The Presidential Records Act: Background and Recent Issues for Congress

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Summary

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

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

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

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

Congress has the authority to revise or enhance recordkeeping requirements for the incumbent Presidents, including requiring a more systematic method of collecting and maintaining e-mail or Internet records. Congress may consider modifying the length of time an incumbent or former President has to review records and decide whether they should be released to the public or clarifying the recordkeeping requirements for the records of the Vice President, which currently give the Vice President broad authority to determine which records qualify as presidential records under the PRA. Congress may also have an interest in examining whether the incumbent President is appropriately capturing all records in every available medium and whether NARA can appropriately retain these records and make them available to researchers and the general public in perpetuity.

This report will be updated in the case of significant developments.

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Introduction

Presidential records are critical tools for understanding the powers and operations of the executive branch of the federal government.[1] These records, however, may include information that, if released to the public, could endanger national security, adversely affect the nation's economy, or result in an unwarranted invasion of personal privacy.

The Presidential Records Act (PRA) details which presidential records and materials the National Archives and Records Administration (NARA) is to assume responsibility for at the end of a President's Administration.[2] According to the act, when a President leaves office, his official records remain property of the federal government, under the supervision of the Archivist of the United States.[3] Once a location for a presidential library has been determined, and the facility is deeded or otherwise placed into the custody of the United States, the former President's records are to be deposited there.[4]

The provisions of the Presidential Records Act have remained relatively unchanged since its 1978 creation, except for several technical amendments.[5] Incumbent Presidents, however, have varied widely in how they chose to interpret the PRA. Additionally, Presidents from both political parties have faced questions and concerns about their abilities to maintain accurate, comprehensive, and accessible archives, especially considering their increasing use of electronic—and perhaps ephemeral—platforms like e-mail, Facebook, Twitter, blogs, and YouTube. The PRA requires the collection of all presidential records, including those created on electronic platforms.[6] The increasing volume of records created by incumbent Presidents may prompt concerns about incumbent Presidents' abilities to appropriately collect and retain records.

Congress has the authority to revise or enhance recordkeeping requirements for incumbent Presidents, including requiring more systematic methods for collecting and maintaining e-mail or Internet records. The 112th Congress may consider modifying the length of time an incumbent or former President has to review records and decide whether they should be released to the public. Similar to the President, the Vice President has discretion to determine which of his records

[1] The Presidential Records Act defines a *presidential record* as "documentary materials … created by the President or his immediate staff." (44 U.S.C. §2201(2)) In turn, the term *documentary materials* includes "all books, correspondence, memorandums, documents, papers, pamphlets, works of art, models, pictures, photographs, plats, maps, films, and motion pictures, including, but not limited to, audio, audiovisual, or other electronic or mechanical recordations." (44 U.S.C. §2201(1)).

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

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

[4] CRS Report R40209, *Fundraising for Presidential Libraries: Recent Legislative and Policy Issues for Congress*, by R. Sam Garrett.

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

[6] 44 U.S.C. §2201.

qualify as presidential records under the PRA.[7] Another issue that may interest Congress is the recordkeeping requirements for vice presidential records. Congress may also consider requiring NARA and other agencies to automatically capture all electronic records (currently, only e-mail sent to or from federal e-mail accounts is automatically retained).

Since 2002, nine bills that sought to directly modify the PRA were introduced in Congress, but none have been enacted. These bills sought to

- eliminate varied presidential interpretations of the PRA by enacting more specific presidential records requirements; or
- update the PRA to include more detailed recordkeeping requirements for electronic records.

