

The History of the Presidential Records Act & Bush's Executive Order 13,233

| | |
|---|----|
| Introduction..... | 1 |
| Access to Government Records and Archives..... | 2 |
| What is covered by the Presidential Archives Act?..... | 3 |
| Ownership and Control of Presidential Archives | 5 |
| Presidential Challenges to the Presidential Records Act | 6 |
| Conclusions..... | 10 |

Introduction

George W. Bush's presidency and government records have been in the news a lot lately. Vice President Dick Cheney won't release information regarding meetings he had to develop our nation's energy policy.¹ The White House refused to release documents and records concerning John Bolton, the now appointed ambassador to the United Nations.² There is controversy brewing over the White House's refusal to allow Senators to review the records of John Roberts, President Bush's nominee to the Supreme Court.³ Also, President Bush issued an executive order delaying and controlling the release of former Presidents' records from the National Archives and Records Administration

¹ Thomas James Conners, "Papers of the President or of the Presidency: Who Owns Presidential Records? Some Recent History and a Challenge." *Portal: Libraries and the Academy*/ 2 No. 4 (2002): 653.

² Tom Raum, "Newsview: Bush Stands His Ground on Bolton". *New York Post Online Edition*, 1 August 2005; available from

http://breakingnews.nypost.com/dynamic/stories/B/BUSH_IN_YOUR_FACE?SITE=NYNYP&SECTION=HOME&TEMPLATE=DEFAULT&CTIME=2005-08-01-22-24-52: Internet; accessed 2 August 2005.

(NARA). This leads to several questions: Is there open access to the records and archives of the federal government? Who controls access to the records and archives of the President? Who owns those records? Should the public have the right to access records of the President, an elected official? Is President Bush hampering access to records and archives?

Access to Government Records and Archives

Charles M. Andrews, as quoted in T.R. Schellenberg's Modern Archives: Principles and Techniques, makes the following statement:

The more it is realized that the true history of a state and a people lies not in episodes and surface events, but in the substantial features of its constitutional and social organization, the more will archives be valued and preserved.⁴

This quote illustrates that one cannot rely on televised news or specific events to find the history of our time and people or "the true history of a state". Instead, we must rely on the archives and records of our governments and social organizations. Because the government is subservient to the people, the records and archives of the government should be accessible to the people. Thomas Jefferson mentions such access to information in his Diffusion of Knowledge Bill, in which he states:

³ Tom Brune, "Roberts' resume backs Dem's claim". *Newsday.com*, 2 August 2005; available from <http://www.newsday.com/news/nationworld/nation/ny-usjudg024367841aug02,0,3282673.story>: Internet; accessed 2 August 2005.

⁴ T.R. Schellenberg, Modern Archives: Principles and Techniques. Chicago. University of Chicago Press. 1956, 4.

The most effectual means of preventing [the perversion of power into tyranny are] to illuminate, as far as practicable, the minds of the people at large, and more especially to give them knowledge of those facts which history exhibits, that possessed thereby of the experience of other ages and countries, they may be enabled to know ambition under all its shapes, and prompt to exert their natural powers to defeat its purposes.⁵

Jefferson argues that access to information is essential to a healthy democracy. This includes government information. A problem comes up, though, in determining exactly what constitutes government information, and what portion of information produced and created by an elected official is personal information. Several acts of legislation cover public access to the records of the United States government. But what of Presidential records and archives? Thomas James Conners posits “that the notion of Presidential records as public property is deeply felt by many people.”⁶ Are Presidential records and archives open to the public?

What is covered by the Presidential Archives Act?

Traditionally, the papers of the President were considered the personal property of the President. From George Washington to Franklin D. Roosevelt, the President and his heirs controlled the papers of the President as they wished. They were destroyed, sold,

⁵ Thomas Jefferson, “Diffusion of Knowledge Bill, 1779. FE 2:221, Papers 2:526.” in *Thomas Jefferson on Politics and Government*; available from <http://etext.virginia.edu/jefferson/quotations/jeff1350.htm>: Internet; accessed on 4 August 2005.

