THE PRESIDENTIAL RECORDS ACT OF 1978: ITS DEVELOPMENT FROM THE RIGHT TO KNOW AND THE PUBLIC'S DEMAND FOR FEDERAL RECORDS OWNERSHIP

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THESIS ABSTRACT

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The Presidential Records Act (PRA) of 1978 established public ownership of presidential records, erasing the previous tradition of presidents retaining records ownership. In 1974, Richard Nixon broke with tradition by signing an agreement with General Services Administrator Donald Sampson that called for the destruction of many of Nixon's Watergate records. This set into motion a string of events, culminating in the PRA. This thesis explores the development of the demand for public access from the 1940s through the passage of the PRA. In addition, the thesis will examine why Congress only sought presidential records ownership when the public demanded ownership of all federal records.

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TABLE OF CONTENTS

INTRODUCTION

Twenty-three years after the establishment of the Presidential Library System, the Presidential Records Act of 1978 established public ownership of presidential records. The change in records ownership was the result of decades of lobbying, primarily by historians and journalists, against a government that often made its records inaccessible. Nevertheless, it was not an issue with which the general public concerned itself. The Nixon-Sampson agreement brought the debate to the public consciousness and provided the impetus for the de-privatization of presidential papers. However, the push for legislation mandating public ownership of presidential papers was not merely a reaction to the Nixon-Sampson agreement. Despite the academic and journalistic communities' desire for an overhaul of the Presidential Library System, central to which was the assertion of public ownership to presidential records, it is unlikely such a change could have occurred without the Watergate controversy.

Access to records is one of the central tenets of modern archival theory. Archival scholars, such as T.R. Schellenberg and Sir Hilary Jenkinson, wrote extensively over the past century concerning the importance of access to records. In defining the role of an archives, Schellenberg asserts that "The end of all archival effort is to preserve valuable records and make them available for use," adding that "every restriction [on the records] should be subject to some limitation in time so that all records that are preserved will

eventually be opened to public use." According to Schellenberg, it is the archivist's job to provide equal records access to the public and government officials under terms satisfactory to both.[1] In contrast, Jenkinson argues in *A Manual of Archive Administration* that the archivist is nothing more than a custodian of records. The records' creator should have the final say in records disposition, and the archives must accept what the records' creators choose to donate.[2]

Schellenberg specifically accounts for the public's right to access government information and expects archivists to help insure that right. Jenkinson, however, disagrees with Schellenberg's assessment, believing that every person or entity, including the government, should have the right to decide the disposition of the records they create. The archivist's job according to Jenkinson is only to preserve records in their custody, not to provide access to the public. For Jenkinson, government records serve the institution that created them, while Schellenberg argues that government records serve the public. These two theories represent the two common beliefs about presidential records. Some believed that presidents owned their records and the presidential libraries' jobs were to preserve the records they received. Others argued that not only presidential records, but all government records, should be freely available to the public, and the presidential libraries and the National Archives should be at the forefront of insuring access.

In his review of the Presidential Library System, Richard Cox compares the presidential libraries to the ancient pyramids of Egypt. The presidents are pharaohs, who

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[1] T.R. Schellenberg, *Modern Archives: Principles and Techniques* (Chicago: The University of Chicago Press, 1956), 224, 225.

[2] Hilary Jenkinson, *A Manual of Archive Administration,* 2nd ed (London: Percy Lund, Humphries and Co. LTD, 1966), 136-155.

erect monuments to themselves. Cox argues that presidential libraries are devoted to the celebration of past presidents' legacies rather than critical research on their presidencies. He questions whether this system hinders access to records, concluding that there has always been a problem with access to presidential records and the current presidential Library System has not alleviated the problem.[3] Similarly, Benjamin Hufbauer proclaims presidential libraries are American temples. He criticizes the presidents' role in their own commemorations and the degree of power they have in shaping their own images and legacies by creating massive monuments to themselves. He argues that the Nixon and Reagan libraries, for example, have sought to control the negative publicity from the Watergate and Iran-Contra scandals respectively.[4]

Timothy Geselbracht asserts that the tradition of presidential records ownership would have been drastically altered had Harry Truman followed the advice of his assistant, George Elsey. He suggested that the president should donate all of the White House Central Files, comprising eighty percent of his records, to the National Archives and should only donate the president's Secretary Files to his presidential library. According to Geselbracht, had Truman not feared losing the right to set access restrictions to his presidential records, other presidents would have likely followed his example and donated their presidential records to the National Archives. This would

[3] Richard J. Cox, "America's Pyramids: Presidents and Their Libraries," *Government Information Quarterly* 19 (2002): 45-75. 46

[4] Benjamin Hufbauer, *Presidential Temples: How Memorials and Libraries Shape Public Memory* (Lawrence, Kansas: The University of Kansas Press, 2006), 5.

have created a centralized collection of presidential papers and left the presidential libraries as modest museums, instead of presidential temples.[5]

Cox, Hufbauer, and Geselbracht are in the minority. Most of the literature about the Presidential Library System written after the Presidential Records Act of 1978 addresses the organization of the system. Few offer critical analysis of the libraries' roles in determining a president's legacy or how the Presidential Records Act of 1978 affected access to records. Fritz Veit, in *Presidential Libraries and Collections*, offers a good analysis of the Presidential Library System as a whole, and how the Presidential Records Act and subsequent legislation and executive orders affected the Presidential Library System.[6]

The majority of the literature discussing ownership was written prior to the Presidential Records Act of 1978. But this literature does not address how the ownership issue evolved into the Presidential Records Act of 1978. Perhaps more importantly, none of the literature connects the right to know with the demand for public ownership. The literature also fails to explain why the movement for increased access to and ownership of federal records developed into a Presidential Records Act focused on public ownership of Executive papers, excluding other federal records.

Access and ownership are concepts that go hand in hand. This thesis explores the development of access and ownership debates and demonstrates their affect on the drafting of the Presidential Records Act of 1978. It argues that the efforts to combat

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[5] Raymond Geselbracht, "Creating the Harry S. Truman Library: The First Fifty Years," *The Public Historian 28* (Summer 2006): 37-78. 40, 41.

[6] Fritz Veit, *Presidential Libraries and Collections* (New York: Greenwood Press, 1987)

government secrecy in the 1950s and 1960s, particularly the efforts to establish the public's right to know and right to access information, led to the increased demand for public ownership of federal records in the 1970s. In addition, the thesis will examine the recommendations of the Public Documents Commission and how they affected presidential records legislation. Finally, it will explore the reasons Congress limited the legislation to presidential records despite the recommendations from the Public Documents Commission and scholars that all federal records should become public property.

CHAPTER I

TRADITIONS OF PRESIDENTIAL RECORDS OWNERSHIP

The Presidential Records Act (PRA) of 1978 was the culmination of nearly thirty years of lobbying by the press and the academic community for a decrease in Executive branch secrecy and an increase in access to records. To understand the PRA's impact, one must know the legislation from which it evolved. Important to the PRA are the establishment of the National Archives, the Federal Records Act, and the Presidential Libraries Act. Each of these pieces of legislation altered the manner in which the United States Government managed and provided access to its records. Each was a progression towards legislation granting not just increased access to presidential records, but also ownership.

From the inception of the presidency to the Presidential Records Act of 1978, tradition governed the ownership of presidential records. George Washington claimed ownership of his presidential records when he bequeathed them to his nephew, Bushrod Washington, upon his death. Washington's precedent led to what H.G. Jones refers to as "larcenous habits" by subsequent presidents.[7] Congress and the public debated the disposition of Washington's records, but the Government lacked a proper storage facility.

[7] H.G. Jones., "Presidential Papers: Is There a Case for a National Presidential Library?" *American Archivist. XXXVIII* (July 1975): 328.

Until the creation of the Library of Congress in 1800, no such facility would exist. Some argued that allowing presidents to keep their records might be the best way to insure their survival. However, this was not the case. Without a repository dedicated to the care of presidential records, they suffered neglect, became damaged beyond repair, or became part of an inaccessible private collection. For decades, presidents entrusted their records to their families or to their estates, and many of the records were subsequently lost, destroyed, or sold to private collectors. Washington's nephew, for example, closed his uncle's presidential papers and charged research fees. Following in Washington's footsteps, John Adams, as well as his son, John Quincy Adams, left their presidential papers in the custody of their families, who only allowed access to select historians. Ulysses S. Grant destroyed some of his correspondence prior to leaving office, leaving the rest for his family to neglect. Likewise, Martin Van Buren and Franklin Pierce purged their presidential records. Warren Harding's widow willfully destroyed a large portion of his records.[8]

There were, however, a couple of notable exceptions to the mishandling of presidential records. For example, the family of Rutherford B. Hayes made the presidential records accessible to the public when they established the Rutherford B. Hayes Memorial Library in 1916 in Fremont, Ohio. Similarly, Herbert Hoover's records went to the Hoover Library of War and Peace at Stanford University.[9]

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[8] Buford Rowland, "The Papers of the Presidents," *American Archivist* 13 (July 1959): 195-211.

[9] Ibid., Herbert Hoover originally established a library at Stanford University in 1919 to house his records relating to World War I. The Hoover tower was dedicated in 1941, on the fiftieth anniversary of Stanford University. The library at Stanford houses records

Even though Congress did not concern itself with presidential records until nearly eighty years after the creation of the Presidency, it did have an interest in the maintenance of other federal records. Congress began its examination of federal records in the early 1800s. In 1810, Congress appointed the Quincy Archives Committee, headed by Josiah Quincy, to examine the state of the public records of the United States. They discovered that federal records were in a horrible state of disorder, being stored in unsafe and inconvenient locations. The committee's recommendations led to the Archives Act of 1810, which was the first attempt by the government to establish a building for storage of public records. This Archive, which housed the records of the Navy, State, and War Departments, did little to enhance the conditions or access to public records and they languished for nearly 125 years. The law only required that records be created and kept, but did not provide guidelines for their care and handling.[10] Fires proved to be the biggest hazard to the records. Nearly 250 fires destroyed records in government buildings throughout Washington between 1873 and 1915.[11] Although Congress demonstrated a renewed interest in the state of the public records of the United States

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relating to Communism and Fascism, as well as Hoover's pre-Presidential records and selected Presidential records that fit with the rest of the collection. The Hoover Library and Museum controlled by NARA was not created until 1962. It is in West Branch, Iowa and houses the bulk of his Presidential records as well as post-Presidential records, such as those of the Hoover Commissions. The Rutherford Hayes library was founded as a private organization, but receives funding from the Ohio Historical Society. It is not part of the Presidential Library System.

10 J. Michael Pemberton, "U.S. Federal Committees and Commissions and the Emergence of Records Management," *ARMA Records Management Quarterly* (April 1996): 1.

11 H. G. Jones, *The Records of a Nation: Their Management Preservation and Use* (New York: Atheneum Press, 1969), 8.

during the latter half of the nineteenth century, legislation aimed at safeguarding the records by improving the state of storage facilities failed. Congress did not authorize the creation of a National Archives Building until 1913. However, it took another twenty years to complete the building.

The first legal decision affecting presidential records came in 1841 with the ruling in *Folsom v. Marsh*. In 1827, historian Jared Sparks struck an agreement with Bushrod Washington to publish a biography of George Washington, which included his writings. Sparks obtained a copyright on the published work in 1837. After another historian published a Washington biography, which also included a reprint of the letters, Sparks sued the other historian claiming copyright violation. The lawsuit made it to judge Joseph Story and the United States Circuit Court in Massachusetts. Story had previously worked with Bushrod Washington, an associate justice of the Supreme Court, Jared Sparks, and Chief Justice John Marshall, on the publication of Sparks's Washington biography. Despite an obvious conflict of interest, Story ruled that the second biography violated Sparks's copyright. His decision confirmed that Washington's presidential papers were his own private property, which he had bequeathed to his nephew. Story's ruling established the copyright privileges of presidential records, which could only be published with permission. The defendants argued that the letters were official, not literary, because they reflected official government business. Therefore, they were not subject to copyright. Story, however, drew no distinction between publications of official letters written while conducting government business and literary publications.[12]

[12] *Folsom vs. Marsh*, 9 F. Cas. 342 (1841).

Folsom vs. Marsh granted legal justification of the right of presidents to claim their official papers as private property. However, George Washington never viewed his presidential papers as private property. While still in office, Washington expressed his desire to build a structure to house his military and private papers, which he thought might be of interest to the nation. In addition, he expressed a desire to build a separate repository for the storage of his presidential papers.[13] Nevertheless, the ruling served as a precedent later cited by Richard Nixon as justification for his agreement with General Services Administrator Donald Sampson in *United States vs. Nixon.* Another precedent cited by supporters of private ownership is that of Grover Cleveland, who used his power to refuse certain documents to Congress as proof that he owned his records.[14]

Ensuring access to presidential records became a concern of Congress with the establishment of the Library of Congress Manuscript Division in 1897. Congress appropriated money to buy presidential records from private collectors and historical societies and maintain them at the Library of Congress. Theodore Roosevelt was the first president to leave his presidential records in the custody of the Library of Congress, depositing them after he left office in 1909. The idea of leaving records with the Library of Congress was not popular among presidents, probably because it simply provided

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[13] John C. Fitzpatrick, ed., *The Writings of George Washington from the Original Manuscripts Sources, 1745-1799*, 39 vols. (Washington: Government Printing Office, 1931-1940), Vol 35, 430, 431.