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

The Presidential Records Act

Pursuant to Chapter 22 of Title 44 of the *U.S. Code*, upon leaving office, an outgoing President may restrict access to certain of his archived records for up to 12 years.[8] Certain presidential files and records may be excepted from public access if they qualify under any of the six criteria delineated in 44 U.S.C. §2204:

1. the information is specifically exempted by an executive order for the purpose of national security or foreign policy;
2. the information is related to federal office appointments;
3. the information is explicitly exempted from disclosure by statute;
4. the information includes trade secrets and commercial or financial information obtained from a person that is privileged or confidential;
5. the information is a confidential communication that requests or submits advice between the President and his advisers—or between the advisers themselves; or
6. the information is personnel or medical files, and their disclosure would amount to an unwarranted invasion of personal privacy.[9]

According to the act, the Archivist of the United States—or, if there is a legal challenge, the federal courts—would have final determination over which records should be released to the public. The act also states that it is not to "be construed to confirm, limit, or expand any

[7] 44 U.S.C. §2204 explicitly places the same recordkeeping duties and responsibilities on the Vice President as are placed on the President. As discussed in **Appendix A**, a federal district court held that Vice President "has discretion concerning the decision to create or dispose of Vice-Presidential records, and even how he chooses to preserve them," however he does not have "discretion in is his ability to *change* the definition of Vice-Presidential records provided by Congress when exercising his obligations under the PRA." Washington v. Cheney, 593 F. Supp. 2d 194, 220-21 (D. D.C. 2009). Vice presidential records are not explicitly defined in the PRA.

[8] 44 U.S.C. §2204(a). After 12 years, Presidential records are subject to the Freedom of Information Act, which governs public access to agency records (5 U.S.C. §552).

[9] Ibid.

constitutionally-based privilege which may be available to an incumbent or former President."[10] The act does not define the parameters of this privilege. Pursuant to the PRA, presidential records are collected and maintained by the incumbent President until he leaves office. The act applies to the records of Presidents dating back to Ronald Reagan.[11]

Presidential Interpretations of the PRA

Although the PRA has remained relatively unchanged since enactment in 1978, successive presidential Administrations have interpreted its meaning differently.[12] This section will examine and compare the most recent two presidential interpretations—one from the George W. Bush Administration and the other from the Obama Administration.

Executive Order 13233

On November 1, 2001, President George W. Bush issued E.O. 13233.[13] This executive order gave the incumbent President, former Presidents, former Vice Presidents, and their designees broad authority to deny access to presidential documents or to delay their release indefinitely. Under the order, former Presidents had 90 days to review and decide whether requested documents should be released—60 days longer than provided under earlier arrangements. Incumbent Presidents had the authority to extend the review period indefinitely, and the Archivist had no recourse to challenge the status of materials that had been withheld or remained in review.[14]

The executive order also changed the procedures for the disclosure of presidential records. Prior to E.O. 13233, presidential records would be released at the termination of the 12-year restriction period—unless the President, former President, or former Vice President asserted "constitutionally based privileges" to stop the disclosure.[15] E.O. 13233, in contrast, required action by the President, former President, or former Vice President for records to be released. If, therefore, none of the designated officers acted to release presidential records, they may have remained unreleased even if the 12-year restriction period lapsed. Moreover, the executive order permitted representatives of a former President or Vice President to challenge the release of

[10] 44 U.S.C. §2204.

[11] All presidential records in federal presidential libraries dedicated to the records of Presidents who served prior to Ronald Reagan (Herbert Hoover through Jimmy Carter) are materials donated to the libraries' collections. Those records are released according to the dictates of the applicable President (if he is living) of the families of the President. For more information on presidential libraries, see CRS Report R41513, *The Presidential Libraries Act and the Establishment of Presidential Libraries*, by Wendy Ginsberg and Erika K. Lunder.

[12] See E.O. 12667; E.O. 13233; and E.O. 13489.

[13] Executive Order 13233, "Further Implementation of the Presidential Records Act," 66 *Federal Register* 56025, November 1, 2001, at http://frwebgate2.access.gpo.gov/cgi-bin/PDFgate.cgi?WAISdocID=phq6IG/29/2/0&WAISaction=retrieve.

