The People’s Papers? A Comparison of the Treatment of Government Leaders’ Records in Canada and the U.S.

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Abstract

U.S. presidents since Franklin Roosevelt have housed their papers in dedicated libraries, but it was not until Ronald Reagan left office that presidents were mandated by law to do so. The Presidential Records Act (PRA) was enacted in 1978 in response to former president Richard Nixon’s plan to destroy thousands of hours of taped conversations. Starting with Reagan, presidents have repeatedly attacked the law. The latest and most egregious access restrictions were made by George W. Bush in 2001. But on President Barack Obama’s first full day in office in January 2009, he overturned Bush’s order and reversed the previously restrictive interpretation of Freedom of Information Act policies on the release of government documents.

The attacks on the PRA have occurred in part because where
ownership and access to presidential papers are concerned, history was long on the side of former presidents and their families.

In Canada, the donors are still in control. There is no Canadian law stating that prime ministers’ papers belong to the public. On the contrary, the bulk of prime ministers’ papers are personal property. Though most former prime ministers have donated many of their records to Library and Archives Canada, they get a tax credit for doing so. There is no mandated timeline for releasing records to the public who pays to house them.

In what ways do the political differences between the United States and Canada affect how presidents and prime ministers keep and dispose of their records? The American system under the PRA is flawed, but it offers something the Canadian system does not: a legal promise of timely public access.

**Introduction**

On November 1, 2001, President George W. Bush issued Executive Order No. 13,233 (2001), which immediately caused public controversy despite widespread support for many of his post–September 11th policy decisions. Presidents commonly issue executive orders telling federal agencies how to interpret various laws or programs, or creating new laws; Bush himself signed approximately one per week that year (Federal Register, 2001). The orders bypass Congress and vary in their weight and urgency. Some have immediate, life-altering effects: For instance, Presidents Kennedy and Johnson used them to ban racial discrimination in federal hiring (Federal Register, 1961).

The Bush order in question addressed presidential papers and the ways in which the public may access them. Since the late 1970s, they have fallen under the jurisdiction of the Presidential Records Act (PRA, 1978), which mandates that a president’s papers must be opened to the public a maximum of twelve years after he has left office. Under Bush’s order, sitting and previous presidents, their heirs, and former vice presidents had the right to veto requests to see documents or delay them indefinitely (Gaidos, 2006, p. 19). The order “effectively eviscerate[d] the PRA,” writes archivist Bruce P. Montgomery (2003, p. 103).

A group of historians, journalists, and public interest groups filed a lawsuit against the National Archives and Records Administration (NARA), which oversees presidential papers, and against its supervisor, the U.S. archivist. But the order was not revoked during the Bush presidency (Public Citizen, 2001). President Barack Obama, who advocated government transparency during his 2008 election campaign, overturned Bush’s executive order on his first full day of office when he wrote his own (Executive Order No. 13,489, 2009).

Given the Bush administration’s tendency toward secrecy and its restrictive policies on
access to government information (see, for example, the clearinghouse www.bush-secrecy.org), one could be forgiven for assuming that Bush’s desire to keep presidential papers private was unique to his administration, but that is not the case. Starting with Ronald Reagan, the first president mandated by the PRA to open his records by a certain date, presidents have “repeatedly attacked” the law (Montgomery, 2003, p. 102).

The controversy surrounding presidential records prompted this author—a Canadian citizen and recently naturalized American—to research the laws and customs that pertain to Canadian prime ministers’ records. Are they, by law, the people’s papers too? While some papers do legally belong to citizens, the majority do not. The differences between the two countries’ practices in this regard are directly related to differences in their political systems. The United States tends to operate by rule of law, Canada by parliamentary tradition. Access to leaders’ records have followed suit.

Though prime ministers since Sir John A. Macdonald have created records, this article does not explore the history of record-keeping practices in Canada to the same extent that it does U.S. practices. The reasons are that (a) there has been no single catastrophic event in Canada that has led to the enactment of strict laws regarding prime ministers’ records; and (b) there are far fewer written accounts of Canada’s political record-keeping (due in part perhaps, to the lack of disaster in Canada’s history).

As Eastwood (1977, p. 4) notes, it was “American trends” that escalated discussions among Canadian archivists, historians, and politicians about who owns ministers’ and prime ministers’ records—taking the issue out of “the obscurity to which it has been confined for so many years in Canada.”