⁶ Conners, 655.

donated, split up, held privately, etc. The President had this authority because of executive privilege.⁷

This precedent changed when Franklin D. Roosevelt started his Presidential library. He started a tradition that subsequent Presidents followed. White House papers were deposited to a federally operated facility that was created with private funds. However, the President still had control of over the decision of whether or not to deposit his records and papers. Following the Watergate scandals, when President Nixon attempted to withhold Presidential records citing executive privilege, legislation was passed that establishes that the papers and records of the President are the property of the United States and must be transferred to NARA after the President leaves office.⁸

The Presidential Records Act of 1978 (or PRA) defines a Presidential record as “documentary materials, or any reasonably segregable portion thereof, created or received by the President” or any of his staff or office. This includes the records of the Vice President.⁹ The materials included in the definition of Presidential records are “any documentary materials relating to the political activities of the President [. . .] but only if such activities relate to or have direct effect upon the carrying out of constitutional, statutory, or other official or ceremonial duties of the President.”¹⁰ The law provides exceptions for personal records “of a purely private or nonpublic character.”¹¹

⁷ Bruce P. Montgomery, “Presidential Materials: Politics and the Presidential Records Act.” *The American Archivist*/66, No. 1 (Spring/Summer 2003): 102

⁸ Brian Chandler Thompson, “Making History: The Sitting Modern President and the National Archives.” *Government Information Quarterly*/12, No. 1: 17.

⁹ National Archives and Records Administration, “Presidential Records (44 U.S.C. Chapter 22)”. Available from <http://www.archives.gov/about/laws/presidential-records.html>: Internet; accessed on 6 August 2005.

¹⁰ Ibid.

¹¹ Ibid.

According to Brian Chandler Thompson, the “core mission of the Presidential libraries is to preserve and make available the records in their holdings.” He also states that “the libraries are archival facilities”.¹² The establishment of the libraries honors the legacy of the President’s administration, but it must be remembered that the archive houses records that are owned by the United States, and controlled by NARA.

Ownership and Control of Presidential Archives

Presidential records are transferred into the custody of NARA on the final day of the President’s stay in office. While in office, the President has control of the records of his office, with assistance and guidance from NARA. After the President leaves office, becoming a private citizen, he has no control over the records.¹³ The United States owns the records and they are under the custody of the U.S. archivist.

Although a President can’t decide if his records will be deposited, he can decide, while still in office, to put some restrictions on records. Five years after leaving office, all records that have no restricted designation are released pursuant to the Freedom of Information Act and PRA. A President can put a twelve-year restriction on the access to the archives; the start of the twelve years begins after leaving the White House. Records with national secrets are subject to the access restrictions of their national security classification. A President cannot dictate restrictions after leaving office.

¹² Thompson, 27-28.

¹³ Montgomery, 121.

Presidential Challenges to the Presidential Records Act¹⁴

President Reagan deemed all his records permitted under the PRA to have restricted access for the greatest time allowed by law, meaning his records would be available for unqualified access in January 2001. However, when the records were to be released, then White House counsel Alberto Gonzales deferred the release of a section of the records. In November 2001, President Bush issued an executive order concerning the access to Reagan's (and Vice President George H.W. Bush's) archive that negated major portions of the PRA. This was not the first challenge to the PRA.

Challenges to the ownership, control, and access of Presidential records began with President Nixon's assertion that the records of the President were subject to executive privilege. The records could be restricted or destroyed at his decision. However, the Supreme Court ruled in *United States v. Nixon* that the records of the executive branch could be seized against the President's will. Executive privilege only applied to military, diplomatic and national security documents.

After Nixon resigned at the threat of impeachment, he moved to control his records. The depository agreement he made allowed him total control over his documents, which included the White House tapes. He could decide their fate and destroy them if he wanted. Congress acted to remedy this situation. They drafted the Presidential Recordings and Materials Preservation Act, which gave control of the documents to the General Services Administration. Nixon, who claimed that the

separation of powers between the branches of government made the Act unconstitutional, challenged this Act. The Supreme Court rejected Nixon's claim, as the custodian of the records as dictated by the Act was the U.S. archivist, an appointee of the executive branch. Nixon also claimed that the Act violated executive privilege. The court ruled that the interests of the public superceded executive privilege.

While the Presidential Recordings and Materials Act determined the custody of Presidential records, the idea of ownership was yet to be addressed. As mentioned above, the PRA dictates that Presidential records belong to the United States, and are not personal property. The question of control is dictated by the PRA, not the President.