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

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

presidential or vice presidential records. Previously, all challenges to disclosure had to be made personally by the former President or former Vice President.[16]

Executive Order 13489

During his first full day in office, President Barack Obama issued an executive order (E.O. 13489) that explicitly revoked E.O. 13233.[17] Under E.O. 13489, incumbent Presidents and former Presidents are granted 30 days to review presidential records to determine whether they should be released. If an incumbent President claims executive privilege for the records of a former President, the Counsel to the President is required to notify the Archivist, the appropriate former President, and the Attorney General of the action. The Archivist is then prohibited from releasing those records—unless instructed to do so by a court order.

In contrast to claims of executive privilege made by an incumbent President, under E.O. 13489, claims of executive privilege made by a former President require the Archivist to consult with the Attorney General, the Counsel to the President, or other appropriate officials to determine the validity of the request. According to the executive order, the incumbent President may instruct the Archivist whether to release the records of a former President, and the Archivist is to "abide by" the President's determination—unless directed otherwise by a court order.[18] If the Archivist denies a former President's executive privilege claim and determines that records should be released, the incumbent President and appropriate former President are to be given 30 days notice of the records' release.

E.O. 13489 vests much of the records disclosure authority in the hands of the incumbent President. This broad authority to determine which records of a former President should be

[16] Since George W. Bush issued E.O. 13233, seven bills have been introduced in Congress that sought to explicitly rescind it. In the 110th Congress, for example, Representative Henry A. Waxman introduced H.R. 1255, which would have rescinded the executive order. The House passed H.R. 1255 under suspension on March 14, 2007, and the bill was eventually placed on the Senate Legislative Calendar. A companion bill (S. 886) was introduced in the Senate on March 14. S. 886 was reported by the Committee on Homeland Security and Governmental Affairs without amendment on June 20, 2007, and placed on the legislative calendar that same day. No further action was taken on either H.R. 1255 or S. 886. In the 108th Congress Representative Doug Ose introduced H.R. 1493, which would have rescinded E.O. 13233. H.R. 1493 was referred to the House Committee on Oversight and Government Reform, which then referred it to the Subcommittee on Technology, Information Policy, Intergovernmental Relations and the Census. No further action was taken on the bill. S. 1517, a companion bill to H.R. 1493 was introduced by Senator Jeff Bingaman, the bill was referred to the Senate Committee on Homeland Security and Governmental Affairs. No further action was taken on the bill. H.R. 5073, introduced by Representative Waxman, also sought to rescind E.O. 13233. It was concurrently referred to the House Committee on Oversight and Government Reform and the House Committee on Homeland Security. The House Committee on Oversight and Government Reform subsequently referred H.R. 5073 to its Subcommittee on Technology, Information Policy, Intergovernmental Relations, and the Census. No further action was taken on the bill. On May 12, 2005 (the 109th Congress), Representative Waxman introduced H.R. 2331, which, in part, sought to statutorily rescind E.O. 13233 and require the application of E.O. 12667, the executive order governing presidential records that was issued by President Ronald Reagan on January 18, 1989. H.R. 2331 was concurrently referred to the House Committee on Government Reform and the House Committee on Homeland Security. No further action was taken on the bill. In the 107th Congress, Representative Stephen Horn introduced H.R. 4187, which sought—among other changes—to rescind E.O. 13233. The bill was reported by the House Committee on Government Reform and then placed on the Union Calendar. No further action was taken on the bill. The remaining bill that sought to rescind E.O. 13233, H.R. 35 from the 111th Congress, will be discussed later in this report.

[17] Executive Order 13489, "Presidential Records," 74 *Federal Register* 4669, January 26, 2009, at http://edocket.access.gpo.gov/2009/pdf/E9-1712.pdf.

