

Calendar No. 487

113TH CONGRESS }
2d Session }

SENATE

{ REPORT
113-218 }

PRESIDENTIAL AND FEDERAL RECORDS ACT
AMENDMENTS OF 2014

R E P O R T

OF THE

COMMITTEE ON HOMELAND SECURITY AND
GOVERNMENTAL AFFAIRS
UNITED STATES SENATE

TO ACCOMPANY

H.R. 1233

TO AMEND CHAPTER 22 OF TITLE 44, UNITED STATES CODE, POPULARLY KNOWN AS THE PRESIDENTIAL RECORDS ACT, TO ESTABLISH PROCEDURES FOR THE CONSIDERATION OF CLAIMS OF CONSTITUTIONALLY BASED PRIVILEGE AGAINST DISCLOSURE OF PRESIDENTIAL RECORDS, AND FOR OTHER PURPOSES



JULY 23, 2014.—Ordered to be printed

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JULY 23, 2014.—Ordered to be printed

Mr. CARPER, from the Committee on Homeland Security and Governmental Affairs, submitted the following

R E P O R T

[To accompany H.R. 1233]

The Committee on Homeland Security and Governmental Affairs, to which was referred the bill (H.R. 1233) to amend chapter 22 of title 44, United States Code, popularly known as the Presidential Records Act, to establish procedures for the consideration of claims of constitutionally based privilege against disclosure of Presidential records, and for other purposes, having considered the same, reports favorably thereon, with amendments, and recommends that the bill, as amended, do pass.

I. PURPOSE AND SUMMARY

H.R. 1233, the Presidential and Federal Records Act Amendments of 2014, amends the Presidential Records Act of 1978 to establish a process by which incumbent and former Presidents can review Presidential records¹ to determine whether to assert that executive privilege limits the release of those records. The bill also makes a number of reforms to the Federal Records Act to mod-

¹ Section 2201(2) of the Presidential Records Act of 1978 defines Presidential records as “documentary materials . . . created or received by the President, his immediate staff, or a unit or individual of the Executive Office of the President whose function is to advise and assist the President, in the course of conducting activities which 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 (A) includes any documentary materials relating to the political activities of the President or members of his 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 (B) does not include any documentary materials that are (i) official records of an agency . . . (ii) personal records; (iii) stocks of publications and stationery; or (iv) extra copies of documents produced only for convenience of reference, when such copies are clearly so identified.” 44 U.S.C. 2201(2).

ernize federal recordkeeping statutes and additional changes to improve the federal government's ability to capture and archive electronic records.

II. BACKGROUND AND NEED FOR THE LEGISLATION

Amendments to the Presidential Records Act

Congress passed the Presidential Records Act of 1978 ("PRA" or "the Act") in the wake of the Watergate scandal and the resignation of President Nixon. Concerned about the possible destruction and loss of President Nixon's records, Congress gave the Archivist of the United States custody of former Presidents' records.² The Act establishes a presumption that most Presidential records should ultimately be released to the public by imposing on the Archivist "an affirmative duty to make such records available to the public as rapidly and completely as possible consistent with the provisions of this Act."³

Under the Act, however, a President has discretion to restrict access to his or her records for up to twelve years after leaving office. Following that period, records are to be released in accordance with the standards contained in the Freedom of Information Act ("FOIA"), with two key exceptions. First, FOIA's "deliberative process" exemption, pertaining to inter-agency or intra-agency memorandums or letters (5 U.S.C 552(b)(5)), does not apply. Second, the Act implicitly allows a President to argue executive privilege shields certain records from public release, noting "[n]othing in this Act shall be construed to confirm, limit, or expand any constitutionally-based privilege which may be available to an incumbent or former President."⁴

Although the PRA provided guidelines for the management, custody, and access to Presidential records, it did not establish any procedures for the consideration of Presidential privilege claims. As a result, sitting Presidents have taken the matter into their own hands and issued Executive Orders purporting to govern the issue.

President Ronald Reagan, the first President covered by the Act's mandates,⁵ issued the first such order in the final days of his administration. Executive Order 12667 required the Archivist to give the incumbent President and the former President whose White House created the record in question thirty calendar days advance notice before releasing Presidential records.⁶ The order authorized the Archivist to release the records at the end of that period unless the incumbent or former President claimed executive privilege, or unless the incumbent President instructed the Archivist to extend the period indefinitely. If the incumbent President decided to invoke executive privilege, the Archivist would withhold the records unless directed to release them by a final court order. If the incumbent President decided not to support a former President's claim of privilege, the Archivist would decide whether or not to honor the claim.

² 44 U.S.C. 2203(f)(1).

³ *Id.*

⁴ 44 U.S.C. 2204(c)(2).

⁵ Although signed into law by President Carter, the PRA only applied to the records of Presidents who took office starting on January 20, 1981 or later.

⁶ Exec. Order No. 12667, 54 Fed. Reg. 3,403 (Jan. 18, 1989).

Around the same time that President Reagan issued Executive Order 12667, he also exercised his right under the PRA to restrict access to some of his records for 12 years. This restriction period expired in January 2001.

In February 2001, the Archivist provided the 30-day notice required by President Reagan's Executive Order of the Archivist's intent to release nearly 70,000 pages of President Reagan's records. In March, June, and August of 2001, counsel to then President George W. Bush requested that the Archivist extend the time for claiming executive privilege. The third extension request in August did not provide a specific deadline for compliance.

In November 2001, President George W. Bush issued Executive Order 13233, the "Further Implementation of the Presidential Records Act."⁷ The order superseded President Reagan's Executive Order on the PRA and gave current and former Presidents (as well as Vice-Presidents) broad authority to withhold Presidential records or delay their release indefinitely.

For example, the Bush Executive Order allowed a former President to extend the document review period indefinitely (something the Reagan order authorized only sitting Presidents to do) and also provided an unlimited review period for the current President. In addition, the order greatly expanded the number of people who could assert executive privilege by allowing former Presidents to designate individuals to raise such claims after the former President's death and by providing a former Vice-President the authority to assert executive privilege claims over their records.

The procedure established under the Bush Executive Order also could have been used to undermine the PRA's presumption that most Presidential records should ultimately be released. Unlike the Reagan order, which authorized the release of records on a schedule unless a President affirmatively extended the schedule or claimed privilege, the Bush order purported to prohibit the release of any records until after both the former and current President affirmatively notified the Archivist. Therefore, if either the current or former President simply did not respond to the Archivist, the records would not be released. Furthermore, the Bush order required the Archivist to honor a former President's claim of executive privilege and withhold the records, even if the incumbent President disagreed with the former President's claim.

On January 21, 2009, the day after his inauguration, President Barack Obama issued Executive Order 13489.⁸ The Obama order revoked the Bush order and established a process for handling executive privilege claims similar to the one articulated in President Reagan's 1989 Executive Order.

It has become evident to Congress that the PRA is not sufficiently clear with respect to its disclosure mandates. Without further Congressional action each successive President likely will issue his or her own executive order interpreting the original PRA. This would make the public's access to Presidential records contingent upon the will of the executive—the avoidance of which was the goal of the original PRA.

⁷ 3 C.F.R. 2001 Comp., pp. 815–819.

⁸ See <http://www.gpo.gov/fdsys/pkg/CFR-2010-title3-vol1/pdf/CFR-2010-title3-vol1-eo13489.pdf>

H.R. 1233 would end the uncertainty associated with the handling of executive privilege claims over Presidential records by legislatively establishing procedures to ensure the timely release of such records.

First, H.R. 1233 requires the Archivist to give the former and incumbent Presidents notice that the Archivist intends to release a former President's records. The bill entitles the Presidents to a period of 60 days—extendable for an additional 30 days upon request—to object to the records' release. This gives a former and incumbent President time to review the records and decide whether to claim privilege. If neither President objects, the Archivist shall release the records to the public.

