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Nixon's Ghost: The Impact of the Presidential Records Act on the National Archives and
Records Administration

A thesis submitted in partial satisfaction of the requirements for the Masters of Library and
Information Science

by

Gina Angela Risetter

2016

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ABSTRACT OF THESIS

Nixon's Ghost: The Impact of the Presidential Records Act on the National Archives and Records Administration

By Gina Angela Risetter

Master of Library and Information Science

University of California, Los Angeles, 2016

Professor Michelle L. Caswell, Chair

In 1978, Congress passed the Presidential Records Act, which declared that all future presidential records were public property and were to be transferred to the National Archives following the end of an administration. Prior to 1978, presidential records were the personal property of the President. While Presidents had been donating records to the National Archives since the times of Franklin Roosevelt, Presidents were legal owners and creators of these records. Making presidential records public property has created unintended consequences for the processing of presidential records. The PRA was passed with the intention of guaranteeing access to presidential records. However, with each new presidential administration comes a new executive order that strengthens or weakens the PRA. Also, the PRA contains a personal records clause that decrees that Presidents own some records, but not others. This has created a gray area where the President and those in his administration can still maintain control over some of their records. While the PRA is a much-needed piece of legislation, it poses some problems in its implementation that has not secured the access to presidential records. For these issues to be resolved, I suggest that the

personal records clause needs stricken from the law and all records need to be turned over to the National Archives at the end of an administration.

The thesis of Gina Risetter is approved.

Frank Tobias Higbie

Jonathan Furner

Michelle L. Caswell, Chair

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Introduction

On September 8th, 1974, President Gerald Ford pardoned Richard Nixon for any involvement in the Watergate break-in and subsequent cover up, ending what many thought to be a shameful chapter in American history. While Nixon's legal culpability in the events that transpired was resolved, the battle over access to the Watergate records had just begun. Richard Nixon was convinced he was entitled to the presidential records that were confiscated by prosecutors during the Watergate investigation. Congress, on the other hand, wanted to make sure Nixon never regained control over his records in order to prevent their destruction. To achieve this end, Congress passed a major law that forever changed the status of presidential records. Watergate led to the passing of the Presidential Records Act (PRA) in 1978, which designated presidential records as public property. But much like the Watergate scandal, the fight over presidential records did not end with simple legal declarations.

This thesis examines the consequences of the PRA and making presidential records public property. In it, I will demonstrate that the PRA accomplished the exact opposite of its intention. Since the enactment of the PRA, stability of access to presidential records ebbs and flows with the heralding of a new administration. Specifically, the personal records clause in the PRA, which designated that some records that were personal in nature did in fact belong to the President, creates confusion and chaos in determining what records belong to the public and what records belong to White House officials. The dichotomy between public records and personal records gave administration officials a comfortable gray zone where they could retain control over presidential records. The PRA has not yet adequately solved the issue of ownership. I suggest that the PRA needs to be modified to destroy the

concept of personal presidential records. While some are worried that the privacy of those affected by the PRA will be violated when their records are transferred to the National Archives, measures currently exist that adequately protect records with personal, non-government related information.

This thesis is composed of several parts. Following this introduction, there is an extensive background section, which provides context of the state of government secrecy prior to the PRA, a larger history of presidential records, and a closer examination of PRMPA and the PRA. Next, I discuss the research questions this thesis will answer, such as the nature of different types of government records; the consequences of designating records as public property; and what can be done to fix the problems posed by the PRA. A short section follows this on the significance this thesis could hold for the research community that uses government information. Next I present a literature review that examines what other scholars have written about archival access in general as well as presidential records specifically. Then, a methods section justifies my use of the historical methods of analysis in researching and writing this thesis. Next, I define the key terms and concepts that are frequently mentioned, followed by a Limitations section that presents known faults in the conception of this thesis. Finally, the Analysis and Conclusion sections constitute the bulk of this thesis by deeply delving into the issues surrounding the PRA, its administration, and its implications. I compare the definition of what an archival donor is, as established by archival theorists, and compare that definition to how Presidents were treated in the laws and in action. Then, I demonstrate how the personal records clause makes it very easy for White House officials to accidentally/purposefully withhold records from the archives. I also explain some of the positive impacts the PRA has had on the processing of presidential

records by examining how it centralized the presidential library system. I also discuss the problems the PRA pose in the archivist's journey to hold government officials accountable while also staying true to the values espoused by the wider archival community. The Conclusion section contains my key suggestions for fixing the problems posed by the PRA. I endorse removing the personal records clause for the PRA and establishing a committee that examines presidential records at the end of an administration. This committee would devise the records schedule that would determine when records could be accessible to the public. There are two appendixes and a bibliography, which help further explain some examples and references I used throughout my thesis.

Background

Before Watergate: Signs of Discontent

The PRA was passed, in part, based off a history of growing discontent exhibited by the people and those in Congress. Following the end of World War II, members of Congress became increasingly wary of the lack of communication and sharing of information present within the federal government. Congressmen pushed for laws to institute records management policies and institutions, which were never before utilized by the federal government. However, a series of high profile scandals involving government deceit and secrecy in the early 1970's, including Watergate, sent Congress and the American public into a frenzy. The PRA was meant to be the final definitive move to solve the majority of the government's records problems

The war created a bustling information system in the American government, leading to the increased production of records. As more records were created, government secrets

became more routine and codified. Timothy Ericson in “Building Our Own ‘Iron Curtain’: The Emergence of Secrecy in American Government,” claims that Americans have been lackadaisical regarding government secrecy.¹ Because few Americans sensed a growth in government secrecy following the World War II era, securing meaningful legislation to compel the government to make its records available to the public was difficult to achieve. But before access could be granted, the first step was passing legislation that required agencies to preserve their records. One of the first attempts to successfully raise awareness of the importance of preservation was the Hoover Commission, which was created in 1947 by President Truman.² The Assistant Archivist of the National Archives wrote to the Commission hoping they would address the following issues:

1. Where did staff responsibility for record management lie in the Federal Government?
2. What were the respective responsibilities of staff agencies and of the operating agencies?
3. Should there be a new General Records Act?
4. What was the proper role of the intermediate record storage center?³

At least in the beginning, government employees were very concerned with issues of transparency and access. Since the National Archives was just in its infancy, its best hope for securing any modicum of records management standards was urging the Hoover Commission to examine how the federal government handles its records after they are no longer actively used.

¹ Timothy Ericson, "Building Our Own" Iron Curtain": The Emergence of Secrecy in

² Hoover's Commission and Recordkeeping American Archivist pg 374

³ Ibid., 376

It was not just the employees of the National Archives who thought these were important issues; the result of the first meeting of this Commission was the creation of the first Federal Records Center. Federal Records Centers serve as general archival repositories for the National Archives and Records Administration; they are placed strategically in regions around the country. Immediately following the conclusion of World War II, efforts to standardize the processing of federal records had already begun to slowly take effect. There was this consensus beginning to build that the American government needs to not only preserve records, but to allow the people to access the records.

The Hoover Commission also resulted in the passing of the Federal Records Act.⁴ The Federal Records Act was the first American law directing federal records management policy. The law called for “each federal agency... to make and preserve records that (1) document the organization, functions, policies, decisions, procedures, and essential transactions of the agency and (2) provide the information necessary to protect the legal and financial rights of the government and of persons directly affected by the agency’s activities.”⁵ The Act listed multiple reasons why having a law such as this that regulates government records may improve government function including: “the ability of the people to hold the government accountable is jeopardized” in the absence of such a law.⁶ This was the beginning of a never-ending movement to hold the government accountable through the means of providing access to its records. While meager in its results and impact, the laws

⁴ Charles N. Davis and Sigman L. Splichal, *Access Denies: Freedom of Information in the Information Age* (Ames, Iowa: Iowa State University Press, 2000): 17.

⁵ *IT Law Wiki*, “Federal Records Act of 1950,” n.d., http://itlaw.wikia.com/wiki/Federal_Records_Act_of_1950

⁶ *Ibid.*

and efforts of the 1950s to regulate and increase openness in the government surely indicate an interest in curtailing government secrecy.

According to Charles Davis and Sigman Splichal in *Access Denied: Freedom of Information in the Information Age*, “Congress had become increasingly concerned about the inability to pry information from Republican-controlled executive agencies.”⁷ This was occurring at the same time that press agents and other journalists were frustrated with the Cold War’s tight grip on government information. Organizations such as the American Society of Newspaper Editors pushed for greater access to government records. Perhaps one of the most famous pushes was a study published by lawyer Harold Cross titled *The People’s Right to Know*, which claimed that Congress was horribly inefficient at processing requests to view government information.⁸ All of these happenings had profound impacts on a California Congressman by the name of John Moss.

In 1958, Congressman John Moss, who was increasingly alarmed and frustrated at the problems created by unnecessary government secrecy, used his position on the Special Subcommittee on Government Information to produce the Moss Report. This report deemed there was a definite “loss of public confidence,” as a result of secretive measures at classifying government information.⁹ The public was at least basically aware that the government was not always honest with them. The Moss Report would eventually snowball into the passing of the Freedom of Information Act (FOIA) in 1966. The passing of FOIA

⁷ Charles N. Davis and Sigman L. Splichal, *Access Denies: Freedom of Information in the Information Age* (Ames, Iowa: Iowa State University Press, 2000): 18.

⁸ Ibid.

⁹ Larry Combest and Daniel P. Moynihan, *Secrecy: Report of the Commission on Protecting and Reducing Government Secrecy*,

was the ultimate expression of a society that rejected what they saw as a growing infrastructure of secrecy; FOIA was not just the wish of those in Congress. Scandal after scandal shortly after the FOIA law was passed damaged the people's trust in their government. Whether the passing of FOIA could be used to mark people's sentiment regarding government secrecy, or be seen as a measure that came too little too late, FOIA surely implies that the rise in government secrecy was not ignored.

Following the enactment of FOIA, three major events occurred that further enraged the public and would lead to a demand for reform in handling government information. In 1971, the Pentagon Papers were leaked and showed how the government was misleading the American people in their military endeavors during the Vietnam War. This sparked an outrage amongst Americans, many of which were already uncomfortable with the war to begin with. Secondly, when J. Edgar Hoover died in 1972, it became glaringly apparent that not only did Hoover amass a dizzyingly high number of secret FBI files obtained through illegal means, but that they were rapidly being destroyed to protect Hoover's legacy. Hoover experienced a good deal of public success in the 1950's. A Gallup poll taken in 1953 indicates that almost 80% of Americans thought J. Edgar Hoover was doing a "good job".¹⁰

This is certainly not the esteem Hoover had in death. In 1971, one year before his death, a band of whistleblowers broke into the Media, Pennsylvania FBI field office, stole every document in the building, and leaked some records to the press. The records revealed a secret program called Cointelpro. Cointelpro operations involved spying on the New Left using illegal wiretaps, fraudulent mail openings, and more. Watergate, the third event in this

¹⁰Gallup, "Timeline of Polling History: People that Shaped the United States, and the World," n.d., <http://www.gallup.com/poll/9964/timeline-polling-history-people-shaped-united-states-world.aspx>.

timeline, represented the push over the edge for many Americans who had enough with government secrecy. When Nixon attempted to secretly regain control of his records, Congress finally felt the impetus to pass comprehensive reform to the system governing presidential records. However, there was no system in place to handle presidential records beyond the President's own judgment.

