After President Richard Nixon planned to destroy Oval Office recordings during the Watergate scandal, Congress enacted the Presidential Records Act (PRA, 44 U.S.C. 2201-2209) to preserve presidential records and make them available to the public. Before the PRA became law in 1978, presidential records were a president’s personal property and presidential libraries only contained documents presidents chose to donate. The PRA made presidential records government property. Now, all presidential records are automatically transferred to the National Archives and Records Administration (NARA) once the president leaves office. The president and vice president can only throw away records that lack “administrative, historical, informational, or evidentiary value” after the Archivist of the United States has provided their written views on the proposed disposal (44 U.S.C. 2203). Since its enactment, the PRA has been amended a handful of times, including a 2014 amendment that, among other things, requires presidents, vice presidents, and other White House officials to copy or forward all electronic messages concerning official business conducted on unofficial email accounts into their official account within 20 days of their creation or transmission (44 USC 2209).

The PRA, along with the Federal Records Act (FRA), are the major laws governing federal records management. Together, the PRA and FRA are vital to government transparency, requiring NARA Archivists to preserve and
provide public access to permanent government records.

Even though the PRA lacks a strong enforcement mechanism, presidents have followed the PRA to preserve their legacies. Even before the PRA, presidents, starting with President Franklin Delano Roosevelt (FDR), donated their records to the NARA for their presidential libraries. In contrast to former presidents, current President Donald Trump seems less interested in preserving a corpus of presidential records. He is the first president to significantly deviate from the PRA’s mandates since the PRA was enacted. Digital records and social media also raise questions about PRA requirements. Both former President Obama and President Trump have used social media. Do their social media posts fall under the scope of the PRA? Also, if President Obama’s presidential library contains only digital presidential records, does it comport with the PRA’s access and preservation goals? With these new presidential records issues comes a renewed interest in the NARA’s role in the retention and preservation of presidential records.

NARA’s Role: Preserving Presidential Records
The NARA works closely with the White House Counsel’s office to implement the PRA, especially during administration transitions when custody and responsibility for the records is officially transferred to the NARA. Like all federal agencies, the NARA is a non-partisan entity, and its employees focus on transferring and archiving presidential records in an orderly fashion. Beyond assisting the White House in managing presidential records, the NARA also provides public access to presidential records of former presidents. Generally, the public can access presidential records in NARA-run presidential libraries and other collections through the Freedom of Information Act (FOIA) five years after the president leaves office. The NARA also responds to special access requests by government entities for presidential records that are embargoed from the public because the records of recent presidential administrations are not immediately available through the Archives.

Presidential records often come into play during the Supreme Court justice nomination process because nominees have often worked in the White House. Brett Kavanaugh worked in the George W. Bush White House, and during his confirmation hearing, the NARA processed nearly nine hundred thousand pages of records. The number of Kavanaugh presidential records dwarfed the one hundred sixty thousand pages of presidential records the NARA processed during the nomination hearings for Justice Kagan, who served in the Clinton Administration, and the seventy thousand pages related to Justice Roberts, who served in the Reagan Administration. As the volume of digital presidential records, including emails, increases exponentially, the NARA’s job in vetting, archiving, and releasing presidential records grows more burdensome and time-consuming.

PRA Accountability: Suing Over PRA Violations

According to Anne Weismann, Chief FOIA counsel at CREW, the current administration’s records preservation issues reveal holes in the PRA that need to be plugged. Weismann suggests adding a private right of action to the PRA to create accountability for preserving public records in the White House. Moreover, if Congress amends the PRA to explicitly provide for judicial review, courts may create a better-defined system to ensure that the PRA’s requirements are properly performed. Weismann sees both records destruction (i.e., deleting President Trump’s tweets) and the president’s failure to create records as raising presidential records issues for government watchdogs, historians, and anyone interested in government transparency. Government accountability grows elusive when the White House does not memorialize the Presidency. Scholars with questions on what this administration was about will find it difficult to get answers to their questions.

The Future of the PRA, Obama’s Library, and What AALL Members Can Do
As President Trump raises issues about presidential records in the digital age, so does President Obama. Breaking with tradition, President Obama has decided the proposed Obama Presidential Center will be managed by the Obama Foundation and that his foundation will fund the digitization of unclassified paper records (approximately 30 million pages) so the NARA can make them available online along with more than one billion pages of electronic presidential records. In other words, Obama’s presidential library will not be a presidential library as we know it. Is this the future? Or, as Timothy Naftali, former director of the Richard Nixon Library, puts it in The New York Times, does it open the door “to a truly terrible Trump library”?

As law librarians, what can we do? For starters, we can educate ourselves about the PRA and stay aware of new developments regarding public access to government records. As AALL members, we can stay informed by joining the AALL Advocates Community to receive updates and action alerts, and to educate ourselves by reading the monthly AALL Washington eBulletin.
and reviewing the AALL Advocacy Toolkit. We can be more vocal about what the public loses when Presidents change the game on us as both President Trump and former President Obama have done by communicating our concerns to our members of Congress. Building relationships with members of Congress is especially helpful if your congressional members serve on either the House Committee on Oversight and Reform or the Senate Committee on Homeland Security and Governmental Affairs. These committees are especially concerned about access and preservation of presidential records. Our profession holds a major stake in government records preservation and access. We have the power to educate and advocate for records management plans that guarantee the preservation of our presidential records.  ■

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