[14] R.D.W. Connor, "The Franklin D. Roosevelt Library," *American Archivist* 3 (April 1940): 83.

shelf space without a memorial.[15]

The creation of the National Archives building in 1933 was the first step toward the creation of the National Archives system. Prior to its construction, many feared that the proposed multimillion dollar facility would become just another storage facility that did not provide preservation or access. Congressmen, supported by historians, such as J. Franklin Jameson and Waldo G. Leland, lobbied for legislation to establish an agency to administer and exert control of the public records. Jameson, in a letter to Senator Simeon Fess in 1926, pressed the need to be proactive in coming up with a system for controlling the flow of records. If Congress waited until the completion of the National Archives building to create an administrative agency, the ensuing chaos of government agencies scrambling to rid themselves of "tons of records and papers" would swamp the fledgling agency to the point that it would be of little use.[16]

The states provided a precedent for such an agency. Many states had been successfully administering their public records since the establishment of the Alabama Department of Archives and History in 1901. By 1930, at least ten states had created institutions to manage their historical records. It was not until 1934 that Congress passed the National Archives Act, establishing an agency responsible solely for the cataloguing, preservation, and disposition of the federal records of the United States.

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[15] Raymond Geselbracht, "The Four Eras in the History of Presidential Papers," *Prologue* 5 (Spring 1983): 38.

[16] Letter from J. Franklin Jameson to Simeon D. Fess, June 23, 1926. Quoted in Fred Shelly, "The Interest of J. Franklin Jameson in the National Archives: 1908-1934," *American Archivist, XII* (April 1949), 122.

It was not until the twentieth century that the practice of treating presidential papers as personal property came under serious scrutiny. Reclaiming old records, such as the Library of Congress attempted to do, was expensive and often impossible. The traditional practice left a glaringly incomplete record of the presidency. After the creation of the Executive Office of the Presidency in 1939, along with all of its subordinate emergency and wartime agencies, an important problem with the traditional, haphazard method of records ownership presented itself. Subsequent administrations might need access to Roosevelt's presidential records to allow a seamless transition without affecting a potential war effort.

The Franklin Roosevelt Library, created in 1939 by a Congressional resolution, was the first federally maintained presidential library. The resolution only applied to the FDR Library. After ascending to the Presidency upon Roosevelt's death, Harry Truman showed little immediate interest in the prospect of creating a Truman Library. By 1950, Truman began investigating options for the disposition of his records. His assistant, George Elsey, began working with the Archivist of the United States, Wayne Grover, on transmitting his presidential records to the National Archives. Elsey and Grover drafted legislation that would allow presidents to deposit their papers with the National Archives. In addition, the legislation provided the basis for managing federal records by charging agency heads with the authority to make, preserve, and transfer records documenting the agency's activities to the National Archives. Congress passed Elsey and Grover's legislation, the Federal Records Act in August 1950.[17]

[17] Geselbracht, "Creating the Harry S Truman Library," 40.

It quickly became apparent to Truman that the Federal Records Act would not be suitable for his own deposit needs. Truman worried that the law did not prevent future presidents or Congress from accessing his papers without his permission. Furthermore, the Federal Records Act did not allow for the acceptance of land or a building in which to house the papers. By the end of Truman's presidency, the government still did not have the legal authority to accept a presidential library, and the access conditions of the Federal Records Act diminished his desire to donate his records to the government.[18]

On August 12, 1955, Congress passed the Presidential Libraries Act of 1955, which allowed the government to accept new libraries without additional Congressional resolutions. The Presidential Libraries Act of 1955 authorized the General Services Administrator, who since 1950 oversaw the National Archives and Records Service, to accept land, buildings, equipment, and gifts for the purposes of establishing a presidential repository. All accepted materials, however, had to be of historic or commemorative value, and have a direct bearing on the career and life of the president.[19] The Presidential Libraries Act of 1955 did more than just authorize the creation of repositories for future presidential records; it laid the framework for future presidents to create presidential museums. The PLA codified the model created by the Franklin Roosevelt Library. However, it did not establish public ownership of presidential records. The PLA implicitly endorsed the tradition of private presidential records ownership.

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[18] Raymond Geselbracht and Timothy Walch, "The Presidential Records Act After Fifty Years," *Prologue* 37 (Summer 2005). Retrieved on November 29, 2001 from http://www.archives.gov/publications/prologue/2005/summer/preslib.html

[19] Veit, 5.

CHAPTER II

ACCESS, OWNERSHIP, AND THE RIGHT TO KNOW

The Presidential Records of Act (PRA) of 1978 was the first Congressional Act of its kind. Congress addressed issues related to records storage, retention, and access prior to passing the PRA of 1978, but it is the only law governing ownership of presidential records. Proponents of the legislation originally desired ownership of all federal records, not just those of the Executive branch. The PRA of 1978 did not emerge out of thin air, as some have suggested. It resulted from nearly thirty years of lobbying for an expansion of records access. This chapter analyzes the extent to which the efforts to combat government secrecy in the 1950s and 1960s, particularly the effort to establish the people's right to know and right to access information, developed into the demand for public ownership of federal records.

The right to know and the right to access are related ideas that began receiving increased scrutiny by scholars in the second half of the twentieth century. After analyzing court decisions involving access to government information, Herbert Foerstel concluded that the cases suggest three levels of the right to access to government information. The first level prevented the government from blocking the expression of

facts and opinions about government business. The second level required the government to recognize the public's requests for information. The highest level required the government to inform the public directly. The only one of the three levels affirmed by the Court is the prohibition of the government from blocking the expression of opinions and facts concerning government business, which is the traditional understanding of freedom of the press. Nevertheless, in these cases, which include *Martin v. City of Struthers* (1943), *Lamont v. Postmaster General* (1965), and *Griswold v. Connecticut* (1965), the public expressed its desire for a right to access government information.[20]

Entangled with the right to access is the right to know. Journalist Kent Cooper coined the phrase "right to know" in 1945 at an address to the Temple Emanu-El in New York City. The *New York Times* repeated the phrase in an editorial stating, "He spoke of 'the right to know.' The citizen is entitled to have access to news, fully and accurately presented. There cannot be political freedom in one country…without the 'right to know.'"[21] Cooper elaborated on his idea in *The Right to Know*, claiming that the right to know is the right of the American people to be informed of all government activities. He claims that it is a slogan adopted by the media for the cause of broadening the rights of the freedom of the press. Cooper argued that the First Amendment should be amended to include the phrase "right to know."[22] It is not surprising that the right to know has always

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[20] Herbert N. Foerstel, *Freedom of Information and the Right to Know: The Origins and Applications of the Freedom of Information Act* (Westport, Connecticut: Greenwood Press, 1999), 13, 14

[21] Editorial, *The New York Time,*. January 23, 1945.

been connected to the First Amendment. Although the Constitution does not specifically grant any such right to the American people, by interpreting the right to know as critical to freedom of the press, Cooper provided the grounds for legitimizing the people's right to access government information. According to Cooper, the right to know implies the right to access.

Legal scholar Wallace Parks argued that the primary purpose of the freedom of speech and press clauses of the First Amendment was to protect the reporting of facts and opinions about government business from interference by the government. The First Amendment guarantees the people's right to know and serves as a prohibition against withholding information unnecessarily.[23] According to Charles Steinberg, "the quintessence of democracy is the expression of the will of the people. Judgment and action depend upon access to adequate information."[24] Herbert Foerstel concurs, arguing that the First Amendment is sufficiently broad to include the right to know, because the founders agreed that the right to know was "essential to the budding American democracy."[25]

Kent Cooper provided the intellectual framework for legitimizing the right to know, but it was the American Society of Newspaper Editor's (ASNE) Committee on

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[22] Kent Cooper, *The Right to Know* (New York: Farrar, Straus, and Cudahy, 1956), xiii.

[23] Wallace Parks, "The Open Government Principle: Applying the People's Right to Know Under the Constitution," *George Washington Law Review* 26, 1 (October 1957): 12.

[24] Charles R. Steinberg, *The Information Establishment: Our Government and the Media* (New York: Hastings House Publishers, 1980), 13-15.

[25] Foerstel, 12.

Freedom of Information that popularized it. One of its early chairmen, James Pope, former editor of the *Louisville Courier Journal*, claimed that newspapers were allowing the people's right to information slip away, and that it was the committee's job to insure that the people had a voice for their right to know. He also admitted, however, that he had no idea how to achieve the goal or even how "to start the battle for reformation."[26]

The idea of freedom of information, which is the free flow of government information, developed in the 1950s and 1960s out of the right to know. One of the first men to make this leap was James Pope, who in 1951 declared, "Freedom of Information is just an idealistic first cousin to freedom of the press."[27] Harold Cross used Cooper's assertion that the right to know is guaranteed by the First Amendment to connect freedom of information with the right to know. His claim was that "public business is the public's business. The people have the right to know. Freedom of information is their just heritage."[28]

Cross analyzed statutes concerning access and concluded that the definition of public records is of the utmost importance in understanding denial of access. He argued that what the government deemed public records were those covered by the right of inspection, which allowed one to view government records upon request. The government routinely granted this right to the public for general information. However,

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[26] Cooper, 283.

[27] James S. Pope, "The Suppression of News," *Atlantic Monthly*, July 1951, 50.

[28] Harold Cross, *The People's Right to Know* (New York: Columbia University Press, 1953), xiii.

agencies often withheld sensitive records from the press.[29] It is this perceived denial of information to news reporting entities, who viewed themselves as the pane through which the public could view government operations, that forced journalists into the forefront of the access debate.

James Wiggins continued to push the idea of freedom of information after he succeeded Pope as the ASNE Freedom of Information Committee chairman. Wiggins used Cross's findings to develop a relationship with John Moss, which influenced the development of the Freedom of Information Act (1966). Wiggins outlined the right to know in *Freedom or Secrecy*:

> It has at least five broad, discernable components: (1) the right to get information; (2) the right to print without prior restraint; (3) the right to print without fear of reprisal not under due process; (4) the right of access to facilities and material essential to communication; and (5) the right to distribute information without interference by government acting under law or by citizens acting in defiance of the law.[30]

Wiggins's definition of the right to know includes several related ideas, including the right to access information and the right to print without restraint. Although other journalists had made use of the concept, Wiggins was the first to offer a definition of the right to know.

The ASNE asserted the right to know on July 12, 1957, with the publication of "A Declaration of Principles." Its declaration claimed that the right to know was guaranteed to the American people as "heirs to the Magna Charta,…the privileges and immunities of

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[29] Ibid., 10, 11.

[30] James Russell Wiggins, *Freedom or Secrecy* (New York: Oxford University Press, 1956) 3-4.

English Common Law, and…the Constitution and the Bill of Rights of the United States."[31] The ASNE expanded the claim beyond the scope of the Constitution, and declared the right to know on the basis of common law. In the same declaration, the ASNE "authorized and instructed" its members to resist any encroachment on their right to know by "all appropriate means."[32]

A theoretical right to know may have existed, but enforcing the right proved difficult. The wording of the right to know broadly rested on a tenuous legal foundation. Early proponents failed to prove a distinction between an abstract right and a concrete right. Cross, Cooper, and Wiggins, argued a concrete right to know as a First Amendment guarantee. Thomas Emerson also claimed that the First Amendment guarded and the Supreme Court supported the right to know.[33] He correctly argues that in several cases the Supreme Court mentioned the right to know. However, the Court never explicitly clarified that right. Nevertheless, legal scholars, such as David O'Brien, argued that the Supreme Court used the right to know as a tool in arguing cases without guaranteeing its constitutionality.[34]

According to O'Brien, the value of the "right to know" lies not in its status as a concrete right, which is unproveable, but instead as an abstract right. Although some

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[31] The American Society of Newspaper Editors, "A Declaration of Principles." Reprinted in David O'Brien, The *Public's Right to Know: The Supreme Court and the First Amendment* (New York: Praeger Publishers, 1981), 4.

[32] Ibid.

[33] Thomas I. Emerson, "Legal Foundations of the Right to Know," *Washington University Law Quarterly* No. I (1976): 2.

