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PRESIDENTIAL RECORDS ACT AMENDMENTS OF 2007

MARCH 9, 2007.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. WAXMAN, from the Committee on Oversight and Government Reform, submitted the following

R E P O R T

together with

ADDITIONAL VIEWS

[To accompany H.R. 1255]

[Including cost estimate of the Congressional Budget Office]

The Committee on Oversight and Government Reform, to whom was referred the bill (H.R. 1255) 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, having considered the same, report favorably thereon with amendments and recommend that the bill as amended do pass.

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The amendments (stated in terms of the page and line numbers of the introduced bill) are as follows:

Page 5, line 4, insert the following:

(b) RESTRICTIONS.—Section 2204 of title 44, United States Code (relating to restrictions on access to presidential records) is amended by adding at the end the following new subsection:

"(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) if that individual has been convicted of a crime relating to the review, retention, removal, or destruction of records of the Archives.".

Page 5, line 5, strike "(b)" and insert "(c)".

Page 5, line 11, strike "(c)" and insert "(d)".

PURPOSE AND SUMMARY

H.R. 1255, the "Presidential Records Act Amendments of 2007," was introduced March 1, 2007, by Reps. Henry A. Waxman, Todd Russell Platts, Wm. Lacy Clay, and Dan Burton. The legislation amends the Presidential Records Act of 1978 to establish a process whereby incumbent and former presidents can, within specified time limits, review records prior to their public release under the Act and determine whether to assert constitutional privilege claims against release of the records. The bill nullifies Executive Order 13233, which established a nonstatutory process for review of presidential records and assertion of privilege claims.

BACKGROUND AND NEED FOR LEGISLATION

The retention and management of presidential records has evolved since the earliest days of our nation. Until the establishment of the first presidential library for Franklin D. Roosevelt in 1939, there were few protocols or systems in place to archive or maintain the executive records of former presidents.

Following the Watergate scandal and the subsequent resignation of President Nixon in 1974, Congress enacted the Presidential Records Act of 1978, which made clear that these records belong to the American people, not to the president. The Act gave the Archivist of the United States custody of the records of a former president and imposed 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."[1] Under the Act, a president may restrict access to records for up to 12 years. Following that period, records are to be released in accordance with the Freedom of Information Act, except that the "deliberative process" exemption does not apply. In addition, the Act recognizes presidential authority to assert executive privilege, providing that: "Nothing 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."[2]

The Presidential Records Act first applied to the records of former President Ronald Reagan. On January 18, 1989, President Reagan issued Executive Order 12667. This executive order estab-

[1] 44 U.S.C. 2203(f)(1).
[2] 44 U.S.C. 2204(C)(2).

lished a process to deal with potential executive privilege claims over records covered by the Presidential Records Act. The order required the Archivist to give the incumbent and former presidents 30 calendar days advance notice before releasing presidential records. 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.

Before he left office, President Reagan exercised his right under the Presidential Records Act to restrict access to some of his records for 12 years. This 12–year restriction period expired in January 2001. In February 2001, the Archivist provided the 30-day notice required by Executive Order 12667 of his intent to release about 68,000 pages of former President Reagan's records. In March, June, and August of 2001, the Counsel to the President instructed the Archivist to extend the time for claiming executive privilege.

In November 2001, President George W. Bush issued Executive Order 13233—Further Implementation of the Presidential Records Act.[3] The order overturned the Reagan order and gave current and former presidents and vice presidents broad authority to withhold presidential records or delay their release indefinitely.

Executive Order 13233 extends the review period for former presidents to 90 days and allows former president to extend that time indefinitely. In addition, it provides for a unlimited review period for the current president. It requires the Archives to honor the assertions of executive privilege made by either the incumbent or former president. Even if the incumbent president disagrees with the former president's claim, the Archivist must honor the claim and withhold the records.