Second, H.R. 1233 establishes different procedures for addressing privilege claims depending on whether the claimant is the current or a former President. This two-track approach reflects the Supreme Court's assessment that although former Presidents may retain some level of privilege over their documents after vacating the White House, such a claim "carries much less weight than a claim asserted by the incumbent himself."⁹ Accordingly, under the bill, if an incumbent President claims privilege over a former President's records, the Archivist must withhold such records, and the requester of the records then bears the burden of challenging the incumbent President's claim of executive privilege in court. In comparison, if the incumbent President declines to support a former President's privilege claim, the Archivist will delay releasing the records for a short period of time in order to give the former President time to obtain a court order to enforce his or her privilege claim. Absent a court order to the contrary, the Archivist will release the records. This is the same approach followed in President Reagan's Executive Order on the PRA.

Third, H.R. 1233 clarifies that the decision to assert a claim of a constitutionally based privilege against the disclosure of a Presidential record must be made personally by a former President or the incumbent President.

Finally, H.R. 1233 would ensure that all Presidential records, even those sent from a personal electronic messaging account, are properly preserved and maintained.

Amendments to the Federal Records Act

H.R. 1233 also would amend several sections of the Federal Records Act, a statute originally enacted over 60 years ago. Congress first addressed federal recordkeeping in the 1930s, when the combination of growing public concern over poor agency recordkeeping practices and an expanding federal government necessitated recordkeeping solutions for a larger volume of records. In 1934, Congress established the National Archives and the position of Archivist of the United States as the primary, central agent of records preservation for the federal government.¹⁰

In 1950, Congress followed up the establishment of the National Archives with the Federal Records Act ("FRA"), which established basic records management responsibilities for federal agencies and set standards for how records were to be maintained, used,

⁹*Nixon v. Administrator of General Services, et al.*, 433 U.S. 425, 448 (1977).

¹⁰See National Archives Act, P.L. 73-432, 48 Stat. 1122 (1934).

archived and ultimately disposed.¹¹ Agencies were to internally manage and store most of their own records, while the National Archives would filter and preserve historical records that were to be ultimately transferred to the National Archives for posterity.

Congress has enacted amendments to the FRA over the years, but federal recordkeeping laws are still focused on the media or physical characteristics of how a record is preserved (e.g. books, papers, maps, photographs, etc.). H.R. 1233 would make a number of important improvements to the FRA, including updating the definition of what constitutes a ‘record’ to shift the emphasis away from the physical media used to store information to the actual information being stored, regardless of form or characteristic. The bill also gives the National Archives and Records Administration (“NARA”) the authority to determine whether information is a ‘record’, thus giving NARA the ability to issue regulations governing how agencies preserve, maintain, and handle the ever-increasing amount of electronic communications.

H.R. 1233 would also allow agencies to transfer documents to NARA for processing in advance of the statutorily required date, authorize agencies to use digital reproductions when they are required to indefinitely maintain copies of documents, and require the Archivist to prescribe internal procedures to prevent the unauthorized removal or destruction of classified records from NARA facilities.

Finally, like the amendments to the PRA, the amendments to the FRA also include language that would provide that an employee of an executive agency may not create or send a record from a non-official electronic messaging account without ensuring such record was submitted to an official electronic messaging account.

III. LEGISLATIVE HISTORY

H.R. 35, the Presidential Records Act Amendments of 2009, was introduced on January 6, 2009, by Representatives Edolphus Towns, Dan Burton, William Lacy Clay, Darrell Issa, Brad Sherman, and Henry Waxman. On January 7, 2009, H.R. 35 was agreed to in the House of Representatives by a vote of 359 to 58. On April 1, 2009, with Senators Lieberman, Akaka, Carper, Pryor, Tester, Burriss, Bennet, Collins, Coburn, and Voinovich present, by a voice vote, H.R. 35 was ordered reported favorably out of the Committee with an amendment in the nature of a substitute,¹² but the bill was never enacted into law.

H.R. 1233 was introduced on March 18, 2013, by Representative Elijah E. Cummings (D-MD). H.R. 1233 includes language to update and modernize the Federal Records Act and the changes to the Presidential Records Act that were included in H.R. 35, as previously passed out of this Committee. On January 14, 2014, H.R. 1233 was agreed to in the House of Representatives by a vote of 420 to 0. The bill was received in the Senate on January 15, 2014 and referred to the Homeland Security and Governmental Affairs Committee.

¹¹ See 44 U.S.C. 3301, et seq.

¹² Presidential Records Act Amendments of 2009, H.R. 35, 111th Cong. (2009). See also S. Rep. No. 111–21 (2010).

The Committee considered the bill at a business meeting on May 21, 2014. Senators Carper and Coburn offered one amendment to the bill which clarified that a President, Vice President or their staff should ensure that all Presidential records, even those sent from a personal electronic messaging account, are properly preserved and maintained in an official electronic messaging account. The amendment also extended the deadlines for ensuring Presidential and federal records are submitted to an official electronic messaging account from five days in the original bill to 20 days. The Committee approved the amendment en bloc.

The committee ordered the bill, as amended, reported favorably en bloc by voice vote on May 21, 2014. Senators Carper, Pryor, Landrieu, McCaskill, Tester, Begich, Coburn, Johnson, Portman, and Enzi were present for the vote on the amendment and the bill.

IV. SECTION-BY-SECTION ANALYSIS OF THE BILL, AS REPORTED

Section 1. Short title; Table of contents

Section 1 establishes the bill's short title as the "Presidential and Federal Records Act Amendments of 2014" and provides the bill's table of contents.

Section 2. Presidential records

Subsection 2(a)(1) adds a new section 2208 to chapter 22 of title 44, United States Code, establishing a process for a former or incumbent President to make a claim of executive privilege over records of that former President yet to be released to the public.

New subsection 2208(a)(1) provides that, when the Archivist of the United States decides to make Presidential records publicly available, the Archivist will promptly give advance notice to the former President during whose term the record was created and the incumbent President. The Archivist will also make the notice available to the public.

New subsection 2208(a)(2) provides that the notice will be in writing and contain pertinent information as determined by the Archivist.

New subsection 2208(a)(3)(A) provides that 60 business days after providing notice under subsection (a)(1), the Archivist shall make the noticed records available to the public unless the Archivist receives a claim of constitutional privilege from a former or incumbent President. The subsection allows for two exceptions to the 60-day deadline. First, subparagraph (a)(3)(B) authorizes a former or incumbent President to extend the deadline up to 30 additional working days by filing a statement with the Archivist that the additional time is needed for adequate review of the records. Second, under subparagraph (a)(3)(C) a deadline for review cannot expire before July 20th of the year that an incumbent President first takes office.

New subsection 2208(b) requires the former or incumbent President to personally assert a privilege claim and notify the Archivist, the House Committee on Oversight and Government Reform, and the Senate Committee on Homeland Security and Governmental Affairs of the privilege claim on the day it is asserted.

New subsection 2208(c) establishes the process through which a former President's records are released to the public and the man-

ner in which the Archivist handles claims of privilege by a former President.

New subsection 2208(c)(1) provides that if the former President asserts a privilege claim, the Archivist shall consult with the incumbent President to determine whether the incumbent President upholds the privilege claim of the former President.

Under new subsection 2208(c)(2)(A), the Archivist must inform the former President and the public of the incumbent President's decision on the former President's claim of privilege within 30 days after having first received the claim of privilege.

If the incumbent President upholds the former President's privilege claim, new subsection 2208(c)(2)(B) prohibits the Archivist from releasing the records unless the incumbent President withdraws his or her decision to uphold the former President's claim or the Archivist is otherwise directed by a final and non-appealable court order.

If the incumbent President decides not to uphold the former President's claim of privilege (or fails to make a decision within the applicable time period), new subsection 2208(c)(2)(C) requires the Archivist to release the applicable records 90 days after having first received notification of the former President's claim. The gap in time between the incumbent President's decision on whether to uphold the former President's privilege claim and the release of the records is designed to provide a former President the opportunity to argue his or her privilege claim in court. However, under H.R. 1233, the Archivist will ultimately release records unless otherwise directed by a court order in an action initiated by the former President.

New subsection 2208(d)(1) provides that if the incumbent President asserts his or her own privilege claim over a former President's records, the Archivist shall not release the records unless the incumbent President withdraws his or her privilege claim or the Archivist is otherwise directed by a final and non-appealable court order. Subsection (d)(2) provides that subsection (d) does not apply to records required to be made available in connection with judicial or congressional proceedings.