[34] O'Brien, 8.

viewed the Supreme Court's recognition of a right to know as a definitive right, the wording of the rulings indicated that it was an abstract right, used to extend rights guaranteed by the First Amendment. The Court used the right to know to broadly interpret the First Amendment. The Supreme Court recognized the people's right to know, without granting it the status of a constitutionally enforceable right. The public secured that right indirectly through the First Amendment.[35]

Proponents of the right to access argued that the government exploited executive privilege to hide information through security classifications. The claim of executive privilege was not new. Presidents since George Washington claimed executive privilege on information they deemed confidential, incompatible with the public's interest, or against the security of the nation. However, during a time of increased awareness of access restrictions, Dwight Eisenhower's claims of executive privilege concerning information relevant to an altercation between the Army and Senator Joseph McCarthy excited Congress. Eisenhower recognized the right of the press to obtain information as a surrogate of the people, while simultaneously upholding the right of the president to deny access to information not in the public's interest by claiming executive privilege. Similarly, many executive branch offices expanded the idea of executive privilege by classifying documents that did not deserve to be classified. This "capricious classification" of documents affirmed the common belief that the government was going out of its way to undermine open access to information.[36] The *Louisville Courier*

[35] Ibid., 20-28.

[36] Steinberg, 14.

Journal, a favorite platform of the ASNE, pointed out the hypocrisy in a 1957 editorial. It alluded to a 1789 federal statute that made public records available except "information held confidential for good cause found." The Government, according to the *Courier,* used the very statute designed to mark records as public property to deny the information to the public.[37] Presidents Kennedy and Johnson continued to use executive privilege as a means to deny access, but it was the expansion of the privilege by Richard Nixon that led to a frontal assault on traditions of access and ownership of government records.

Some, such as Richard Cox and Anna Kasten Nelson, have argued that the idea of public records ownership did not exist prior to the Nixon controversy. However, professional historians, archivists, and journalists, were calling for ownership of public officials' papers as early as 1837. Cox and Kasten argue that archivists largely ignored issues of ownership and access, and the idea of the public owning the records of the president did not mature until after the Nixon-Sampson agreement.[38] As early as 1837, Jared Sparks, the same man who copyrighted his publication of the letters of George Washington, expressed his view in a letter to Joseph Story that presidential papers are public property.[39] After the ruling in *Folsom vs. Marsh*, the claim of public ownership

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[37] "The Editorial View On Fooling the Public," The *Courier-Journal, The Louisville Times*, 21 June, 1957.

[38] Cox, 52. See Also *The Records of Federal Officials: A Selection of Materials from the National Study Commission on Records and Documents of Federal Officials*. Ed. Anna Kasten Nelson (New York: Garland Publishing, Inc., 1978.) 1-5.

[39] J. Frank Cook. "'Private Papers' of Public Officials," *American Archivist* 28 (July 1975) 299-324. 307.

did not re-emerge until the middle of the twentieth century. Although Nelson and Cox are correct that archivists were not at the forefront of the issue, a debate had been developing for nearly a decade prior to Nixon's agreement with Donald Sampson. In fact, it was one of the considerations at the 1955 hearings for the Presidential Libraries Act. There was, however, a renewed interest in the topic in the mid-1970s, as archivists, historians, journalists, and the public alike questioned the traditions of records ownership.

Prior to the Nixon-Sampson agreement a well-documented debate about the ownership of public officials' records existed, with most historians and scholars arguing for public ownership. In one of the earliest published criticisms of private ownership, Julian Boyd and Lucius Wilmerding Jr. argued in 1960 that, "The records of the President belong to the people that created that office."[40] The comment was in reference to Eisenhower's donation of his presidential records. Boyd and Wilmerding argued that the public should not have to rely on the donation of something it rightfully owned.

In his testimony at the hearings for the 1955 Presidential Libraries Act, the Administrator of General Services, Edmund Mansure, argued that presidents' removal of their papers was in keeping with tradition and that "the papers are the personal property of the retiring presidents." Mansure notes that a negative consequence of this tradition was the dispersal and destruction of a significant number of presidential records prior to the twentieth century.[41] The testimony codified the tradition and made it the basis for the

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[40] Julian Boyd and Lucius Wilmerding, Jr. "Who Owns the President's Papers?," *New York Times*, May 1, 1960, Sec E., 10.

[41] Statement of Edmund Mansure. June 13, 1955. *Hearings on Bills to Provide for the Acceptance and Maintenance of Presidential Libraries*. Washington, D.C.: Government Printing Office, 1956. 14.

proposed legislation. However, there was no legal basis for declaring the records of a president as his personal property. The precedent was tradition alone. In a 1969 book, Jones hinted at the flimsy legal basis of the assertion of ownership when he called it "only an assumption supported by a long tradition of acquiescence."[42] The tradition of personal ownership, then, lies as much with the failure to challenge the ownership as it does with the physical claiming of the records by a president.

David Lloyd and Herman Kahn support Mansure's statement, adding that the ability of the Executive office to function as an independent arm of the government necessitates private ownership of presidential records. Kahn claims that the constitutional nature of the Presidency makes the president's records his personal property and their fate is at his discretion.[43] According to Lloyd, the wishes of the presidential owner should be considered above all others to insure that the records are made available to the public. He also questions whether future presidents will even desire to donate their presidential papers to the government, because there is no way of knowing what future factors may dissuade a donor.[44]

Lloyd is one of the first scholars to articulate the fear of what others later called the "chilling effect," although he does not use that phrasing. Lloyd's chief fear is that public ownership equates to immediate disclosure at the conclusion of a term. The

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[42] Jones, *The Records of a Nation*, 158.

[43] Herman Kahn, "The Presidential Library-A New Institution" *Special Libraries* 50 (March 1959): 106.

[44] David D. Lloyd. "The Harry S Truman Library," *American Archivist* 18 (April 1955): 107-108.

knowledge of immediate disclosure would result in members of the executive office intentionally limiting the number and type of records produced. This idea is at the forefront of the later debates about the Presidential Records Act.

H.G. Jones asserts, in *The Records of a Nation*, that Franklin Roosevelt established a new precedent of public ownership when he donated his papers to his library.[45] Thomas Greer argues that Roosevelt even stated that presidential records are "the People's Records."[46] Nevertheless, supporters of Roosevelt's claim never followed up on his assertion. According to Jones, supporters of the legislation failed to dispel the "legal fiction that a president owned or possessed a private right to the records accumulated during his tenure in office."[47] Although not a definitive ruling, the language of the 1955 Presidential Libraries Act, suggests inherent acceptance by Congress of a president's right of ownership. The Act calls for donation of presidential papers to a library built at private expense, but maintained with public funds.[48] The use of the word "donated" means that the records are recognized as the presidents' personal property.

Former deputy Archivist of the United States, James O'Neill, argues, on the other hand, that ownership is not even an important issue. If one considers the state of presidential records prior to the creation of the Presidential Library System, despite their short comings and the potential future problems, the presidential libraries succeeded in

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[45] Jones, *The Records of a Nation,* 155.

[46] Thomas H. Greer, *What Roosevelt Thought: The Social and Political Ideas of Franklin D. Roosevelt* (East Lansing, MI: Michigan State University Press, 1958): 229

[47] Jones, *The Records of a Nation*, 158.

[48] Cook, 312.

their primary objective, preserving the records of their namesake presidents. O'Neill passively supported the traditional view of presidential records ownership, stating that it does not matter if one supports private ownership or public ownership, private ownership "is nonetheless the case."[49]

F. Gerald Ham took a different stance, stating, "…these papers originate from one activity only-that of serving in a public capacity. I think they should be public papers."[50] Ham argues that documents produced at public expense by an official serving the public are public documents. If the public paid for their creation, then the public should be the legal owners. In "'Private Papers' of Public Officials," J. Frank Cook similarly argues that the papers of public officials belong to the people, and that tradition, legislation, or administrative policies to the contrary conflict with the nation's best interest.[51] A chief component of the issue with regards to the presidency concerns the nature of the office itself. According to Cook, the supporters of private ownership commonly claimed that the constitutional nature of the presidential office overrides the public's claim to ownership, while those calling for public ownership claim that regardless of the nature of the office, records created at public expense belong to the public. In addition, supporters of public ownership do not believe the president's executive privilege with regards to his presidential papers follows him into retirement.[52]

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[49] James O'Neill, "Will Success Spoil the Presidential Libraries?" *American Archivist* 26, no. 3 (July 1973): 339-351. 344.

[50] Statement by F. Gerald Ham. *Time Magazine*, 31 December 1973. 12.

[51] Cook, 299.

[52] Ibid 300-301.

There was no unified statement on the matter of ownership until the American Assembly published its recommendations for the records of public official in 1975. Founded by Dwight Eisenhower in 1950 and affiliated with Columbia University, the American Assembly is a non-partisan organization that shapes public policy by sponsoring meetings and commissioning research. Among the Assembly's recommendations were that all branches of the government should recognize that policies regarding the records of public officials had not served the nation well, the public property interest "should be inviolable," and standards must be implemented to control the timing and limitations of public disclosure. Specifically with regards to presidential records, the Assembly called for the end to "the practice of recognizing ownership of presidents or their heirs."[53]

Taking the previous arguments into account, one can break the public vs. private ownership debate into the following two basic ideas: The public owns all presidential records because they are created at public expense, and the president owns his presidential records because tradition, precedent, and the sensitive nature of the office dictate it. Although public ownership of presidential records specifically was the goal of some scholars, many called for ownership of all federal records. In fact, the American Assembly offered its recommendations on federal records as a whole. When the National Commission on the Records and Documents of Federal Officials convened in 1977, its goal was not to outline parameters for establishing presidential records ownership; its goal was to recommend legislation that dictated the ownership of all federal records.

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[53] "The Records of Public Officials: The Final Report of the Forty-Eighth American Assembly." *American Archivist* 28 (July 1975): 329-336.

Although journalists called for increased openness of government throughout the 1950s, it was not until the Kennedy administration that they sought a legislative remedy. On April 27, 1961, at a meeting of the American Newspapers Publishers Association, John F. Kennedy asked the press to impose the same level of self censorship during the Cold War as it would during a declared war. The press reacted negatively to JFK's request, viewing it as sign of the Kennedy Administration's overall information policy. Representative John E. Moss (D-California), chairman of the Special Subcommittee on Government Information, in concert with influential members of the press, such as Harold Cross, sought legislative options for quelling the growing trend toward government suppression of information.

Congress made several attempts to introduce a Freedom of Information bill in the early 1960s, but each time the bills died in either the House or the Senate. Senator Hubert Humphrey (D-Minnesota) proposed adding an exemption for government agencies responsible for supervising banks, and a new bill, S. 1160, passed the Senate in February 1965. After passing the Senate, Moss convinced Senate Judiciary Chairman, Emanuel Celler (D-NY), to allow Congress to refer the bill to the Government Information Subcommittee instead of the judiciary subcommittee. After more than a year of compromises with the Justice Department, which had a hand in drafting the legislation, the bill passed the House on June 20, 1966. president Lyndon Johnson signed the Freedom of Information Act (FOIA) into law on July 4, 1966. The FOIA granted the public the legal right to request government information. More importantly, however, was the existence of judicial review.

The Freedom of Information Act of 1966 met with great approval from both journalists and the public. The law did not suit government agencies and they produced a poor record of compliance. FOIA did not require a deadline for compliance with requests, nor did it allow for penalties to agencies refusing to cooperate. Many agencies worked around the law. Examples of FOIA abuses include requiring large reproduction fees, requiring detailed and lengthy descriptions of the information requested prior to processing, and declaring an entire document exempt from the act when only a small portion of it was exempt from release.[54]

Correction of FOIA's deficiencies required an amendment. In early 1973, both the House and the Senate introduced bills offering amendments to FOIA. Congress established a committee to work a compromise between the two versions of the bills. On October 7, 1974, the Senate followed the House and voted in favor of the amendments to the Freedom of Information Act. President Gerald Ford disagreed with the language of the amendments and vetoed the legislation claiming it was unconstitutional. Congress achieved the two thirds majority required to overturn the veto, and the FOIA amendments took effect on February 19, 1975. The amendments altered the FOIA in several ways. For example, the act now disallowed the practice of withholding an entire document if only a portion was exempt. This forced agencies to release documents with sensitive information redacted. It also established compliance response times and provided the

[54] Foerstel, 45.

courts with the authority to review complaints and pass judgment on whether or not information was improperly withheld.[55]

The events leading to the Presidential Records Act of 1978 were set into motion long before Richard Nixon signed his agreement with Donald Sampson. The Nixon-Sampson Agreement was simply the impetus for moving forward with the increasingly popular idea of public ownership that had been debated and argued for the past two decades. Although the argument for public ownership of federal records developed about the same time as the argument for the people's right to know, they developed within different communities. Ownership was the concern of historians and archivists, while immediate access was the demand of journalists. The journalistic community was more vocal at an earlier time than their historian counterparts. The Freedom of Information Act established the means by which the public could demand access to government records. However, the result was not as drastic as originally hoped. The demand for ownership of federal records was the next logical step. Although the Nixon-Sampson Agreement was definitely not out of the ordinary if one considers the records of previous presidents, it occurred at a time of heightened awareness of access restrictions to government records, particularly to those of the Executive branch. It is likely that the idea of ownership would have eventually resulted in legislation without the Nixon-Sampson Agreement. Nevertheless, historians and journalists alike seized the opportunity and demanded reform. The preexisting argument plus two decades of discussion concerning the right to

[55] Bruce P. Montgomery, *Subverting Open Government: White House Materials and Executive Branch Politics* (Lanham, MD: Rowan and Littlefield Publishers, 2005), 11.

access and the right to know influenced and pushed the drafters of the PRA toward public ownership of presidential records. The resulting National Study Commission on the Records and Documents of Federal Officials, established to offer recommendations for the ownership of federal records was led by journalists, historians, archivists, and lawmakers attempting to focus these debates into concrete demands.

