

As government information professionals, I don't think it's a stretch to say most of us have been closely watching the events related to missing sensitive documents and former President Donald Trump unfold. Historically, outgoing presidents did, in fact, take their documents with them when they left office because they were considered personal property, but the Presidential Records Act of 1978 (44 U.S.C. §2201-2209) changed that. Thanks to the Watergate scandal during the Richard Nixon administration four years prior, all presidential and vice-presidential documents are now publicly owned and housed in the National Archives—that includes anything from margin notes and doodles to top secret national security materials.

The PRA states that after a president's term, the administration's records be transferred to the Archivist of the United States and begin to be made public five years after that president left office; it also permits the former president and the vice president to invoke up to six specific restrictions to public access for up to twelve years.<sup>1</sup> During those five years, the records are generally exempt from public access of any kind, including Freedom of Information Act requests—only Congress, the courts, and the incumbent and former presidents may have access.

The act, which took effect January 20, 1981, started with the Reagan administration, but just before he left office, he issued Executive Order 12667, which not only established the procedures for NARA and former and incumbent presidents to implement the PRA but also limited access to certain records that would've been scheduled for disclosure. Exemptions include “national security information that is properly classified; information about appointees to Federal office; information specifically exempt from disclosure by law; trade secrets and confidential business information; confidential communications requesting or submitting advice between the president and his advisors or between such advisors; and information which, if disclosed, would cause a clearly unwarranted invasion of personal privacy.”<sup>2</sup> The exemptions are compulsory by the Archivist, following a 30-day review by both former and current presidents.

The Executive Order was annulled by EO 13233, “Further Implementation of the Presidential Records Act.” Issued November 2, 2001, by George W. Bush, it gave former presidents and vice presidents even broader discretion to withhold documents and allowed a former president to “designate a representative . . . to act on his behalf” in the assertion of

presidential privilege in the event of the former president's disability or death. If a former president designated a record as restricted, NARA could not permit access to it upon request “unless and until . . . the former president and the incumbent president agree to authorize access to the records or until so ordered by a final and nonappealable court order.”<sup>3</sup>

Based on this, it's easy to see where Trump's legal team may have gotten their assertions where he could declassify a document by “thinking about it” and it would be so.<sup>4</sup> In *American Historical Association v. National Archives*, an alliance of historians and government transparency activists filed a federal lawsuit following Bush's executive order that sought the immediate release of the Reagan papers, claiming EO 13233 unjustifiably circumvented the law.<sup>5</sup>

Bush's executive order raised concerns for historians and open-government advocates because it effectively opposed the intent of the 1978 PRA, allowing presidents to edit the history of their administrations. It wasn't until Barack Obama's Executive Order 13489, issued on his first day in office in 2009, that most of the provisions of EO 12667 were restored with some modifications.<sup>6</sup> The PRA was amended in 2014, which established several new provisions.

When Trump left office on January 20, 2021, all his administration's records should have been moved from the White House to the National Archives. Instead, FBI agents found multiple sets of classified documents at Trump's private Florida residence, Mar-a-Lago. According to the search warrant, FBI agents were looking for evidence relating to three statutes: Section 793, “applies to activities such as gathering, transmitting and unauthorized person, or losing information pertaining to national defense, and to conspiracies to commit such offenses”; Sections 2071 and 1519 address concealing, altering, destroying or removing federal records.<sup>7</sup>

While attorneys for Trump and the Department of Justice make their arguments before a judge, an appeals court and a special master in this ongoing case, the history of the Presidential Records Act and subsequent executive orders and amendments indicate that regardless of whether an administration's records should be made public, they most definitely are not supposed to be stored haphazardly in a private home.

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## Notes

1. National Archives and Records Administration, "Presidential Records Act (PRA) of 1978," Archives.gov, <https://www.archives.gov/presidential-libraries/laws/1978-act.html>.
2. National Archives and Records Administration, "Office of the Federal Register (OFR): Executive Orders: Executive Order 12667—Presidential Records," Archives.gov, <https://www.archives.gov/federal-register/codification/executive-order/12667.html>.
3. Executive Order 13233 of October 20, 2001, Further Implementation of the Presidential Records Act," Code of Federal Regulations, title 3 (2001): 815–19, <https://www.govinfo.gov/content/pkg/CFR-2002-title3-vol1/pdf/CFR-2002-title3-vol1-eo13233.pdf>.
4. Glenn Thrush, Alan Feuer, and Charlie Savage, "Trump Claims He Declassified Documents. Why Don't His Lawyers Say So in Court?" *New York Times*, September 22, 2022. <https://www.nytimes.com/2022/09/22/us/politics/trump-documents-declassification.html>.
5. *American Historical Association v. National Archives and Records Administration*, 402 F. Supp. 2d 171 (D.D.C. 2005), <https://www.rcfp.org/wp-content/uploads/imported/20011128ahavnara.pdf>.
6. Executive Order 13489 of January 21, 2009, Presidential Documents, Federal Register.gov, <https://www.federalregister.gov/documents/2009/01/26/E9-1712/presidential-records>.
7. United States District Court Southern District of Florida, "InReSealedSearchWarrant," CaseNo.22-MJ-8332-BER, <https://www.flsd.uscourts.gov/sites/flsd/files/DE-102.pdf>; Criminal Resources Manual, "2057. Synopses of Key National Defense and National Security Provisions," Justice.gov, <https://www.justice.gov/archives/jm/criminal-resource-manual-2057-synopses-key-national-defense-and-national-security-provisions>; U.S. House of Representatives, "18 USC 2071: Concealment, removal, or mutilation generally." Title 18-Crimes and Criminal Procedure, <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title18-section2071&num=0&edition=prelim>; U.S. House of Representatives, "18 USC 1519: Destruction, alteration, or falsification of records in Federal investigations and bankruptcy." Title 18-Crimes and Criminal Procedure, [https://uscode.house.gov/view.xhtml?req=\(title:18%20section:1519%20edition:prelim\)](https://uscode.house.gov/view.xhtml?req=(title:18%20section:1519%20edition:prelim)).