New subsection 2208(e) requires the Archivist to adjust applicable time periods to comply with the return date of any congressional subpoena, judicial subpoena, or judicial process.

Subsection (b) makes technical corrections to modernize a number of definitions contained in 44 U.S.C. Sec. 2201.

Subsection (c) modifies 44 U.S.C. Sec. 2203 to give Presidential administrations the option to, in effect, allow pre-acquisition of physical and electronic records.

Subsection (d) amends 44 U.S.C. Sec. 2204 to prevent the Archivist from making any original Presidential records available to individuals claiming access to the records as a designated representative of a President if that individual has been convicted of a crime related to the review, retention, removal, or destruction of records of the Archives.

Subsection (e) adds a new section 2209 to chapter 22 of title 44, United States Code, which provides that a President, Vice President or their staff should ensure that all Presidential records, even those sent from a personal electronic messaging account, are properly preserved and maintained in an official electronic messaging

account. In cases of intentional violation of this requirement, the section authorizes disciplinary action as determined by the appropriate supervisor, in accordance with subchapter I, II, or V of chapter 75 of title 5, U.S. Code.

Section 3. National Archives and Records Administration (NARA)

Subsection (a) amends 44 U.S.C. Sec. 2107 to outline the federal agency option of ‘pre-accessioning,’ or the transfer of agency documents to NARA for processing and release in advance of the statutorily required date for doing so.

Subsection (b) amends 44 U.S.C. Sec. 2111 to clarify that NARA may accept for deposit ‘recorded information’ generally, rather than the more limited types of information (e.g. motion-picture films, still pictures, and sound recordings) that are listed under the current statutory language.

Subsection (c) amends provisions in 44 U.S.C. Sec. 2114 to modernize terminology addressing the audio and visual records that NARA is likely to receive for deposit.

Subsection (d) amends 44 U.S.C. Sec. 2116 to include digital reproductions among the categories of reproductions that federal agencies may keep when they are statutorily required to maintain copies of documents indefinitely.

Section 4. Records management by Federal agencies

Section 4 amends 44 U.S.C. Sec. 3106 to expand the types of unlawful forms of destruction to include actions that are specific to electronic records, such as ‘corruption,’ ‘deletion,’ and ‘erasure,’ that may not be covered under the current statutory language.

Section 5. Disposal of records

Subsection (a) amends 44 U.S.C. 3301 to update the definition of ‘records’ to shift the emphasis to the information being stored in a given record, rather than any specific media used to store information and gives NARA the authority to determine what constitutes a ‘record’ as that term is applied to federal agencies. This, in effect, gives NARA the ability to issue binding regulations governing agencies’ record preservation, maintenance, and transfer requirements.

Subsections (b), (c), (e) amend 44 U.S.C. Sec. 3302(3), 3303(1), and 3312, respectively, to add digitization language to provisions dealing with the scheduled disposal and evidentiary validity of federal records.

Subsection (d) amends 44 U.S.C. Sec. 3303a(c) to update the language regarding the respective House and Senate congressional committees of jurisdiction.

Section 6. Procedures to prevent unauthorized removal of classified records from National Archives

This section requires the Archivist to prescribe internal procedures to prevent the unauthorized removal or destruction of classified records from NARA facilities.

Section 7. Repeal of provisions related to the National Study Commission on Records and Documents of Federal Officials

This section repeals provisions of Chapter 33 of title 44 governing the now-defunct National Study Commission on Records and Documents of Federal Officials.

Section 8. Pronoun amendments

This section removes pronouns throughout title 44 and replaces them with gender-neutral references to the Archivist, former President, incumbent President, or other official, as appropriate.

Section 9. Records management by the Archivist

Subsection (a) amends 44 U.S.C. Sec. 2902 to require NARA promote and pursue electronic recordkeeping and receipt of electronic records from federal agencies.

Subsection (b) amends 44 U.S.C. Sec. 2907 to provide the Archivist with the authority to establish and use records centers with the capability of digitizing records in the same way that NARA would capture records on microfilm or other photographic processes.

Subsection (c) amends 44 U.S.C. Sec. 2904 to delete vestigial language regarding the General Services Administration (GSA) and its Administrator.

Subsection (d) amends 44 U.S.C. Sec. 2906 to clarify NARA's ability to inspect federal agencies' records for the purpose of ensuring their historical value.

Subsections (e), (f), and (g) amend 44 U.S.C. Sec. 2115, the heading for chapter 29, of title 44, U.S.C., and 44 U.S.C. 3102(2), respectively, to delete references to GSA and its Administrator.

Section 10. Disclosure requirement for official business conducted using non-official electronic messaging account

Section 10 adds a new section 2911 to chapter 29 of title 44, United States Code, which would provide that an employee of an executive agency may not create or send a record from a non-official electronic messaging account without ensuring such record was submitted to an official electronic messaging account within 20 days. In cases of intentional violation of this disclosure requirement, the section authorizes disciplinary action as determined by the appropriate supervisor, in accordance with subchapter I, II, or V of chapter 75 of title 5, U.S. Code.

V. EVALUATION OF REGULATORY IMPACT

Pursuant to the requirement of paragraph 11(b)(1) of rule XXVI of the Standing Rules of the Senate the Committee has considered the regulatory impact of this bill. The Committee believes the bill updates the Federal Records Act and ends the uncertainty currently associated with the handling of executive privilege claims over Presidential records by establishing how the release of a former President's records will be managed. The legislation will not result in additional regulation, increased economic impact, adverse impact on personal privacy, or additional paperwork on any individuals or businesses.

VI. CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

JUNE 5, 2014.

Hon. TOM CARPER,
Chairman, Committee on Homeland Security and Governmental Affairs, U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 1233, the Presidential and Federal Records Act Amendments of 2014.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Matthew Pickford.

Sincerely,

DOUGLAS W. ELMENDORF.

Enclosure.

H.R. 1233—Presidential and Federal Records Act Amendments of 2014

H.R. 1233 would amend federal law regarding the preservation, storage, and management of federal records. The legislation would amend the Presidential Records Act to establish a process for reviewing Presidential records. The legislation also would update archival laws to accommodate the government's use of electronic and digital communications. Finally, H.R. 1233 would require the National Archives and Records Administration (NARA) to prevent unauthorized access or removal of government records.

According to NARA, most provisions in H.R. 1233 would codify and expand current practices. Executive Orders and Presidential memoranda have directed NARA and agencies to better manage government records. Consequently, CBO estimates that implementing H.R. 1233 would have no significant cost over the next five years. The legislation could affect direct spending by agencies not funded through annual appropriations; therefore, pay-as-you-go procedures apply. CBO estimates, however, that any net increase in spending by those agencies would not be significant. Enacting H.R. 1233 would not affect revenues.

H.R. 1233 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would impose no costs on the budgets of state, local, or tribal governments.

On May 20, 2013, CBO transmitted a cost estimate for H.R. 1233, the Presidential and Federal Records Act Amendments of 2013, as ordered reported by the House Committee on Oversight and Government Reform on March 20, 2013. Both versions of the legislation contain similar provisions, and their estimated costs are the same.

The CBO staff contact for this estimate is Matthew Pickford. The estimate was approved by Theresa Gullo, Deputy Assistant Director for Budget Analysis.