Also, unlike the Reagan order which stated that records were to be released on a schedule unless action occurred, the Bush executive order states that records will be released only after actions by the former and current presidents have occurred. Therefore, if either the current or former president simply does not respond to the Archivist, the records would not be released.

Moreover, under the Bush executive order, designees of the former president may assert privilege claims after the death of the president, in effect making the right to assert executive privilege an asset of the former president's estate. Furthermore, the order authorizes former vice presidents to assert executive privilege claims over their records.

Historians and scholars immediately raised concerns about the potential impact the Bush executive order would have on the future release of presidential records. These concerns continue five years after the order went into effect. At a March 1, 2007, hearing before the Subcommittee on Information Policy, the Census, and the National Archives, presidential historian Robert Dallek expressed concern that current policies carry "the potential for incomplete and

[3] 3 C.F.R. 2001 Comp., pp. 815–819.

distorted understanding of past presidential decisions, especially about controversial actions with significant consequences." He noted further:

> Consider what difference the release of the Kennedy, Johnson, and Nixon tapes has made in our understanding of the decision-making on Vietnam in these administrations. Consider how much we will lose if representatives of the Reagan, Clinton, and current Bush administrations were in the future to use Executive Order 13233 to hold back documents on the Reagan administration's decision-making relating to Iran-contra or the Clinton administration's response to intelligence about a potential Al Qaeda attack, or the current administration's decision to fight in Iraq. It is understandable that every president and his heirs wants to put the best possible face on his administration, but an uncritical or limited reconstruction of its history does nothing to serve the long-term national interest.

H.R. 1255 would nullify Executive Order 13233 and establish procedures to ensure the timely release of presidential records. The bill requires the Archivist to provide advanced notice to the former and incumbent presidents before the presidential records are released. This gives the former and incumbent presidents the time to review the records and decide whether to claim privilege. Also, the bill requires the Archivist to withhold records (or parts of records) for which the incumbent president claims privilege. In this event, a requester would have the burden of challenging a claim of executive privilege in court.

H.R. 1255 makes several important changes in how release of these records is managed. Unlike the Bush executive order, the bill establishes a deadline for review of records. Under the Bush executive order, the Archivist must wait for both the current and former president to approve the release of presidential records, a review process that can continue indefinitely. Under the bill, the current and former president would have a set time period of no longer than 40 business days to raise objections to the release of these records by the Archivist. If no objections were raised, the records would automatically be released, whether or not there was a specific request.

Second, the bill limits the authority of former presidents to withhold records. Under the Bush executive order, the Archivist must withhold records if a former president claims privilege, and the requester must challenge the privilege claim in court. The bill reverses the legal burden, requiring the former president to protect a privilege claim with a court order. Under the bill, if a former president claims privilege, the Archivist will withhold the records for an additional 20 days in order to give the former president time to file suit to enforce his privilege claim. However, the Archivist will release the records absent a court order to the contrary or absent the current president claiming privilege on that same record. This is the same approach followed in the Reagan order.

Third, the bill clarifies that the incumbent and former presidents must make privilege claims personally. The bill would make clear that the right to claim executive privilege is personal to current

and former presidents and cannot be bequeathed to assistants, relatives, or descendants.

And finally, the bill eliminates executive privilege claims for vice presidents. The bill restores the long-standing understanding that the right to assert executive privilege over presidential records is a right held only by presidents.

LEGISLATIVE HISTORY

H.R. 1255, legislation to improve public access to presidential records, was introduced on March 1, 2007, by Reps. Henry A. Waxman, Todd Russell Platts, Wm. Lacy Clay, and Dan Burton, and referred to the Committee on Oversight and Government Reform. H.R. 1255 is substantively identical to legislation introduced by Rep. Horn in the 107th Congress as H.R. 4187 and favorably reported by the Committee.