Willful Ignorance: A Short History of Presidential Records

Before the PRA, presidential records were seen as the personal property of the President who created them. Each President had very personal reasons for designating how accessible their records should be. This tradition began with George Washington, who had two options for dealing with his papers: keep them for himself, or throw them away. The National Archives would not exist for another one hundred and thirty-seven years, and there was no precedent set for him to follow.¹¹ Presidents following Washington firmly believed in this sacred right to own their records. President Howard Taft said, "The Executive Office of the President is not a recording office. The vast amount of correspondence that goes through it, signed either by the President or his secretaries, does not become property or a record of the government... The retiring President takes with him all of the correspondence, original and copies, which he carried on during his administration."¹² The creation of the presidential library system in the 1930's instituted some continuity of control over presidential records from administration to administration. But presidents still decided which of their records were deposited in their libraries, and which records when home with them.

¹¹ Pamela R. McKay, "Presidential Papers: A Property Issue," *The Library Quarterly* (1982): 26.

¹² *Ibid.*, 27.

There were several factors in place that incentivized presidents to maintain as much control over their records as possible: separation of powers, partisan reasons, monetary reasons, and the longevity of their historical legacy. Most of these incentives still hold true today and might explain why presidents continue to intercede in the process that transfers and releases records to the public.

One reason presidential records were seen as private property is because many believed that this upheld the separation of powers clause mandated by the Constitution. Records generated by the Executive Branch are the only records of the three branches that are subject to records management policies and laws. In fact, records generated by Congress and the Supreme Court are still seen as the personal property of the original creators. When Congress passed the PRA, Nixon argued in one of his many legal battles that this law violated the separation of powers clause.¹³

The second reason presidents wanted to maintain control of their records was for partisan reasons. It was feared that the newly anointed President would reveal embarrassing records generated by the former President as part of an effort to shame him.¹⁴ By maintaining control of the records even after their terms in office ended, presidents could ensure that their records would not be used to sabotage them at a later date as part of a political game between warring parties.

Thirdly, there were significant monetary incentives for presidents to own their records, especially in the twentieth century. Multiple presidents made a lot of money donating their records to the National Archives. Since there was no law compelling them to

¹³ The courts ultimately rejected this argument.

¹⁴ Nancy Kegan Smith and Gary M. Stern, "A Historical Review of Access to Records in Presidential Libraries." *The Public Historian* 28, 3 (2006): 79-116.

turn their records over, presidents would appraise the value of their records and receive a hefty tax write-off for their “charitable donation” to the National Archives. Truman, Eisenhower, and Johnson all implemented this strategy to make save money in their post-presidential adventures.¹⁵ Nixon was in the process of appraising his records when they were confiscated. After PRMPA and the PRA were passed, the tax write-off option was no longer viable.¹⁶

Finally, presidents had no reason *not* to donate their records, even if the law did not demand it. Prior to the PRA, the closest thing to a law governing presidential records was the Presidential Libraries Act (PLA), which was passed in 1955 by President Eisenhower.¹⁷ The law made it easy as legally possible for presidents to deed their records over to the National Archives. The PLA allowed the National Archives to accept presidential records without accompanying legislation for each transaction.¹⁸ Despite the fact that the Presidential Libraries Act did not require presidents to turn over their records, the law still protected the president’s right as the owner of the documents. In essence, it gave the retiring President the right to close any documents he wanted. Specifically, the law says, “Papers, documents, or other historical materials accepted and deposited... are subject to restrictions as to their availability and use stated in writing by the donors or depositors or by persons

¹⁵ Matthew G. Brown, "The First Nixon Papers Controversy: Richard Nixon's 1969 Prepresidential Papers Tax Deduction." *Archival Issues* (2001): 10.

¹⁶ According to Brown, The Tax Reform Act of 1969 also closed this loophole as well, but was just forming while Nixon was preparing to appraise the value of his papers.

¹⁷ This is not to be confused with another law passed in 1986 by Ronald Reagan bearing the same name.

¹⁸ Matthew G. Brown, "The First Nixon Papers Controversy: Richard Nixon's 1969 Prepresidential Papers Tax Deduction." *Archival Issues* (2001): 10.

legally qualified to act on their behalf.”¹⁹ Referring to the presidents as “donors” is still part of the reason why [residents interfere today. Donating to the National Archives was the best way for presidents to control how future archival users could evaluate their presidencies.

Under the PLA, there was not much of a risk to donating Presidential materials; the presidents could simply keep anything they thought would be embarrassing or damaging to their legacy, while giving them the appearance of being committed to open government and transparency.

Under the Microscope: Presidential Records Laws Examined

Quickly following his resignation, Richard Nixon made an arrangement with the head of the General Services Administration, Arthur Sampson, to receive the records that were confiscated from him during the Watergate investigation. This included the infamous secretly recorded audiotapes that became central to the prosecution’s investigation.²⁰ Today, one can see the danger in returning presidential records to an embarrassed and disgraced President. But back in the 1970’s, Nixon’s actions were unheard of, and Congress had to make the rules up as they went along to confront the crisis in front of them.

While technically Nixon’s attempts to receive his records were in line with a long-standing tradition that began with Washington, Congress acted quickly to prevent him from

¹⁹ “Presidential Libraries Act,” *National Archives and Records Administration*, n.d., Accessed January 21, 2016, <http://www.archives.gov/presidential-libraries/laws/1955-act.html>.

²⁰ Nixon set up a secret tape recording system that turned on whenever anybody in his office spoke. Only Nixon, his chief of staff Bob Haldeman, and an aide, Alexander Butterfield knew. Butterfield later, accidentally under oath during the Watergate trial, revealed that there was a secret taping system. Up until that point in the Watergate investigation, all the evidence was he-said-she-said. The tapes, investigators felt, might be able to finally give definitive proof as to what happened and who ordered what.

regaining custody of his materials. The Presidential Records and Materials Preservation Act (PRMPA) passed in 1974, and immediately placed the Nixon records under federal custody. PRMPA was passed to prevent Nixon from destroying his records, which many thought would happen if no intervention occurred. Passing this law is seminal in the history of federal records management because this was the first time presidential materials were involuntarily transferred to the National Archives.

Nixon protested PRMPA vehemently. Nixon's actions created the environment in which a discussion about the handling of presidential records in the post-presidency could occur. The PRA can be seen as a continuation of PRMPA; now all presidential records belong to the custody of the people. The PRA was supposed to be the last word in a long drawn out, complicated argument over who owns these records. Presidential records, and any records generated by White House officials, became like any other government record: regulated and preserved for public consumption. Additionally, the law standardized the process for transferring and processing presidential records. Supposedly, access to presidential records was no longer dictated by the whims of the President.

Under the PRA, presidential records, or any record generated by a White House official during a presidential administration, are automatically closed for five years following the conclusion of a presidency. Then, for records that are placed into pre-determined categories of restriction, the current President can decide how long those records are not accessible. However, this restrictive status is not supposed to exceed twelve years. . Some examples of the pre-determined restrictive categories include trade secrets, confidential communication between the presidents and his advisers, medical files, etc.²¹

²¹ Ibid.

Obviously, there are records that fall into other restrictive categories that remained closed for longer than 12 years. The PRA for the first time also established a pattern for the handling of Vice Presidential records as well. Vice Presidential records get the same treatment as presidential records.

One particularly important clause in the Presidential Records Act is the “personal records clause.” This created a means by which White House officials could keep some of their records that were seen as exhibiting no evidentiary value of the operating practices of the federal government. White House officials, including the President and the Vice President, do not have to turn over personal records. They are seen as the rightful owner and creator of these records. While many presidents do choose to donate personal records, most of the time, the records belong to the private foundation of the presidential library. A deed of gift must be drawn up to officiate the process of donating personal records. The difference between a private foundation owning records and the National Archives owning records is the private foundation can screen who gets access to their records.

Since the passage of the PRA, other executive orders have been issued that greatly increase the role of the former President and family members in processing White House records. For example, President Reagan signed Executive Order 12,667, requiring NARA to notify both the sitting and former President of the release of his materials.²² This also gave incumbent presidents the right to review the records set to be released and subsequently close materials under the notion of executive privilege.²³ This process can greatly delay the availability of records. In another instance, while presidential records were originally

²² Executive Order 12667—Presidential Records,” National Archives, accessed October 8th, <http://www.archives.gov/federal-register/codification/executive-order/12667.html>.

²³ Ibid.

required to open twelve years after a president leaves office, President George Bush issued Executive Order 13,233 extending presidents, vice presidents, and approved family members the right to claim executive privilege over records slated to be released to the public.²⁴ This gave any granted parties the right to close any materials selected for release under executive privilege. To make matters more complicated, President Obama adopted a different approach by nullifying Bush's amendments to the Presidential Records Act, but not Reagan's amendments. This chaos created by executive orders is a problem that the lawmakers of the PRA did not expect. Reading what transpired following the passing of the PRA, one has a hard time understanding a clear linear event of just all the court cases, executive orders, and more passed; it is utter chaos. Looking at the executive orders alone passed by presidents following the Nixon administration; there is an inconsistent and unclear opinion on how presidential records should be handled after the conclusion of an administration.

When presidential records suddenly became property of the National Archives through involuntarily means, the National Archives became the center of multiple legal battles between presidents who did not want to turn over their papers and an unsympathetic Congress or judge who demanded public access to their records. While Congress passed PRMPA and the PRA with the intention of preventing the President from interfering with the accessibility of presidential records, the exact opposite has happened. Presidents have repeatedly resorted to passing executive order to nullify any current laws or regulations.

²⁴ *Federation of American Scientists*, "Executive Order 13233: Further Implementation of the Presidential Records Act," accessed October 8th, <http://www.fas.org/sgp/news/2001/11/eo-pra.html>.

Ultimately, this was the environment Richard Nixon was attempting to regain possession of his records. Based on the growing resentment the American people and Congress exhibited towards government secrecy, Nixon's actions created a perfect storm for a law such as the PRA to be passed. The Presidential Records Act did not arise out of a natural development surrounding a discussion and rethinking of archival ownership; it was forced out of a need to stop Richard Nixon. By necessity, it was created in an atmosphere of distrust that has never quite dissipated. This is the proper lens needed for examining what has happened since Nixon and the passing of the Presidential Records Act. In the post-Watergate era, it is assumed that the President needs to be held accountable. Distrust is now codified. While some presidents have complied more cooperatively with the Presidential Records Act than others, the law is meant to hold an individual accountable who many believe cannot be held accountable.

Research Questions

Ultimately, the biggest change instituted by the PRA is presidents lost their status as creators and donors of their records. Presidents had multiple incentives to remain donors of their records, and this is evident by examining the reaction of presidents following the Watergate scandal. The role the former President plays in governing control over their records have increased over the years, despite the fact that the PRA was supposed to prevent just that. As such, access to presidential records is anything but standard, and stands to be interfered with in the future under new administrations.

This thesis aims to better understand how access to presidential records has changed since the passing of the PRA. Most importantly, how can the Presidential Records Act be

improved to facilitate better access to presidential records? Has the designation of public ownership of presidential records assisted NARA and its mission to provide access to presidential records, or hurt it? Are there any drawbacks to public ownership of presidential records? Can presidents be creators and donors of government records? Does the nature of presidential records differentiate it from other government records? Through analyzing primary sources such as laws and court decisions, I aim to look at the ways in which these measures helped the National Archives in processing presidential records and how can be improvements.

Statement of Significance

This thesis aims to fill a gap in the research already done on presidential records. As it stands now, not much research has been done on some of the negative consequences created by the PRA. Also, by advocating a revisioning of the PRA to strengthen the current loopholes in the law, it will have a dramatic impact on future research. This thesis impacts presidents and those who work in the Executive Branch. In addition, advocating for changes to the Presidential Records Act will have a ripple effect on all research that is accomplished with the assistance of government records. The time researchers will have to wait to access records will be impacted by the implications of this thesis. Overall, this thesis aims to advance research in archival studies while also, hopefully, providing ideas for improving historical research overall.