VII. CHANGES IN EXISTING LAWS MADE BY THE BILL, AS REPORTED

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, the following changes in existing law made by the bill, as reported, are shown as follows: (existing law proposed to be omitted is enclosed in black brackets, new matter is printed

in italic, existing law in which no change is proposed is shown in roman):

UNITED STATES CODE

* * * * *

TITLE 44—PUBLIC PRINTING AND DOCUMENTS

* * * * *

Chap.		Sec.
1. Joint Committee on Printing		101
* * * * *		
29. Records Management by the Archivist of the United States [and by the Administrator of General Services]		2901
* * * * *		

CHAPTER 21—NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

Sec.	
2101. Definitions.	
* * * * *	
[2114. Preservation of motion-picture films, still pictures, and sound recordings.]	
<i>2114. Preservation of audio and visual records.</i>	
* * * * *	

【§ 2107. Acceptance of records for historical preservation】

【When it appears to the Archivist to be in the public interest, he may—】

【(1) accept for deposit with the National Archives of the United States the records of a Federal agency, the Congress, the Architect of the Capitol, or the Supreme Court determined by the Archivist of the United States to have sufficient historical or other value to warrant their continued preservation by the United States Government;】

【(2) direct and effect the transfer to the National Archives of the United States of records of a Federal agency that have been in existence for more than thirty years and determined by the Archivist of the United States to have sufficient historical or other value to warrant their continued preservation by the United States Government, unless the head of the agency which has custody of them certified in writing to the Archivist that they must be retained in his custody for use in the conduct of the regular current business of the agency;】

【(3) direct and effect, with the approval of the head of the originating agency, or if the existence of the agency has been terminated, then with the approval of his successor in function, if any, the transfer of records, deposited or approved for deposit with the National Archives of the United States to public or educational institutions or associations; title to the records to remain vested in the United States unless otherwise authorized by Congress; and】

【(4) transfer materials from private sources authorized to be received by the Archivist by section 2111 of this title.】

§2107. Acceptance of records for historical preservation

(a) *IN GENERAL.*—When it appears to the Archivist to be in the public interest, the Archivist may—

(1) accept for deposit with the National Archives of the United States the records of a Federal agency, the Congress, the Architect of the Capitol, or the Supreme Court determined by the Archivist to have sufficient historical or other value to warrant their continued preservation by the United States Government;

(2) direct and effect the transfer of records of a Federal agency determined by the Archivist to have sufficient historical or other value to warrant their continued preservation by the United States Government to the National Archives of the United States, as soon as practicable, and at a time mutually agreed upon by the Archivist and the head of that Federal agency not later than thirty years after such records were created or received by that agency, unless the head of such agency has certified in writing to the Archivist that such records must be retained in the custody of such agency for use in the conduct of the regular business of the agency;

(3) direct and effect, with the approval of the head of the originating Federal agency, or if the existence of the agency has been terminated, with the approval of the head of that agency's successor in function, if any, the transfer of records, deposited or approved for deposit with the National Archives of the United States to public or educational institutions or associations; title to the records to remain vested in the United States unless otherwise authorized by Congress; and

(4) transfer materials from private sources authorized to be received by the Archivist by section 2111 of this title.

(b) *EARLY TRANSFER OF RECORDS.*—The Archivist—

(1) in consultation with the head of the originating Federal agency, is authorized to accept a copy of the records described in subsection (a)(2) that have been in existence for less than thirty years; and

(2) may not disclose any such records until the expiration of—

(A) the thirty-year period described in paragraph (1);

(B) any longer period established by the Archivist by order; or

(C) any shorter period agreed to by the originating Federal agency.

* * * * *

[§ 2111. Material accepted for deposit]

[When the Archivist considers it to be in the public interest he may accept for deposit—]

[(1) the papers and other historical materials of a President or former President of the United States, or other official or former official of the Government, and other papers relating to and contemporary with a President or former President of the United States, subject to restrictions agreeable to the Archivist as to their use; and]

[(2) documents, including motion-picture films, still pictures, and sound recordings, from private sources that are appro-

appropriate for preservation by the Government as evidence of its organization, functions, policies, decisions, procedures, and transactions.]

【This section shall not apply in the case of any Presidential records which are subject to the provisions of chapter 22 of this title.】

§2111. Material accepted for deposit

(a) *IN GENERAL.*—When the Archivist considers it to be in the public interest the Archivist may accept for deposit—

(1) *the papers and other historical materials of a President or former President of the United States, or other official or former official of the Government, and other papers relating to and contemporary with a President or former President of the United States, subject to restrictions agreeable to the Archivist as to their use; and*

(2) *recorded information (as such term is defined in section 3301(a)(2) of this title) from private sources that are appropriate for preservation by the Government as evidence of its organization, functions, policies, decisions, procedures, and transactions.*

(b) *EXCEPTION.*—This section shall not apply in the case of any Presidential records which are subject to the provisions of chapter 22 of this title.

* * * * *

【§2114. Preservation of motion-picture films, still pictures, and sound recordings】

【The Archivist may make and preserve motion-picture films, still pictures, and sound recordings pertaining to and illustrative of the historical development of the United States Government and its activities, and provide for preparing, editing, titling, scoring, processing, duplicating, reproducing, exhibiting, and releasing for non-profit educational purposes, motion-picture films, still pictures, and sound recordings in his custody.】

§2114. Preservation of audio and visual records

The Archivist may make and preserve audio and visual records, including motion-picture films, still photographs, and sound recordings, in analog, digital, or any other form, pertaining to and illustrative of the historical development of the United States Government and its activities, and provide for preparing, editing, titling, scoring, processing, duplicating, reproducing, exhibiting, and releasing for non-profit educational purposes, motion-picture films, still photographs, and sound recordings in the Archivist's custody.

§ 2115. Reports; correction of violations

(a) In carrying out 【their respective】 *the* duties and responsibilities under chapters 21, 25, 29, 31, and 33 of this title, the Archivist 【and the Administrator】 may 【each】 obtain reports from any Federal agency on such agency's activities under such chapters.

(b) When 【either】 the Archivist 【or the Administrator】 finds that a provision of any such chapter has been or is being violated, the Archivist 【or the Administrator】 shall (1) inform in writing the

head of the agency concerned of the violation and make recommendations for its correction; and (2) unless satisfactory corrective measures are [inaugurated] *demonstrably commenced* within a reasonable time, submit a written report of the matter to the President and the Congress.

§ 2116. Legal status of reproductions; official seal; fees for copies and reproductions

(a) When records that are required by statute to be retained indefinitely have been reproduced by photographic, microphotographic, *digital*, or other processes, in accordance with standards established by the Archivist the indefinite retention by the photographic, microphotographic, *digital*, or other reproductions constitutes compliance with the statutory requirement for the indefinite retention of the original records. The reproductions, as well as reproductions made under regulations to carry out chapter 21, 29, 31, and 33 of this title, shall have the same legal status as the originals.

* * * * *

(c) The Archivist may charge a fee set to recover the costs for making or authenticating copies or reproductions of materials transferred to [his] *the Archivist's* custody. Such fee shall be fixed by the Archivist at a level which will recover, so far as practicable, all elements of such costs, and may, in the Archivist's discretion, include increments for the estimated replacement cost of equipment. Such fees shall be paid into, administered, and expended as a part of the National Archives Trust Fund. The Archivist may not charge for making or authenticating copies or reproductions of materials for official use by the United States Government unless appropriations available to the Archivist for this purpose are insufficient to cover the cost of performing the work.

* * * * *

CHAPTER 22—PRESIDENTIAL RECORDS

* * * * *

Sec.

2201. Definitions.

* * * * *

2208. *Claims of constitutionally based privilege against disclosure.*

2209. *Disclosure requirement for official business conducted using non-official electronic messaging accounts.*

* * * * *

§ 2201. Definitions

As used in this chapter—

(1) The term 'documentary material' means all books, correspondence, [memorandums] *memoranda*, documents, papers, pamphlets, works of art, models, pictures, photographs, plats, maps, films, and motion pictures, including, but not limited to, [audio, audiovisual] *audio and visual records*, or other electronic or mechanical recordings, *whether in analog, digital, or any other form.*

(2) The term 'Presidential records' means documentary materials, or any reasonably segregable portion thereof, created or received by the President, [his] *the President's* immediate

staff, or a unit or individual of the Executive Office of the President whose function is to **[advise and assist]** *advise or assist* the President, in the course of conducting activities which 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—

(A) includes any documentary materials relating to the political activities of the President or members of **[his]** *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

* * * * *

§ 2203. Management and custody of Presidential records

(a) Through the implementation of records management controls and other necessary actions, the President shall take all such steps as may be necessary to assure that the activities, deliberations, decisions, and policies that reflect the performance of **[his]** *the President's* constitutional, statutory, or other official or ceremonial duties are adequately documented and that such records are **[maintained]** *preserved and maintained* as Presidential records pursuant to the requirements of this section and other provisions of law.