**History of presidential papers**

A U.S. president who left office in the time between George Washington in 1797 and Franklin Roosevelt in 1945 usually packed up his papers—even those regarding government business—and took them home. They were considered his or his family’s personal property, to do with as he pleased, including destroying them if desired. President Warren Harding’s wife burned nearly half of her husband’s papers after he died while still in office in 1923 (Cox, 2002). Setting fire to records related to a bribery scandal was an attempt, said Mrs. Harding, to be loyal to the president’s memory (Sax, 2001). Other presidents strictly limited access to documents or charged the government large sums to buy them back.

In 1938, President Franklin Roosevelt announced that he wanted to donate his papers to the government. After meeting with a group of historians, he decided to build a library for the papers in Hyde Park, N.Y., on the grounds of his family estate. In 1950, five years after Roosevelt died, 85 per cent of his papers were released for research purposes. The papers were still private by law, but “they were in spirit what he had admitted them to be, the property of the people of the United States” (Geselbracht, 1986, p. 159).
Roosevelt set a new precedent. In 1955, Congress passed the Presidential Libraries Act (1955), which encouraged presidents to donate their papers and other materials to a library and museum for posterity, and gave them the right to keep some of their collection private. It was up to presidents to raise money to build their library, after which it would be run by government archivists and curators, and paid for by taxpayers (Thompson, 1995). All presidential libraries (except Nixon’s) prior to President Reagan’s rely on deeds of gift to acquire material and open it to the public. For example, the John F. Kennedy Presidential Library & Museum in Boston has negotiated over the years with family and friends of the former president to donate material, and the deed they sign sets terms on it (J. Roth, personal communication, September 12, 2008).

The Presidential Records Act

Nixon’s hubris

The deed-of-gift custom for presidential libraries changed with President Richard Nixon. In some ways, Nixon was an archivist’s and historian’s dream: He was a meticulous record keeper with an eye to history. He wanted a complete record of his administration so that historians and others could not misjudge it. This desire, coupled with paranoia, led him to install a self-activating taping system in the Oval Office. During investigations into Nixon’s role in the 1973 Watergate break-in, he refused subpoenas to hand over tapes containing thousands of hours of conversations, some implicating him in the scandal (Montgomery, 2006). There was a constitutional crisis as people questioned the limits of presidential power.

Special prosecutors filed suit against Nixon and he appealed, yet the Supreme Court ultimately ruled that he hand over the tapes. It was the first time in history that the Supreme Court had addressed whether a president had to release documents against his will (Montgomery, 2006, p. 9). Nixon resigned in August 1974, but as he left office he signed an agreement with the government that gave him the right to destroy those recordings within a few years (Montgomery, 2006).

This was an untenable deal, and people were outraged. After much deliberation, Congress passed the PRA (1978), which officially made presidents’ and vice presidents’ papers the property of the government and the public. The PRA came into effect January 20, 1981.

What is a presidential record?

The PRA is a statute of NARA, which oversees government records as well as the presidential library system. The PRA defines presidential records as those relating to a president’s constitutional, statutory, or other official duties. This can include e-mails to staff, notes from meetings with world leaders, memoranda about legislation, etc.—anything related to the president’s job. The law also covers vice presidents’ records.
NARA archivists do not go to the White House to collect records; it is up to the president and his staff to ensure compliance with the PRA (M. Krusten, personal communication, February 25, 2009). This staff includes White House records managers who work there regardless of the administration (Good, 2008). To aid in this practice, this White House Office of Records Management (WHORM) creates about 60 subject categories, such as agriculture, education, human rights, science, national security, etc. (George Bush Presidential Library and Museum, n.d.). The WHORM employees guide the president and his staff with the credo, “You come in with nothing. You leave with nothing” (Good, 2008).

When a president leaves office, his records are handed over to NARA. According to PRA rules, NARA archivists have five years to arrange and describe the records, after which the public can begin to request them under the Freedom of Information Act (FOIA). Presidents can decide to restrict certain records for up to 12 years, including those related to national defence or security, foreign policy, appointment of federal officials, trade secrets and privileged commercial information, personnel and medical information, and confidential communications between the president and his advisers. After this time, in theory, the records must be made public.

The U.S. archivist

The U.S. archivist, who oversees NARA, has little independent authority over presidential records (Montgomery, 2006, p. 96). When George W. Bush signed the executive order that redefined the PRA and limited access to records, U.S. archivist Allen Weinstein had to honour it. He said that while Bush’s order conflicted with his desire to ensure access, he would defend it against legal action (Field, 2004; Barry & Steemson, 2005, p. 10).