Literature Review

Access and Accountability

It is unsurprising that scholars in the archival studies field are ardent proponents of increasing access to presidential records. Academics agree that the public has exhibited an increased desire to access government records. This increased desire caused the Executive Branch to restrict and censor more of their records for a multitude of reasons. Despite this backlash, scholars are split on whether the increase in restrictions placed on government records has caused society to be more apathetic or more distrustful, spurring citizens to demand even more access. Either way, the literature advocates archivists taking a more aggressive role in defending access to archival materials without too many specifics on what exactly that entails.

A major focus in the literature is how technology transformed archival research by revolutionizing how archivists approach their work. Since the passing of the PRA, the ways users access government records have changed, as well as the demand for it. Understanding the impact technology has on access, both from the perspective of the user and from the perspective of the government is critical for implementing any proposed changes to the current system governing presidential records. Valerie Harris, an archivist at the University of Illinois, Chicago, and Kathryn Stine, the senior digital curator at UC Berkeley, examined issues of access surrounding politically controversial cases at the UIC Special Collections in “Politically Charged Records: A Case Study with Recommendations for Providing Access to Challenging Collections.”²⁵ Archivists are forced to meet the expectations of a new generation of researchers who demand instantaneous online discovery and access.²⁶

²⁵Valerie Harris and Kathryn Stine, "Politically Charged Records: A Case Study with Recommendations for Providing Access to a Challenging Collection," *The American Archivist* 74, no. 2 (2011): 633-651.

²⁶ Ibid., 637.

Therefore, if archivists are found being lackadaisical regarding the terms of restrictions put forth by donors, technology makes it easier for those mistakes to be discovered. In the case of the UIC Special Collections, when it was discovered that the names of students and possibly their graders were not sanitized from records in a study Senator Obama conducted on elementary schools, UIC was forced to temporarily close the collection just as interest in the collection was rising. Technology greatly increases the visibility of collections with users being able to easily find collections of interest to them. While technology facilitates access to collections, it also puts the work of the archivist under a microscope.

This subsequent growth in demand resulted in a mounting tension between the public, who demands greater access to more information, and an increasingly secretive government that is taking to censoring records more and more. This is certainly an issue with presidential records as well. With increased access comes an increased attempt to regulate and codify archival materials. As will be explained later in thesis, Presidents since 1978 have targeted the PRA by issuing executive orders. Legislation surrounding access is also of great debate amongst scholars. While most acknowledge that legislation of some sort is needed to guarantee a certain level of access, they also acknowledge that laws do not entirely correct problems of access to government records. John Dirks in “Accountability, History, and Archives: Conflicting Priorities or Synthesized Strands?” summarizes the problem by saying, “Archivists depend ultimately on legislation that has significant authority. The paradox is, of course, that those who ultimately are or will be held accountable by what records we acquire and preserve are the ones who issue such authority.”²⁷ The very people who are affected by demands of access, such as politicians and

²⁷ Ibid., 44.

legislators, are simultaneously granted the power to issue laws that specify what records should be turned over and when.

Since lawmakers are responsible for creating laws that could affect the status of the records they themselves generate, many are worried about conflicts of interest present in this situation. However, Brian Keough and Elizabeth A. Novara in "Public or Private? Reconsidering Ownership and Value of State Legislators' Papers" claim laws are necessary.²⁸ While examining the status of state legislators' papers, which are not mandated by law as public property in many states, this article provides an interesting insight into the fate of political records that are not immediately transferred to public custody. Keough and Novara notice a marked difference in states that do not mandate public ownership of government records: "the absence of a legal definition of ownership contributes to a lack of understanding of their value."²⁹ This statement holds true when comparing it to what happened to presidential records. It was not until the public was confronted with the imminent possibility of Nixon destroying his records that the values of presidential records were realized. Unfortunately, many times, the value of archival material is usually not realized until after tragedy struck. However, Keough and Novara, made a point reminiscent of what Dirks made. Keough and Novara point out that dependence on lawmakers is "predicated on good relations between executive and legislative branches" and that "it can fail if legislators feel that an executive agency is overreaching its powers."³⁰ If the archives

²⁸ Brian Keough and Elizabeth Novara, "Public or Private? Reconsidering Ownership and Value of State Legislators' Papers," *Journal of the Midwest Archives Conference (MAC)*, 2013.

²⁹ *Ibid.*, 22.

³⁰ *Ibid.*, 26.

are not perceived as valuable enough, it is easy for lawmakers to brush off the importance of mandating accessibility of archival materials.

The backlash created by greater access affects more than lawmakers; it also has an impact on potential archival donors. Elena Danielson focuses on the struggle archivists face in balancing the increasing demands of users and the nervousness of donors in “The Ethics of Access.”³¹ One can sense the impending sense of doom created by this article as Danielson speaks of a “backlash” that cropped up with the advent of greater access. According to Danielson, “one symptom of this backlash in society in general is an increase in the withholding of what was once public information. This renewed sense of privacy may endanger the preservation of historical documentation.”³² The government, keenly aware that more people are looking at their records, instinctively pulled back and withheld more records from public viewing. Many are worried potential donors will think twice before signing over the custody of their materials out of fear that their records will be closely scrutinized and used to vilify them. Kathryn Hammond Baker is also very concerned with the safety of government records in “The Business of Government and the Future of Government Archives.”³³ Baker claims, “Many government archivists have had the experience of being unable to persuade some creators to transfer custody of records

³¹ Elena Danielson, “The Ethics of Access,” *The American Archivist* 52, no. 1 (1989): 52-62.

³² *Ibid.*, 59.

³³ Kathryn Baker, “The Business of Government and the Future of Government Archives.” *The American Archivist* 60 (1997): 236.

containing personal data. Other creators have circumvented public records laws, choosing to destroy records rather than retain them at all.”³⁴

While technology certainly made it easier for users to find archival materials, the researchers are split on what effect this has had on society. Society has either grown more distrustful and suspicious, causing them to look into the archival materials themselves, or the Internet has made them more apathetic, giving them a means to ignore what is going on around them. Harris and Stine believe that Americans have taken a “casual attitude” towards access to government records and archival materials. While Dirks, on the other hand, claims there is an “emergence of a more cynical public, increasingly assertive in its exercise of individual and group rights (driven by revelations of past injustices and modern scandals in both the government and private sectors alike).”³⁵ So which is it? Is the state of research worse off now than it was before? What the literature does not seem to consider is that both openness and secrecy is increasing, and that these two concepts are not mutually exclusive. With increased access and interest in records comes increased regulation and overview of these records as they are processed and opened for viewing. These are both naturally occurring side effects of public records laws, and it is something that can be mitigated and controlled.

Given that these sources discussed previously agree that access in the Internet age has increased in demand, it is interesting that these Dirks disagrees with Harris and Stine on the impact of increased access. If there is an increase in demand for access to public records, it only implies that people would care more about that access. Whether curious users on the

³⁴ Ibid., 239.

³⁵ Ibid.

Internet are pinpointing random collections driven by personal interest, or serious researchers are using Google before calling archival repositories, that implies that Internet users are not apathetic. Dirks' belief that society is driven by a will to see the records for themselves makes more credible sense. The Internet has forever changed the public's response to political scandals. The unprecedented access offered by technological advances makes the archives a much more relevant institution. Instead of housing old historical items, they are the force of accountability in today's government.

While it is acknowledged that the government has responded less than favorably to the greater demand for access, some disagree with the idea that government officials are always acting to close records for malignant reasons. Danielson counters this notion by saying, "the clash between inequitable restrictions on archival collections and the demands of a democratic society have led to greater openness; for example, there is a growing agreement that Archivists cannot be asked to protect the reputations of public figures indefinitely."³⁶ People who become donors know that they cannot restrict access to their records forever. Numerically speaking, more records have been released since the advent of public records laws than previously.³⁷ This lends credence to the argument that while there has been an increase of censorship, there has been a marked increase in the numbers of records made available to the public.

The literature advocates that archivists must take a more aggressive role in demanding wider access to governmental records. Archivists must take on a stronger

³⁶ Elena Danielson, "The Ethics of Access," *The American Archivist* 52, no. 1 (1989): 52-62.

³⁷ Peter Sezzi, "Public vs Private: A Bibliographic Exploration of Access, Ownership, and Control of Presidential Papers, Records, and Documents," Lanham, Maryland: Scarecrow Press, 2005, 5.

defensive position of records because according to Eric Ketelaar in “Archival Temples, Archival Prisons: Modes of Power and Protection,” openness is a prerequisite for accountability.”³⁸ For Ketelaar, who is Emeritus Professor of Archival Studies at the University of Amsterdam as well as a prolific archival scholar, access to records is absolutely necessary to hold the government accountable. Harris and Stine emphatically agree, and they see the archivist as the most apt person to lobby on behalf of records. They say in their article, “Archivists should be acquiescent no more! We should instead begin to be aggressive as professionals and citizens to fight this unprecedented tilt towards secrecy.”³⁹

But simply believing that records should be accessible is not enough to ensure access to records is protected. Danielson as well as Harris and Stine think archivists must work with donors to soothe their worries about access and secure records under agreeable terms. Danielson says, “Missing from the story is the professional archivist who, if present, could have mediated between the family and the researcher for the release of portions of the records.”⁴⁰ Harris and Stine claim something similar: “...archivist [should] be much more upfront in their conversations with donors about

³⁸ Eric Ketelaar, "Archival Temples, Archival Prisons: Modes of Power and Protection." *Archival science* 2, no. 3-4 (2002): 224.

³⁹ Valerie Harris and Kathryn Stine, "Politically Charged Records: A Case Study with Recommendations for Providing Access to a Challenging Collection," *The American Archivist* 74, no. 2 (2011): 651.

⁴⁰ Elena Danielson, "The Ethics of Access," *The American Archivist* 52, no. 1 (1989): 54.

Documenting collections.”⁴¹ Archivists cannot sit back and let legislators and donors dictate what is accessible and what is not. Archivists must negotiate and work as opposed to passively supporting wider accessibility to records.

Presidential Records

The literature regarding presidential records advocates a need for greater protection of presidential records from the influence of the President. The inefficiencies NARA has demonstrated since the passing of the PRA are well documented. However, there is disagreement amongst the scholars concerning what needs to be fixed. A small, but valid, part of the literature warns of the side effects of publicizing presidential records by force. For the most part, though, public ownership of presidential records is assumed as a given, and it is the National Archives that needs to be strengthened to ensure the most access to these records.

Few articles dare to analyze the negative consequences of the PRA. These authors come from a variety of backgrounds and experiences. For example, in Don Wilson’s “Presidential Records: Evidence for Historians or Prosecutors,” he discusses how the PRA has altered the diction used in presidential records. Wilson, who has been a fervent supporter of the preservation of electronic records in the National Archives,⁴² served as Archivist of the United States from 1987 to 1993, as Deputy Director of the Eisenhower Library, and as

⁴¹Valerie Harris and Kathryn Stine, "Politically Charged Records: A Case Study with Recommendations for Providing Access to a Challenging Collection," *The American Archivist* 74, no. 2 (2011): 640.