(b) Documentary materials produced or received by the President, **[his]** *the President's* staff, or units or individuals in the Executive Office of the President the function of which is to **[advise and assist]** *advise or assist* the President, shall, to the extent practicable, be categorized as Presidential records or personal records upon their creation or receipt and be filed separately.

(c) During **[his]** *the President's* term of office, the President may dispose of **[those of his Presidential records]** *those Presidential records of such President* that no longer have administrative, historical, informational, or evidentiary value if—

(1) * * *

(2) the Archivist states that **[he]** *the Archivist* does not intend to take any action under subsection (e) of this section.

(d) In the event the Archivist notifies the President under subsection (c) that **[he]** *the Archivist* does intend to take action under subsection (e), the President may dispose of such Presidential records if copies of the disposal schedule are submitted to the appropriate Congressional Committees at least 60 calendar days of continuous session of Congress in advance of the proposed disposal date. For the purpose of this section, continuity of session is broken only by an adjournment of Congress sine die, and the days on which either House is not in session because of an adjournment of more than three days to a day certain are excluded in the computation of the days in which Congress is in continuous session.

(e) The Archivist shall request the advice of the Committee on Rules and Administration and the Committee on Governmental Affairs of the Senate and the Committee on House Oversight and the Committee on Government Operations of the House of Representatives with respect to any proposed disposal of Presidential records whenever **[he]** *the Archivist* considers that—

(1) * * *

* * * * *

(f) *During a President's term of office, the Archivist may maintain and preserve Presidential records on behalf of the President, including records in digital or electronic form. The President shall remain exclusively responsible for custody, control, and access to such Presidential records. The Archivist may not disclose any such records, except under direction of the President, until the conclusion of a President's term of office, if a President serves consecutive terms upon the conclusion of the last term, or such other period provided for under section 2204 of this title.*

[(f)] (g)(1) Upon the conclusion of a President's term of office, or if a President serves consecutive terms upon the conclusion of the last term, the Archivist of the United States shall assume responsibility for the custody, control, and preservation of, and access to, the Presidential records of that President. The Archivist shall have an affirmative duty to make such records available to the public as rapidly and completely as possible consistent with the provisions of this [Act] chapter.

* * * * *

(3) The Archivist is authorized to dispose of such Presidential records which [he] *the Archivist* has appraised and determined to have insufficient administrative, historical, informational, or evidentiary value to warrant their continued preservation. Notice of such disposal shall be published in the Federal Register at least 60 days in advance of the proposed disposal date. Publication of such notice shall constitute a final agency action for purposes of review under chapter 7 of title 5, United States Code.

§ 2204. Restrictions on access to Presidential records

(a) Prior to the conclusion of [his] *a President's* term of office or last consecutive term of office, as the case may be, the President shall specify durations, not to exceed 12 years, for which access shall be restricted with respect to information, in a Presidential record, within one or more of the following categories:

(1) * * *

* * * * *

(5) confidential communications requesting or submitting advice, between the President and [his] *the President's* advisers, or between such advisers; or

* * * * *

(b)(1) Any Presidential record or reasonably segregable portion thereof containing information within a category restricted by the President under subsection (a) shall be so designated by the Archivist and access thereto shall be restricted until the earlier of—

(A) * * *

(B) upon a determination by the Archivist that such record or reasonably segregable portion thereof, or of any significant element or aspect of the information contained in such record or reasonably segregable portion thereof, has been placed in

the public domain through publication by the former President, or [his] *the President's* agents.

* * * * *

(3) During the period of restricted access specified pursuant to subsection (b)(1), the determination whether access to a Presidential record or reasonably segregable portion thereof shall be restricted shall be made by the Archivist, in [his] *the Archivist's* discretion, after consultation with the former President, and, during such period, such determinations shall not be subject to judicial review, except as provided in subsection (e) of this section. The Archivist shall establish procedures whereby any person denied access to a Presidential record because such record is restricted pursuant to a determination made under this paragraph, may file an administrative appeal of such determination. Such procedures shall provide for a written determination by the Archivist or [his designee] *the Archivist's designee*, within 30 working days after receipt of such an appeal, setting forth the basis for such determination.

* * * * *

(d) Upon the death or disability of a President or former President, any discretion or authority the President or former President may have had under this chapter, *except section 2208*, shall be exercised by the Archivist unless otherwise previously provided by the President or former President in a written notice to the Archivist.

* * * * *

(f) *The Archivist shall not make available any original Presidential records to any individual claiming access to any Presidential record as a designated representative under section 2205(3) of this title if that individual has been convicted of a crime relating to the review, retention, removal, or destruction of records of the Archives.*

§ 2205. Exceptions to restricted access

Notwithstanding any restrictions on access imposed pursuant to [section 2204] *sections 2204 and 2208 of this title*—

(1) * * *

(2) subject to any rights, defenses, or privileges which the United States or any agency or person may invoke, Presidential records shall be made available—

(A) pursuant to [subpena] *subpoena* or other judicial process issued by a court of competent jurisdiction for the purposes of any civil or criminal investigation or proceeding;

(B) to an incumbent President if such records contain information that is needed for the conduct of current business of [his] *the incumbent President's* office and that is not otherwise available; and

* * * * *

(3) the Presidential records of a former President shall be available to such former President or [his] *the former President's* designated representative.

* * * * *

§ 2207. Vice-Presidential records

Vice-Presidential records shall be subject to the provisions of this chapter in the same manner as Presidential records. The duties and responsibilities of the Vice President, with respect to Vice-Presidential records, shall be the same as the duties and responsibilities of the President under this chapter, *except section 2208*, with respect to Presidential records. The authority of the Archivist with respect to Vice-Presidential records shall be the same as the authority of the Archivist under this chapter with respect to Presidential records, except that the Archivist may, when the Archivist determines that it is in the public interest, enter into an agreement for the deposit of Vice-Presidential records in a non-Federal archival depository. Nothing in this chapter shall be construed to authorize the establishment of separate archival depositories for such Vice-Presidential records.

§ 2208. Claims of constitutionally based privilege against disclosure

(a)(1) When the Archivist determines under this chapter to make available to the public any Presidential record that has not previously been made available to the public, the Archivist shall—

(A) promptly provide notice of such determination to—

(i) the former President during whose term of office the record was created; and

(ii) the incumbent President; and

(B) make the notice available to the public.

(2) The notice under paragraph (1)—

(A) shall be in writing; and

(B) shall include such information as may be prescribed in regulations issued by the Archivist.

(3)(A) Upon the expiration of the 60-day period (excepting Saturdays, Sundays, and legal public holidays) beginning on the date the Archivist provides notice under paragraph (1)(A), the Archivist shall make available to the public the Presidential record covered by the notice, except any record (or reasonably segregable part of a record) with respect to which the Archivist receives from a former President or the incumbent President notification of a claim of constitutionally based privilege against disclosure under subsection (b).

(B) A former President or the incumbent President may extend the period under subparagraph (A) once for not more than 30 additional days (excepting Saturdays, Sundays, and legal public holidays) by filing with the Archivist a statement that such an extension is necessary to allow an adequate review of the record.

(C) Notwithstanding subparagraphs (A) and (B), if the 60-day period under subparagraph (A), or any extension of that period under subparagraph (B), would otherwise expire during the 6-month period after the incumbent President first takes office, then that 60-day period or extension, respectively, shall expire at the end of that 6-month period.

(b)(1) For purposes of this section, the decision to assert any claim of constitutionally based privilege against disclosure of a Presidential record (or reasonably segregable part of a record) must be made personally by a former President or the incumbent President, as applicable.

(2) A former President or the incumbent President shall notify the Archivist, the Committee on Oversight and Government Reform of the House of Representatives, and the Committee on Homeland Security and Governmental Affairs of the Senate of a privilege claim under paragraph (1) on the same day that the claim is asserted under such paragraph.

(c)(1) If a claim of constitutionally based privilege against disclosure of a Presidential record (or reasonably segregable part of a record) is asserted under subsection (b) by a former President, the Archivist shall consult with the incumbent President, as soon as practicable during the period specified in paragraph (2)(A), to determine whether the incumbent President will uphold the claim asserted by the former President.