“Only the President can say, ‘This document is a record. This document is not a record,’” writes Don Wilson (1996, p. 189), a former U.S. archivist hired by Ronald Reagan. The archivist can consult presidents on whether a record has historical or evidentiary value, but the decision is ultimately up to the president (Montgomery, 2003). In the age of electronic records, the job of NARA archivists has become more difficult because of the increasingly large volume of potentially important records. But NARA “cannot be a policing agency,” writes Wilson (1996, p.190).

It is, however, the U.S. archivist’s duty to step in and tell Congress if a president plans to destroy important records, yet this duty has not always been fulfilled (Montgomery, 2006, p. 95). One famous case involves Don Wilson. In January 1993, as George Bush Sr. was leaving office, then-U.S. archivist Wilson signed a deal with Bush giving him control over thousands of magnetic tapes and hard drives containing National Security e-mails, among other materials (Montgomery, 2003; Barry & Steemson, 2005). At the time, Wilson was in discussions to become the director of Bush’s presidential library, which he later did. In 1995, a federal judge cancelled the Bush-Wilson deal, saying it was against the law as outlined in the PRA (“A
Special Place,” 1995).

All presidents since Reagan have attempted to restrict access in one way or another as a way to look out for their own and each other’s reputations. Two days before he left office in January 1989, Reagan signed an executive order that gave him (and future presidents) the right to block access to documents once he left office and became a private citizen (Montgomery, 2006). George W. Bush’s 2001 executive order, which superseded Reagan’s and required people to give “compelling” reasons to see records, was arguably prompted by the fact that thousands of papers from Reagan’s office were slated to open that year (Montgomery, 2003).

Democrats have also been involved in the practice. Vice President Al Gore’s aides apparently told White House computer staff to “get lost” and that they would “take care of their own records” (Cox, 2002, p. 12). President Bill Clinton was cited with contempt of court for failing to save computer files (Montgomery, 2006).

The Canadian situation

There has been no Nixon-level crisis in Canada, nor might there ever be. “The United States has elevated its presidents so much that when anyone is corrupt or has a problem, it is such a shock that people say, ‘We have to change everything,’” says Daniel German, a government archivist at Library and Archives Canada (LAC). In Canada, German says, citizens have a more pragmatic view: “We know they’re just politicians.” When in 1998 the National Capital Commission in Ottawa made plans to widen the road leading to Parliament with the intent to create a “grand boulevard” akin to the national mall in Washington, people responded, “How dare they? It’s only Parliament” (D. German, personal communication, February 23, 2009; “Metcalfe Grand Boulevard,” n.d.).

Some Canadian government archivists say they expected inquiries into the federal sponsorship scandal and government corruption during the Jean Chrétien era to lead to sharper definitions of public versus private records, but this never occurred (P. DeLottinville, personal communication, February 27, 2009). The fact-finding report on the sponsorship program produced by Commissioner John Gomery recommended only that the government keep better records (Commission of Inquiry, 2006).

What is a record?

The government in Canada is in many ways different from that in the United States. One way this is relevant for this discussion is that prime ministers’ duties are defined by tradition rather than by law, as they are in the U.S. Constitution. In other words, the prime minister’s job is not legally defined. As such, there have never been hard-and-fast rules when it comes to their records.

Prime ministers in Canada create two kinds of records: government (or institutional) and personal/political. The former are similar to presidential records: those created in the course of business, including cabinet confidences, some correspondence and negotiations with provinces. These records are housed in the Privy
The Council Office (PCO)—the hub of operations for the prime minister and cabinet—and are governed by the Library and Archives Canada Act (2004).

The LAC Act says that government records cannot be destroyed, but does not offer a specific timeline for when they must be opened. For this it refers to the Access to Information Act (1983), which says that access may be refused if records are less than 20 years old. (Before this law was passed, government records were either opened after 30 years, or, if a minister denied access, not at all [Bazillion, 1980].) After about 30 years—which is a convention, not a law—the PCO sends to LAC those government records that archivists deem historically valuable (P. Delottinville, personal communication, January 27, 2009).

A word about cabinet confidences: The confidentiality of cabinet proceedings between the prime minister and ministers is protected by convention, common law, and court decisions (Department of Justice, n.d.). Bazillion (1980, p. 154) writes, “The cabinet government, for as long as it has existed…incorporates a large degree of official secrecy.”¹ This is because of the way government works. Cabinet ministers meet to discuss government policy and reach a consensus before going public with decisions. The concern is that if ministers’ notes or conversations were opened, the public would be ill-informed and ministers would start censoring their words during discussions (Department of Justice, n.d.). Therefore, the Access to Information Act (section 69, 1) explicitly excludes cabinet confidences; they cannot be requested for at least 20 years.