⁴² Don Wilson, “Letter to the Editor of Chronicle of Higher Education, *CoOL: Conservation OnLine*, March, 1993,” <http://cool.conservation-us.org/bytopic/electronic-records/wilson1.html>.

the first Director of the Ford Library. At the time of publication of this article in 1997, he was the Executive Director of the Bush Library at Texas A&M. Wilson contends that using presidential records as court evidence is causing members of the executive branch to basically alter the content of their records. The author claims that after the passage of the PRA, the words used by Executive Branch officials became more “formal, carefully worded and structured,” while the actual types of records themselves changed, consisting of “option memoranda and formal minutes of meetings, all bureaucratic in nature.”⁴³

Peter Sezzi in *Personal Versus Private: Presidential Records in a Legislative Context* takes this claim even further, suggesting that the PRA is doing the exact opposite of providing more access to presidential records by prompting the executive branch to obscure their records entirely. Sezzi speaks of a “Chilling Effect,” where record creators are afraid that political opponents, or perhaps simply those of a different time lacking the proper context, will use records to scare, intimidate, or shame them at a later date.⁴⁴ This wariness, Sezzi argues, causes record creators to simply create fewer records. Sezzi’s book looks at the entire history of presidential records from George Washington to present day. It provides brief essays exploring different aspects related to presidential records, but its major contribution is providing in-depth appendixes of every court case, legislation passed, executive orders issued, and archives that deal with presidential records. Both Sezzi and Wilson’s works provide valuable insight as to the possible negative consequences of the PRA. Certainly, more research such as this needs to be conducted.

⁴³ Ibid.

⁴⁴ Peter Sezzi, “Public vs Private: A Bibliographic Exploration of Access, Ownership, and Control of Presidential Papers, Records, and Documents,” Lanham, Maryland: Scarecrow Press, 2005, 5.

Only one article flirts with the idea that presidents might have some right to the records that are created during their administrations. Pamela McKay, at the time an employee of the Learning Resources Center at Worcester State College, looks at the presidential record issue through an understanding of legal concepts of property in “Presidential Papers: A Property Issue.”⁴⁵ While exploring the pros and cons of the publication of presidential records, she considers the right of the President to own his records simply because he created them. She cites a quote from Grover Cleveland, who was President long before anyone questioned the custody of records, who said “I regard the papers and documents withheld and addressed to me or intended for my use and acting purely unofficial and private, not infrequently confidential, and having reference to the performance of a duty exclusively mine.”⁴⁶ He goes on to say, “I suppose if I desired to take them into my custody I might do so with entire propriety, and if I saw fit to destroy them no one could complain.”⁴⁷ She suggests that since presidents created the records, then simply, they deserve some claim of ownership. In addition, presidents are more equipped to rule the nation and solicit advice from their advisors when the threat of their records being exposed one day does not hang over their head.⁴⁸

It is important to note that while the consequences of the PRA are minimally studied, questioning the validity of publicly owned presidential records is even more rare. While Pamela McKay begins to suggest that perhaps presidents have some right to their records, it

⁴⁵ McKay, Pamela R. "Presidential papers: a property issue." *The Library Quarterly* (1982): 21- 40.

⁴⁶ *Ibid.*, 36.

⁴⁷ *Ibid.*

⁴⁸ *Ibid.*

is but one part of a paper that examines property law in the case of these records. I believe the lack of discussion around the negative consequences of public records laws damages any chances for improvement. Perhaps archivists are too afraid of being ostracized for questioning the validity of public records laws. Doing so might give a professional archivist the appearance of supporting government secrecy. But only by truly examining the downfalls of forcing presidents to turn over their records can solutions be found. Too often, the literature simply blames the executive branch for attempting to hide their records. While this is a problem, it is not the only problem. Overall, these scholars with their wide variety of experiences make a valid point that needs to be explored more. If there is a backlash that comes from forcing presidents to turn their records over, this represents an area for further research.

For the most part though, scholars advocate strengthening NARA in its interactions with the executive branch. Scholars mostly make examples of executive orders 12,667 and 13,233 in demonstrating that access to presidential records is unstable. Bruce Montgomery provides an example of a comprehensive historical account regarding access threats presidential records. He examines the ways in which Nixon's legal logic in pursuing the return of his records influenced Presidents Reagan and Bush in an extremely detailed explanation of presidential challenges to the PRA in "Source Material: Nixon's Ghost Haunts the Presidential Records Act: The Reagan and George W. Bush Administration"⁴⁹ By carefully constructing the background behind every law, reaction, and court decision related to the attacks on the PRA, Montgomery, who focuses on government secrecy at the

⁴⁹ Bruce P. Montgomery, "Source Material: Nixon's Ghost Haunts the Presidential Records Act: The Reagan and George W. Bush Administrations." *Presidential Studies Quarterly* 32, no. 4 (2002): 794.

University of Pittsburgh School of Information Science, provides one of the most complete timelines on how the words and ideas espoused by Nixon during his legal battles formed a very strong undercurrent in the words of other presidents at a future date. He claims that both Reagan and Bush used Nixon's idea of executive privilege as a means of censoring presidential records, even though the courts rendered Nixon's many legal arguments unsound in the past. Montgomery notes, "It was as if the Bush Justice Department followed a blue print of the Reagan administration's selective reading of *Nixon v. Administrator of General Services* concerning... executive privilege and then devised a... scheme aimed at maximizing presidential control over presidential material."⁵⁰ This article highlights the need developing a way to stop presidents from recycling Nixon's old logics in attacks on the PRA.

James David and David Bearman agree that presidents must be held accountable in "The Looming Crisis in Federal Records Management" and "The Implications of *Armstrong v. Executive of the President* for the Archival Management of Electronic Records," respectively.⁵¹ Both focus on records management issues such as federal retention schedules, documentation of records, and record creation. Both scholars examine how current systems in place for addressing these issues in the federal government are flawed, ultimately threatening record accessibility. David points out that The Record Disposal Act and Federal Records Act "require agencies to prepare records that adequately document their organization," he claims, but "compliance with these laws has unfortunately varied through

⁵⁰ Ibid., 800.

⁵¹ David, James. "The looming crisis in federal records management." *Journal of Government Information* 30, no. 4 (2004): 445.

the years.”⁵² He points out that technically all federal agencies are to designate a retention schedule. However, the Federal Bureau of Investigation did not create a retention schedule until 1970, almost 7 decades after it was created.⁵³

David Bearman, in “The Implications of *Armstrong v. Executive of the President* for the Archival Management of Electronic Records,” focuses specifically on the actions of George Bush in passing Executive Order 13,223. He examines its impact on electronic records management in the federal government. According to Bearman, the archivist must be involved in the beginning stages of document creation to ensure that the integrity and accessibility of electronic records are maintained because federal agencies cannot be trusted to do an adequate job.⁵⁴ Archivists need to be involved in developing systems that capture federal records, as well as given more authority in negotiating with federal agencies for transferring their records.⁵⁵ These two articles demonstrate real ways in which the federal government skirts public records laws to demonstrate the fragility of government records.

The majority of the articles written about presidential records range from strict historical accounts of what has happened since Watergate to articles that attempt to provide a solution to the problem of uneven access to presidential records. Articles that propose the strengthening of NARA as the solution to current records management issues provide excellent descriptions and timelines of scandals involving the executive branch hiding its documents. Here, the link between Watergate and laws like executive orders 12,667 and

⁵² Ibid.

⁵³ Ibid.

⁵⁴ Ibid.

⁵⁵ Ibid.

13,233 is most clearly established. However, much of the literature lacks a discussion about the flaws exhibited by the Presidential Records Act.

Methods

This paper primarily utilizes two methods of analysis. One of which is the historical method of analysis. The second is an analysis of the practices and theories of the National Archives. The historical method of analysis was used in analyzing primary source materials and putting them in conversation with each other. Analyzing the practices of the National Archives is necessary for understanding the flaws inherent in the PRA and is also useful in positing solutions to the problems the law posts.

1) Historical Method of Analysis

According to the Jim Secord, historical analysis is predicated on “immers[ing] yourself in your primary sources,” regarding a topic of interest.⁵⁶ Based on my internship experiences at the Nixon and Reagan Presidential Libraries, I was aware that laws governing presidential records became much more strict after the Watergate scandal. Despite these changes, it is very evident from what I read for various graduate classes that archival theorists were unsatisfied with the enforcement capabilities of public records laws. Based on this, I identified the problem having to do on the ease with which Presidents subvert the PRA by issuing executive orders.

This thesis rests on a close analysis of key laws, Executive Orders, and court cases. The five most important legal actions to this thesis are the Presidential Libraries Act (PLA),

⁵⁶ Jim Secord, “Tools and Techniques for Historical Research,” *University of Cambridge*, 2003, <http://www.hps.cam.ac.uk/research/tthr.html>

the PRA, *Nixon v. GSA* (1977), Executive Order 12,667, and Executive Order 13,233. I became aware of these legal recourses through my graduate classes, as well as my readings for the literature review in this thesis. I chose to focus on these primary sources because the language and spirit of these documents all contradict each other. The conflicts presented in these differing documents can be demonstrated through real world examples such as the Hillary Clinton email scandal and more.

This thesis rests on two conflicting ideas present within the language of the PRA: one being that all presidential records belong to the people, and the other being that not all records generated during a presidential administration are considered “presidential.” I examine real life scenarios where the tension between what can be a public record and what can be a personal record resulted in losses to the archives. Being an intern at the Ronald Reagan Presidential Library, I heard about the story of Larry Speakes from my internship supervisor. Speakes was Reagan’s Press Spokesman from 1981-1987. When Speakes left the Reagan administration, he took home over 100 boxes of what he thought were personal records that he was entitled to under the PRA. When Speakes later donated those materials to the Reagan Presidential Library, it turned out he took custody of classified records as well as other documents that should have gone to the National Archives. To show that this is a problem across party lines, I examine the Hillary Clinton email scandal as well and demonstrate how, much like the Speakes episode, Clinton deleted emails she thought were hers under the PRA, but it turned out to really be records destined for the National Archives. These two real-world examples serve as sources that evaluate the effectiveness of the PRA.

I initially thought about the possibilities of the National Archives and the Executive Office collaborating to create public records laws. However, the more research I did, the

more I began to see presidents as former donors. This thought became the dominating anchor of this thesis. I thought about why Presidents would feel they have the right to pass executive orders aimed at the PRA. I felt the personal records clause was the answer. If the personal records clause no longer existed, and *all* records were transferred over to the National Archives at the end of an administration, then maybe presidents would not try to control their records. The personal records clause is the loophole that allows the President to be involved at all in the transferring and opening of presidential records.

I read the PRA closely and came to the conclusion that the law contradicted itself as well as other key laws, executive orders, and court cases. The personal records clause violates the spirit of the PRA, which intended on designating presidential records as public property. Just the passing of the PRA itself has created a chain reaction where Presidents now pass Executive Orders over each other. The logic in these Executive Orders directly rests on logic Nixon used in *Nixon v. GSA* (1977), which was ruled unsound by the courts. The personal records clause in the PRA also does not make sense from an archival theory standpoint. Having personal records necessitates a having a creator, which would be the President in this case. If those personal records end up in the archives, that would make the President a donor. That causes presidential records to straddle the line between public records and personal papers, which is not where government records should be. This all became apparent to me after closely reading the PRA, *Nixon v. GSA*, Executive Order 12,667, and Executive Order 13,233.

Another method by which I come to the conclusions in this thesis is by examining the practices and theories regularly used by the National Archives and the archival field at large. I do this on multiple fronts. First, I examine a daily practice archivists at the National

Archives commit every day: reviewing records for release. By screening each record for personal information, I demonstrate how the regular actions archivists commit every day make the personal records clause of the PRA redundant. I examine the ethical decisions archivists make daily in terms of opening and restricting access to records containing personal information. In addition, I examine the role of the archivist as a negotiator with donors. The archivist, I argue, plays a very delicate balance in working with donors to donate materials under circumstances that are favorable to everyone involved in the donation process. For archivists at the National Archives, it is vital they maintain functioning relations with the White House, the exact body the National Archives is charged with holding accountable. This is a difficult balance to maintain. It is because of this precarious balance, I argue, that the National Archives has not been active agitators in pursuing meaningful reform to the National Archives.