CHAPTER III

THE NIXON-SAMPSON AGREEMENT, THE PRESIDENTIAL RECORDINGS AND MATERIALS PRESERVATION ACT, AND THE PUBLIC DOCUMENTS COMMISSION

Prior to the FOIA amendment, Richard Nixon sparked a controversy that altered the course of federal records management. On September 8, 1974, Richard Nixon signed an agreement with General Services Administrator, Arthur F. Sampson, granting Nixon "legal and equitable title" to his presidential records.[56] Nixon legally had the right to keep his presidential records, but he did not have a suitable site to house them. The Nixon-Sampson agreement allowed Nixon to deposit his presidential records temporarily in a repository near his home in California. In order to prevent disclosure of incriminating Watergate information, particularly audio tapes, he restricted access to the materials to himself, the General Services Administrator, or his representative. One could only gain access to the materials by using two keys, which were in the possession of Nixon and Sampson. For three years, only copies of Nixon presidential records could be removed from the repository. Anyone seeking documents needed written approval from Richard Nixon. After three years, Nixon reserved the right to remove any and all

[56] *Nixon vs. Administrator of General Services*, 433 U.S. (1977). The National Archives was part of the General Services Administration from 1950 until 1984. Nixon struck a deal with the GSA administrator instead of the Archivist of the United States, because the GSA administrator had ultimate control of National Archives Records.

documents from the repository for any purpose, including destruction. The tapes, however, would remain until September 1, 1979, at which time he would donate them to the Federal Government with the stipulation that they be destroyed on either September 1, 1984, or his death, whichever occurred sooner.[57]

Once the Nixon-Sampson agreement became known, scholars, journalists, and lawmakers began re-examining arguments for presidential records ownership. For many, the controversy provided the perfect time to seek legislation controlling ownership of federal records, not just presidential records. Lawmakers acted quickly. In October 1974, the Senate introduced S.4016, a bill that sought federal control of Richard Nixon's presidential records. Initially, the bill only considered president Nixon's records. Senator Jacob Javits (R-NY) expressed the opinion of the majority of the Senate, claiming there was an urgent need to preserve Nixon's records, and attempts to pass a more comprehensive federal records bill would surely "get bogged down." The Senate did indicate, however, that ownership of federal records warranted further inquiry.[58]

Representative John Brademas (D-IN), who desired more comprehensive legislation, acted on Javits's request for further inquiry and introduced H.R. 16902 recommending the establishment of a commission to examine all issues related to ownership of federal records. He chaired the Subcommittee on Printing of the Committee on House Administration, which previously held public hearings on several other bills

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[57] Congress, House, Committee on House Administration, "Nixon-Sampson Agreement Relating to Presidential Materials," *The Public Documents Act: Hearings on H.R. 16902 and Related Legislation*, 93rd Congress, 2nd Session, 1974: 235-237.

[58] *Congressional Record*. October 3, 1974. S. 18240.

concerning federal records. Brademas used his position as chair to bring the resolution before the committee. Like Javits, Brademas stressed the need for urgency in resolving the Nixon situation. Unlike Javits, however, he felt an immediate need to push forward with a commission to study the disposition of federal records, claiming the problem was so varied and complex that it warranted comprehensive study before any legislation passed.[59]

President Gerald Ford signed the Presidential Recordings and Material Preservation Act (PRMPA) into law on December 19, 1974. Title I of the act established federal control of the Nixon presidential materials and instructed the Administrator of the General Services Administration to develop rules governing access. Title II established the National Study Commission on Records and Documents of Federal Officials. The law provided the Commission, commonly referred to as the Public Documents Commission, with several clear tasks. First, the PRMPA directed the Commission to examine the historical practice of presidential records ownership and establish whether or not public ownership of presidential records should be accepted. It also asked the Commission to consider whether guidelines governing ownership should extend to all federal records. The Commission was to recommend guidelines for the controlling, disposition, and preservation of papers created by the Executive Office of the President. The PRMPA also instructed the Commission to consider the privacy rights of individuals communicating with federal officials. More importantly, the bill directed the

[59] Congress, House, Subcommittee on Printing of the Committee on House Administration, *Hearings before the Subcommittee on Printing of the Committee on House Administration*, 93rd Congress, 2nd Session, 1974, 26.

Commission to establish criteria for determining the definition of records and documents of members of Congress.[60] Although Congress intended the Commission to offer guidelines for presidential records ownership, it is clear that they also intended the Commission to create an ownership plan for all federal agency records, including the papers of members of Congress.

The Presidential Materials and Recordings Preservation Act established regulations for access to Nixon's records. Congress, however, worried about treating Nixon fairly. For example, Senator Javits stated, "We must treat Mr. Nixon just as fairly as we would any subsequent president."[61] As a result, Congress established more lenient restrictions on Watergate materials. In addition, personal materials that were in the possession of the government were to be returned to Nixon. Prior to opening the records, however, the records had to be processed.

Richard Nixon challenged the legality of the PRMPA in court, claiming the act denied him the same rights afforded to other presidents, including a right to privacy. In addition, Nixon claimed the PRMPA violated the Constitution's separation of powers clause because Congress cannot legislate the Executive branch. He asserted that the government treated him unfairly because of Watergate. In *Nixon v. Administrator of General Services*, the Supreme Court ruled that the government should retain possession of Nixon's presidential records because of the circumstances surrounding his departure

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[60] National Study Commission on the Records and Documents of Federal Officials, *Final Report of the National Study Commission on Records and Documents of Federal Officials* (Washington, D.C.: Government Printing Office, March 31, 1977), 10-11.

[61] U.S. Congress, Senate, Committee on Government Operations. *Hearings Before the Committee on Government Operations: GSA Regulations Implementing Presidential Recordings and Materials Preservation Act,* 94th Congress, 1st Session, 1975.

from office.[62] *Nixon v. GSA* had two important results. First, it upheld the constitutionality of the PRMPA, claiming separation of powers does not grant autonomy to the president, and ruled that Nixon's privacy rights were not violated. Nixon, therefore, was not able to dispose of or limit access to the records and recordings relating to the Watergate scandal. Second, by upholding the constitutionality of the PRMPA, the Supreme Court validated the Public Documents Commission established by Title II.

The Commission began its task on December 15, 1975, and held a series of public hearings through March 25, 1977. Accomplishing its task objectively required the appointment of both federal officials and individuals from the general public. The president, the American Historical Association, the Organization of the American Historians, and the Society of American Archivists appointed the public members. The federal officials represented the White House, the State Department, the Justice Department, the Department of Defense, the Senate, the House of Representatives, the Library of Congress, the General Services Administration, and the judiciary. The commission was composed of seventeen members. The PRMPA required the president to choose the chairman from among his appointed public members. On September 9, 1975, he chose former Eisenhower Attorney General Herbert Brownell to serve as chairman of the Public Documents Commission.[63]

One important legal issue that had to be dealt with in a Presidential Records Act from Congress was that of separation of powers. Did the House and the Senate, as the Legislative branch, have the Constitutional authority to dictate what the Executive branch

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[62] Veit, 10.

[63] Ibid., 11

must do with its paperwork? The Supreme Court's ruling on the Presidential Recordings and Materials Preservation Act of 1974 set a precedent. The Court ruled the PRMPA constitutional because Congress did not take control of the presidential records themselves but left control to the General Services Administration, which was an Executive Branch agency. Therefore, infringement of the separation of powers between Legislative and Executive branches was not an issue. [64]

The Public Documents Commission failed to reach a consensus. The Commission, therefore, presented two reports to Congress. The majority report served as the official *Final Report of the Commission*. The minority report written by the three dissenting members, Chairman Herbert Brownell, Dr. Daniel Boorstin, and Hon. Lowell Weicker, Jr. carried the title *Alternate Report of the Minority Members,* and appeared as an addendum to the final report. The dissenting members of the Commission disagreed with the majority on how ownership legislation should relate to the Freedom of Information Act and whether proposed legislation should attempt to counteract the "chilling effect."

Although the members of the majority and minority agreed that all records created or received by a president in the conduct of his official duties should be public property, they could not agree on how to control access. The minority report proposed extending the Freedom of Information Act, which governed access to non-presidential records of Executive agencies, to include presidential records. The minority report also noted that the "regulation of access by the Freedom of Information Act…also addresses the problem

[64] (National Study Commission on the Records and Documents of Federal Officials 1977, 6.)

of a possible 'chilling effect.'"[65] During the public hearings, the extent of a possible chilling effect was a constant source of conflict.

Not everyone agreed that the legislation would lead to a chilling effect. University of Indiana History professor Richard Kirkendall complained, "At the moment we are forced to rely on an assumption…but we need a much more substantial investigation." He went on to add that in his experiences, federal officials were under tremendous pressure to create records, and many of them want to preserve their legacies by preserving the sources documenting their roles in the government. He concluded that, "there is such a thing as the chilling effect. The logic of the argument has some strength, but I am inclined to feel…that we might be relying on that too much in the making of decisions about restrictions on access, and, as a consequence, become more restrictive than we need to be."[66] Kirkendall, in effect, believed that the egos of government officials would counteract any fears of immediate access to the information.

Arthur Schlesinger agreed with Kirkendall's conclusion, citing a specific case in which the State Department attempted to block access to material because it portrayed several diplomats in an unflattering manner. After the information came to light, the reaction was minimal. Schlesinger used this as an example to downplay the chilling

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[65] (National Study Commission on the Records and Documents of Federal Officials 1977, 81.)

[66] Statement of Richard Kirkendall in Chicago on November 18, 1976, *Hearings of the Nationals Study Commission on the Records and Documents of Federal Officials*, Jimmy Carter Presidential Library and Museum, Atlanta, National Study Commission on the Records and Documents of Federal Officials microfiche collection, 22, 23.

effect, "I think there's a great tendency to over-react," and "I don't think it's a major problem."[67]

Another historian, Walter Murphy, questioned the existence of the chilling effect during the hearings. Murphy used the Supreme Court as an example, citing the publishing of the papers of several justices. He insisted that he had never heard a serious claim that current Justices communicated less candidly with each other than those in the past.[68] John Chambers expounded on this idea in the New York hearings: "I think there are a lot of reasons why people put things down, and why they don't and this action is not going to affect it much either way.[69]

The majority members of the Commission thought that Murphy and Chambers's criticisms devalued the potential impact of a chilling effect. The Majority Report stated that, "The public's right to know is not an absolute right. It must be balanced at times against the government's ability to continue to function and the demands of national security."[70] Fourteen years later, a National Archives task force examining issues of security and confidentiality agreed: "The president's goal is to assure reasonable protection for the integrity of the presidential decision-making process. The frankness of

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[67]Statement of Arthur Schlesinger, Jr on January 14, 1977, Panel Discussion, Records of the Executive Office of the President. National Study Commission on the Records and Documents of Federal Officials microfiche. 18, 19.

[68] (National Study Commission on the Records and Documents of Federal Officials 1977, 122).

[69] Statement of John W. Chambers in New York on December 6, National Study Commission Microfiche, 88.

[70] (National Study Commission on the Records and Documents of Federal Officials 1977, 3).

such interchanges can be irreparably impaired if any participant is free to publish what any other participant has said or written."[71]

Despite the objections to the relevance of the chilling effect, the majority members felt it was a significant enough issue to warrant a fifteen-year moratorium on access to government records. The Minority Report specifically criticized the Majority Report's logic, claiming "there is…no basis in law for the majority's wholesale blanketing of governmental records for fifteen years on a theory of 'chilling effect."[72] It is clear from reviewing the two documents, that the minority members' dismissal of the chilling effect was a significant factor in the provisions laid out in the dissenting report.

There are several other major differences between the two reports. The first relates to the right to know. The Minority Report lists two of its purposes as recognizing the people's right to know and providing information on the conduct of the government. The Majority Report, on the other hand, did not include any references to the right to know, and emphasized instead the balance between protecting the autonomy of federal officials in the operations of government, and the interests of historians in reconstructing the nation's history.[73]

On the issue of ownership, both the Majority and Minority reports agreed that all records produced by federal officials should be public property, based on Article IV,

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[71] The NARA Task Force on NARA Responsibilities for Federal Records and Related Documentation, *Report of the NARA Task Force on NARA Responsibilities for Federal Records and Related Documentation*, Washington, D.C., Government Printing Office, 1988, 11.

[72] (National Study Commission on the Records and Documents of Federal Officials 1977, 109).

[73] Ibid., 105.

