or in connection with the transaction of public business and preserved or appropriate for preservation by that agency or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the Government or because of the informational value of the data in them.

For more information on the Federal Records Act, see CRS Report R43072, *Common Questions About Federal Records and Related Agency Requirements*, by Wendy Ginsberg.

ensure the automated capture of all qualifying presidential records, perhaps the language in the bills could be modified to ensure that qualifying presidential records created on any electronic messaging account without automated record capturing technology be forwarded to electronic messaging accounts equipped with such technology.⁵⁹

Cost

The Congressional Budget Office (CBO) found that H.R. 1233 would “codify and expand current practices,” and “would have no significant cost over the next five years.”⁶⁰ H.R. 1234, according to CBO estimates, would cost the federal government “\$15 million over the 2014 to 2018 period.”⁶¹ These estimated costs, however, appear related to upgrading agencies’ electronic systems to comply with potential amendments to the Federal Records Act that are included in the bill. The CBO score did not find significant costs associated with any amendments to the Presidential Records Act.

Additional Policy Considerations

As previously noted, Congress has the authority to use its legislative powers to amend the Presidential Records Act. Congress may also use its oversight powers to investigate and potentially influence changes in the PRA’s implementation. Since enactment of the PRA, however, the President has maintained great control over the disclosure of the records of incumbent and former Presidents through the issuance of executive orders.

Clarifying Responsibilities

Congress may choose to amend the PRA to codify presidential recordkeeping responsibilities, including the length of time an incumbent President or former President would have to review and determine whether the Archivist may release certain presidential records to the public. H.R. 1233, analyzed in the above section of this report, would codify a 60-day time limit for review of materials prior to their release. Some Members may believe that amending the PRA could affect a President’s, former President’s, or former Vice President’s claims of privilege for certain information or records. Moreover, some Members may believe that current recordkeeping practices at the White House are sufficient, thorough, and comprehensive. Other Members, however, may believe that different presidential Administrations’ interpretations of the PRA could arguably lead to inconsistent recordkeeping policies and practices. This could leave policy-

⁵⁹ In certain cases, the President or his immediate staff may need to use email or other record-creating platforms that are not equipped with automated archiving technologies. For example, in his May 3, 2011, testimony before the House Committee on Oversight and Government Reform, Brook M. Colangelo, detailed three White House email outages that occurred in 2009. During these times, EOP employees may have needed to access alternative email servers without automated records capturing mechanisms to conduct federal business. See U.S. Congress, House Committee on Oversight and Government Reform, *Presidential Records in the New Millennium: Updating the Presidential Records Act and Other Federal Recordkeeping Statutes to Improve Electronic Records Preservation*, 112th Cong., 1st sess., May 3, 2011, at http://oversight.house.gov/images/stories/Testimony/5-3-11_Colangelo_Testimony.pdf.

⁶⁰ Congressional Budget Office, *Cost Estimate: H.R. 1233, The Presidential and Federal Records Act Amendments of 2013*, Washington, DC, May 20, 2013, at <http://www.cbo.gov/sites/default/files/cbofiles/attachments/hr1233.pdf>.

⁶¹ Congressional Budget Office, *Cost Estimate: H.R. 1234, Electronic Message Preservation Act*, Washington, DC, May 23, 2013, at <http://www.cbo.gov/sites/default/files/cbofiles/attachments/hr1234.pdf>.

makers, scholars, and the general public with an incomplete or inconsistent history of individual Presidents and the institution of the presidency as a whole. Some proponents of codified presidential records provisions maintain that without more detailed codification of record collection and public release responsibilities, an incumbent President, former President, or former Vice President may attempt to keep from disclosure important historical documents for increasingly longer periods of time—or the time certain records are kept from the public may change with each new Administration’s preferences. Some may argue that such action could increase public mistrust of the presidency, inhibit academic understanding of the presidency, or increase the difficulty of identifying possible abuses of executive authority.

Collection of, Retention of, and Access to Electronic Records

The rapid evolution of social media and other means of communication present many challenges for meeting archiving requirements. Congress may choose to further assess and monitor whether the Administration is properly adhering to the PRA through the use of manual archiving techniques for capturing its use of social media. Congress may also have interest in fostering the development of a cost-effective technology that would automate the capture of records created with any electronic platform.