Generally speaking, the archival field did not start off as a theory-based field; it began as a field rooted in best practices. With time, it has developed into a field of “mindful practice,”⁵⁷ where theory guides archivists in their daily practices. One influential article is Raymond H. Geselbracht’s “Origins of Restrictions on Access to Personal Papers at the Library of Congress and the National Archives.” Which discusses the dichotomy in traditions governing personal paper archives and public archival institutions. The article mentioned that the National Archives was an institution that is a public archives, but became a personal papers repository with the first donation by Presidential Roosevelt. After reading this, I began to think about the conundrum posed by having Presidents donating their presidential records. A portion of this thesis explores the issues of ownership in the realm of

⁵⁷ Quoted from Dr. Tobias Higbie during the author’s thesis defense.

presidential records. The PRA creates a category called “personal records,” and I explored this category heavily in this thesis. This thesis explores the implications, both in practice and in theory, of personal presidential records and demonstrates why this notion is faulty.

Definition of Key Terms

One of the most important key terms to define is “presidential record”. The National Archives defines a presidential record as:

“[Including] any documentary materials relating to the political activities of the President or members of the President’s 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 does not include any documentary materials that are (i) official records of an agency... (ii) personal records; (iii) stocks or publications and stationery; or (iv) extra copies of documents produced only for convenience or reference, when such copies are clearly so identified.”⁵⁸

What is important to note here is that under this definition, presidents may retain control over “personal records.” While this does give the President a bit of a gray area to hide in, the PRA tries its best to define personal record as well:

The term “personal records” means all documentary materials, or any reasonably segregable portion thereof, 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.”⁵⁹

An example of a personal record would be a memo written about a personal family problem, a medical health issue, etc. Also, this paper will discuss a great number of laws, executive

⁵⁸ *National Archives and Records Administration*, “Presidential Records,” <http://www.archives.gov/about/laws/presidential-records.html>.

⁵⁹ *Ibid.*

orders, court decisions, and individuals. As such, a comprehensive list of the laws, court cases, and executive orders that are referenced frequently is available in Appendix A.⁶⁰

Also prevalent in this thesis is a discussion on archival donors. However, a donor is a nuanced archival concept. According to Rob Fisher in “Donor and Donor Agency: Implications for Private Archives Theory and Practice,” there can be creators, donors, and stewards of archival records. A creator, according to Fisher, “refers to the individual, family, or organization that creates and accumulates the archival material in question.”⁶¹ A donor, on the other hand, is the agent responsibly for handling the legal negotiations and conditions surrounding the transfer of ownership from the creator to the archival repository. Creators can be donors, but donors do not necessarily have to be creators. An individual can create records, and someone else can legally negotiate the donation of records.

Finally, there is a steward, who “develops archival consciousness, an awareness of the possibility of preserving the material in an archives—perhaps through personal experience and knowledge or initial contact with an archivist—and the potential ramifications of posterity.”⁶² The steward initially conceives that the material can be preserved in an archive, and then eventually shifts roles as the donor by seeking out means to transfer records for preservation in an archive. It is important to note that one individual

⁶⁰ Katherine Gaidos’ “Access to Vice Presidential Records in the Aftermath of Executive Order 13,233: From Haphazard Past to Uncertain Future,” provided most of the information for this chart.

⁶¹ Rob Fisher, "Donors and Donor Agency: Implications for Private Archives Theory and Practice," *Archivaria* 79 (2015): 93.

⁶² *Ibid.*, 95

can fill all these roles, or multiple people can fill these three roles.⁶³ Theoretically, since the government exhibits a regular transfer of records as part of its daily activities, government employees cannot be creators, donors, or stewards. The records are created with the inevitability of either disposal or hitting the archives.

Limitations

This paper is confined by one major limitation. I chose not to gather any empirical evidence on what archivists who work for the National Archives think about the PRA and its effectiveness. Asking archivists to comment on the Presidential Records Act has the possibility to place the employees in a position where they might criticize their superiors. Archivists are always balancing the interests of their users versus the interests of the donors. In this case, NARA archivists are faced with the task of accommodating the interests of the most powerful person in the country: the President. This thesis does contain quotes and anecdotes from archivists at the Ronald Reagan Presidential Library. These quotes and stories came about naturally while I was interning there. Any firsthand accounts of the effectiveness of the PRA, or any quotes from archivists at the Reagan Library certainly proved invaluable to this study. Any natural conversations that come up during my time at the Reagan Library were insightful and welcomed, but not coerced so as not to put any Reagan archivists in an uncomfortable position.

Analysis

⁶³ Ibid., 98

This section will examine three ways the PRA exhibits flaws in its drafting and execution. First, the PRA caused presidents to start passing executive orders aimed at strengthening or weakening access to presidential records. Now that presidents have to turn over their records involuntarily, each President since 1978 has passed at least one Executive Order that tweaks the process of gaining access to records. Two examples in particular, Executive Order 12,667 (Reagan) and Executive Order 13,233 (George W. Bush), exemplify why this new development is problematic. The PRA was created to ensure a standard level of access to records exists from administration to administration. This is effectively negated when each President adjusts the accessibility of presidential records while in office. Secondly, I will explore the ways in which the personal records clause makes it difficult to hold the President and other White House employees accountable. The personal records clause provides a means by which White House employees can avoid depositing records in the archives. This is incredibly problematic in terms of providing access to a complete picture of the presidential administration. Thirdly, the personal records clause contradicts sound archival theory. “Personal” records imply a level of ownership that Presidents, or any government employee, cannot possess according to theorists. I examine the ways Presidents were treated as donors, and how this erroneous impulse is still encouraged under the PRA.

Unintended Consequences: How Presidents Combat the PRA

Presidents cannot seem to agree what role executive privilege should play in the accessibility of presidential records. Some presidents have enacted actions that restrict access to presidential records on the grounds of protecting executive privilege. Other presidents reversed previous executive orders, guided by a less severe notion of the role

executive privilege plays in processing presidential records. Since the enactment of the PRA, the time it takes to actually release records has increased thanks to executive orders issued by Reagan and Bush. Reagan and Bush's logic rings similar to arguments Nixon used when suing for custody of his records in the late 1970's. Nixon advocated for greater control over his records under the guise of executive privilege; however, the Court did not agree with his logic. Still yet, Reagan and Bush contradicted the ruling of the Court in *Nixon v. GSA* (1977). The conflicting ideas of the role executive privilege plays also threaten access to presidential records. The threat of a new crop of executive orders issued every four to eight years makes it difficult for the National Archives to create availability plans for users and to establish processing goals.

Ronald Reagan was the first president compelled to turn his records over to the National Archives. However, his executive order, passed in January 1989, shortly before his records would belong to the custody of the National Archives, instituted some checks that greatly slow down the process of releasing presidential records the public. The order says: "Section 2: ...the Archivist utilizing any guidelines provided by the incumbent and former presidents shall identify any specific materials, the disclosure of which he believes may raise a substantial question of Executive Privilege."⁶⁴ Before releasing any presidential records that have already gone through the extensive and labor intensive routine of processing them, the Archivist must examine them again and identify any records that might violate the President's "executive privilege".

⁶⁴ *National Archives and Records Administration*, "Executive Order 12,667 – Presidential Records," n.d., <http://www.archives.gov/federal-register/codification/executive-order/12667.html>.

This, in turn, starts another round of delays. The former President is given time to review the records in question and has the option to apply for an extension to have more time to review the records. Once the former President raises concerns of executive privilege, “Upon receipt of a claim of Executive privilege by a former President, the Archivist shall consult with the Attorney General (through the Assistant Attorney General for the Office of Legal Counsel), the Counsel to the President, and such other Federal agencies as he deems appropriate concerning the Archivist's determination as to whether to honor the former President's claim of privilege or instead to disclose the Presidential records notwithstanding the claim of privilege.”⁶⁵ The Archivist then has to consult all interested parties, further slowing down the process. If the Archivist decides to continue with releasing the records, he has to give the President and the former President a minimum thirty days notice. All of this rests on the notion that the former President has the right to raise issues of executive privilege over records that supposedly do not belong to him. Reagan was certainly not alone in this thought, however.

Under the PRA, records were to be opened after twelve years. The records from Ronald Reagan and George H.W. Bush hit the twelve year mark with the beginning of George W. Bush's administration. Under Executive Order 12,667, the current President can raise issues of executive privilege. This is exactly what George W. Bush did. Bush issued the Archivist of the United States to refrain from releasing his father's and President Reagan's records for 90 days. When ninety days passed, another ninety-day restriction was imposed. Following those ninety days, the Archivist was instructed to wait a few weeks. In that time, Executive Order 13,233 was passed.

⁶⁵ Ibid.

Executive Order, passed by President George W. Bush is titled: “Further Implementation of the Presidential Records Act.” “Further Implementation,” according to this Executive Order, means expanding the list of people who can raise issues of executive privilege to family members, not just the former and current presidents. President George W. Bush’s Executive Order 13,233 specifically cites *Nixon v. GSA* in establishing the importance of executive privilege to the order. The law specifically states:

(b) In *Nixon v. Administrator of General Services*, the Supreme Court set forth the constitutional basis for the President's privileges for confidential communications: "Unless [the President] can give his advisers some assurance of confidentiality, a President could not expect to receive the full and frank submissions of facts and opinions upon which effective discharge of his duties depends."... Based on those precedents and principles, the Court ruled that constitutionally based privileges available to a President "survive[] the individual President's tenure." *Id.* at 449. The Court also held that a former President, although no longer a Government official, may assert constitutionally based privileges with respect to his Administration's Presidential records...⁶⁶

What Executive Order 13,233 fails to point out though, is the Court qualifies this sentiment directly in the next paragraph of *Nixon v. GSA*. When taken together, the Court’s opinion on the role of executive privilege in granting access to presidential records reads wholly different:

At the same time, however, the fact that neither President Ford nor President Carter supports appellant's claim detracts from the weight of his [Nixon’s] contention that the Act impermissibly intrudes into the executive function and the needs of the Executive Branch. This necessarily follows, for it must be presumed that the incumbent President is vitally concerned with and in the

⁶⁶ George W. Bush: “Executive Order 13233 – The Further Implementation of the Presidential Records Act,” November 1, 2001, Online by Gerhard Peters and John T. Wooley, *The American Presidency Project*, www.presidency.ucsb.edu/ws/?pid=61514.

best position to assess the present and future needs of the Executive Branch, and to support invocation of the privilege accordingly.⁶⁷

A former President is still granted the right of executive privilege, but not President necessarily agrees that the premise behind the PRA threatens executive privilege.

The opinion of the current President should weigh more than the former President.

Bush's Executive Order widened the power of the former President in controlling his records.

Furthermore, the judge deemed that executive privilege was not an issue in providing access to the Nixon materials. He said, "...in determining public access to the materials, 'the need to protect any party's opportunity to assert any constitutionality based right or privilege,' and the need to return to appellant his purely private materials, there is no reason to believe that the restrictions on public access ultimately established by regulation will not be adequate to preserve executive confidentiality."⁶⁸

Bush and Reagan's executive orders use executive privilege as the foundation for their orders. Both of which imposed dramatic delays on the unveiling of presidential records. As Ira Pemstein stated in a conversation with the author, under Bush's executive order, "boxes sat on the shelves for years." While Obama overturned Bush's Executive Order, the precedent has been set. Each President can tweak the effectiveness of the PRA just by passing an Executive Order. Obama's Executive Order effectively re-instated Reagan's Executive Order. Reagan's executive order, however, allowed President Bush to greatly delay the opening of the Reagan/Bush records in a very clear conflict of interest. While

⁶⁷ "Nixon v. Administrator of General Services 433 U.S. 425 (1977),: *Justia US Supreme Court*, n.d., <https://supreme.justia.com/cases/federal/us/433/425/>.