Section 3 of the Constitution, which grants Congress the authority to dispose of and make rules respecting United States property. The two reports differed in their implementation of public records ownership. The Majority Report focused on the personal interests of federal officials, asserting that officials should be able to maintain control over some records of a personal nature. It called these records of a personal nature public records to distinguish them from other federal records. In contrast, the Minority Report focused on reaching a broad definition that covered all federal records and deemphasized the personal aspect.

In the Majority Report, public records would not be subject to federal records laws, and the determination of what falls into the category would lay with the record creator. This included confidential correspondence between officials and their staffs, papers reflecting decision-making processes, conference notes, and "various other materials found in presidential papers, the office files of members of Congress, and judges." Furthermore, the Majority Report created a subgroup of public records and specifically outlined what different types of records should constitute the public papers of presidents. They did not apply the same distinction to records of congressmen and judges. The rationale for creating a separate category for presidential papers was that the sensitive and delicate nature of presidential decision-making produced a unique kind of record that required special protection. In a reference to the chilling effect, the Majority Report claimed that filing these records under public papers with different access

restrictions than federal records would ensure the president received "candid and uninhibited advice."[74]

The Minority Report commented with disfavor on the Majority Report's suggestion that, after segregating the president's personal paperwork, his official papers be divided into "federal records" and presidential "public papers," since even the Majority Report admitted that doing so would be virtually impossible. Instead, the Minority Report suggested creating a broad definition of publicly owned federal records, stating, "Our system of government does not distinguish between the president, appointed officials, the Congress and the judiciary. All are bound by the same Constitution and laws." The Minority Report pointed out, correctly, that the reference to "his public papers" reveals a contradiction in the majority's recommendation that the records are public and not under the control of the federal officials who created them.[75]

The second major difference between two reports involved the Freedom of Information Act. The Majority Report proposed extending FOIA to all federal records, but imposed different restrictions on public papers. Primarily, it proposed that each federal official should have the right to impose access restrictions for a period of up to fifteen years because this "was the most appropriate way to balance the sensitive nature of some public papers against the public's right to the earliest feasible access."[76] The majority considered fifteen years long enough to counteract the chilling effect, but not so long that it denied the public its right to access government information. In contrast,

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[74] Ibid., 6.

[75] Ibid., 107, 108.

[76] Ibid., 7.

since the Minority Report did not make the distinction between public papers and federal records, it recommended all government records should be subject to the provisions of FOIA.[77]

Although they differed on several key points, the combined Majority and Minority reports offered several important suggestions for establishing and implementing federal records ownership. The Commission suggested that all three branches of the federal government be required to archive and make available their records, stating

> An obvious hazard that must be avoided by the Congress is the passage of legislation that either reaches only one branch of government, without justification of the limitation, or makes unsupported distinctions in the treatment of the three branches. Without valid distinctions, the appropriate solution is to make all three branches subject to the same disclosure provisions because the citizen is entitled to know about the decision-making process of all branches.[78]

In a scathing criticism of Congress, Professor Allen Weinstein of Smith College, who later became the Archivist of the United States, pointed out the deficiencies in Congressional record keeping. Requests are processed not by archivists, but by the Senate clerks. The lack of professionals coupled with the haphazard record keeping often caused lengthy delays in accessing records. It was clear, according to Weinstein, that

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[77] Ibid., 80.

[78] Ibid., 7.

Congress intentionally attempted to exempt itself from the same access regulations that were becoming commonplace in the Executive Branch.[79]

In addition to recommending public ownership of presidential papers, the Commission also stressed the importance of public ownership of the records of members of Congress and the judiciary. Although the majority wished to expand the public records vs. federal records distinction to the other two houses and the minority simply wanted to amend FOIA to include Congress and the judiciary, the two reports were in basic agreement that the papers of all three government branches should be treated equally. The majority also recommended that creators of public records be granted a period of ten to fifteen years in which to control access to the records.

In the Final Report, the Commission had to face the problem of personal versus political records in presidential paperwork. The Code of Federal Regulations defined personal records as "papers of a private or nonofficial character which pertain only to an individual's personal affairs that are kept in the office of the federal official," but which "will be clearly designated by him as nonofficial and will be filed separately from the official records of his office."[80] In its Final Report, the Public Documents Commission recommended that a distinction be made between certain political papers, which could be considered personal property of the president, and presidential public papers, which belonged to the Government. According to the Majority Report of the Commission,

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[79] Allan Weinstein, "Access and the Law," Reprinted in Anna Kasten Nelson, *A Selection of Documents from the National Study Commission on the Records and Documents of Federal Officials*. 52.

[80] (National Study Commission on the Records and Documents of Federal Officials 1977, 54).

materials relating to personal participation in party politics that are neither received nor created in the course of conducting the constitutional or statutory duties of the president should be considered personal papers of the president.[81] The Minority Report agreed with the majority's definition, and thus claimed that records could be divided into personal and private, but never explicitly stated a definition.

The public's right to know remained a central tenet that guided the Commission's recommendations. The right to know is important, according to the Commission, "to aid the continuing operations of the government," "to enable the people to judge the conduct of the government on the basis of maximum information, made publicly available as soon as feasible," and "to assure the people of their fullest possible reconstruction of their national history."[82] The ultimate consideration should be given to striking the perfect balance between the right to know and the ensuring both the government's ability to function and national security.

Some participants argued that the Public Documents Commission failed. A participant in the hearings, Anna Kasten Nelson, insisted that the inability to agree on one report rendered the Commission useless.[83] She failed to note the impact the Commission had on the development of Presidential Records Act of 1978, and overemphasized the Presidential Records Act's failure to address federal records in general. Issues such as

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[81] Memorandum to President Carter fom Robert Lipshutz, Hugh Carter, and Mike Cardozo, August 9, 1977. Cutler files, box 107, folder "Presidential Papers, 8/77-10/80", Jimmy Carter Presidential Library and Museum. 2

[82] (National Study Commission on the Records and Documents of Federal Officials 1977, 3).

[83] Kasten-Nelson, 5.

the chilling effect, amendment of FOIA, and a time limit on access restrictions, were central issues debated in the hearings for the Presidential Records Act. The Public Documents Commission identified important issues and offered recommendations. The Commission served as a bridge, connecting the demand for access that emerged from the right to know in the 1950s and 1960s to the demand for ownership. Likewise, the recommendations of the Commission bridged the gap from FOIA, which governed public access to Executive records, to the Presidential Records Act, which proclaimed public ownership of presidential records. One of the most important results, however, was the Commission's addressing of the chilling effect, which was such a significant issue that was a major factor in splitting the Commission.

CHAPTER IV

THE PRESIDENTIAL RECORDS ACT OF 1978

Archivists, historians, and public officials debated the merits of the traditional system of presidential papers ownership for decades. But the issue failed to generate public interest. The Nixon-Sampson agreement brought the debate to the forefront of public consciousness and provided the impetus for the de-privatization of presidential papers. However, the push for legislation mandating public ownership of presidential papers was not merely a reaction to the Nixon-Sampson agreement. Despite the academic community's desire for an overhaul of the Presidential Library System, which included public ownership of presidential records, it is unlikely such a change could have occurred without an incident such as the Nixon-Sampson agreement.

This chapter addresses the issues of ownership debated in Congress at the Hearings for the two presidential records bills. Issues such as the right to access, public ownership of Congressional records, the "chilling effect," the constitutionality of legislating the operations of the Executive Branch, the right to privacy, and the separation of the National Archives from the General Services Administration, dominated the discussions for several days. The issues related directly to the public vs. private ownership debate, redefining presidential recordkeeping, and ultimately the way in which America views the records of its leaders. The hearings before Congress influenced the

final version of the Presidential Records Act of 1978 and the contributions of congressmen, scholars, and legal advisors are evident in the text.

It was a long held tradition for presidents to retain all records of their administration. The Presidential Library System counted on the generosity of past presidents. Its success lulled the public into a false sense of security concerning access to presidential papers. The fact that every president between Herbert Hoover and Richard Nixon donated his papers to his library is only evidence that no president until Nixon had reason to limit access to the records of his Presidency. It should not be assumed that every president donated every document he created. No law required the donation of every document. A president could shape his own legacy by purging his records, choosing which papers to donate, retain, or destroy. As George Reedy stated in his testimony before the Subcommittee of the Committee on Government Operations, "We are in effect leaving the presidential record, or the record of an administration entirely up to the man who created that record… I have yet to meet a man who does anything other than recommend himself highly. I know of very few people who spend time advertising their mistakes and their blunders and their errors."[84] Reedy suggested that in the pre-Presidential Records Act system, presidents were not completely forthcoming with all of their records.

Nixon was the first president after the PLA of 1955 to attempt retention of all his records. Few presidencies generated a scandal approaching the magnitude of Watergate.

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[84] Statement of George Reedy, Nieman Professor, School of Journalism, Marquette University, Milwaukee, WI, *Presidential Records Act of 1978*, (Washington DC: U.S. Government Printing Office, 1978), 195.

Historians have argued, rightfully so, that Americans will always view the Nixon presidency in two stages, pre-Watergate and post-Watergate, with the Watergate scandal being the defining legacy of the Nixon years.[85] The public protest surrounding the Nixon-Sampson agreement was an important issue because of the specific records, primarily his audio tapes and everything related to Watergate that he attempted to keep, and not because he broke with tradition.

Despite the desire to prevent future presidents from following in Nixon's footsteps, Congress weighed the issues of public ownership carefully, considering the consequences to the presidential office. After the passage of the Presidential Recordings and Materials Preservation Act (1974), Congress established the National Commission on the Records and Documents of Public Officials to examine the issue of ownership. A major concern was the civil rights of the president, particularly his right to privacy. Congress debated privacy protection more than the potential threat to national security. It is interesting, given the ever increasing assertion that presidential papers were by definition public, that one of the central issues was the right to privacy associated with these public papers. The debate over privacy also focused on whether an invasion of privacy would create a chilling effect. There was also a desire for fairness. The Supreme Court decision in the PRMPA established public ownership of Nixon's presidential materials, but not the records of the Presidency in general. The ruling held that the public had a right to know the content of the Nixon records. Importantly, it did not require

[85] George Rising and Michael Schaller, *The Republican Ascendancy: American Politics, 1968-2001* (Wheeling, IL: Harlan Davidson, 2002), 55.

future presidents to allow complete public access to their papers. It only established a precedent if a future situation arose similar to that of Nixon.[86]

The National Commission on the Records and Documents of Public Officials findings led three congressmen to introduce two bills in the House. Richardson Preyer first introduced his bill, H.R. 10998 in September 1977, and then submitted a revised version in February 1978. Allen Ertel and John Brademas submitted a separate bill, H.R. 11001, four days after the revised Preyer bill. These bills each addressed some issues outlined in the Public Documents Commission's recommendations. However, each bill added its own suggestions.

When the House Subcommittee of the Committee on Government Operations convened on February 22, 1978, it continued the process begun by the Commission on Records and Documents of Public Officials, and began hearings relating to the two presidential records bills drafted by Richardson Preyer, Allen Ertel, and John Brademas. The two bills reflected the two reports from the Public Documents Commission. The Preyer bill mirrored the Minority Report of the Pubic Documents Commission by proposing that presidential records be subject to the Freedom of Information Act, thereby stripping the president of all access authority. Ertel's bill mirrored the majority Report's desire to establish presidential records ownership within the framework of the Presidential Library System, allowing presidents to control access for a period of up to fifteen years. Allen Ertel was a member of the Commission who sided with the majority in the split.

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[86] *Nixon v Administrator of General Services*, 433 U.S. 425,431 (1977).

The Subcommittee addressed the Preyer bill first. It called Philip W. Buchen, the former counsel to Gerald Ford, to voice his opinion. Buchen outlined the purpose of the legislation as threefold. First, to keep presidents whose records were not covered by the Federal Records Act from disposing of or appropriating the documents. Second, to make the records of officials' conduct in office as complete as possible without deterring the individuals involved or their staffs from making full and candid records of their observations and actions. Third, to establish rules that are fair for all officials that also do not put undue restraints on them or impose a heavy archival burden on the government.[87] He admonished Congress for only considering the records of presidents and vice presidents in the bill, calling it unjustifiably discriminatory. Buchen called into question the discriminatory nature of the bill and reiterated the stance of the Public Documents Commission, which called for legislation dealing with the records of all three branches. Particularly, he found the unwillingness of Congress to consider making the records of its officials public unfair and discriminatory.

During his testimony, Buchen introduced what he called the "golden rule" principle, which asks that Congress not impose any controls on presidential records that its members would not want applied to their own records. Prior to the hearings, Congressman Richardson Preyer had expressed concern over the preservation and access to the documents of the House of Representatives. In a letter sent to Chairman Jack Brooks of the Select Committee on Congressional Operations, he asked the committee to give high priority to an examination of the House's policy with regards to the Public

[87] Statement of Philip Buchen, Former Counsel to the President, *Presidential Records Act of 1978*, 100.