As noted earlier in the report, electronic platforms allow records to be created at a much greater volume than they were historically. Acquiring and paying for archival building space may not be a concern because electronic records do not need to be stored on shelves. It is not clear, however, that existing technologies are capturing all Presidential records in every medium of creation. Additionally, it is unclear whether the records captured and retained will be accessible to the public in perpetuity. In short, will the technologies that permit federal employees, lawmakers, and the general public to create and view certain records today (for example PDF technologies) exist in 10, 20, or 30 years? Or will the ephemeral nature of these technologies lead to a future situation in which millions of records created on multiple platforms can no longer be accessed?

Appendix A. Vice Presidential Records Controversy

The record-preservation policies governing the Vice President's records have prompted controversy.⁶² Former Vice President Dick Cheney challenged a lawsuit filed by an organization that sought to preserve records that former Vice President Cheney claimed were subject to his control. In September 2008, a judge ordered former Vice President Cheney to preserve all records until the case was decided, according to media reports.⁶³ Former Vice President Cheney's office submitted to the Federal District Court of Washington, D.C., a motion to dismiss the lawsuit (filed by Citizens for Responsibility and Ethics in Washington (CREW)) on December 8, 2008. The motion asserted, "[t]he vice president alone may determine what constitutes vice presidential records or personal records, how his records will be created, maintained, managed and disposed, and are all actions that are committed to his discretion by law."⁶⁴

On January 19, 2009, a federal district court judge found that CREW could not demonstrate that the Vice President failed to comply with his obligations under the PRA. The decision accepted former Vice President Cheney's claim that he should have discretion over which of his records are to be preserved and released to the public.⁶⁵ The court also found that vice presidential records were, pursuant to 44 U.S.C. §2207, to be preserved in the same manner as presidential records. The PRA does not explicitly define vice presidential records.

⁶² 44 U.S.C. §2201.

⁶³ Christopher Lee, "Cheney Must Hold His Records," *The Los Angeles Times*, September 21, 2008, p. A-28, at <http://articles.latimes.com/2008/sep/21/nation/na-cheney21>.

⁶⁴ Defendants' Motion to Dismiss or, in the Alternative, for Summary Judgment, and Memorandum of Points and Authorities in Support of Defendants' Motion, *Citizens for Responsibility and Ethics in Washington et al. v. Cheney* (No. 08-1548) (D.D.C. filed December 8, 2008). See also Pamela Hess, "Cheney Claims Power to Decide his Public Records," the Associated Press, December 18, 2008, at <http://www.wtop.com/?nid=116&sid=1474512>.

⁶⁵ *Citizens for Responsibility and Ethics in Washington v. Cheney*, 2009 U.S. Dist. LEXIS 3113 (D.D.C. 2009).

Appendix B. Presidential Records Act Amendments Introduced in the 111th and 112th Congresses

Language similar or identical to some the provisions within H.R. 1233 and H.R. 1234 (113th Congress) can be found in bills from both the 111th and 112th Congresses. **Appendix B** provides background information on the bills from the two previous Congresses that sought to amend the Presidential Records Act. Similar provisions can be found in the legislation introduced in the 113th Congress.

112th Congress

In the 112th Congress, two bills were introduced that would clarify the terms under which presidential records should be released to the public: the Transparency and Openness in Government Act (H.R. 1144) and the Presidential Records Act Amendments of 2011 (H.R. 3071). Both bills contain identical PRA-amending language.⁶⁶

Similar to the language in H.R. 1233 (113th Congress), both H.R. 1144 and H.R. 3071 would have amended the PRA to provide a 60-day presidential record review period any time the Archivist intended to release previously unreleased presidential records. Pursuant to the bill's language, the review period would have been extended for an additional 30 days if the Archivist provided a statement that "such an extension is necessary to allow an adequate review of the record." The bill also would have codified the requirement that any claim of executive privilege be made by the applicable former President or by the incumbent President. On September 29, 2011, Representative Edolphus Towns introduced H.R. 3071, which contained identical amending language.