⁶⁸ "Nixon v. Administrator of General Services 433 U.S. 425 (1977),: *Justia US Supreme Court*, n.d., <https://supreme.justia.com/cases/federal/us/433/425/>.

Reagan's order is less insidious than Bush's, it can still pose accountability issues in the future.

An executive order does not need to be directed at the PRA to have an impact on access to presidential records. There are tangential issues that also dramatically impact when records are opened. The issue that tends to grab the most attention from the press and the public is that of classification. The process by which the government classifies and declassifies records can greatly impact access to presidential records. Surely, Presidents have passed executive orders that impact classification procedures. Most recently, President Obama passed Executive Order 13,526, which creates a process for declassifying records that had been classified for over twenty-five years. This certainly is not the only Executive Order dealing with this manner. Clinton (Executive Order 12,958); Reagan (Executive Order 12,356); Carter (Executive Order 12,065); and more presidents have passed executive orders that deal with classifying or declassifying information. There are many mechanisms by which to control access to presidential and governmental records.

Faulty Logic: The Problematic Personal Records Clause

In truth, the PRA creates a loophole that White House members can exploit to their advantage. Which begs the question: should there be space designated for personal records within the White House? In essence, can personal records even be created in the government? The idea of private government records is counterintuitive. The PRA itself exhibits conflicting ideas. The law starts off by saying: "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.”⁶⁹ However, there are exceptions to this rule. Personal records are not considered to be presidential records.

Personal records are considered:

(3) The term "personal records" means all documentary materials, or any reasonably segregable portion thereof, 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.⁷⁰

But can government records be personal? The law allows for personal records to remain in the custody of the President by claiming they are not presidential records to begin with. Gifts sent to the President, which demonstrate the esteem and position of the President at home and abroad are considered personal. While the President usually donates items such as these, personal records are subject to deeds-of-gifts that could possibly restrict access under certain circumstances. Certainly records are created that contain truly personal information in which a release of that record would constitute an invasion of privacy. Nonetheless, those records were still created in federal offices using publicly funded resources. Under this definition, documents such as the Presidential Daily Diary, which

⁶⁹ *National Archives and Records Administration*, "Presidential Records Act," *National* n.d., <http://www.archives.gov/about/laws/presidential-records.html>.

⁷⁰ *Ibid.*

records the President's daily schedule as well as his feelings about specific events, is also a personal record. Personal records can very much assist archival users in their research.

Yet at the same time, presidential records are not like other government records. Each presidential administration has a uniquely idiosyncratic aspect to it. The White House records of the Nixon administration are vastly different than those of the Johnson or Roosevelt administrations. Many of the positions appointed by a President resign at the beginning of a new presidency. Whereas government agencies are more about documenting and achieving the overall goals of the institution, the White House is tied to a very specific individual who serves for a finite amount of time. Each administration pursues unique policies. It is not as if the FBI must rehire an entirely new staff of employees with each new presidential administration. FBI records certainly do not have the same personal quality that a presidential record might have. Each new administration also brings a new group of cabinet heads and leaders. Government agencies are not usually in today's time known by the public at large by the person in charge like the White House is.

The personal records clause is incredibly problematic for archivists because it is getting more difficult to put records in either a personal or public category. The advent of technology is making easier for all kinds of information to be put in the same document. Furthermore, the farther in importance an employee is to the President, the less intense the pressure is to make sure records put into the personal category are actually personal. By looking at two instances where supporting roles in a presidential administration took home or destroyed records that were meant for the National Archives, the implications of the personal records clause is more pronounced. Whether White House officials are ignorant regarding what records belong to them or they are simply manipulating a loophole in the

system, the personal records clause makes it easy for public records to avoid placement in the archives.

Archivists at the Clinton Presidential Library ran into this problem when they began examining email records of Clinton officials. They found that personal information was intermixed with sensitive government information in the same email document. While in previous administrations it might have been easier to put records in a personal or public category, this task will become increasingly harder with time as technology makes communication easier.

Another problem archivists run into occurs sometimes when a member of a presidential administration donates their “personal papers” back to the presidential library at a later date. Whether those in the White House were unaware of what specifically constitutes a personal record or were simply feigning naivety to take embarrassing records home with them, the PRA creates noise and confusion when a presidential administration comes to an end. An example of this happened at the Ronald Reagan Presidential Library. Larry Speakes served as Reagan’s acting press spokesman from 1981 to 1987. He took many of what he thought were his personal record home with him once he stepped down from office. Sometime after Reagan’s administration ended and the Ronald Reagan Presidential Library was constructed, Speakes decided to donate his collection back to the Library. His personal collection constituted over one hundred boxes worth of materials.

Besides creating a logistical nightmare of having to find space, process, and integrate over one hundred boxes of new material, archivists found that Speakes had taken back many confidential records that certainly would not fall under the category of “personal records.” Whether or not Speakes intentionally took confidential White House files and kept them out

of the hands of the National Archives, this situation is problematic and bound to repeat as more presidential libraries are constructed. At best, he denied researchers the chance to see possibly useful records; at worse, he threatened national security with his ignorance. When asking an archivist at the Reagan Library why a White House aide would take records that legally belonged to the National Archives, he believed that most of the employees of the White House had little understanding what was personal and what was public. Either way, whether officials knowingly take records home with them or simply do not know what belongs to them, the confusion created by the personal records clause is worrisome. Luckily, Speakes decided to donate his records at a later date; he could have easily kept them in his possession permanently and archival users would never get the chance to see the records that belonged to them in the first place.

While not obviously immediately upon first glance, the problems Hillary Clinton is facing with her emails are rooted in the same problem that Larry Speakes faced. Hillary Clinton's email problems are directly centered in gray zone between public and private records. It turns out that while she was Secretary of State, Clinton never used her @state.gov email address; she solely used her personal email address for her work. When her staff originally combed through her emails and deleted over 30,000 emails deemed to be "personal" records, no one noticed. It was not until a congressional investigation began that the State Department realized Clinton never used her government email address and that that her personal server was wiped clean. Those 30,000+ emails she deleted were gone forever.

Clinton claimed she did not want to carry two Blackberry phones, so she just used her personal email. While using her personal email is not against the law, as a *Slate* article

describes it, it violates the “spirit” of the Obama Administration. More specially, the article claims:

If Secretary John Kerry did today what Clinton did, it would run afoul of the current laws on the books, which require government officials to copy or forward work email sent or received on a private account to their government account within 20 days. Hillary’s email use, though, does not appear to have violated any of the laws that were in place when she was in office—even though it did clearly fall well short of the Obama administration’s preferred best practices and was also explicitly discouraged by the State Department.⁷¹ However, using her personal email carries more ramifications than just for any immediate legal troubles Hillary might face. Using a personal email account, and deleting the emails as well, effectively negates the opportunity to request to view those emails under FOIA requests, subpoenas, and other types of searches.⁷²

In response to this, Clinton claims that the records she deleted were not marked top secret. However, the government routinely reviews records and marks them top secret at a latter date. This is another reason why it is important that White House officials explicitly know what records belong to them and what records should go to the National Archives. The records Hillary Clinton deleted very well would have ended up at the National Archives once Obama’s term in office ended. Whether or not Clinton knew this is unclear. In fact, the State Department has gone back recently and classified some of those emails as top-secret.⁷³

Reviewing is a major task archivists undertake every day at the National Archives. Archivists are still finding records from presidential administrations decades ago that need

⁷¹ Josh Voorhees, “A Crystal-Clear Explanation of Hillary’s Confusing Email Scandal,” *Slate*, August 20, 2015, http://www.slate.com/blogs/the_slatest/2015/08/20/hillary_clinton_email_scandal_explained.html.

⁷² Ibid.

⁷³ Carrie Johnson, “22 Hillary Clinton Emails Dubbed Top Secret,” *NPR*, updated January 20, 2016, <http://www.npr.org/2016/01/29/464811045/as-iowa-caucuses-near-clinton-email-probe-persists>.

to be closed even though they were not immediately marked for restrictive access. While archival theorists are arguing over the merits of more-product-less-processing, a theory that calls on archivists to describe collections in the bare minimum fashion needed to render the collection visible, archivists handling presidential records must read documents line-by-line. The process of reviewing each record is incredibly time consuming, but absolutely necessary to ensuring information that should not be made available to the public is released too early.

Clinton's actions prevent this democratic process from taking place. As Voorhees reminds in his *Slate* article, "Remember: Clinton says she deleted 31,830 emails. Since Clinton and her team decided for themselves which messages to turn over and which ones to delete—and since they've never fully explained how such decisions were made—there's no way to know with any certainty that everything erased was actually OK to erase."⁷⁴ It is very comparable to Speakes deciding what records he should take home based off his sole personal judgment and nothing else. While the PRA instituted some oversight in the transferring of presidential records, the personal records clause is a loophole. People like Clinton and Speakes, whether they know what they are doing or not, can pretty easily get away with taking classified and other inappropriate records away from the attention of the National Archives.

These examples demonstrate the ways in which the PRA fails to provide stable access to presidential records. Ultimately, the PRA fails to address the difficult components of ownership present in presidential records. It does not address the way in which the federal government treated presidents like donors in the past. In an ideal world, when George

⁷⁴ Josh Voorhees, "A Crystal-Clear Explanation of Hillary's Confusing Email Scandal," *Slate*, August 20, 2015, http://www.slate.com/blogs/the_slatest/2015/08/20/hillary_clinton_email_scandal_explained.html.

Washington ended his time in office, he would have established a better tradition for his papers that conformed to sound archival theory. Overcoming the inertia of tradition has proven to be one of the hardest aspects of changing how the federal government handles presidential records. Presidents since the PRA have taken to adjusting the PRA through executive orders to fit their needs, acting much like a donor would in securing his best interests.

Archival Nonsense: Why Government Records Cannot be Personal

Most would argue that due to the nature of government records, presidents could not be archival donors. Yet, examining the behavior of Presidents and how others treated them prior to the PRA, Presidents were donors. When comparing the actions of presidents to any other regular archival donor, one will see they are more similar than one would imagine. With an understanding of what an archival donor is and the role they play in the processing of records, the archival community should be concerned at past and current actions that reinforce the presidents' notions of being donors. Presidents-as-donors defies the National Archives' general commitment to accountability as well as violates the professional values espoused by the archival community at large.

According to Rob Fisher in "Donors and Donor Agency: Implications for Private Archives Theory and Practice," Fisher said that "donors are not necessarily passive agents; they pursue their own interests, perhaps with scant regard for the niceties of archival theory or tradition."⁷⁵ Presidents have certainly acted in their own interests when donating records

⁷⁵ Rob Fisher, "Donors and Donor Agency: Implications for Private Archives Theory and Practice," *Archivaria*, 79 (2015): 99.

without a legal obligation to do so. They chose what materials could be available to the public just like any other donor would.

Fisher makes explicit that the definition of a donor does not, and should not, normally apply to government agencies. Fisher claims that, “Donation implies a change of legal ownership. The regular transfer of records from a corporate entity or government agency to an in-house archives or official custodian does not constitute donation as it generally involves a change in custody or control, not ownership.”⁷⁶ So while the FBI or the CIA cannot be said to be donating their materials to the National Archives when their records are transferred, the actions of presidents in the past does not resemble the action of government agencies today. First of all, there was never a “regular” transfer of records between the White House and the National Archives. Presidents did not begin transferring their records to the National Archives until 1934; for the entirety of American history up until that point, the willing transfer of records over in a systematic manner was nonexistent. Even after presidents started donating their records, it was not on a regular schedule. Some presidents, such as Hoover, took decades to donate their records.