[18] E.O. 13489, p. 4670.

released to the public may arguably stand in contrast to the designs of the Presidential Records Act, which places greater authority over records disclosure in the hands of the Archivist. The executive order does not define the boundaries of executive privilege, but it does define a "*substantial question of executive privilege*" as a situation in which "NARA's disclosure of Presidential records might impair national security (including the conduct of foreign relations), law enforcement, or the deliberative processes of the executive branch."[19]

Maintaining Electronic Records

The PRA appears to require collection and maintenance of—and accessibility to—the records of former Presidents, including those created electronically. As new technologies are introduced and increasingly utilized by Presidents, NARA must continuously ensure that ubiquitous and perhaps ephemeral electronic records can be collected, maintained, and accessed, regardless of format. Archiving presidential use of social networking sites like Facebook or Twitter, for example, may pose different archival challenges than e-mail.[20]

Pursuant to the PRA, NARA is responsible for the custody, control, and preservation of the records of former Presidents. Incumbent Presidents, however, are responsible for managing and archiving their records during the tenure of their Administrations. NARA has worked with incumbent Presidents as they prepare to leave office, to provide for the capture and preservation of certain online records generated by presidential staff who make increasing use of the Internet and other technologies. For example, on the last day of each outgoing Administration, the President provides NARA "a snapshot of the WhiteHouse.gov website."[21]

To meet the task of maintaining all presidential records, including those created electronically, NARA created an Executive Office of the President (EOP) system within its Electronic Records Archive (ERA) to maintain and make available such records. According to NARA, the ERA is currently used to maintain and preserve the electronic records from the George W. Bush Administration and the electronic records of former Vice President Dick Cheney. The ERA is not yet used to preserve the electronic records of the Clinton Administration.[22] Although NARA will not be given archival control of President Obama's records until after his tenure in office ends, the National Archives said the ERA "has the capability to manage the electronic records of any given administration."[23] NARA has said that the "Administration has consulted with NARA

[19] Ibid, p. 4669.

[20] In August 2012, the Office of Management and Budget in consultation with NARA released guidance to federal agencies to clarify and amend recordkeeping policies, including those related to electronic recordkeeping. This guidance does not apply to the Executive Office of the President. See Jeffrey D. Zients and David S. Ferriero, *Managing Government Records Directive*, Office of Management and Budget and the National Archives and Records Administration, Washington, DC, August 24, 2012, at http://www.whitehouse.gov/sites/default/files/omb/memoranda/2012/m-12-18.pdf.

[21] Information provided electronically to the author by NARA on April 21, 2011. According to NARA, the Archives "also receives earlier versions of the White House websites when they are available." The George W. Bush websites archive is at http://georgewbush-whitehouse.archives.gov, and the William J. Clinton websites archive is at http://clintonlibrary.gov/_previous/archivesearch.html.

[22] Information provided electronically to the author by NARA on October 1, 2012.

[23] Ibid.

regarding the records status of PRA content on social media sites and technical approaches to managing them."[24]

At a May 3, 2011, House Oversight and Government Reform Committee hearing, Brook M. Colangelo, chief information officer of the Office of Administration in the EOP, testified that "the EOP has been able to rely on an automated system that archives email sent and received on the EOP system." The commercial, off-the-shelf product used to capture all EOP emails "archives inbound and outbound email messages in near real time and in original format with attachments, whether sent or received from EOP computers or EOP BlackBerries."[25] Mr. Colangelo also testified that Short Message Service (SMS) texts and Personal Identification Number (PIN) messaging are also automatically archived by commercial software.

The Obama Administration is the first to extensively use external sites like Facebook, Twitter, and YouTube, as well as other social networking media. Mr. Colangelo testified that there is no software to "offer a sufficiently comprehensive, reliable, and affordable" method of automatic archiving of presidential use of social networking sites.[26] Archiving the presidential use of sites like Twitter and Facebook, therefore, "is handled on a component-by-component basis" using a "combination of traditional manual archiving techniques (like saving content in an organized folder structure) and automated techniques (such as Real Simple Syndication (RSS) feeds and Application Programming Interfaces (APIs))."[27] Mr. Colangelo said the White House would continue to search for a comprehensive automatic archiving option for social media.

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

If EOP employees do perform work on non-work e-mail accounts or other technologies, they are required to forward such records to the proper destinations for archiving.[28]

The Growth of Presidential Records

According to NARA's Report on Alternative Models for Presidential Libraries, "Presidential Libraries … experienced an explosive growth in the volume of electronic records, especially White House email."[29] The report continued:

> Presidential Library holdings in electronic form are now much larger than the paper holdings. Indeed, the email system for the George W. Bush Administration alone is many

[24] Ibid.