Once the prime minister's government records are sent to the PCO, they can be requested through the Access to Information Act. But most are not labelled as government records. They are “personal and political,” and they leave the Prime Minister’s Office (PMO) the day he or she does. These are the prime ministers’ private property. There is overlap between personal/political records and those housed at the PCO, as there is a lot of exchange between the two offices (P. DeLottinville, personal communication, February 27, 2009).

Personal/political records can include speeches, photos, agendas, letters, meeting minutes, senior staff files, the operations of the PM office, and constituency files (related to legislative duties). The U.S. president also creates documents that fit into a personal/political category, like diaries, medical files, and papers generated during a reelection campaign (M. Krusten, personal communication, February 25, 2009). But by contrast, prime ministers claim that many more of their records are personal and political.

Prime minister vs. minister

It is worth noting the distinction between prime ministers and “regular” cabinet ministers. Cabinet ministers oversee departments—they are Minister of Justice, or Labour, or Finance—and in doing so they create a type of record called a “ministerial record,” which is defined in the LAC Act and cannot be destroyed. The prime minister does not typically oversee a department like this, and so he or she does not create ministerial records. (The PCO actually
mandates that ministers break down their records into four categories: cabinet documents, institutional records, ministerial records, and personal and political records [PCO, 2008].

LAC archivists say the ministerial records category, which was created in the mid-’80s, is virtually unenforceable, in part because these documents are difficult to separate from others. Instead, ministers tend to follow what the prime minister does, which is claim that records in their offices are personal and the rest are institutional (P. Delottinville, personal communication, January 27, 2009).

It is perhaps because there are more rules governing ministers than prime ministers, or perhaps because there are more ministers, that articles written on government leaders’ records in Canada over the past few decades primarily address them (see, for example, Eastwood, 1977; Bazillion, 1980; Carroll, 1987-88; McAndrew & Horodoyski, 2000). Most of the details about prime ministers’ records found for this paper come from interviews with two government archivists who have worked with those materials for decades.

A tax break for prime ministers

LAC, in its previous incarnations, has for nearly 100 years (LAC, n.d. a) sold itself to prime ministers as a safe place to house their personal records. LAC uses wording that sounds like a promotional brochure: “The Choice of Library and Archives Canada as the repository for the prime ministers’ personal papers offers a number of advantages” (LAC, n.d. b).

Since the 1970s, the primary incentive for prime ministers has been a tax break based on the value of their papers. In effect, this means Canadians are paying prime ministers twice for their work. Peter DeLottinville, director of political archives at LAC, says it’s “awkward” to explain to journalists and the public that Jean Chrétien, for example, who had a 40-year political career paid for by taxpayers, can donate most of the fruits of that career to LAC for a tidy sum, the amount of which isn’t released to the public (personal communication, February 27, 2009). (This is not unprecedented in the United States: In 2000, the Justice Department paid the Nixon estate $18 million to compensate for records seized in 1974 [Cox, 2002, p. 45].)

Daniel German, an LAC archivist who processed Brian Mulroney’s papers, does not see a conflict in the practice of prime ministers maintaining legal control of their records while they’re housed at taxpayer expense. “We’re obtaining access so the records will someday be opened, and that’s invaluable,” he says (personal communication, February 23, 2009). But he admits that Mulroney’s and others’ papers won’t be open anytime soon. LAC advises prime ministers and their families to open records after about 30 years. This is a recommendation only: For example, a number of Lester Pearson’s files are still restricted, and he left office in 1968 and died in 1972 (LAC, n.d. c).

As with NARA archivists in the United States, LAC archivists do not go to departments or offices to help make distinctions between record categories. There is some training that goes on, but it is left to prime ministers and their private staff to make these decisions. Staff
members may be hired for political loyalty and may not have organizational skills—this combination could mean records are not culled very carefully (D. German, personal communication, February 23, 2009).

A U.S.–Canada comparison

To more directly compare U.S. and Canadian practices, below is a table showing what has happened to the records of George H.W. Bush, who left the presidency in January 1993, and Brian Mulroney, who stepped down as prime minister in June 1993. Bush was the last president to whom PRA rules fully apply and whose records should be completely accessible.