(2)(A) Not later than the end of the 30-day period beginning on the date of which the Archivist receives notification from a former President of the assertion of a claim of constitutionally based privilege against disclosure, the Archivist shall provide notice to the former President and the public of the decision of the incumbent President under paragraph (1) regarding the claim.

(B) If the incumbent President upholds the claim of privilege asserted by the former President, the Archivist shall not make the Presidential record (or reasonably segregable part of a record) subject to the claim publicly available unless—

- (i) the incumbent President withdraws the decision upholding the claim of privilege asserted by the former President; or
- (ii) the Archivist is otherwise directed by a final court order that is not subject to appeal.

(C) If the incumbent President determines not to uphold the claim of privilege asserted by the former President, or fails to make the determination under paragraph (1) before the end of the period specified in subparagraph (A), the Archivist shall release the Presidential record subject to the claim at the end of the 90-day period beginning on the date on which the Archivist received notification of the claim, unless otherwise directed by a court order in an action initiated by the former President under section 2204(e) of this title or by a court order in another action in any Federal court.

(d) The Archivist shall not make publicly available a Presidential record (or reasonably segregable part of a record) that is subject to a privilege claim asserted by the incumbent President unless—

- (1) the incumbent President withdraws the privilege claim; or
- (2) the Archivist is otherwise directed by a final court order that is not subject to appeal.

(e) The Archivist shall adjust any otherwise applicable time period under this section as necessary to comply with the return date of any congressional subpoena, judicial subpoena, or judicial process.

§ 2209. Disclosure requirement for official business conducted using non-official electronic messaging accounts

(a) *IN GENERAL.*—The President, the Vice President, or a covered employee may not create or send a Presidential or Vice Presidential record using a non-official electronic message account unless the President, Vice President, or covered employee—

- (1) copies an official electronic messaging account of the President, Vice President, or covered employee in the original

creation or transmission of the Presidential record or Vice Presidential record; or

(2) forwards a complete copy of the Presidential or Vice Presidential record to an official electronic messaging account of the President, Vice President, or covered employee not later than 20 days after the original creation or transmission of the Presidential or Vice Presidential record.

(b) ADVERSE ACTIONS.—The intentional violation of subsection (a) by a covered employee (including any rules, regulations, or other implementing guidelines), as determined by the appropriate supervisor, shall be a basis for disciplinary action in accordance with subchapter I, II, or V of chapter 75 of title 5, as the case may be.

(c) DEFINITIONS.—In this section:

(1) COVERED EMPLOYEE.—The term ‘covered employee’ means—

(A) the immediate staff of the President;

(B) the immediate staff of the Vice President;

(C) a unit or individual of the Executive Office of the President whose function is to advise and assist the President; and

(D) a unit or individual of the Office of the Vice President whose function is to advise and assist the Vice President.

(2) ELECTRONIC MESSAGES.—The term ‘electronic messages’ means electronic mail and other electronic messaging systems that are used for purposes of communicating between individuals.

(3) ELECTRONIC MESSAGING ACCOUNT.—The term ‘electronic messaging account’ means any account that sends electronic messages.

* * * * *

CHAPTER 29—RECORDS MANAGEMENT BY THE ARCHIVIST OF THE UNITED STATES [AND BY THE ADMINISTRATOR OF GENERAL SERVICES]

Sec.

2901. Definitions.

* * * * *

2907. Records centers and centralized microfilming or digitization services.

* * * * *

2911. Disclosure requirement for official business conducted using non-official electronic messaging accounts.

* * * * *

§ 2901. Definitions

As used in this chapter, and chapters 21, 25, 31, and 33 of this title—

(1) * * *

* * * * *

(11) the term ‘National Archives of the United States’ means those official records which have been determined by the Archivist of the United States to have sufficient historical or other value to warrant their continued preservation by the Federal Government, and which have been accepted by the Archivist for deposit in [his] the Archivist’s custody;

* * * * *

§ 2902. Objectives of records management

It is the purpose of this chapter, and chapters 21, 31, and 33 of this title, to require the establishment of standards and procedures to assure efficient and effective records management. Such records management standards and procedures shall seek to implement the following goals:

(1) * * *

* * * * *

(4) Simplification of the activities, systems, and processes of records **creation and of records maintenance and use** *creation, maintenance, transfer, and use.*

* * * * *

(6) Direction of continuing attention on records from their initial creation to their final disposition, with particular emphasis on the prevention of unnecessary Federal paperwork *and the transfer of records from Federal agencies to the National Archives of the United States in digital or electronic form to the greatest extent possible.*

(7) Establishment and maintenance of such other systems or techniques as **the Administrator or** the Archivist considers necessary to carry out the purposes of this chapter, and chapters 21, 31, and 33 of this title.

* * * * *

§ 2904. General responsibilities for records management

(a) * * *

(b) **The Administrator** *The Archivist* shall provide guidance and assistance to Federal agencies to ensure economical and effective records management by such agencies.

(c) In carrying out **their** *the* responsibilities under **subsection (a) or (b), respectively** *subsections (a) and (b)*, the Archivist **and the Administrator** shall **each** have the responsibility—

(1) * * *

* * * * *

(6) to conduct records management studies and, in **his** *the Archivist's* discretion, designate the heads of executive agencies to conduct records management studies with respect to establishing systems and techniques designed to save time and effort in records management;

* * * * *

(8) to report to the appropriate oversight and appropriations committees of the Congress and to the Director of the Office of Management and Budget in January of each year and at such other times as the Archivist **or the Administrator** (as the case may be) **deems desirable**—

(A) * * *

* * * * *

[(d) In addition, the Administrator, in carrying out subsection (b), shall have the responsibility to promote economy and efficiency in the selection and utilization of space, staff, equipment, and supplies for records management.]

(d) *The Archivist shall promulgate regulations requiring all Federal agencies to transfer all digital or electronic records to the National Archives of the United States in digital or electronic form to the greatest extent possible.*

§ 2905. Establishment of standards for selective retention of records; security measures

(a) The Archivist shall establish standards for the selective retention of records of continuing value, and assist Federal agencies in applying the standards to records in their custody. [He] *The Archivist* shall notify the head of a Federal agency of any actual, impending, or threatened unlawful removal, defacing, alteration, or destruction of records in the custody of the agency that shall come to [his] *the Archivist's* attention, and assist the head of the agency in initiating action through the Attorney General for the recovery of records unlawfully removed and for other redress provided by law. In any case in which the head of the agency does not initiate an action for such recovery or other redress within a reasonable period of time after being notified of any such unlawful action, the Archivist shall request the Attorney General to initiate such an action, and shall notify the Congress when such a request has been made.

* * * * *

§ 2906. Inspection of agency records

(a)(1) In carrying out [their respective] *the* duties and responsibilities under this chapter, [the Administrator of General Services and] the Archivist (or the [designee of either] *Archivist's designee*) may inspect the records or the records management practices and programs of any Federal agency [solely] for the purpose of rendering recommendations for the improvement of records management practices and programs *and for determining whether the records of Federal agencies have sufficient value to warrant continued preservation or lack sufficient value to justify continued preservation.* Officers and employees of such agencies shall cooperate fully in such inspections, subject to the provisions of paragraphs (2) and (3) of this subsection.

(2) Records, the use of which is restricted by law or for reasons of national security or the public interest, shall be inspected, in accordance with regulations promulgated by [the Administrator and] the Archivist, subject to the approval of the head of the agency concerned or of the President. [The regulations promulgated by the Administrator and the Archivist under this paragraph shall, to the extent practicable, be identical.]

(3) If [the Administrator or] the Archivist (or the [designee of either] *Archivist's designee*) inspects a record, as provided in this subsection, which is contained in a system of records which is subject to section 552a of title 5, such record shall be—

(A) maintained by [the Administrator, the Archivist,] *the Archivist* or such designee as a record contained in a system of records; or

* * * * *

(b) In conducting the inspection of agency records provided for in subsection (a) of this section, [the Administrator and] the Archi-

vist (or the [designee of either] *Archivist's designee*) shall, in addition to complying with the provisions of law cited in subsection (a)(3), comply with all other Federal laws and be subject to the sanctions provided therein.

§ 2907. Records centers and centralized microfilming or digitization services

The Archivist may establish, maintain, and operate records centers and centralized microfilming or *digitization* services for Federal agencies.