This implies that there was, in fact, a “change in custody or control,” that Fisher referred to when a President would donate his papers to the National Archives. The presidential records were not stored in College Park, Maryland where the National Archives is headquartered; presidential records are stored in separately constructed archival repositories named after the President. It is, after all, common practice to name buildings after significant donors who contribute an important collection or a substantial financial donation. The act of establishing a presidential library and museum reinforces the idea that

⁷⁶ Ibid., 94

presidents were donors. The presidents who did undertake the process of having their papers appraised and with a drafted deed of gift further confirmed their status as donors. This is the ultimate symbol of the legal transaction between donor and archival institution.

There were certain behaviors exhibited by NARA archivists themselves that indicated presidential records were to be treated differently than regular federal records. While the presidents prior to the PRA were certainly donating government documents, the records were treated more like a collection of personal papers more than anything else. This does not coincide with the primary function of the National Archives, which is to preserve and provide access to federal records. Many in the archival profession would agree that personal papers are processed differently than government records.

Raymond H. Geselbracht in “The Origins of Restrictions on Access to Personal Papers at the Library of Congress and the National Archives” speaks of a “bifurcation” in the development of American archival tradition and theory. One, which he claims is widely used by the Library of Congress and other historical societies, is referred to as the historical manuscripts tradition. The other, mostly used in public government archives, is called the public archive tradition.⁷⁷ Under the tenets of the historical manuscript tradition, the donor has a much more esteemed place in the archival process. As Geselbracht said, “The donor, according to the access policy that evolved within the historical manuscripts tradition, possessed important rights of proprietorship that had to be recognized even after his manuscript collection was given to an archival repository.”⁷⁸ Donors have the right to

⁷⁷ Raymond H. Geselbracht, "Origins of Restrictions on Access to Personal Papers at the Library of Congress and the National Archives," *American Archivist* 49, no. 2 (Spring 1986): 143.

⁷⁸ *Ibid.*, 146

impose access restrictions on the records in their collection as they see fit. While the archivist can engage in the art of negotiation, the final decision rests with the donor.

On the other hand, the public archives tradition “stressed that the documents with which it was concerned—the official records of governments, as opposed to the nonofficial papers of individuals and other nongovernmental entities—should be as unreservedly open for use as was possible.”⁷⁹ For most of the National Archives’ collections, the public archives tradition is the appropriate archival theory to guide practicing archivists. While presidential records should have fallen under the public archives tradition from the beginning of the American presidency, past practices indicate that these records were treated more as historical manuscripts. Presidential libraries straddle the divide between these two archival traditions. When Roosevelt donated his papers to the National Archives, the federal agency became a personal papers repository as well as a public archive.⁸⁰

More importantly, the Presidential Libraries Act established presidents as legal donors. The Presidential Libraries Act was not drafted for this purpose. It makes no effort to define what a donor is or who can be donors. Amongst other things, the law says, “Papers, documents, or other historical materials accepted and deposited... are subject to restrictions as to their availability and use stated in writing by the donors or depositors or by persons legally qualified to act on their behalf.”⁸¹ Unintentionally, the Presidential Libraries Act codified a tradition that started under Washington, and still holds ramifications for today’s federal records management policies.

⁷⁹ Ibid., 153.

⁸⁰ Ibid., 154.

⁸¹ *National Archives and Records Administration*, “Presidential Libraries Act of 1955,” n.d., <http://www.archives.gov/presidential-libraries/laws/1955-act.html>.

There are wide reaching implications if presidents are treated as legal donors, whether in spirit or by the law. Archivists, historians, and any other group of archival users should be invested in examining the ways presidents are treated under laws like the PRA. Randall Jimerson in “Archives for All: Responsibility and Social Justice,” identifies four services the archives provides for the public including:

1. [Holding] political and social leaders accountable for this actions
2. [Resisting] political pressure in order to support open government
3. [Redressing] social justice
4. [Documenting] underrepresented social groups and fostering ethnic and community identities⁸²

When presidents are treated like donors, this affects professional archivists and the wider archival-user-community at large in two ways: ensuring accountability is questionable at best and it flies in the face of the value system espoused by the professional archival community.

It is impossible to hold presidents truly accountable for their actions in office if they can control their records to any extent. For one thing, accountability cannot be guaranteed because each new President is different. Looking at the history of executive orders passed since the PRA, each President has a different idea regarding how accessible presidential records should be. Accountability should not be a relative concept; a President should not be able to strengthen or weaken the PRA as he sees fit. The PRA was drafted out of the fear of what Richard Nixon would do to his records if he gained control of them. There is a precedent of distrust in our presidents that called for stricter accountability in the first place. This is negated each time a President passes an executive order addressed at the PRA.

⁸² Randall Jimerson, "Archives for all: professional responsibility and social justice," *The American Archivist* 70 no. 2 (2007): 254.

Archivists have a moral and professional obligation to hold presidents accountable and to facilitate access to presidential records. This is because the archives is a place of power. It is important to maintain a factual and unmolested narrative for future generations to rediscover their past and sometimes their identity. As such, archivists must be prepared to interfere between the President and the records when they are being transferred to the National Archives. Archival theorists are discarding the previously believed notion that the job of the archivist was to act as a neutral steward over the records.⁸³ Records certainly are not created in a neutral environment under neutral circumstances, and neither are the archives that hold those records. How an archivist arranges and describes collections of archival records stands as the first interaction a user has with those records. According to Eric Ketelaar in “The Archival Image,” he said “the image of the archives is formed equally by their function in understanding the past and by their function in achieving accountability.”⁸⁴

Archives are seen in the public as interpreting the past and reminding those in the government that their records will be scrutinized by the public one day. Archivists are not passive actors who simply receive documents; they provide a regulatory check that is critical especially in dealing with presidential records. This is why the role of the archivist is so crucial in the transferring of records from the White House to the National Archives. Archivists ensure that the integrity of the records are maintained. But when the integrity of the records is threatened, the archives cannot fulfill its function in society.

⁸³ Ibid.

⁸⁴ Eric Ketelaar, “The Archival Image,” *The American Archivist* 58 (Fall 1995): 456.

Some might be content with knowing that presidential records, for the most part, are deposited in the National Archives. While the exact date of when they will be accessible is uncertain, what matters is that those records are protected. But that viewpoint is just taking into account the situation governing presidential records as it stands today. While executive orders might delay the availability of records, the precedent of diluting the PRA is troublesome. It makes it impossible to predict access to presidential records in the future. There are a dizzying number of executive orders directed at weakening the PRA. That history will only grow longer and more complicated with each new administration. This is not a viable system if stabilizing access to presidential records is the goal. In a massive bureaucracy like the United States, changing the laws governing opening and restricting records every 4-8 years makes it extremely difficult to plan ahead. The current executive orders and laws in place are not guaranteed to remain in ten or twenty years. Presidents have forged forward anyways with asserting as much control over their records as possible.

The implementation of the PRA did have some positive consequences, though in an area that was also probably unexpected. The PRA created a whole new type of presidential library, a library where the archives was insulated from the private foundation. The private foundation and the National Archives are set up to be natural enemies sometimes. The private foundation, established to promote the legacy of the President and often staffed by family members, has a very different set of motives than archivists who are interested in facilitating honest historical research. But more importantly, the PRA has brought more oversight and regulation to a presidential library system which acted more as a confederacy of presidential libraries than a centralized system in the past. This has made an impact on the processing of presidential records as well. Despite its fallbacks, the PRA is a necessary

concept with a flawed execution. The PRA has made a substantial, positive impact on the handling of government records.

Presidential libraries were greatly impacted by the passing of the PRA. In essence, the PRA created a dichotomy in the presidential library system; prior to the PRA presidential libraries were created under deed-of-gifts. The President or his family donated the records with the result being a legal deed transferring the records to the National Archives. The PRA eliminated the needs for deeds of gifts. This created a fundamentally different type of presidential library. According to Ira Pemstein, the supervisory archivist at the Ronald Reagan Presidential Library, deed-of-gift libraries are greatly controlled by the family of the president.⁸⁵ It is difficult to release records that put the President in an unfavorable light, and the family has the right to screen researchers and deny entrance into their research rooms.⁸⁶

To the presidential libraries created under the PRA, impartiality is very important to the archivists. Pemstein said, “the [private] Foundation can intervene with the museum department and the education department, but they can’t touch us [the archives department]. The PRA gives us a bubble, and it is our job to focus on the records and just the records.”⁸⁷ When the Ronald Reagan Presidential Library hosted one of the Republican debates in the 2016 primaries, the archives staff unanimously voted to not attend the debate to maintain their space from the Reagan Foundation and its events. Archivists at deed-of-gift libraries do

⁸⁵ Roosevelt, Truman, Eisenhower, Kennedy, and Johnson Libraries are deed-of-gift libraries.

⁸⁶ Also according to Ira Pemstein, it is near impossible to get the approval to see any of the Joseph Kennedy Sr. papers at the Kennedy Library.

⁸⁷ Conversation with the author, February 9th, 2016.

not have that luxury. The PRA can provide a barrier of sorts between the National Archives employees and the private foundation. The more distance between these two organizations, the better it is for the processing and releasing of presidential records. According to Nancy Kegan Smith in "Historical Review of Access to Records in Presidential Libraries," "for most of their existence, most visitors and researchers to a presidential library have not been aware that the library is managed as part of the National Archives and Records Administration."⁸⁸ The impartiality of the museums at presidential libraries is suspect at best already. The PRA insulates the research room and the archival stacks from the biases present in the museum, and impartiality is something archivists at these presidential libraries pride themselves on.

In addition, the PRA brought centralization to the already existing presidential libraries. Presidential libraries are spread out over the country. They are placed usually in the hometown of the President or a location of significance to the President. Some are in major cities, like the Kennedy Library in Boston and the Johnson Library in Dallas; some are in rural areas like the Eisenhower Library in Abilene, Kansas and the Truman Library in Independence, Missouri. With offices all over the country, the presence of the National Archives was felt in some presidential libraries more than others. According to Kegan, "for many years the National Archives had only an advisory role in the establishment of these libraries by their foundations."⁸⁹ Any sort of overarching goals or collaborations between the presidential libraries was scarce. In essence, each presidential library was an island, loosely bound to other presidential libraries by a similar formation and a distant mother agency.

⁸⁸ Nancy Kegan Smith and Gary M. Stern. "A Historical Review of Access to Records in Presidential Libraries." *The Public Historian* 28.3 (2006): 16.

⁸⁹ *Ibid.*, 17.

This confederacy affected the overall processing of presidential records. As Kegan said, “The fact that the National Archives and Records Administration staff working in the libraries or with headquarters staff further contributed to the decentralized and somewhat autonomous nature of the individual libraries.”⁹⁰ With more prevalent technology and the PRA forcing the National Archives to play a stronger role in the regulation of presidential records, the libraries were under tougher regulations. However, the damage created by a lack of strict oversight took its toll on the deed-of-gift libraries. In examination of the holdings of the existing presidential libraries, it was found that these libraries were all over the place in terms of what has been processed. It resulted in delays in releasing audiotapes and other records, with some presidential libraries exceling in processing, while others were lacking. Overall, the implications and consequences created as a result of the personal records clause of the PRA contradict the original intentions of the law.