The Subcommittee on Information Policy, the Census, and the National Archives held a hearing on March 1, 2007, on the issue of public access to presidential records. The witnesses were Allen Weinstein, the Archivist of the United States, National Archives and Records Administration; Harold Relyea, Specialist in American National Government, Congressional Research Service; Thomas Blanton, Director, National Security Archive, George Washington University; Scott Nelson, Senior Attorney, Public Citizen Litigation Group; Robert Dallek, Author/Historian; Anna K. Nelson, Distinguished Historian in Residence, American University; and Steve L. Hensen, Director of Technical Services, Rare Book, Manuscript, and Special Collections Library, Duke University (on behalf of the Society of American Archivists).

The Subcommittee on Information Policy, the Census, and the National Archives held a markup to consider H.R. 1255 on March 6, 2007. The Subcommittee approved the bill without amendment and reported it favorably to the full Committee. The full Committee held a markup to consider H.R. 1255 on March 8, 2007, and approved it, as amended by voice vote.

SECTION-BY-SECTION

Section 1. Short title

This section provides that the short title of H.R. 1255 is the "Presidential Records Act Amendments of 2007."

Section 2. Procedures for consideration of claims of constitutionally based priviledge against disclosure

Section 2(a) adds a new section 2208 to chapter 22 of title 44, United States Code, popularly known as the Presidential Records Act of 1978, establishing how records will be reviewed by a former or current president prior to the public release of those records under the Presidential Records Act.

Subsection (a)(1) provides that, when the Archivist of the United States determines to make records publicly available, he will promptly give advance notice to the applicable former president and the incumbent president. The Archivist will make the notice available to the public. Subsection (a)(2) provides that the notice will be in writing and contain pertinent information as determined by the Archivist.

Subsection (a)(3)(A) requires the Archivist to make the records available after 20 working days following notice unless the Archivist has received a claim of constitutional privilege by a former or incumbent president. There are two exceptions to the 20–day deadline. Under subparagraph (a)(3)(B), a former or incumbent president may extend the deadline for up to 20 additional working days by filing a statement with the Archivist that the additional time is needed for adequate review of the records. Under subparagraph (a)(3)(C), a deadline for review cannot expire before July 20th of the year that an incumbent president first takes office.

Subsection (b) requires the former or incumbent president to assert any claim of privilege personally. Also, the former or incumbent president must notify the Archivist, the House Committee on Oversight and Government Reform and the Senate Committee on Homeland and Governmental Affairs of the privilege claim on the same day that it is asserted.

Subsection (c) provides that if the former president asserts a privilege claim, the Archivist must withhold release of the records covered by that claim for another 20 working days. Upon the expiration of this 20-day period, the Archivist must release the records unless otherwise directed by a court order in an action initiated by the former president.

Subsection (d) provides that if the incumbent president asserts a privilege claim, the Archivist must continue to withhold the records unless and until the incumbent president withdraws the claim or the Archivist is otherwise directed by a final and non-appealable court order. Subsection (d) does not apply to records required to be made available in connection with judicial or congressional proceedings.

Subsection 2(b) clarifies that authority to claim executive privilege is personal to a former or incumbent president and cannot be delegated to their representatives. In addition, it clarifies that a former or incumbent vice president cannot claim presidential privileges.

Subsection 2(c) makes a clerical amendment to the Presidential Records Act.

Subsection 2(d) prevents 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.

Section 3. Executive order of November 1, 2001

Section 3 provides that Executive Order 13233, dated November 1, 2001, shall have no force or effect.

EXPLANATION OF AMENDMENTS

Ranking Minority Member Davis offered an amendment, which was accepted by voice vote, to prevent individuals who have been convicted of a crime related to the review, retention, removal, or destruction of records of the Archives from accessing original copies of presidential records as a designated representative of a president. The amendment was accepted by voice vote.

COMMITTEE CONSIDERATION

On Thursday, March 8, 2007, the Committee ordered the bill reported to the House by a voice vote.