Documents Commission's recommendations.[88] Brooks agreed to put the issue on the Select Committee's agenda for February 28, 1978 and to initiate a study examining practical solutions for distinguishing between personal and public records and to consider the means by which the House could establish permanent arrangements for storing, arranging, and accessing its records.[89]

At the time of Buchen's testimony, the House had already committed to examining the issue of public ownership of its records. Furthermore, in later testimony, Allen Ertel revealed that the issue of access to Congressional and Judicial papers had not been raised in his proposed bill because it would be more appropriate for it to be raised as a House Resolution rather than as a statutory enactment.[90] However, according to Ertel, the resolution would only cover the institutional records of Congress. For example, the resolution would insure that the records of committees and any other associated materials would be preserved and made available to the public. It did not call for public ownership of congressmen's records, even those produced at government expense. The only records made subject to the resolution would be those of committee members conducting committee business.[91] It would seem that Buchen's accusation of discrimination was justified. Although Congress did make an attempt to apply the Public Documents Commission's recommendations that records of all three branches be made public, it

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[88] Letter from Richardson Preyer to Jack Brooks, *PRA of 1978*, 26.

[89] Ibid., 27.

[90] Statement of Hon. Allen Ertel, A Representative in Congress from the State of Pennsylvania, *PRA of 1978*, 76.

[91] Ibid., 77.

aimed to do so only at the highest level of Congress, while making the individual papers of the executive branch public.

One justification was that historians were much more interested in the papers of the president than of a congressman because he had more effect on national policy. Storage costs posed another problem with providing access to the records of 535 congressmen. According to Ertel, Congress would need to weigh the merits of access against the archival burden.[92] One suggestion was the establishment of a House Historical Office, similar to the recently created Senate Historical Office, that would maintain, preserve, and control the records of Congress.[93] In addition, some feared that enacting legislation establishing public ownership of Congressional and Judicial records would create a Constitutional dilemma, and it was best to let Congress and the judiciary regulate themselves. Members of Congress favored this since there was a perception that Congress had a better record of compliance than the Executive branch.[94] When asked if the Public Documents Commission intended the proposed legislation to include Congress and the judiciary or if the Commission expected Congress to regulate itself, Archivist of the United States James Rhoads, also a Public Documents Commission member, stated that the expectation of the Commission was that congressmen's records would be included in ownership legislation.[95]

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[92] Ibid., 79.

[93] Statement of Mack Thompson, Executive Director, American Historical Association, PRA *of 1978*, 258.

[94] Statement of Allen Ertel, *PRA of 1978*, 79.

[95] Statement of James B. Rhoads, Archivist of the United States, PRA *of 1978*, 161, 162.

The idea that Congress had a better record of compliance with access was a fiction. It was not until the creation of the Senate Historical Office in 1975 that archivists were able to review and exert control over the Senate's records. At the time of the Presidential Records Act hearings, no such office existed for the House. Furthermore, the lack of intellectual control over the records could result in substantial delays in processing information requests. The clerks of both houses would block access to Congressional files dating back to the inception of Congress. Historian Allen Weinstein, in an article written while the hearings were underway, called the situation "scandalous" and accused Congress of hypocrisy and self-protectiveness in the face of its newfound interest in presidential records.[96] The aforementioned factors, coupled with Congress's own exclusion from the Freedom of Information Act, shows that Congress did not have a better record of compliance with access requests than the Executive branch; it simply had a better public image.

In addition to the "golden rule" principle, Buchen questioned the feasibility of the bill. Adequate documentation of a president's activities would require recording of conversations and deliberations with congressmen and advisors. Relating the issue to the "golden rule" principle, he questioned whether congressmen really wanted all of their conversations leading up to a decision recorded, and if Congress wanted to mandate, and therefore justify, the taping practices of president Nixon.

In a prepared statement, Representative John Erlenhorn expounded on Buchen's assertion of discrimination by claiming the Committee needed to explore whether or not

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[96] Allen Weinstein, "Time to Act on Public Access to Presidential, and Other, Papers" *Washington Star*, February 26, 1978.

the president's records should be treated differently than those of other public officials. In his opinion, the president, because he is elected, should be afforded greater rights to his papers than an appointed official, whom he refers to as subordinate.[97] Despite the concern over the president's rights, it is interesting that Erlenhorn claims enhanced privilege because of the president's elected status, not the magnitude of the office. Granting privilege to elected officials would also serve the purpose of allowing congressmen to retain their official records because of their elected status. He reiterated Buchen's desire to grant a president the right to set his own access limits to his records. It becomes clear that the clause granting the Archivist of the United States the right to control access to presidential records was a serious point of contention among the bill's detractors. Erlenhorn's fear is similar to Buchen's. He worried the threat of a president's records being made public shortly after he left office would result in the bulk of business being conducted orally, to avoid leaving a record.[98] The potential of a chilling effect that had earlier split the Public Documents Commission now threatened to derail the effort for presidential records legislation.

The Preyer bill, like the Minority Report of the Public Documents Commission, did not allow for the president or vice president to set conditions and limitations on access to their records after leaving office. Not including this sort of provision raised fears that it could end in results contrary to the purpose of the bill. It was argued that the inability to limit access for at least a limited time would result in a "chilling effect," by

[97] Prepared Statement of Honorable John N. Erlenhorn, A Representative in Congress from the State of Illinois, *PRA of 1978*, 58.

[98] Ibid., 59.

which the officeholder would be less willing to maintain a completely candid record of his activities. Historians would gladly exchange the short term loss of access to materials for a more thorough historical record.[99] As Arthur Schlesinger stated, "If the Historian demands instant access, his importunancy may well impoverish the ultimate record; if he wants the fullest possible record, he must restrain his impatience."[100] Furthermore, he argues that without creator imposed restrictions, the only way to control access to records would be through statutory restrictions, similar to the Freedom of Information Act. Statutory restrictions would complicate the access process by creating legal controversies, forcing the Courts to make access decisions on a phrase-by-phrase basis.[101]

Stephen Hess of the Brookings Institute downplayed the "chilling effect" by claiming it was less of a factor at the White House than in other agencies. He listed what he called the three realities of a president's staff. First, advisors hold their positions because they want to advise the president. The opportunity to express views fully would be a motivating factor to maintain a complete and accurate record. Second, since only a few aides have unlimited access to the Oval Office, the president's staff would necessarily have to conduct much of its business on paper. Finally, the increased bureaucratization of the government forced more business to be conducted by paper, because it would be the only method of reaching the president. Therefore, the normal

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[99] Statement of Philip Buchen, PRA *of 1978*, 32.

[100] Statement of Arthur Schlesinger, Jr., Professor of Humanities, City College of New York, *PRA of 1978*, 211.

[101] Ibid., 32.

conduct of business would necessitate the keeping of accurate records, despite whatever chilling effect may exist in the creators mind.[102]

George Reedy also claimed that the chilling effect had been "grossly exaggerated."[103] He also provided three reasons. First, people who desire confidentiality will communicate in such a way as not to leave a record. Second, if someone sends a document worth receiving by the president, then the creator knows that it might wind up in the hands of the public. Third, most communications to the president are written by individuals who want the documents preserved, for their own legacies.[104] It is the third claim by Reedy that seems the most logical when evaluating the existence or extent of a chilling effect. Although a president, whose name will be remembered in history regardless of the records he produces, may not want all of his records to survive, many of his staffers want to preserve their legacies as members of his office. Reducing their preservable communications with the president would in turn reduce their definable contribution to history. Historian Allen Weinstein agreed, claiming there is a chilling effect, which exists on "sober, outside, critical examination of materials already made public either as leaks or as background during the presidential term or in memoir form thereafter," and neither of the two bills would make the situation worse.[105]

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[102] Letter from Stephen Hess to Richardson Preyer on February 24, 1978, *PRA of 1978*, 153.

[103] Letter from George Reedy to Richardson Preyer on July 15, 1978, *PRA of 1978*, 209.

[104] Ibid.

[105] Statement of Allen Weinstein, Professor of History, Smith College, PRA *of 1978*, 179.

It is clear that the Carter Administration feared a chilling effect and thought that the Preyer bill would have an impact on the written record. In a memo to president Carter, Robert Lipshutz urged the president to oppose the parts of the Preyer bill aimed at amending FOIA, because it would cause "a chilling effect on the White House staff and on members of [the] staff that communicate with [the president]."[106]

Erlenhorn raised several other issues with regard to the proposed bill. Chief among them was the method by which the president could dispose of his official records. The proposed bill allowed the president to dispose of his records only after seeking the approval of the Archivist of the United States and publishing a disposition schedule in the Federal Register. Forcing the president to seek the permission of one of his subordinates violates Article II of the Constitution, according to Erlenhorn, and he should not "be made subject to the control of one of his inferiors."[107] In addition, the bill clashed with the Freedom of Information Act by excluding standard FOIA exemptions with regards to presidential records. Only two of the FOIA exemptions of other governmental agencies match those granted to presidential records under the bill. If a researcher sought information from a government agency under the Freedom of Information Act, he may not be granted access. However, he could seek the same information from the presidential papers and the Archivist would be legally bound to grant access. Erlenhorn suggested including the FOIA exemptions in the bill in order to rectify the discrepancy.[108]

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[106] Memorandum for the President from Robert Lipshutz, Michael Cardozo, and Hugh Carter on February 23, 1978, Staff Secretary Files, Box 97, Folder "7/27/78," Jimmy Carter Presdiential Library and Museum, 3.

[107] Letter from Stephen Hess to Richardson Preyer, *PRA of 1978*, 61.

This is especially important when one considers Buchen's claim that fear of premature disclosure would lead to a lapse in efficient record keeping. The Archivist, who had no part in the creation of the document and who would most likely be unaffected by it, could legally release any presidential material that was not subject to FOIA exemption. .

Although Erlenhorn and Buchen both believed the Archivist would be objective in his application of the rule, the fear existed that record creators would not have faith in his objectivity.[109] Buchen used this example to emphasize the need for allowing the records creator to control access to his records. As written, the bill offered no protection to the president, because it allowed for arbitrary application of the FOIA exemptions by the controller of the records. Erlenhorn repeatedly stressed the need for the president to always be afforded more protection than any of his subordinates. The bill did the opposite. It provided more protection under the Freedom of Information Act to the president's subordinates and subordinate agencies than to the president.[110]

From a constitutional standpoint, the bill was questionable. The ruling in *Youngstown Sheet and Tube* v. *Sawyer* in 1952 held that Congress had the right to legislate the internal operation of the executive branch. Such legislation, however cannot stand if it impairs the ability of the Executive Branch in performing its assigned functions. It was the opinion of the Attorney General's office that if the bill were interpreted broadly, it could severely disrupt the operations of the executive office.[111]

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[108] Ibid.

[109] Ibid., 63.

[110] Ibid., 64.

The Ertel and Brademas bill provided the president considerably more control. The bill allowed the president to remove his personal papers, with the exception of documents relating to his role as the leader of his party, from the remainder of the presidential papers. In order to counteract the chilling effect, the bill allowed for the president to control access to his papers for a maximum of fifteen years. The bill established definitions of personal and public papers, but also allowed the president to make the final determination of which records should fall into each category. All papers were subject to review by the Archivist, but the president had the final say and could not be overturned. Several members of Congress objected to the bill's grant of power, because the president could then declare sensitive, perhaps even damaging, information as personal without oversight, thereby granting him de facto power of unlimited denial of access.[112]

The bill's definition of personal and presidential papers was ambiguous. In Ertel's opinion, it would be possible for some documents to not clearly fit into either category, allowing the president to claim them as personal. This distinction matters little, because without the authority to overturn the president's decision, the definitions of personal vs. presidential had little practical purpose. Ertel and Brademas designed the bill to balance between the president's right to privacy and the public's right to access. The president could limit access for up to fifteen years. Any records the president declared personal records would not be subject to FOIA during the fifteen year period.

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[111] Prepared Statement of Lawrence A. Hammond, Deputy Assistant Attorney General, Office of Legal Counsel, U.S. Department of Justice, *PRA of 1978*, 117.

[112] Ibid., 79.

After fifteen years, all records would be subject to FOIA. The bill's proposed grant to the president of sole authority over the determination of what was personal and public would undermine the process of FOIA, as well as the intended purpose of the bill. Although the Preyer bill subjected the presidential records to FOIA as well, it did not grant the president the authority to control access to his papers. Personal papers would not be subject to FOIA and the president could control them for much longer than fifteen years.

The privacy issue forced Congress to address the unclear distinction between personal and public presidential papers. Although there was previous discussion about the process of determining presidential vs. personal papers, there was little discussion about whether the president's personal papers should be public. Reedy, in a letter to Preyer, wrote, "I, myself, cannot find a distinction between personal and public papers as a president's private life is public property and many papers which inevitably will be classified as 'private' will certainly be of far greater significance to history than those classified as 'public.'"[113] Reedy expressed concern about the potential abuse of power by a president if given the discretion to claim files as personal. Instead, Reedy called for the classification of files into the categories of "historically relevant" and "historically irrelevant," with the Archivist and a small advisory board making the decision of relevancy.[114]

Reedy believed a president forfeited his right to privacy upon election to the office, because as both the chief executive and the head of State, he is the living embodiment of the Nation. Even private letters to friends and family, produced at

[113] Letter from George Reedy to Richardson Preyer on July 15, 1978, *PRA of 1978,* 210.

