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111–21

PRESIDENTIAL RECORDS ACT AMENDMENTS OF 2009

R E P O R T

OF THE

COMMITTEE ON HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS UNITED STATES SENATE

TO ACCOMPANY

H.R. 35

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

MAY 19, 2009.—Ordered to be printed

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

R E P O R T

[To accompany H.R. 35]

The Committee on Homeland Security and Governmental Affairs, to which was referred the bill (H.R. 35) 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, reports favorably thereon with an amendment and recommends that the bill do pass.

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I. PURPOSE AND SUMMARY

H.R. 35, the "Presidential Records Act Amendments of 2009," was introduced on January 6, 2009. The legislation amends the Presidential Records Act of 1978 to establish a process by which incumbent and former Presidents can review Presidential records whose release is regulated by the Presidential Records Act in order to determine whether to assert that executive privilege limits the release of those records.[1]

[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

Continued

II. Background and Need for the Legislation

Congress passed the Presidential Records Act of 1978 ("PRA" or "the Act") in the wake of the Watergate scandal and the resignation of President Richard M. 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 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 that executive privilege shields certain records from public release, noting that "[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, 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.[5] 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

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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).

[2] 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.

[3] 44 U.S.C. 2203(f)(1).

[4] 44 U.S.C. 2204(C)(2).

[5] Exec. Order No. 12,667, 54 Fed. Reg. 3,403 (Jan. 18, 1989).

privilege, the Archivist would decide whether or not to honor the claim.

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 didn't provide a specific deadline for compliance.

In November 2001, President George W. Bush issued Executive Order 13233, entitled "Further Implementation of the Presidential Records Act."[6] The order superceded 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 that 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 had affirmatively notified the Archvist. 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 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. 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 clear 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 own executive order interpreting the original PRA, thus making the public's access to Presidential records contingent upon the will of the executive—the avoidence of which was the very goal of the original PRA.

[6] 3 C.F.R. 2001 Comp., pp. 815–819.

H.R. 35 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. 35 requires the Archivist to give the former and incumbent Presidents notice that he 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 the former and incumbent Presidents 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. 35 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 vactating the White House, such a claim "carries much less weight than a claim asserted by the incumbent himself." [7] 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 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. 35 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.

III. Legislative History

H.R. 35 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. The bill was received in the Senate on January 8, 2009 and referred to the Homeland Security and Governmental Affairs Committee. On April 1, 2009, with Senators Lieberman, Akaka, Carper, Pryor, Tester, Burris, Bennet, Collins, Coburn, and Voinovich present, by a voice vote, the bill was ordered reported favorably out of the Committee with an amendment in the nature of a substitute.

IV. Section-by-Section Analysis, as Reported

Section 1. Short title

This section provides that the short title of H.R. 35 is the "Presidential Records Act Amendments of 2009."

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

Section 2. Procedures for consideration of claims of constitutionally based privilege 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 2208(a)(1) provides that, when the Archivist of the United States decides to make Presidential records publicly available, he will promptly give advance notice to the former President during whose term the record was created and to the incumbent President. The Archivist will also make the notice available to the public.

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

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.

Subsection 2208(b) requires the former or incumbent President to personally assert a privilege claim. 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 day it is asserted.

Subsection 2208(c) establishes the process through which a former President's records are released to the public and the manner in which the Archivist handles claims of privilege by a former President.

- Subparagraph (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 subparagraph (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, subparagraph(c)(2)(B) prohibits the Archivist from releasing the records unless the incumbent President withdraws his 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), subparagraph(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 privilege claim in court. However, under H.R. 35, the Archivist will ultimately release records unless otherwise directed by a court order in an action initiated by the former President.

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.

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.

Section 2(b) amends Section 2204 of the PRA 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.

Section 2(c) makes clerical amendments to the Presidential Records Act.

Section 3. Executive order of November 1, 2001

Section 3 provides that Executive Order 13233, dated November 1, 2001, and Executive Order 12667, dated January 1, 1989, shall have no force or effect.

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 that the bill 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

April 21, 2009.

Hon. Joseph I. Lieberman,
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. 35, the Presidential Records Act Amendments of 2009.

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. 35—Presidential Records Act Amendments of 2009

H.R. 35 would amend the Presidential Records Act to establish a process for reviewing Presidential records. That act details which records and materials are to be assumed by the National Archives and Records Administration (NARA) at the end of a President's administration.

H.R. 35 would require the Archivist of the United States to provide notice to the incumbent and former President and the public up to 90 days before making Presidential records public. If a claim of executive privilege is made by a former President against such disclosure and the incumbent President determines not to uphold the claim, the Archivist would release the materials within 90 days of that determination unless the Archivist is otherwise directed by a final court order that is not subject to appeal. If a claim of executive privilege is made by an incumbent President against such disclosure, the Archivist could not release material unless the claim is withdrawn or the Archivist is otherwise directed by a court order. H.R. 35 also would allow a newly elected President until July 20 of the first year in office to review Presidential records that would otherwise be made public during that time. Finally, the legislation would rescind Executive Orders 13233 and 12667. (Those orders concern the procedures for releasing Presidential records by NARA.)

Based on information from NARA, CBO estimates that implementing H.R. 35 would have no significant impact on federal spending. Enacting the legislation would not affect direct spending or revenues.

The bill contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would not affect the budgets of state, local, or tribal governments.

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

VII. Changes in Existing Laws

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

* * * * * * *

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 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.

* * * * * * *

§ 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 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 of a Presidential record (or reasonably segregable part of a record) 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 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 of 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.

(d)(1) 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—

(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) of this title.

(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.

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