The information in rows one and three has been explained elsewhere in the paper. The second row (how many records) includes statistics from the Bush library website (http://bushlibrary.tamu.edu/research/research.php) and, in Canada, from Daniel German.

The fourth row (timeline for most restricted records) shows that in Bush’s case, the library says the “last” of his formerly withheld documents were opened in January 2009, which is about four years later than the PRA requires. There were about 80,000 restricted documents from two categories: federal appointments and confidential communications between the president and advisers. Quotes are used around “last” because there are certainly some records that haven’t been processed, that are still classified by another agency, etc.

The last row explains how to access as-yet-unopened records. In Bush’s case, one should use FOIA. He can try to prevent access by citing national security or executive privilege, which presidents can invoke to withhold information. In Mulroney’s case, any records still in the PCO can be requested using the Access to Information Act. (Cabinet confidences can’t be requested for four more years.) But for the 2.5 million records in LAC, for which there is a 1,452-page finding aid (LAC, 2003) online, one must write to him directly. Mulroney’s work address is included at the end of the paper.

Table 1. Case Study: George H.W. Bush vs. Brian Mulroney

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<th>George H.W. Bush (Left office January 1993)</th>
<th>Brian Mulroney (Left office June 1993)</th>
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<tr>
<td><strong>While in office</strong></td>
<td>White House records managers help cull records</td>
<td>Private staff help cull records</td>
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<tr>
<td><strong>How many records</strong></td>
<td>40,000,000 in his library; they are public by law</td>
<td>2,500,000 in LAC; these are private. More in the PCO</td>
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Faculty of Information Quarterly  
Housing Memory Conference Proceedings  
Vol 1, No 3 (May 2009)

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<th>Timeline for opening</th>
<th>PRA mandates up to 12 years</th>
<th>No mandated timeline</th>
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<tr>
<td>Timeline for most restricted records</td>
<td>“Last” of these opened in January 2009</td>
<td>Cabinet confidences can be requested after 20 years</td>
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| How to access the rest | FOIA, though Bush can try to block their release | Some: Access to Information  
Most: Write him a letter |

## Conclusion

The mechanisms of access to leaders’ records are freedom of information laws. In both the United States and Canada, governments in power have a good deal of discretion over how to follow these laws.

In Canada, a number of archivists say the Access to Information Act is used often and is effective (D. German, personal communication, February 23, 2009). During an audit conducted last year, however, Information Commissioner Robert Marleau called the Act “an outdated piece of legislation with a weak compliance model” (Cribb, 2009).

The information commissioner handles complaints and sometimes makes complaints of his own. Last June, he asked the court to review decisions made about access to some of Prime Minister Jean Chrétien’s records. In 1999, requests were made to the PCO for access to Chrétien’s daily agendas, whose entries relate to meetings, travel, appearances, and some personal information. The PCO claimed these are private documents. A complaint was made to the information commissioner, who recommended the records be released (Federal Court, 2008). The commissioner is testing the boundaries of the definitions of records.

In the United States, Barack Obama began his administration with much media fanfare; overturning Bush’s executive order regarding the PRA was one of his first acts. He also sent a memo to executive branch departments, instructing them to administer FOIA with the presumption that “openness prevails.” The memo was an explicit reversal from the Bush administration’s policy.

This paper hasn’t addressed why we, the people, should care whether openness prevails. (Nor has it talked about the cultural differences between the United States and Canada in this context: Do Canadians trust their government more than Americans do?) Some people might think that in a time of an overabundance of digital information, during which many government websites are overflowing, there is much openness already and therefore little need to ask for more. But a freely available speech, for example, which Vice President Dick Cheney gave on energy policy, will not reveal how that policy decision was made. Governments and individual politicians cannot be held accountable if what they do can’t be seen, heard, or read.

The first line of Obama’s memo is a succinct reminder of the importance of openness. “A democracy requires accountability, and accountability requires transparency,” he
writes. “As Justice Louis Brandeis wrote, ‘sunlight is said to be the best of disinfectants.’”

In the case of government leaders’ records, it would seem the sun shines brighter in the United States.
References


1 A certain amount of secrecy is required and tolerated in any democracy. It is interesting to note
that one of Richard Nixon's main arguments for not handing over his records was that the Constitution, which mandates a separation between branches of government, afforded him “executive privilege.” He said this executive privilege gave him the right to have secret conversations that must never be open to anyone. The Supreme Court denied that this was his right in this case (Montgomery, 2006), though Nixon laid groundwork for other presidents, like George W. Bush, who made liberal use of executive privilege.

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