Nixon tied up his records with court challenges. NARA prepared regulations for release of Nixon archives. At every regulation, Nixon lawyers attempted to control access by waylaying the release of records through legislation. Meanwhile, President Reagan issued Executive Order 12,291. This executive order maintained that actions "shall not be undertaken unless potential benefits to society for the regulations outweigh the potential costs to society."¹⁵ NARA, as a result, had to submit to the Office of Information and Regulatory Affairs their regulations. The Office of Information and Regulatory Affairs, in turn, submitted the regulations to the Justice Department for review to calculate the cost-benefit analysis, wrestling control of the release of records from the U.S. archivist. The Justice Department, using the executive order as a badge, decided to adhere to Nixon's argument of executive privilege restricting access to the records of his Presidency. This practice was reversed through challenges in the courts.

¹⁴ See Montgomery for a complete, thorough, exhaustive, and exhausting review of the challenges and changes to the PRA.

¹⁵ As quoted in Bruce P. Montgomery, 109.

The PRA clearly gives the authority to control access to records to the U.S. archivist.

The Justice Department had no authority over the archivists or their duties.

As President Reagan prepared to leave office, his electronic messages, some containing records of the Iran-Contra affair, were set to be purged. A challenge to halt the erasure of the electronic messages was brought against the Reagan and George H.W. Bush administrations. The issue at stake with these records was that President Reagan did not treat these electronic messages as records, and thought they were not subject to the PRA. The courts decided that the electronic messages did fall under the definition of “records.” Further, this round of challenges revealed that there was no basis for judicial review of Presidential activities with regard to keeping and maintaining records in the PRA. The President, while in office, could destroy at will, or otherwise handle any records he wishes without legal recourse. However, after the President leaves office, the records are subject to the PRA; the office of the archivist is subject to judicial review. Since Reagan failed to destroy the records while in office, he could not do so as a former President.

The day before President George H.W. Bush vacated the White House, he instigated an agreement with the then U.S. archivist that gave President H.W. Bush complete control over his Presidential records. The U.S. archivist then retired his post and announced he would head the Bush Presidential Library in Texas. The agreement would allow the former President, a private citizen, to direct the efforts of the acting U.S. archivist, as well as revoke control of Presidential records from the PRA. This agreement was nullified in the courts. One reason the agreement was nullified was that it allowed for a private citizen to direct the active U.S. archivist, a post supervised by the current

President. Another aspect of the court ruling, which clarifies previous court rulings, dictated that the President must dispose of material while in office, and can't retroactively reclassify Presidential records as personal material, thus exempting them from the jurisdiction of the PRA.

Of President George W. Bush's Executive Order 13,233, Bruce P. Montgomery states that the "executive order was surprising in its sweeping violation of the PRA and in exceeding the bounds of legitimate protection of executive privilege."¹⁶ The executive order attempts to establish several new restrictions on access to Presidential records. The executive order gives control of the records to the creator of the records as if the records were personal property. In addition, when making any Freedom of Information Act request to access records, the requester must justify the request with a demonstrable need to access the records. This added hurdle to access records hints at an attitude of closure instead of openness with regard to records access.

Further, the executive order established a process for Vice Presidents to control access to their records separate from the PRA and the President's records. Under the PRA, the records of the Vice President are considered part of the Presidential records.

Also, the executive order extended the privileges of executive privilege Bush invoked (total control of the records) to designated representatives or family members of the former President or Vice President. After the death of a former President, family members or representatives can decide to continue to restrict access to records into perpetuity.

¹⁶ Montgomery, 125.

There are several groups, including Senators, historians, archivists, and public citizens groups working on reversing the executive order. Undoubtedly, there are and will be court challenges.

Conclusions

The establishment of the Presidential Records Act marks the maturity of our government. The recognition that the records and archives of the Office of the President are in need of archival treatment will make the history of that office available for future research. The recognition of the rights of the people of this nation to have access to the elected leaders is a major victory for healthy democracy. However, the challenges to the PRA by certain Presidents shows how these government officers wish to operate in secrecy for varying reasons: to protect their special interests, protect themselves against legal action, and protect their friends (or father's friends), etc.

The goal and mission of archives runs counter to the attempts to sequester and keep closed Presidential records. Openness and access, as well as protecting records and documents, are valuable constructs that make archives extremely important. The people that are elected to the Office of the President need to understand that the rights of the people to access their elected official's papers supersede any claims and challenges to that access. The Office of the President should let archivists do their job.