ROLLCALL VOTES

No rollcall votes were taken on this legislation.

APPLICATION OF LAW TO THE LEGISLATIVE BRANCH

Section 102(b)(3) of Public Law 104–1 requires a description of the application of this bill to the legislative branch where the bill relates to the terms and conditions of employment or access to public services and accommodations. This bill provides for increased public access to presidential records. As such this bill does not relate to employment or access to public services and accommodations.

STATEMENT OF OVERSIGHT FINDINGS AND RECOMMENDATIONS OF THE COMMITTEE

In compliance with clause 3(c)(1) of rule XIII and clause (2)(b)(1) of rule X of the Rules of the House of Representatives, the Committee's oversight findings and recommendations are reflected in the descriptive portions of this report.

STATEMENT OF GENERAL PERFORMANCE GOALS AND OBJECTIVES

In accordance with clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, the Committee's performance goals and objectives are reflected in the descriptive portions of this report.

CONSTITUTIONAL AUTHORITY STATEMENT

Under clause 3(d)(1) of rule XIII of the Rules of the House of Representatives, the Committee must include a statement citing the specific powers granted to Congress to enact the law proposed by H.R. 1255. Article I, Section 8, Clause 18 of the Constitution of the United States grants the Congress the power to enact this law.

FEDERAL ADVISORY COMMITTEE ACT

The Committee finds that the legislation does not establish or authorize the establishment of an advisory committee within the definition of 5 U.S.C. App., Section 5(b).

UNFUNDED MANDATE STATEMENT

Section 423 of the Congressional Budget and Impoundment Control Act (as amended by Section 101(a)(2) of the Unfunded Mandate Reform Act, P.L. 104–4) requires a statement whether the provisions of the reported include unfunded mandates. In compliance with this requirement the Committee has received a letter from the Congressional Budget Office that is included herein.

EARMARK IDENTIFICATION

H.R. 1255 does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9(d), 9(e), or 9(f) of rule XXI.

COMMITTEE ESTIMATE

Clause 3(d)(2) of rule XIII of the Rules of the House of Representatives requires an estimate and a comparison by the Committee of the costs that would be incurred in carrying out H.R. 1255. However, clause 3(d)(3)(B) of that rule provides that this requirement does not apply when the Committee has included in its report a timely submitted cost estimate of the bill prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act.

BUDGET AUTHORITY AND CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

With respect to the requirements of clause 3(c)(2) of rule XIII of the Rules of the House of Representatives and section 308(a) of the Congressional Budget Act of 1974 and with respect to requirements of clause (3)(c)(3) of rule XIII of the Rules of the House of Representatives and section 402 of the Congressional Budget Act of 1974, the Committee has received the following cost estimate for H.R. 1255 from the Director of Congressional Budget Office:

MARCH 9, 2007.

Hon. HENRY A. WAXMAN,
Chairman, Committee on Oversight and Government Reform,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 1255, the Presidential Records Act Amendments of 2007.

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

Sincerely,

PETER R. ORZSAG.

Enclosure.

H.R. 1255—Presidential Records Act Amendments of 2007

H.R. 1255 would amend the Presidential Records Act and nullify Executive Order 13233 to establish a statutory process for reviewing Presidential records. The bill would require the Archivist of the United States to provide notice to the former and incumbent President and the public 20 days before making Presidential records public. During that 20-day period, a former or incumbent President could claim a constitutionally based privilege against disclosure of the information. If the claim is made by a former President, the Archivist could release the material at the end of an additional 20-day period unless otherwise directed by a court order. If the claim is made by an incumbent President, the Archivist could not release the material unless the claim is withdrawn or the Archivist is otherwise directed by a final court order that is not subject to appeal. H.R. 1255 also would allow a newly elected President additional

time—until July 20 of the first year in office—to review Presidential records that would otherwise be made public during that time.