Conclusion

The Solution

In essence, the PRA exhibits loopholes in its make up and its implementation. The loopholes allow for presidential records to be taken home instead of deposited into the archives, where those records really belong. Archivists have remained silent on this issue. Historians and the ALA have issued lawsuits over the accessibility of the Nixon records, but where have the archivists been? Archivists, especially archivists within the National Archives, have been quiet about this. The sensitive position federal archivists find themselves in might explain their silence. I think the best course of action is to alter the

⁹⁰ Ibid., 18.

language of the PRA to make it more explicitly clear that personal records cannot be government records; the personal records clause in the PRA needs to be abolished and all records should be transferred to the National Archives.

When President Bush passed executive order 13,233, the then-President of the Society of American Archivists drafted a call to action. In it, he called executive order 13,233 “a complete abnegation of the original 1978 Presidential Records Act.” He also claimed that “the archival and public information implications aspects of this order are profound, being contrary to established archival principles and standards, being inconsistent with existing statutory law, and most important, being at odds with the principles of open access to information upon which our country is founded.” He urged archivists to write to their representatives with their concerns.⁹¹

Besides this one instance, other professional organizations have been much more vocal in their protest of access surrounding presidential records. What might explain the silence on the part of archivists from within the National Archives? Archivists from the National Archives hold dual responsibilities as being beholden to archival users, but also to the President that “created” those records. The duality in the role of the archivist is not new. Theodore Schellenberg popularized the concept of the primary and secondary use of records. According to Schellenberg, “Public records are created to accomplish the purposes for which an agency has been created—administrative, fiscal, legal, and operating... But public records are preserved in an archival institution because they have values that will exist long after they cease to be of current use, and because their values will be for others than the

⁹¹ *Society of American Archivists*, “Call to Action on Executive Order 13233: A Message from President Steve Hensen,” presented on November 15, 2001, <http://www.archivists.org/news/actnow.asp>.

current users.”⁹² Just how presidential records consist of these two primary values, archivists at the National Archives must operate on two different levels in professionalism. As much as the situation should be different, archivists have to work with the executive branch. Clear lines of communication are vital to insuring the easiest transition between active and passive records.

Normally, archivists defer to donors for establishing the restrictions on access to their donated collections. Archivists negotiate with the donors and try to coax donors into favorable positions; but at the end of the day, the donor has the final say in how much their collections are censored. However, the idea of negotiating with presidents and working with them to establish access to presidential records does not sit well with most people, especially in today’s age where many do not trust government officials to police themselves. It is the archivists’ job to hold the White House accountable, but the PRA also creates a space where presidents are donors of the records. Tightening up the PRA to clear up the confusion created by the personal records clause can make the job of the archivist a little less complicated in having to negotiate with the President. Either all records generated during a presidential administration are public property, or none of it is. Under the Presidential Libraries Act, there was at least uniformity; *everything* belonged to the former President. The Presidential Records Act needs to remove the definition of personal records.

Of course, records containing personal information not related to documenting the normal activities of the government will be created; that is inevitable. Beyond that, there are many records with sensitive, personal information drafted by the President that does not

⁹² Theodore Schellenberg, *National Archives and Records Administration*, “Bulletin Number 8: The Appraisal of Modern Public Records,” 1956, <http://www.archives.gov/research/alic/reference/archives-resources/appraisal-of-records.html>.

document the activities of his presidency and the government. The National Archives already restricts access to records of personal nature. National Archives archivists undertake reviewing records individually before they are open to the public. The role of the archivist in all this is that of an ethical reviewer. Archivists look at each document to ensure no personal information such as social security numbers, medical information, or anything of the sort is not released to the public inappropriately. If such a document is found, they remove the document and put a withdrawal sheet in the place where the document would normally be. The withdrawal sheet notifies the researcher that whatever document was supposed to be here has been closed. It will list what category of classification was used to close the record.⁹³ One really commonly used classification restriction is the B-6 category that states: “Release would constitute a clearly unwarranted invasion of personal privacy.” Most of the time, it is used because the document has the social security number of an individual who is still alive. But a very realistic example of a document that would be closed under the B-6 restriction would be, say, an employee of the Department of Commerce writing to her superior saying her Dad is of failing health so she is taking some time off to spend time with him. A document like this is closed because it would not tell the researcher anything about the character of the presidential administration, and that warrants an unnecessary disclosure of personal information. The archivist is entrusted with protecting the personal information of the President, the White House, as well as all the people who come in contact with the White House throughout an administration.

While many presidential records will inevitably be personal in nature, the National Archives is already equipped with the proper classification categories to protect those

⁹³ See Appendix B for an example of a real withdrawal record.

records. At least with all records being transferred to the National Archives, those records are protected and access one day will be granted. When a member of an administration can take records home, there is no guarantee anyone will be able to access those records. To prevent future incidents such as the Hillary Clinton email scandal, the concept of personal government records needs to be corrected.

This committee would convene only at the end of a presidential administration to review the records as they are transferred to the National Archives. Reviewing presidential records is an enormous task, one that will certainly take time to complete. It would be best if they started prior to the end of an administration. On this committee would be individuals with archival backgrounds, history backgrounds, and legal backgrounds. Together, they will create a records schedule that will guide the opening of records and how long records of certain categories should remain closed. Representatives from the White House would be able to give recommendations as the review commences on what they think should be restricted, but they will have no final decision. Those from the White House surely know the nature of the presidential records better, so while they can certainly help in determining the sensitivity of certain records, they cannot make suggestions as to how long records should be closed.

The biggest problem facing the committee and federal archivists is the impact technology has over the content of records. Email records are surely going to pose issues in deciding when they should be available as archival records. Increasingly, the email records will contain both personal and public information in them. The committee has the options to order the records be sanitized, where all sensitive information is censored with the public information allowed standing, or that they are closed entirely. The committee has the final

decision in what record groups are sanitized and what remains closed. Historical perspective is always necessary in determining the relevance of certain presidential records. A set period of time after the committee has issued its decision, say twenty years or so, a new committee should review the recommendations of the first committee and make any revisions to the records schedule as required. Since none of the records belong to the President, he does not have any say in the manner.

Responses to the problems unintentionally created by the PRA must be nuanced and drafted with a keen understanding of the role the archivist plays in the matter. The archivist will always have to balance the needs of the governing agency with the needs of the user. Simply advocating for the National Archives to “get tough” could jeopardize their working relationship with the White House. The PRA itself needs to be adjusted to explicitly clarify what records go to the National Archives at the end of a presidential administration, which would be all of them. Eradicating the personal records clause makes it explicitly clear to politicians that none of their records belong to them; they belong to the National Archives and to the people.

Understanding the context behind the passing of the PRA is critical for contextualizing how presidents act in today’s time. Presidents were legal creators of their records and donated them to presidential libraries built in their name. While the presidential library tradition only began with Franklin D. Roosevelt, presidents were legal creators for the entirety of American history. Following World War II, a growing consciousness and discomfort with the lack of transparency, coupled with several scandals created an

intolerable situation when Watergate happened. The PRA followed in an attempt to control government secrecy that many felt had grown out of control.

The PRA attempted to correct a long over due issue: ownership of presidential records. However, in correcting this problem, it created a very thorny situation. Under the PRA, presidential records belong to the public, but not *all* presidential records. Personal records were defined, and gave presidents and administration members a loophole to take records home with them instead of depositing them into the National Archives. While the PRA is a good first start to regulating the transfer of presidential records and releasing them to the public, some developments have shown flaws in the law's structure and execution.

The PRA brought formality to the presidential library system, which had previously been acting more like a confederacy of museums and archives than anything else. But the process of making presidential records available to the public has gotten more complicated since the passing of the PRA. Presidents now use executive orders to dilute the PRA by instituting checks that delay the release of presidential records. This is problematic because it defies the ethical standards of archivists. Accountability is threatened considerably when the length of time that needs to pass to access records changes with each presidential administration.

Ultimately, to fix the issues present in the PRA, the law needs to be tightened up to ensure access to presidential records does not ebb and flow with each administration. The concept of personal government records needs to be done away with. All records generated during a presidential administration should be turned over to the National Archives. There are existing measures in place that ensures that personal information is not released before it

is appropriate to do so. Anything personal turned over would still remain closed. This is the most exact way to ensure records are safe and stored in the National Archives.

Appendix A

Key Legislation, Court Cases, and Executive Orders

The Presidential Libraries Act (1955)	Formalizes presidential libraries and their abilities to maintain and accept papers donated by Presidents, made presidential libraries official federal facilities
The Presidential Records and Materials Act (1974) (otherwise referred to as PRMPA)	Revokes Nixon's agreement with Arthur F. Sampson, created National Study Commission on Records and Documents of Federal Officials to research ownership of federal records. Required access to Watergate materials be a priority.
<i>Nixon v. Administrator of General Services</i> , 433 U.S. 425, (1977)	Supreme Court case that rejected President Nixon's claim that PRMPA violated the separation of powers, executive privilege, and Nixon's right to privacy.
Presidential Records Act (1978)	Declared presidential records as public property, not property of the creating President.
Executive Order 12,667 (1989)	Executive Order issued by Ronald Reagan that required NARA to notify a current or former president of the intent to release records; gives current or former president right to object due to executive privilege; gives president right to designate archival guidelines upon leaving office.
<i>Armstrong v. Bush</i> (1989-1997)	Lawsuit against the Reagan administration, brought forth by Scott Armstrong, over the access to documents stored in the "PROFS" e-mail system set to be destroyed.
Amendments to FOIA (1996)	Declared digital records and information delivery as subject to FOIA regulation, required federal agencies to provide electronic versions of records; definition of record expanded to mean "any information that would be an agency record subject to the requirements of this section when maintained by an agency in any format, including an electronic format."
Executive Order 13,233 (2011)	Executive order issued by President Bush that gives current and former presidents, current and former vice presidents, to claim

	executive privilege and seal records that would normally be released under the Presidential Records Act. Also allowed those designated by current and former presidents/vice presidents to claim executive privilege as well
Executive Order 13,489 (2009)	Executive Order issued by President Obama which reversed Executive Order 13,233, which was passed by President Bush.
Executive Order 13,526 (2009)	Executive Order issued by President Obama which instituted a system for declassifying records that were kept classified longer than the standard 25 years; created National Declassification centers run by the National Archives.

Appendix B

Example of part of a withdrawal sheet from the Ronald Reagan Presidential Library.

WITHDRAWAL SHEET Ronald Reagan Library					
Collection Name				Withdrawer	
File Folder [JGR/APPOINTEE CLEARANCES - 11/14/1985-12/31/1985]				CAS 8/25/2005	
Box Number 3				FOIA	
				F05-139/01	
				COOK	
				24KDB	
Doc No	Doc Type	Document Description	No of Pages	Doc Date	Restrictions
1	MEMO	J. ROBERTS TO RICHARD HAUSER RE PROSPECTIVE NOMINEE (PARTIAL)	1	11/18/1985	B6 385
2	MEMO	ROBERTS TO HAUSER RE APPOINTMENTS TO PRESIDENT'S NATIONAL SECURITY TELECOMMUNICATIONS ADVISORY COMMITTEE (P. 1 PARTIAL, P. 2 CLOSED)	2	11/20/1985	B6 386
3	MEMO	ROBERTS TO HAUSER RE PROSPECTIVE APPOINTEE (PARTIAL)	1	11/21/1985	B6 387
4	MEMO	ROBERTS TO HAUSER RE PROSPECTIVE APPOINTEE (PARTIAL)	1	11/21/1985	B6 388
5	MEMO	ROBERTS TO DIANA HOLLAND, RE: REAPPOINTMENT OF JOYCE C. YOUNG TO THE COMMITTEE FOR PURCHASE FROM THE BLIND AND OTHER SEVERELY HANDICAPPED (THIS DOCUMENT HAS BEEN RELEASED IN WHOLE)	1	12/31/1985	B6 1173

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