* * * * *

§ 2911. Disclosure requirement for official business conducted using non-official electronic messaging accounts

(a) *IN GENERAL.*—An officer or employee of an executive agency may not create or send a record using a non-official electronic messaging account unless such officer or employee—

(1) copies an official electronic messaging account of the officer or employee in the original creation or transmission of the record; or

(2) forwards a complete copy of the record to an official electronic messaging account of the officer or employee not later than 20 days after the original creation or transmission of the record.

(b) *ADVERSE ACTIONS.*—The intentional violation of subsection (a) (including any rules, regulations, or other implementing guidelines), as determined by the appropriate supervisor, shall be a basis for disciplinary action in accordance with subchapter I, II, or V of chapter 75 of title 5, as the case may be.

(c) *DEFINITIONS.*—In this section:

(1) *ELECTRONIC MESSAGES.*—The term ‘electronic messages’ means electronic mail and other electronic messaging systems that are used for purposes of communicating between individuals.

(2) *ELECTRONIC MESSAGING ACCOUNT.*—The term ‘electronic messaging account’ means any account that sends electronic messages.

(3) *EXECUTIVE AGENCY.*—The term ‘executive agency’ has the meaning given that term in section 105 of title 5.

* * * * *

CHAPTER 31—RECORDS MANAGEMENT BY FEDERAL AGENCIES

* * * * *

§ 3102. Establishment of program of management

The head of each Federal agency shall establish and maintain an active, continuing program for the economical and efficient management of the records of the agency. The program, among other things, shall provide for

(1) * * *

(2) cooperation with [the Administrator of General Services and] the Archivist in applying standards, procedures, and techniques designed to improve the management of records,

promote the maintenance and security of records deemed appropriate for preservation, and facilitate the segregation and disposal of records of temporary value; and

* * * * *

§ 3103. Transfer of records to records centers

When the head of a Federal agency determines that such action may affect substantial economies or increased operating efficiency, [he] *the head of such agency* shall provide for the transfer of records to a records center maintained and operated by the Archivist, or, when approved by the Archivist, to a center maintained and operated by the head of the Federal agency.

§ 3104. Certifications and determinations on transferred records

An official of the Government who is authorized to certify to facts on the basis of records in [his] *such official's* custody, may certify to facts on the basis of records that have been transferred by [him or his] *such official or such official's* predecessors to the Archivist, and may authorize the Archivist to certify to facts and to make administrative determinations on the basis of records transferred to the Archivist, notwithstanding any other law.

§ 3105. Safeguards

The head of each Federal agency shall establish safeguards against the removal or loss of records [he] *the head of such agency* determines to be necessary and required by regulations of the Archivist. Safeguards shall include making it known to officials and employees of the agency—

(1) * * *

* * * * *

【§ 3106. Unlawful removal, destruction of records】

【The head of each Federal agency shall notify the Archivist of any actual, impending, or threatened unlawful removal, defacing, alteration, or destruction of records in the custody of the agency of which he is the head that shall come to his attention, and with the assistance of the Archivist shall initiate action through the Attorney General for the recovery of records he knows or has reason to believe have been unlawfully removed from his agency, or from another Federal agency whose records have been transferred to his legal custody. In any case in which the head of the agency does not initiate an action for such recovery or other redress within a reasonable period of time after being notified of any such unlawful action, the Archivist shall request the Attorney General to initiate such an action, and shall notify the Congress when such a request has been made.】

§ 3106. Unlawful removal, destruction of records

(a) *FEDERAL AGENCY NOTIFICATION.—The head of each Federal agency shall notify the Archivist of any actual, impending, or threatened unlawful removal, defacing, alteration, corruption, deletion, erasure, or other destruction of records in the custody of the agency, and with the assistance of the Archivist shall initiate action*

through the Attorney General for the recovery of records the head of the Federal agency knows or has reason to believe have been unlawfully removed from that agency, or from another Federal agency whose records have been transferred to the legal custody of that Federal agency.

(b) ARCHIVIST NOTIFICATION.—In any case in which the head of a Federal agency does not initiate an action for such recovery or other redress within a reasonable period of time after being notified of any such unlawful action described in subsection (a), or is participating in, or believed to be participating in any such unlawful action, the Archivist shall request the Attorney General to initiate such an action, and shall notify the Congress when such a request has been made.

* * * * *

CHAPTER 33—DISPOSAL OF RECORDS

Sec.

3301. Definition of records.

[3315. Definitions.]

[3316. Establishment of Commission.]

[3317. Duties of Commission.]

[3318. Membership.]

[3319. Director and staff; experts and consultants.]

[3320. Powers of Commission.]

[3321. Support services.]

[3322. Report.]

[3323. Termination.]

[3324. Authorization of appropriations.]

§ 3301. Definition of records

[As used in this chapter, ‘records’ includes all books, papers, maps, photographs, machine readable materials, or other documentary materials, regardless of physical form or characteristics, made or received by an agency of the United States Government under Federal law or in connection with the transaction of public business and preserved or appropriate for preservation by that agency or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the Government or because of the informational value of data in them. Library and museum material made or acquired and preserved solely for reference or exhibition purposes, extra copies of documents preserved only for convenience of reference, and stocks of publications and of processed documents are not included.]

§ 3301. Definition of records

(a) RECORDS DEFINED.—

(1) IN GENERAL.—As used in this chapter, the term ‘records’—

(A) includes all recorded information, regardless of form or characteristics, made or received by a Federal agency under Federal law or in connection with the transaction of public business and preserved or appropriate for preservation by that agency or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the United States Government or because of the informational value of data in them; and

(B) does not include—

- (i) library and museum material made or acquired and preserved solely for reference or exhibition purposes; or
- (ii) duplicate copies of records preserved only for convenience.

(2) *RECORDED INFORMATION DEFINED.*—For purposes of paragraph (1), the term ‘recorded information’ includes all traditional forms of records, regardless of physical form or characteristics, including information created, manipulated, communicated, or stored in digital or electronic form.

(b) *DETERMINATION OF DEFINITION.*—The Archivist’s determination whether recorded information, regardless of whether it exists in physical, digital, or electronic form, is a record as defined in subsection (a) shall be binding on all Federal agencies.

§ 3302. Regulations covering lists of records for disposal, procedure for disposal, and standards for reproduction

The Archivist shall promulgate regulations, not inconsistent with this chapter, establishing—

(1) procedures for the compiling and submitting to [him] the Archivist of lists and schedules of records proposed for disposal,

* * * * *

(3) standards for the reproduction of records by [photographic or microphotographic processes] *photographic, microphotographic, or digital processes* with a view to the disposal of the original records.

§ 3303. Lists and schedules of records to be submitted to the Archivist by head of each Government agency

The head of each agency of the United States Government shall submit to the Archivist, under regulations promulgated as provided by section 3302 of this title—

(1) lists of any records in the custody of the agency that have been [photographed or microphotographed] *photographed, microphotographed, or digitized* under the regulations and that, as a consequence, do not appear to have sufficient value to warrant their further preservation by the Government;

* * * * *

§ 3303a. Examination by Archivist of lists and schedules of records lacking preservation value; disposal of records

(a) The Archivist shall examine the lists and schedules submitted to [him] the Archivist under section 3303 of this title. If the Archivist determines that any of the records listed in a list or schedule submitted to [him] the Archivist do not, or will not after the lapse of the period specified, have sufficient administrative, legal, research, or other value to warrant their continued preservation by the Government, [he] the Archivist may, after publication of notice in the Federal Register and an opportunity for interested persons to submit comment thereon—

(1) * * *

* * * * *

(c) The Archivist may request advice and counsel from [the Committee on Rules and Administration of the Senate and the Committee on House Oversight of the House of Representatives] *the Committee on Oversight and Government Reform of the House of Representatives and the Committee on Homeland Security and Governmental Affairs of the Senate* with respect to the disposal of any particular records under this chapter whenever [he] *the Archivist* considers that—

(1) * * *

* * * * *

(e) The Archivist may approve and effect the disposal of records that are in [his] *the Archivist's* legal custody, provided that records that had been in the custody of another existing agency may not be disposed of without the written consent of the head of the agency.