Based on information from the National Archives and Records Administration, CBO estimates that implementing H.R. 1255 would have no significant impact on federal spending. In addition, the legislation would not affect direct spending or revenues.

The bill contains no intergovernmental mandates as defined in the Unfunded Mandates Reform Act (UMRA) and would not affect the budgets of state, local, or tribal governments. H.R. 1255 would impose private-sector mandates, as defined by UMRA, on former Presidents, their designees and families, and former vice presidents by changing the procedure or eliminating the ability to claim constitutionally based privileges related to the disclosure of Presidential or Vice-Presidential records. CBO estimates that the direct cost to comply with those mandates would be minimal, if any, and well below the annual threshold established by UMRA ($131 million in 2007, adjusted annually for inflation).

The CBO staff contacts for this estimate are Matthew Pickford (for federal costs) and Paige Piper/Bach (for the private-sector impact). This estimate was approved by Peter H. Fontaine, Deputy Assistant Director for Budget Analysis.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (new matter is printed in italic and existing law in which no change is proposed is shown in roman):

TITLE 44, UNITED STATES CODE

* * * * * * *

CHAPTER 22—PRESIDENTIAL RECORDS

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Sec.
2201. Definitions.

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2208. Claims of constitutionally based privilege against disclosure.

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§ 2204. Restrictions on access to Presidential records

(a) * * *

* * * * * * *

(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 presi-

dential record as a designated representative under section 2205(3) if that individual has been convicted of a crime relating to the review, retention, removal, or destruction of records of the Archives.

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§ 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 20-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 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 20 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 period under subparagraph (A), or any extension of that period under subparagraph (B), would otherwise expire after January 19 and before July 20 of the year in which the incumbent President first takes office, then such period or extension, respectively, shall expire on July 20 of that year.

(b)(1) For purposes of this section, any claim of constitutionally based privilege against disclosure must be asserted 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 paragraph (1).

(c)(1) The Archivist shall not make publicly available a Presidential record that is subject to a privilege claim asserted by a former President until the expiration of the 20-day period (excluding Saturdays, Sundays, and legal public holidays) beginning on the date the Archivist is notified of the claim.

(2) Upon the expiration of such period the Archivist shall make the record publicly available unless otherwise directed by a court order in an action initiated by the former President under section 2204(e).

(d)(1) The Archivist shall not make publicly available a Presidential record that is subject to a privilege claim asserted by the incumbent President unless—

(A) the incumbent President withdraws the privilege claim; or

(B) the Archivist is otherwise directed by a final court order that is not subject to appeal.

(2) This subsection shall not apply with respect to any Presidential record required to be made available under section 2205(2)(A) or (C).

(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.

* * * * * * *

ADDITIONAL VIEWS OF REPRESENTATIVE TOM DAVIS

This legislation is identical to legislation (H.R. 4187) introduced in the 107th Congress and approved by the Committee under Rep. Dan Burton's (R–IN) leadership. I commend him for his work in this area. We need to ensure that the public's interest remains paramount. As Rep. Mike Turner (R–OH) noted in Subcommittee, it is important that we distinguish the Nation's interest from a former President's interest. I offered an amendment to this bill (H.R. 1255), which was approved by the Committee on a voice vote that I would like to highlight.

My amendment will close a loophole in the Presidential Records Act, which allows those individuals previously convicted of a crime relating to mishandling Archives records to continue to have special access to Presidential records. The amendment states that the Archivist shall not make available any original Presidential records to any individual claiming access as a designated representative under Section 2205(3) of title 44, if that individual has been convicted of a crime relating to the review, retention, removal, or destruction of Archives records.

In short, if you are convicted of mishandling Archives records, we should not give you special access to original Presidential records. We should take the simple step of blocking your access to them. You are a risk, and we are obligated to mitigate risks of this type. Given the critical importance of Presidential records to the public, to researchers, and to the press, we must ensure no one can tamper with history.

TOM DAVIS.

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