Presidential Records: Issues for the 111th Congress

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Summary

Most records of recent former Presidents and former Vice Presidents are required by statute to be turned over to the National Archives and Records Administration at the end of each administration. These records are then disclosed to the public, unless the Archivist of the United States, the incumbent President, or the appropriate former President claims the records should be kept private.

On his first full day in office, President Barack Obama issued an executive order (E.O. 13489), rescinding E.O. 13233, changing substantially the presidential record preservation policies promulgated by the George W. Bush Administration. E.O. 13489 grants the incumbent President and the relevant former Presidents 30 days to review records prior to their being released to the public. Under the policies of the Bush Administration, the incumbent President, former Presidents, former Vice Presidents, and their designees were granted broad authority to deny access to presidential documents or to delay their release indefinitely. Moreover, former Presidents had 90 days to review whether requested documents should be released.

Prior to President Obama's issuance of E.O. 13489, legislation was introduced in the 111th Congress (H.R. 35) that would statutorily rescind the executive order (E.O. 13233) issued by former President George W. Bush. E.O. 13233 allowed the incumbent President—as well as former Presidents whose records were affected—to withhold from public disclosure the records of former Presidents and Vice Presidents or to delay their release indefinitely under claims of executive privilege. In addition to statutorily overturning E.O. 13233, H.R. 35 would reduce the time a President would have review his records prior to their public release.

This report will analyze President Barack Obama's E.O. 13489, and discuss its departure from the policies of the previous administration. Additionally, this report will examine H.R. 35 and its possible legislative effects on the presidential records policies of the Obama Administration.

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Introduction

Since 1955, the Presidential Libraries Act (44 U.S.C. § 2112) has governed the establishment of federally maintained presidential libraries. These libraries are created to serve as archives that return presidential papers and communications to the public realm. Currently, 12 presidential libraries are managed and maintained by the federal government through the National Archives and Records Administration (NARA).

In addition to the Presidential Libraries Act, presidential records are subject to the Presidential Records Act of 1978 (44 U.S.C. §§ 2201-2207; P.L. 95-591). The act details which records and materials are to be assumed by the National Archives at the end of a President's administration.[1] According to Chapter 22 of Title 44 of the U.S. Code, when a President leaves office, his official records remain in the custody of the federal government, under the supervision of the Archivist of the United States. Once a location for a presidential library has been determined, and the facility is deeded to the United States, the former President's records are to be deposited there.[2]

On November 1, 2001, President George W. Bush issued an executive order (E.O. 13233), which allowed the incumbent President—as well as former Presidents, former Vice Presidents, and their designees whose records are affected—to withhold from public disclosure the records of former Presidents and Vice Presidents or to delay their release indefinitely under claims of executive privilege.[3] On January 7, 2009, the House passed a bill (H.R. 35) that would statutorily revoke E.O. 13233. The bill would also allow the Archivist to reassume control of access to the records of former Presidents.

On January 21, 2009, President Barack Obama issued E.O. 13489[4] on his first full day in office. The new executive order explicitly rescinded E.O. 13233. Many of the aims of H.R. 35 are incorporated into President Obama's executive order. However, unlike H.R. 35, which would grant the Archivist final determination over record disclosure, President Obama's order allows the incumbent President to stop disclosure through claims of executive privilege. This report will discuss policy changes incorporated into E.O. 13489 and analyze the possible effects of H.R. 35.

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[1] As a consequence of the so-called Watergate incident, Congress passed the Presidential Recordings and Materials Preservation Act of 1974 (PRMPA; 44 U.S.C. § 2111) to assure that the presidential papers of Richard M. Nixon were placed under federal custody. Though this act, which directly addresses presidential records, was passed prior to the 1978 Presidential Records Act, it governed only documents associated with the Nixon presidency.

[2] CRS Report R40209, *Fundraising for Presidential Libraries: Legislative and Policy Issues in the 111th Congress*, by R. Sam Garrett.

[3] Executive privilege has never been defined definitively. The President, as the leader of the executive branch, is granted authority to determine which records should be afforded a privileged status that prevents their disclosure. This power is used to ensure that the power vested in the executive branch is not compromised in comparison to the two other branches of federal government: the legislature and the judiciary. The President may claim executive privilege over any record, and the claim does not need to coincide with any of the criteria in the Presidential Records Act that automatically exempt records from publication.