(f) The Archivist shall make an annual report to the Congress concerning the disposal of records under this chapter, including general descriptions of the types of records disposed of and such other information as [he] *the Archivist* considers appropriate to keep the Congress fully informed regarding the disposal of records under this chapter.

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§ 3312. Photographs or microphotographs of records considered as originals; certified reproductions admissible in evidence

[Photographs or microphotographs of records] *Photographs, microphotographs of records, or digitized records* made in compliance with regulations under section 3302 of this title shall have the same effect as the originals and shall be treated as originals for the purpose of their admissibility in evidence. Certified or authenticated reproductions of the [photographs or microphotographs] *photographs, microphotographs, or digitized records* shall be admitted in evidence equally with the original [photographs or microphotographs] *photographs, microphotographs, or digitized records*.

* * * * *

[§ 3315. Definitions]

[For purposes of this section and section 3316 through section 3324 of this title—]

[(1) the term 'Federal official' means any individual holding the office of President or Vice President of the United States, or Senator or Representative in, or Delegate or Resident Commissioner to, the Congress of the United States, or any officer of the executive, judicial, or legislative branch of the Federal Government;]

[(2) the term 'Commission' means the National Study Commission on Records and Documents of Federal Officials; and]

[(3) the term 'records and documents' shall include handwritten and typewritten documents, motion pictures, television tapes and recordings, magnetic tapes, automated data proc-

essing documentation in various forms, and other records that reveal the history of the Nation.】

【§ 3316. Establishment of Commission】

【There is established a commission to be known as the National Study Commission on Records and Documents of Federal Officials.】

【§ 3317. Duties of Commission】

【It shall be the duty of the Commission to study problems and questions with respect to the control, disposition, and preservation of records and documents produced by or on behalf of Federal officials, with a view toward the development of appropriate legislative recommendations and other recommendations regarding appropriate rules and procedures with respect to such control, disposition, and preservation. Such study shall include consideration of—】

【(1) whether the historical practice regarding the records and documents produced by or on behalf of Presidents of the United States should be rejected or accepted and whether such practice should be made applicable with respect to all Federal officials;】

【(2) the relationship of the findings of the Commission to the provisions of chapter 19 of this title, section 2101 through section 2108 of this title, and other Federal laws relating to the control, disposition, and preservation of records and documents of Federal officials;】

【(3) whether the findings of the Commission should affect the control, disposition, and preservation of records and documents of agencies within the Executive Office of the President created for short-term purposes by the President;】

【(4) the recordkeeping procedures of the White House Office, with a view toward establishing means to determine which records and documents are produced by or on behalf of the President;】

【(5) the nature of rules and procedures which should apply to the control, disposition, and preservation of records and documents produced by Presidential task forces, commissions, and boards;】

【(6) criteria which may be used generally in determining the scope of materials which should be considered to be the records and documents of Members of the Congress;】

【(7) the privacy interests of individuals whose communications with Federal officials, and with task forces, commissions, and boards, are a part of the records and documents produced by such officials, task forces, commissions, and boards; and】

【(8) any other problems, questions, or issues which the Commission considers relevant to carrying out its duties under section 3315 through section 3324 of this title.】

【§ 3318. Membership】

【(a)(1) The Commission shall be composed of seventeen members as follows:】

【(A) one Member of the House of Representatives appointed by the Speaker of the House upon recommendation made by the majority leader of the House;】

[(B) one Member of the House of Representatives appointed by the Speaker of the House upon recommendation made by the minority leader of the House;]

[(C) one Member of the Senate appointed by the President pro tempore of the Senate upon recommendation made by the majority leader of the Senate;]

[(D) one Member of the Senate appointed by the President pro tempore of the Senate upon recommendation made by the minority leader of the Senate;]

[(E) one member of the Federal judiciary appointed by the Chief Justice of the United States;]

[(F) one person employed by the Executive Office of the President or the White House Office, appointed by the President;]

[(G) three appointed by the President, by and with the advice and consent of the Senate, from persons who are not officers or employees of any government and who are specially qualified to serve on the Commission by virtue of their education, training, or experience;]

[(H) one representative of the Department of State, appointed by the Secretary of State;]

[(I) one representative of the Department of Defense, appointed by the Secretary of Defense;]

[(J) one representative of the Department of Justice, appointed by the Attorney General;]

[(K) the Administrator of General Services (or his delegate);]

[(L) the Librarian of Congress;]

[(M) one member of the American Historical Association, appointed by the counsel of such Association;]

[(N) one member of the Society of American Archivists, appointed by such Society; and]

[(O) one member of the Organization of American Historians, appointed by such Organization.]

[(2) No more than two members appointed under paragraph (1)(G) may be of the same political party.]

[(b) A vacancy in the Commission shall be filled in the manner in which the original appointment was made.]

[(c) If any member of the Commission who was appointed to the Commission as a Member of the Congress leave such office, or if any member of the Commission who was appointed from persons who are not officers or employees of any government becomes an officer or employee of a government, he may continue as a member of the Commission for no longer than the sixty-day period beginning on the date he leaves such office or becomes such an officer or employee, as the case may be.]

[(d) Members shall be appointed for the life of the Commission.]

[(e)(1) Members of the Commission shall serve without pay.]

[(2) While away from their homes or regular places of business in the performance of services for the Commission, members of the Commission shall be allowed travel expenses in the same manner as persons employed intermittently in the service of the Federal Government are allowed expenses under section 5703 of title 5, United States Code, except that per diem in lieu of subsistence shall be paid only to those members of the Commission who are not

full-time officers or employees of the United States or Members of the Congress.】

【(f) The Chairman of the Commission shall be designated by the President from among members appointed under subsection (a)(1)(G).】

【(g) The Commission shall meet at the call of the Chairman or a majority of its members.】

【§ 3319. Director and staff; experts and consultants】

【(a) The Commission shall appoint a Director who shall be paid at a rate not to exceed the rate of basic pay in effect for level V of the Executive Schedule (5 U.S.C. 5316).】

【(b) The Commission may appoint and fix the pay of such additional personnel as it deems necessary.】

【(c)(1) The Commission may procure temporary and intermittent services to the same extent as is authorized by section 3109(b) of title 5, United States Code, but at rates for individuals not to exceed the daily equivalent of the annual rate of basic pay in effect for grade GS-15 of the General Schedule (5 U.S.C. 5332).】

【(2) In procuring services under this subsection, the Commission shall seek to obtain the advice and assistance of constitutional scholars and members of the historical, archival, and journalistic professions.】

【(d) Upon request of the Commission, the head of any Federal agency is authorized to detail, on a reimbursable basis, any of the personnel of such agency to the Commission to assist it in carrying out its duties under sections 3315 through 3324 of this title.】

【§ 3320. Powers of Commission】

【(a) The Commission may, for the purpose of carrying out its duties under sections 3315 through 3324 of this title, hold such hearings, sit and act at such times and places, take such testimony, and receive such evidence, as the Commission may deem desirable.】

【(b) When so authorized by the Commission, any member or agent of the Commission may take any action which the Commission is authorized to take by this section.】

【(c) The Commission may secure directly from any department or agency of the United States information necessary to enable the Commission to carry out its duties under section 3315 through section 3324 of this title. Upon request of the Chairman of the Commission, the head of such department or agency shall furnish such information to the Commission.】

【§ 3321. Support services】

【(a) The Administrator of General Services shall provide to the Commission on a reimbursable basis such administrative support services and assistance as the Commission may request.】

【(b) The Archivist of the United States shall provide to the Commission on a reimbursable basis such technical and expert advice, consultation, and support assistance as the Commission may request.】

【§ 3322. Report】

【The Commission shall transmit to the President and to each House of the Congress a report not later than March 31, 1977.】

Such report shall contain a detailed statement of the findings and conclusions of the Commission, together with its recommendations for such legislation, administrative actions, and other actions, as it deems appropriate.】

【§ 3323. Termination】

【The Commission shall cease to exist sixty days after transmitting its report under section 3322 of this title.】

【§ 3324. Authorization of appropriations】

【There is authorized to be appropriated such sums as may be necessary to carry out section 3315 through section 3324 of this title.】

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