[114] Ibid.

personal expense and outside the normal duties of office, should become public property because everything a president does while in office reflects on his positions as president.[115] Reedy represented an extreme, but commonly held position in the public vs. personal debate. Historians and journalists made the most forceful arguments for an expanded definition of public ownership of presidential records. Few went as far as Reedy, however. The American Historical Association's official position was that both public and personal materials belonged to the president and he should be allowed to take them with him when he left office.[116] Reedy also unwittingly gave credence to the claim of Congressional hypocrisy by arguing that the records of congressmen should not be made public because of the nature of the office. Congress's role is purely political and congressmen function as part of a body. Therefore, historical importance is concerns the results of Congress as a whole, not the actions of its individuals.[117]

Despite the greater authority over records offered by the Ertel and Brademas bill, the Archivist of the United States, James Rhoads, supported the Preyer bill. Rhodes argued that a president should be allowed to control access to his papers for up to fifteen years after leaving office. He reasoned that FOIA would impair the archivists' abilities to process and make records available if an acceptable buffer period was not established. Immediately subjecting records to FOIA upon the end of a president's term could prove disastrous, because the managing presidential library would become so inundated with

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[115] "Statement of George Reedy." *PRA of 1978*. 203

[116] "Statement of Mack Thompson, Executive Director, American Historical Association." *PRA of 1978*. 257

[117] "Statement of George Reedy." *PRA of 1978*. 206

FOIA requests it would not be able to perform its basic functions of processing and preservation.[118] Many opined that a three to five year window of restricted access would be more than adequate to process a portion of records. The Library would then release available documents to the public, and FOIA requests for other material would occur only in extreme cases.[119]

The two bills differed in many ways. The Ertel and Brademas bill subjected presidential records to an amended Freedom of Information Act, vesting all access decisions in the Archivist. The Preyer bill adopted the recommendation of the Public Documents Commission granting access power to the president, or vice president in the case of his records, with FOIA covering the documents after the buffer period. The two bills were on opposite ends of the spectrum, and each focused on a different aspect of the issue. Preyer's bill sought to limit the power of the president to deny access to his presidential papers, but left the process open to the so called "chilling effect." Ertel's bill, on the other hand, sought to counteract the potential non-recording of activities by granting the president greater powers of determining access. The Ertel bill granted the president substantial leeway in determining which documents to declare personal. The debate over the two bills reflected the ownership debate among scholars and demonstrated that Congress found it difficult to balance privacy and access concerns.

The problem of access had both physical and intellectual dimensions. Most concerns over access revolved around the ability of historians and scholars to receive

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[118] "Statement of James B. Rhoads, Archivist of the United States, National Archives and Records Service, General Services." *PRA of 1978*. 136

[119] Ibid., 161.

permission to look at documents. However, arrangement played an important role in access. George Reedy addressed this issue in his testimony before the subcommittee. Reedy was acutely worried about the president's ability to shape his legacy, and thereby the writing of history. Access, Reedy argued, was much less important than arrangement of the records. Under both bills, the task of organizing files rested with the creator of the record. However, the president would not be in charge of his records once he deposited them in a library. Archivists then should be given the task of arrangement at the point of creation. Under Reedy's plan, the archivist would have the power to decide the relevancy and historical value of documents, which would facilitate the use of the documents by historians.[120] This was the first suggestion by a participant in the hearings of establishing a records management agency to maintain the files while the president was still in office. Until this point, all suggestions dealt solely with inactive records, with the exception of discussions of the Archivist and president making the decision of personal vs. public while still in office. Reedy's testimony had an effect on the later establishment of the White House Office of Records Management.

Public ownership meant little if historians, journalists, and other citizens could not access presidential records. Arthur Schlesinger, a Humanities professor at the City University of New York, claimed, "I have seen no overwhelming advantage in declaring presidential papers public property. It has seemed to me that all interests would be adequately served by considering such papers private property clothed with a public interest and therefore to be placed under the day-to-day control of the archives of the

[120] "Statement of George Reedy." *PRA of 1978*. 207.

United States."[121] Schlesinger's comment is a new idea. He does not commit fully to private or public ownership. Instead, he claims the middle ground as the most fair to all involved. He likens the process to owning a historic site. An individual still owns the property, but in light of its value to the public, the owner cannot sell, deface, or alter it in any way.[122] Schlesinger's suggestion opposed the Preyer bill. He wanted private ownership, with the Archives setting access guidelines to ensure public access. It should be noted that Schlesinger believed that the president had the right to set some access restrictions, and advocated a ten year limit. He showed implicit trust in the Presidency, arguing that Nixon's attempt to deny access was an aberration and not a new precedent.[123] Schlesinger's plan does not adequately account for the distinction between personal and public papers. If all presidential papers are private, but the public is guaranteed the right to access, then all personal papers would then be open to the public. Although his plan approached the middle ground more than Ertel or Preyer's, it left the president open to a potential invasion of privacy.

Disgust with the Nixon-Sampson agreement led to displeasure with the system that helped create it. Since both bills called for an Archivist to administer a complicated set of requirements, some began suggesting the separation of the National Archives and Records Administration from the General Services Administration. The first mention came in the testimony of Clement Vose of the American Political Science Association.

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[121] "Statement of Arthur Schlesinger, Jr., Professor of Humanities, City University of New York." *PRA of 1978*. 210

[122] Ibid.

[123] Ibid., 215.

Reiterating Reedy's call for an independent office within the White House to manage records, Vose took the idea one step further. Separation would "guard against the kind of political intrusion in handling presidential papers represented by the Nixon-Sampson agreement" and would ensure that "the later handling of papers in the presidential libraries would be under the sole supervision of professional archivists."[124] Mack Thompson, expressing the views of the AHA, stated that the separation of the National Archives from the GSA was a necessary step in creating an office with the integrity and competency to carry out the successful management and control of presidential records.[125]

Both Thompson and Vose simply reiterated a recommendation of the Public Documents Commission. The members of the Commission, as well as the American Political Science Association and the American Historical Association, viewed proper and ethically sound management and preservation of records as paramount to the issue of ownership, whether public or private. Allowing professional archivists to manage these records was the only feasible solution. It was not without precedent. Richard Nixon had a similar records management office during his Presidency, which made no distinction between public and private papers.

Throughout the proceedings, president Carter's staff kept him apprised of the development of the legislation. How much impact he had on the final legislation, however, is unclear. Carter took several positions on issues and appointed the

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[124] "Prepared Statement of Clement E. Vose, Representing the American Political Science Association." *PRA of 1978*. 250.

[125] "Statement of Mack Thompson, Executive Director, American Historical Association." *PRA of 1978*. 258.

Administrator of General Services, Jay Solomon, to present his views to the Congressional committee. First, he agreed with public ownership of presidential records, but disagreed strongly with extending the FOIA to cover presidential records, because of a potential chilling effect. Although he would retain ownership of his records, despite a Presidential Records Act, Carter intended to donate his records in accordance with many of the PRA restrictions. Some in the Carter Administration feared that Congress would seize control of Carter's records in the same way they did Nixon's presidential records if Carter did not allow full access to his records.[126] The Presidential Recordings and Materials Preservation Act, in their opinion, established the precedent for legislating the disposition of presidential records on a case by case basis.

Carter also supported an access restriction limit on presidential records of either twelve or thirteen years, an idea he borrowed from Gerald Ford. In his deposit agreement with the United States, Ford secured the right to control access to his presidential records for a period of thirteen years, because it would cover three election cycles. Three elections would virtually ensure a complete turnover on the president's staff.[127] Finally, he strongly felt that the legislation should not apply to him. Carter was not being hypocritical with this recommendation. He fully intended to donate his presidential records to the United States after his term ended. In a letter to Jay Solomon on March 6,

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[126] Memorandum to the President from Hugh Carter, Robert Lipshutz, and Michael Cardozo on August 9, 1977, Cutler files, box 107, folder "Presidential Papers, 8/77-10/80," Jimmy Carter Presidential Library and Museum, 2.

[127] Memorandum for the President from Robert Lipshutz, Michael Cardozo, and Hugh Carter on February 23, 1978, Staff Secretary Files, Box 97, Folder "7/27/78," Jimmy Carter Presidential Library and Museum, 3.

1978, he announced his intention to donate his "official papers and other historical materials" to his presidential library.[128] His concern was that a successful presidential bid in 1980 would result in a split of his collection, with the Archivist of the United States controlling access to the records created after January 20, 1981, and Carter controlling access to records of his first term.

On June 29, 1978, after the conclusion of the subcommittee's hearings, Preyer, Ertel, and Brademas jointly submitted a revised compromise bill, H.R. 13364, which incorporated elements of each bill and revisions in response to testimony from the contributors. For example, to balance the public's desire for access with the fear of creating a chilling effect, the new bill established a ten-year period in which the president could restrict access to materials falling within six categories, after which the records would be subject to FOIA. The six restrictions were similar to Preyer's original exemptions, but expanded after the suggestion of Representative Erlenhorn, to more closely approximate FOIA. The ten-year access restriction was a suggestion by Arthur Schlesinger. [129]

After conducting a markup session, a third bill, H.R. 13500, which more closely approximated president Carter's wishes, was introduced. Chief among the new provisions was the removal of the president's ability to appoint the Archivist and the

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[128] Letter from President Jimmy Carter to General Services Administrator Jay Solomon on March 6, 1978, Staff Secretary Files, Box 97, Folder "7/27/78," Jimmy Carter Presidential Library and Museum, 1.

[129] Materials Relating to the Legislative History of the Presidential Records Act of 1978, *The PRA of 1978*, 796-798.

extension of the president's restriction power from ten to twelve years. In a memo to the president, several of his aides indicated that they felt confident they could get the ten year restriction raised to twelve years. They had enough Congressional support to kill the bill that year, but it would probably be reintroduced the following year. Carter determined that he would receive no credit for supporting the Presidential Records Act and would only receive criticism for opposing portions of it. Therefore, he let it pass, but continued to work towards amendments.[130] The extension of the restriction period, lobbied for by Carter's aides, is evidence that Congress legitimately feared a chilling effect. The purpose of removing the president's power to appoint the Archivist of the United States makes sense in light of fears that the president's ability to limit access would be further enhanced by the appointment of a puppet.

On November 4, 1978, president Carter signed the Presidential Records Act, which amended Title 44 of the United States Code, to insure preservation of and public access to the presidential records. The Presidential Records Act of 1978 established public ownership of presidential records, the implementation of access controls over the records, and management of the records. The Act defined presidential records as documentary materials created or received by the president or anyone working for the Executive Office of the President that have a bearing on his official duties as the President of the United States. Personal records are defined as records of a nonpublic nature that have no bearing on the president's official duties, and include diaries, journals, records relating to private political associations, and records relating to the president's

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[130] Memorandum to the President on the Disposition of Presidential Papers from Bob Lipshutz, Hugh Carter, and Mike Cardozo on July 24, 1978, Staff Secretary Files, Box 97, Folder "7/27/98," 1-3.

campaign and election. To curb the potential development of a "chilling effect," the act instructs the president to assure that the activities, decisions, and deliberations reflecting the performance of his duties are adequately documented "through the implementation of records management controls and other necessary actions."[131]

In addition to the "chilling effect" controls, the act instructs the Archivist of the United States to take custody of presidential records at the conclusion of a president's term. The Archivist also has the authority to appraise the records and dispose of anything deemed to have no historical value. In addition to management controls, the Presidential Records Act established a twelve-year period in which a president could restrict access to records involving information within the following six categories: 1) national security or foreign policy secrets, 2) the appointment of federal officials, 3) records exempted specifically by another statute, 4) trade secrets or financial information, 5) confidential communications between the president and his advisors, and 6) personal medical files. In addition to the presidential restrictions, the Archivist may restrict access to all presidential records for a period of up to five years after accepting custody for the purpose of processing and arranging the records. The Presidential Records Act subjects vice presidential records to the same regulations as those of the president.[132]

Although the version of the bill signed into law on November 4, 1978 more closely approximated the Ertel-Brademas bill than the compromise bill, it still represented a compromise between the two and an infusion of ideas from the panelists.

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[131] Public Law 95-591. November 4, 1978. Reprinted in *Presidential Records Act of 1978*, 891, 892.

[132] Ibid., 893-895.

The contributions of all the participants are important, because the hearings allowed professional scholars, politicians, and lawyers to actively engage in debate over the issues of ownership and provided a forum through which to affect change. The Nixon-Sampson agreement marked a shift in the argument of ownership. Few scholars, with the exception of Arthur Schlesinger, argued for the continued privatization of presidential records. Instead, the right of public ownership became a forgone conclusion. The issue shifted from ownership back to access. Even advocates of private ownership, such as Schlesinger, with his historical site model, began arguing for unfettered public access. Others, such as Ertel and Brademas, called for the opposite, public ownership, with the president establishing access restrictions for a limited period of time. Still others, such as George Reedy, advocated complete public ownership and maintenance of all presidential records, public and private with no regard to the president's right to privacy.

