



Records, Papers, Decisions: Kavanaugh Records and the Presidential Records Act

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Since Judge Brett Kavanaugh's nomination to be an Associate Justice of the Supreme Court was [received on July 10](#), papers detailing his activities in the George W. Bush Administration and the Office of Independent Counsel Kenneth W. Starr have been the subject of [ongoing congressional interest](#). Specifically, many Members of Congress have discussed the public release of Judge Kavanaugh's records and whether the scope and volume of records released is similar to the records of previous Supreme Court nominees.

The [release and maintenance of records](#) pertaining to Judge Kavanaugh's tenure in these offices is governed by the interaction of the Federal Records Act, the Presidential Records Act (PRA), and the Freedom of Information Act (FOIA). While the Federal Records Act applies to all [federal records](#), such as Judge Kavanaugh's [attorney work files](#) from his tenure with the Office of Independent Counsel, the PRA applies only to records created on behalf of a president, such as records created during the George W. Bush Administration.

After a President leaves office, the legal custody of presidential records transfers from the President to the Archivist of the National Archives and Records Administration (NARA), who oversees the custody, control, preservation, and access to presidential records.

PRA Restrictions

[Presidential records](#) are defined 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." Presidential records meeting certain criteria may be subject to a withholding period of [up to 12 years](#) after the conclusion of the President's Administration.

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The PRA allows the outgoing President to restrict access to six categories of presidential records for specified durations of time, not to exceed 12 years. The [records categories](#) for which a President can restrict access include the following:

- Records described in an [executive order](#) as in the interest of national defense or foreign policy or that are otherwise classified documents,
- Records relating to appointments to federal office,
- Records specifically exempted from disclosure by statute,
- Records that contain trade secrets and commercial or financial information,
- Records of confidential communications requesting or submitting advice between the President and the President’s advisers or between such advisers, and
- Records of personnel and medical files whose disclosure would constitute an invasion of personal privacy.

As the length of time between the conclusion of a presidency and the present day increases, [records restrictions under the PRA weaken](#). For example, [generally less than five years](#) out from the conclusion of a presidency, presidential records cannot be accessed through FOIA unless the Archivist has completed the processing of the records. Between five and 12 years out from the end of a presidency, the Archivist determines PRA restrictions in consultation with the former President. After 12 years, these PRA restrictions no longer apply, though [FOIA exemptions](#) (for example the trade secrets exemption) may still be applicable to presidential records.

Exceptions to Restricted Access of Presidential Records

Although a number of laws safeguard presidential records for particular durations of time, certain federal officials may access presidential records within the 12-year time frame, known as gaining “special access” to presidential records. Per 44 U.S.C. §2205:

[S]ubject to any rights, defenses, or privileges which the United States or any agency or person may invoke, Presidential records shall be made available—

(A) pursuant to subpoena or other judicial process issued by a court of competent jurisdiction for the purposes of any civil or criminal investigation or proceeding;

(B) to an incumbent President if such records contain information that is needed for the conduct of current business of the incumbent President’s office and that is not otherwise available; and

(C) to either House of Congress, or, to the extent of matter within its jurisdiction, to any committee or subcommittee thereof if such records contain information that is needed for the conduct of its business and that is not otherwise available.

Observers have questioned what constitutes a House or Senate request for presidential records and who needs to make the request for the records for it to qualify under [44 U.S.C. §2205\(C\)](#). In a news release dated [August 15, 2018](#), NARA writes that “the National Archives longstanding and consistent practice has been to respond only to requests from the Chair of Congressional Committees, regardless of which political party is in power.”

National Archives and Records Administration Efforts to Release

In its August 15 news release, NARA described its efforts to release records related to Judge Kavanaugh’s service in the George W. Bush Administration. NARA noted that the Archives processed approximately 70,000 pages of Chief Justice [John Roberts’s records](#) and 170,000 pages of Justice [Elena Kagan’s records](#), whereas it anticipates processing “the equivalent of several million pages of paper and email records”

related to Judge Kavanaugh. In response to a congressional “special access” request dated [July 27, 2018](#), NARA is prioritizing the processing of 900,000 pages. NARA anticipates completing its review of the White House Counsel Office emails from Judge Kavanaugh and the textual records related to his tenure as Associate Counsel and Senior Associate Counsel to the President—[totaling approximately 300,000 pages](#)—by August and the remaining 600,000 pages by October.

In the same news release, NARA recognized that the George W. Bush Presidential Library is conducting a separate review of such records, which is permissible under 44 U.S.C. Section 2205(3). NARA, however, did note that “the PRA representative of President George W. Bush requested and received from the National Archives a copy of the White House Counsel’s Office records and nomination records and has begun to provide copies of those records directly to the Senate Judiciary Committee, which is something that has never happened before.” Records related to Judge Kavanaugh that have been released can be found on [NARA’s web page](#).

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