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

[26] Ibid.

[27] Ibid.

[28] Ibid.

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

> times larger than the entire textual holdings of any other Presidential Library. These electronic holdings bring new challenges to processing and making available Presidential records. The sheer volume exponentially increases what archivists have to search and isolate as relevant to a request, a lengthy process in and of itself before the review begins. Once review begins, the more informal communication style embodied in Presidential record emails often blends personal and record information in the same email necessitating more redactions.

In June 2010, the Government Accountability Office (GAO) submitted testimony to the House Committee on Oversight and Government Reform's Subcommittee on Information Policy, Census and National Archives on "The Challenges of Managing Electronic Records."[30] GAO stated that the "[h]uge volumes of electronic information" were a "major challenge" in agency record management.[31]

> Electronic information is increasingly being created in volumes that pose a significant technical challenge to our ability to organize it and make it accessible. An example of this growth is provided by the difference between the digital records of the George W. Bush administration and that of the Clinton administration: NARA has reported that the Bush administration transferred 77 terabytes[32] of data to the [National] Archives [and Records Administration] on leaving office, which was about 35 times the amount of data transferred by the Clinton administration.[33]

Congressional Activity Related to the PRA

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

112th Congress

In the 112th Congress, for example, two bills were introduced that would clarify the terms under which presidential records should be released to the public: the Transparency and Openness in Government Act (H.R. 1144) and the Presidential Records Act Amendments of 2011 (H.R. 3071). Both bills contain identical PRA-amending language.[34]

Both H.R. 1144 and H.R. 3071 would amend the PRA to provide a 60-day presidential record review period any time the Archivist intends to release previously unreleased presidential records. Pursuant to the bill's language, the review period could be extended for an additional 30 days if the Archivist provides a statement that "such an extension is necessary to allow an adequate

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

[31] Ibid., p. 10.

[32] A terabyte is about 1 trillion bytes, or 1000 gigabytes.

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

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

review of the record." The bill also seeks to codify the requirement that any claim of executive privilege be made by the applicable former President or by the incumbent President. On September 29, 2011, Representative Towns introduced H.R. 3071, which contained identical amending language.

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

Potential Policy Options

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

Clarifying Responsibilities

Congress may choose to amend the PRA to clearly codify presidential recordkeeping responsibilities, including the length of time an incumbent President or former President would have to review and determine whether certain materials should be released to the public. Some Members may believe that amending the PRA may affect a President's, former President's, or former Vice President's claims of privilege for certain information or records. Moreover, some Members may believe that current recordkeeping practices at the White House are sufficient, thorough, and comprehensive. Other Members, however, may believe that different presidential Administrations' interpretations of the PRA could arguably lead to inconsistent recordkeeping policies and practices. This could leave policymakers, scholars, and the general public with an inconsistent history of individual presidents and the institution of the presidency as a whole. Without more detailed codification of record collection and public releasing responsibilities, an incumbent President, former President, or former Vice President may attempt to keep from disclosure important historical documents for increasingly longer periods of time—or the time certain records are kept from the public may vacillate with each new Administration's preferences. Some may argue that such action could increase public mistrust of the presidency, inhibit academic understanding of the presidency, or increase the difficulty of identifying possible abuses of executive authority.

Electronic Records and the Definition of a Presidential Record

Some may believe that the PRA, as currently written, includes electronic media within the definition of the presidential record, and the statute needs no clarifying amendments. Others may believe that more specific recordkeeping requirements are necessary because the PRA may not clearly delineate proper recordkeeping requirements of electronic presidential records by the incumbent President. Congress may consider amending the PRA to require NARA to certify annually all the recordkeeping practices of each presidential Administration—including electronic recordkeeping practices. Congress could require NARA to then report its certification to relevant congressional committees. Such a requirement might lead to a more standardized process of records collection and maintenance practices by incumbent Presidents. This might better ensure consistent and thorough upkeep of a presidential records archive—even prior to records transfers

to NARA. Investment in a recordkeeping system, certification of such system, and annual reports on the status of such system, however, might place high financial and manpower costs on NARA and the incumbent President.