In his testimony, Mack Thompson stated that the first order of business for Congress should be to establish ownership. Everything else would fall into place with the answering of that question.[133] However, the issues did not work themselves out that easily. Ownership and access are inseparable, so resolving ownership of presidential records required resolving issues of access to those records. The access issue in turn raised concerns with the constitutional separation of powers, the chilling effect, the right to privacy, and the security of information. The fear of a chilling effect was the single most important issue in the development of the Presidential Records Act and had the most impact on its final language and provisions.

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[133] Public Law 95-591

CONCLUSION

The Presidential Records Act, signed into law by president Carter on November 4, 1978, established public ownership of presidential papers. It was the first act of Congress in the Nation's history aimed at controlling the ownership of presidential papers. The PRA of 1978 was the culmination of decades of lobbying by scholars for access to government information. When it became clear that the Freedom of Information Act did not provide the necessary level of access for many journalists and historians to Executive branch documents, the pressure for claiming public ownership of federal records increased.

The pressure for asserting public ownership of federal records, regardless of their provenance was growing in the two decades prior to Richard Nixon's agreement with General Services Administrator Donald Sampson. Although records of government agencies were not considered the private property of the individual records' creators, presidential records continued to be considered the personal property of their creators until the 1950s, when scholars such as H.G. Jones, Edmund Mansure, Herman Kahn, and David Lloyd went on record to criticize the idea. Although organizations such as the American Society of Newspaper Editors began lobbying for increased access to publicly owned government records, others argued that presidential records should also be publicly owned. In 1966, FOIA established procedures for public access to government

records other than presidential papers. Traditionally, access to presidential records was poor. Beginning with the establishment of the Library of Congress Manuscript Division and continuing with the establishment of the Presidential Library System, access to donated presidential papers improved, but presidents still controlled access to all records they chose not to donate.

Nixon's attempt to close access to his presidential records relating to his Watergate involvement provided the impetus to move forward with the idea that presidential records should be considered public property and, therefore, treated like all other government records. Initially, Congress only seized control of the Nixon presidential records with the 1974 passing of the Presidential Recordings and Materials Preservation Act. Title II of the act left the larger question of ownership unanswered, but established a commission whose task was to establish recommendations for the ownership of the records of presidents, members of Congress, and federal judges. The National Study Commission on the Records and Documents of Federal Officials examined the issue of ownership and produced two reports to Congress. The Commission called on the same individuals and organizations previously debating ownership access, such as the AHA, SAA, ASNE, F. Gerald Ham, and H.G. Jones, to testify at the hearings and help establish recommendations to offer Congress. In addition, many of the same individuals and organizations also contributed during the Presidential Records Act Hearings. After reviewing the suggestions of the Public Documents

Commission, Congress moved forward with legislation aimed at establishing ownership of presidential records. Despite objections voiced at the hearings, the final version did not address the records of Congress or the judiciary.

According to the published hearings for the Presidential Records Act, the *Congressional Record*, and memoranda to and from president Carter and his staff, there are several reasons that the Congress failed to enact federal records legislation. First, members of Congress believed they had a better record of compliance than the Executive branch with requests for information. Therefore, it need not be subject to legislation forcing a branch of the Government to be more transparent to the American public. Second, Congress believed its tradition of self regulation should extend to issues of records ownership and access. Any legislation would be considered separately and enacted as a statute. Finally, some congressmen believed that the importance of the presidential office demanded immediate action. Because the records of congressmen were perceived as less interesting to the public than the records of the president, no legislation establishing ownership or regulating access to congressmen's records would be necessary. The hypocrisy of Congress on the issues of access and ownership was evident throughout the twentieth century. Every time the public pushed for legislation regulating federal records, the result only affected the Executive branch. From the Freedom of Information Act to the Presidential Records Act of 1978, all regulatory legislation exempted Congress and the judiciary. The perceived Executive branch

secrecy that resulted in the Freedom of Information Act also seemingly allowed Congress an excuse to exempt itself and the judiciary from ensuring public access to their own records.

EPILOGUE

The PRA did not end the debate over access to presidential records. The PRA established the rules for handling presidential records after the completion of a president's term and established temporary access restrictions to the documents. According to the PRA, presidential records should be made available to the public no later than twelve years after a president leaves office. All access restrictions must be imposed while the president is still in office.[134] In 1989, prior to leaving office, Ronald Reagan issued Executive Order 12667, which bypassed the PRA's access restrictions. E.O. 12667 allowed the president to extend his claim of executive privilege beyond the twelve-year limit. Thirty days prior to the twelve-year time limit, the Archivist had to notify the president of all documents being released. The president then had thirty days to claim executive privilege and keep the documents sealed.[135] E.O. 12667 allowed a president the power to keep any of his presidential records sealed until his death.

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[134] U.S. Congress, House, Committee on Government Operations, *Presidential Records Act of 1978: Report to Accompany H.R. 13500*, 95th Congress, 2nd Session, 95-1487, pt. I, 18.

[135] President, Executive Order, "Executive Order 12667," Retrieved from http://www.reagan.utexas.edu/archives/speeches/1989/011889f.htm on November, 29 2007.

In 2001, twelve years after the end of Ronald Reagan's Presidency, the National Archives began the process of preparing documents for release. President George W. Bush then amended E.O. 12667 with E.O. 13233 on November 1, 2001. E.O. 13233 increases the time frame to claim executive privilege from one month to three months, provides the right for the current president to claim executive privilege over a previous president's records, and allows a former president to assign a third party representative to claim executive privilege on his behalf.[136] Bush then used his power of executive privilege to prevent the release of some of Reagan's presidential records. E.O. 13233 received heavy criticism from the American Library Association and the Society of American Archivists, who claimed that it violated the PRA.[137] By allowing a president to designate a representative on his behalf, he could control access to his records indefinitely. The actions by presidents Reagan and Bush lend credence to the proponents of increased access that feared public ownership of presidential records would have little effect without a guaranteed access.

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[136] President, Executive Order, "Executive Order 13233: Further Implementation of the Presidential Records Act," Retrieved on November 29, 2007 from http://www.whitehouse.gov/news/releases/2001/11/20011101-12.html

[137] Society of American Archivists, "Call to Action on Executive Order 13233," 15 November 2001. Retrieved on November 29, 2007 from http://www.archivists.org/news/actnow.asp. See also, American Library Association Government Documents Roundtable "Resolution Concerning Executive Order 13233, Further Implementation of the Presidential Records Act," 1 January 2002. Retrieved on November 29, 2007 from http://www.ala.org/ala/godort/godortresolutions/20020121269.htm.

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APPENDIX

TEXT OF THE PRESIDENTIAL RECORDS ACT OF 1978
US CODE, TITLE 44, CHAPTER 22

§ 2201. Definitions

As used in this chapter—

(1) The term "documentary material" means all books, correspondence, memorandums, documents, papers, pamphlets, works of art, models, pictures, photographs, plates, maps, films, and motion pictures, including, but not limited to, audio, audiovisual, or other electronic or mechanical recordations.

(2) The term "Presidential records" means documentary materials, or any reasonably segregable portion thereof, created or received by the President, his immediate staff, or a unit or individual of the Executive Office of the President whose function is to advise and 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 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; but

(B) does not include any documentary materials that are

(i) official records of an agency (as defined in section 552 (e) [1] of title 5, United States Code);

(ii) personal records;

(iii) stocks of publications and stationery; or

(iv) extra copies of documents produced only for convenience of reference, when such copies are clearly so identified.

(3) or materials, The term "personal records" means all documentary reasonably segregable portion therof, any [2] of a purely private or nonpublic character which do not 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 includes—

(A) diaries, journals, or other personal notes serving as the functional equivalent of a diary or journal which are not prepared or utilized for, or circulated or communicated in the course of, transacting Government business;

(B) materials relating to private political associations, and having no relation to or direct effect upon the carrying out of constitutional, statutory, or other official or ceremonial duties of the President; and

(C) materials relating exclusively to the President's own election to the office of the Presidency; and materials directly relating to the election of a particular individual or individuals to Federal, State, or local office, which have no relation to or direct effect upon the carrying out of constitutional, statutory, or other official or ceremonial duties of the President.

(4) The term "Archivist" means the Archivist of the United States.

(5) The term "former President", when used with respect to Presidential records, means the former President during whose term or terms of office such Presidential records were created.

§ 2202. Ownership of Presidential Records

The United States shall reserve and retain complete ownership, possession, and control of Presidential records; and such records shall be administered in accordance with the provisions of this chapter.

§ 2203. Management and Custody of Presidential records

(a) Through the implementation of records management controls and other necessary actions, the President shall take all such steps as may be necessary to assure that the activities, deliberations, decisions, and policies that reflect the performance of his constitutional, statutory, or other official or ceremonial duties are adequately documented and that such records are maintained as Presidential records pursuant to the requirements of this section and other provisions of law.

(b) Documentary materials produced or received by the President, his staff, or units or individuals in the Executive Office of the President the function of which is to advise and assist the President, shall, to the extent practicable, be categorized as Presidential records or personal records upon their creation or receipt and be filed separately.

(c) During his term of office, the President may dispose of those of his Presidential records that no longer have administrative, historical, informational, or evidentiary value if—

(1) the President obtains the views, in writing, of the Archivist concerning the proposed disposal of such Presidential records; and

(2) the Archivist states that he does not intend to take any action under subsection (e) of this section.

(d) In the event the Archivist notifies the President under subsection (c) that he does intend to take action under subsection (e), the President may dispose of such Presidential records if copies of the disposal schedule are submitted to the appropriate Congressional Committees at least 60 calendar days of continuous session of Congress in advance of the proposed disposal date. For the purpose of this section, continuity of session is broken only by an adjournment of Congress sine die, and the days on which either House is not in session because of an adjournment of more than three days to a day certain are excluded in the computation of the days in which Congress is in continuous session.

(e) The Archivist shall request the advice of the Committee on Rules and Administration and the Committee on Governmental Affairs of the Senate and the Committee on House Oversight and the Committee on Government Operations of the House of Representatives with respect to any proposed disposal of Presidential records whenever he considers that—

(1) these particular records may be of special interest to the Congress; or

(2) consultation with the Congress regarding the disposal of these particular records is in the public interest.

(f)

(1) Upon the conclusion of a President's term of office, or if a President serves consecutive terms upon the conclusion of the last term, the Archivist of the United States shall assume responsibility for the custody, control, and preservation of, and access to, the Presidential records of that President. The Archivist shall have an affirmative duty to make such records available to the public as rapidly and completely as possible consistent with the provisions of this Act.

(2) The Archivist shall deposit all such Presidential records in a Presidential archival depository or another archival facility operated by the United States. The Archivist is authorized to designate, after consultation with the former President, a director at each depository or facility, who shall be responsible for the care and preservation of such records.

(3) The Archivist is authorized to dispose of such Presidential records which he has appraised and determined to have insufficient administrative, historical, informational, or evidentiary value to warrant their continued preservation. Notice of such disposal shall be published in the Federal Register at least 60 days in advance of the proposed disposal date. Publication of such notice shall constitute a final agency action for purposes of review under chapter 7 of title 5, United States Code.

§ 2205. Exceptions to restricted access

Notwithstanding any restrictions on access imposed pursuant to section 2204—

(1) the Archivist and persons employed by the National Archives and Records Administration who are engaged in the performance of normal archival work shall be permitted access to Presidential records in the custody of the Archivist;

(2) subject 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 subpena 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 his 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; and

(3) the Presidential records of a former President shall be available to such former President or his designated representative.

§ 2206. Regulations

The Archivist shall promulgate in accordance with section 553 of title 5, United States Code, regulations necessary to carry out the provisions of this chapter. Such regulations shall include—

(1) provisions for advance public notice and description of any Presidential records scheduled for disposal pursuant to section 2203 (f)(3);

(2) provisions for providing notice to the former President when materials to which access would otherwise be restricted pursuant to section 2204 (a) are to be made available in accordance with section 2205 (2);

(3) provisions for notice by the Archivist to the former President when the disclosure of particular documents may adversely affect any rights and privileges which the former President may have; and

(4) provisions for establishing procedures for consultation between the Archivist and appropriate federal agencies regarding materials which may be subject to section 552 (b)(7) of title 5, United States Code.

§ 2207. Vice-Presidential records

Vice-Presidential records shall be subject to the provisions of this chapter in the same manner as Presidential records. The duties and responsibilities of the Vice President, with respect to Vice-Presidential records, shall be the same as the duties and responsibilities of the President under this chapter with respect to Presidential records. The authority of the Archivist with respect to Vice-Presidential records shall be the same as the authority of the Archivist under this chapter with respect to Presidential records, except that the Archivist may, when the Archivist determines that it is in the public interest, enter into an agreement for the deposit of Vice-Presidential records in a non-federal archival depository. Nothing in this chapter shall be construed to authorize the establishment of separate archival depositories for such Vice-Presidential records.