111th Congress

Two bills introduced in the 111th Congress would have significantly amended the PRA: H.R. 35, and H.R. 1387. H.R. 35 incorporated amendments that had been introduced in previous Congresses, including an attempt to statutorily rescind President Bush's Executive Order 13233.⁶⁷ Although the bill was not enacted, it marked continued concern by some Members of Congress that presidential Administrations were misinterpreting the spirit of the PRA. H.R. 1387, which would have clarified the PRA's electronic recordkeeping requirements for the incumbent President, also incorporated legislative ideas from previous Congresses.⁶⁸

H.R. 35

On January 6, 2009, Representative Towns introduced H.R. 35, the Presidential Records Act Amendments of 2009, which would have reinstated many of the presidential records archiving

⁶⁶ It appears that H.R. 3071 is a stand-alone excerpt of PRA amendments found in H.R. 1144. H.R. 1144 was introduced on March 17, 2011; H.R. 3071 was introduced on September 29, 2011.

⁶⁷ H.R. 1255 and S. 886 in the 110th Congress; H.R. 4187 in the 107th Congress.

⁶⁸ H.R. 5811 in the 110th Congress.

policies in effect prior to George W. Bush's issuance of E.O. 13233, including shortening the presidential record review period to 20 days.⁶⁹ The bill would have revoked President Bush's executive order.⁷⁰ H.R. 35 would have required an incumbent President, former Presidents, or former Vice Presidents to justify why certain records should be afforded protected status for reasons of executive privilege. In contrast, under E.O. 13233, any person seeking to access unreleased presidential records had to demonstrate why the records should be disclosed—without full knowledge of the information that the record may include.

H.R. 35 passed the House under suspension of the rules on January 7, 2009, by a vote of 359-58. The bill was referred to the Senate Committee on Homeland Security and Governmental Affairs on January 8, 2009. On May 19, 2009, the committee reported the bill with an amendment in the nature of a substitute. The bill was placed on the Senate Legislative Calendar that day. No further action was taken on the bill.

H.R. 1387

On March 9, 2009, Representative Paul W. Hodes introduced H.R. 1387, the Electronic Message Preservation Act. The bill, like H.R. 1234 (113th Congress), would have amended 44 U.S.C. §2206, which directs the Archivist of the United States to promulgate regulations that govern PRA's implementation. H.R. 1387 would have required the Archivist to promulgate regulations for provisions to establish “standards necessary for the economical and efficient management of electronic Presidential records during the President's term of office.” H.R. 1387 would have required the promulgated regulations to include

- records management controls necessary for the capture, management, and preservation of electronic messages,
- records management controls necessary to ensure that electronic messages are readily accessible for retrieval through electronic searches, and
- a process to certify the electronic records management system to be used by the President for the purposes of complying with H.R. 1387's new requirements.⁷¹

Also similar to provisions in H.R. 1234 (113th Congress), H.R. 1387 would have required the Archivist to certify, annually, that “electronic management controls established by the President” met the requirements of the legislation and to report to Congress the results of that certification.⁷² The Archivist would have also been required to submit a report within a year of an incumbent President leaving office that detailed “the volume and format of electronic Presidential records deposited into that President's Presidential archive depository” and whether those records met the legislation's requirements.⁷³

⁶⁹ Under President Bush's E.O. 13233, that review period was 90 days. President Obama's E.O. 13489, which was issued after Representative Towns introduced H.R. 35, reduced the review period to 30 days.

⁷⁰ For more information on the power and limitations of executive orders, see CRS Report RS20846, *Executive Orders: Issuance, Modification, and Revocation*, by Vivian S. Chu and Todd Garvey.

⁷¹ H.R. 1387, Sec. 3.

⁷² *Ibid.*

⁷³ *Ibid.*

H.R. 1387 was reported by the House Oversight and Government Reform Committee on January 27, 2010, and passed the House under suspension of the rules on March 17, 2010. On March 18, 2010, the bill was referred to the Senate Committee on Homeland Security and Governmental Affairs. No further action was taken on the bill.

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