Collection of, Retention of, and Access to Electronic Records

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

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

Appendix A. Vice Presidential Records Controversy

While the PRA requires retention, preservation, and public release of most of the records of a former President, including the records of "his immediate staff," the record-preservation policies governing the Vice President's records have prompted controversy.[35] Former Vice President Dick Cheney challenged a lawsuit filed by an organization that sought to preserve records that former Vice President Cheney claimed were subject to his control. In September 2008, a judge ordered former Vice President Cheney to preserve all records until the case was decided, according to media reports.[36] Former Vice President Cheney's office submitted to the Federal District Court of Washington, D.C., a motion to dismiss the lawsuit (filed by Citizens for Responsibility and Ethics in Washington (CREW)) on December 8, 2008. The motion asserted, "[t]he vice president alone may determine what constitutes vice presidential records or personal records, how his records will be created, maintained, managed and disposed, and are all actions that are committed to his discretion by law."[37]

On January 19, 2009, a federal district court judge found that CREW could not demonstrate that the Vice President failed to comply with his obligations under the PRA. The decision accepted former Vice President Cheney's claim that he should have discretion over which of his records are to be preserved and released to the public.[38] The court also found that vice presidential records were, pursuant to 44 U.S.C. §2207, to be preserved in the same manner as presidential records. As noted earlier in this report, the PRA does not explicitly define vice presidential records.

[35] 44 U.S.C. §2201.

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

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

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

Appendix B. Presidential Records Act Amendments Introduced in the 111th Congress

Two bills introduced in the 111th Congress would have significantly amended the PRA: H.R. 35, and H.R. 1387. H.R. 35 incorporated amendments that had been introduced in previous Congresses, including an attempt to statutorily rescind President Bush's Executive Order 13233.[39] Although the bill was not enacted, it marked continued concern by some Members of Congress that presidential Administrations were misinterpreting the spirit of the PRA. H.R. 1387, which sought to clarify the PRA's electronic recordkeeping requirements for the incumbent President, also incorporated legislative ideas from previous Congresses.[40]

H.R. 35

On January 6, 2009, Representative Edolphus Towns introduced H.R. 35, the Presidential Records Act Amendments of 2009, which sought to reinstitute many of the presidential records archiving policies in effect prior to George W. Bush's issuance of E.O. 13233, including shortening the presidential record review period to 20 days.[41] The bill would have revoked President Bush's executive order.[42] H.R. 35 would have required an incumbent President, former Presidents, or former Vice Presidents to justify why certain records should be afforded protected status for reasons of executive privilege. In contrast, under E.O. 13233, any person seeking to access unreleased presidential records had to demonstrate why the records should be disclosed—without full knowledge of the information that the record may include.

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

H.R. 1387

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

[39] H.R. 1255 and S. 886 in the 110th Congress; H.R. 4187 in the 107th Congress.

[40] H.R. 5811 in the 110th Congress.

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

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

- records management controls necessary for the capture, management, and preservation of electronic messages;
- records management controls necessary to ensure that electronic messages are readily accessible for retrieval through electronic searches; and
- a process to certify the electronic records management system to be used by the President for the purposes of complying with H.R. 1387's new requirements.[43]

In addition, H.R. 1387 would have required the Archivist to certify, annually, that "electronic management controls established by the President" met the requirements of the legislation and to report to Congress the results of that certification.[44] The Archivist would have also been required to submit a report within a year of an incumbent President leaving office that detailed "the volume and format of electronic Presidential records deposited into that President's Presidential archive depository" and whether those records met the legislation's requirements.[45]

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

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[43] H.R. 1387, Sec. 3.

[44] Ibid.

[45] Ibid.