[4] Executive Order 13489, "Presidential Records," 74 *Federal Register* 4669, January 26, 2009. The executive order was issued on January 21, but not printed in the *Federal Register* until January 26.

The Policy Question

Presidential records are a critical tool for understanding the powers and operations of the executive branch of the federal government. These presidential records, however, may include information that, if released to the public, could endanger national security, drastically affect the nation's economy, or result in an unwarranted invasion of personal privacy. The policy issue for Congress is to determine whether incumbent and former Presidents should be granted wide-ranging authority to assert claims of executive privilege—sometimes at the cost of government transparency and political scholarship. Presidential records are a critical piece of the nation's historical archive, yet some argue their public release is to be weighed against concerns for national security, privacy, and economic protection.

The Presidential Records Act

Pursuant to Chapter 22 of Title 44 of the U.S. Code, upon leaving office, an outgoing President may restrict access to certain of his archived records for up to 12 years.[5] Certain presidential files and records may be excepted from public access if they qualify under any of the six criteria delineated in 44 U.S.C. § 2204. These criteria are

1. the information is specifically exempted by an executive order for the purpose of national security or foreign policy;
2. the information is related to federal office appointments;
3. the information is explicitly exempted from disclosure by statute;
4. the information includes trade secrets and commercial or financial information obtained from a person that is privileged or confidential;
5. the information is a confidential communication that requests or submits advice between the President and his advisers—or between the advisers themselves; or
6. the information is personnel or medical files, and their disclosure would amount to an unwarranted invasion of personal privacy. [6]

According to the act, the Archivist—or the courts—would have final determination over which records should be released to the public. The act also states that it is not to "be construed to confirm, limit, or expand any constitutionally-based privilege which may be available to an incumbent or former President."[7] The act does not define the parameters of this privilege.

[5] 44 U.S.C. § 2204(a). After 12 years have expired, Presidential records are subject to the Freedom of Information Act, which governs public access to agency records (5 U.S.C. § 552).

[6] Ibid.

[7] 44 U.S.C. § 2204.

Executive Order 13233

President George W. Bush issued E.O. 13233 on November 1, 2001. The executive order gave the incumbent President, former Presidents, former Vice Presidents, and their designees broad authority to deny access to presidential documents or to delay their release indefinitely. Under the order, former Presidents had 90 days to review whether requested documents should be released (this is 60 days more than provided under earlier arrangements). Sitting Presidents had the authority to extend the review period indefinitely, and the Archivist had no recourse to challenge the status of materials that had been withheld or remained in review.[8]

The executive order also changed the procedure for the disclosure of presidential records. Under practices prior to E.O. 13233, presidential records would be released at the termination of the 12-year restriction period—unless the President, former President, or former Vice President asserted "constitutionally based privileges" to stop the disclosure.[9] E.O. 13233 required action by the President, former President, or former Vice President for records to be released. If, therefore, none of the designated officers acted to release of presidential records, they may have remained undisclosed even if the 12-year restriction period lapsed. Moreover, the executive order permitted representatives of a former President or Vice President to challenge the release of presidential records. Formerly, all challenges to disclosure had to be made by the former President or former Vice President himself.

Executive Order 13489

During his first full day in office, President Barack Obama issued an executive order (E.O. 13489) that explicitly revoked E.O. 13233. Under E.O. 13489, incumbent Presidents and former Presidents are granted 30 days to review presidential records to determine whether they should be released. If an incumbent President claims executive privilege for the records of a former President, the Counsel to the President is required to notify the Archivist, the appropriate former President, and the Attorney General of the action. The Archivist is then prohibited from releasing those records—unless instructed to do so by a court order.

In contrast to claims of executive privilege made by an incumbent President, claims of executive privilege made by a former President now require the Archivist to consult with the Attorney General, the Counsel to the President, or other appropriate officials to determine the validity of the request. According to the executive order, the incumbent President may instruct the Archivist whether to release the records of a former President, and the Archivist is to "abide by" the President's determination—unless directed otherwise by a court order. If the Archivist denies a former President's executive privilege claim and determines that records should be released, the incumbent President and appropriate former President are to be given 30 days notice of the records' release.

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[8] The executive order stated that "references in this order to a former President shall be deemed also to be references to the relevant former Vice President" (Sec. 11). A former Vice President, therefore, would have authority identical to a former President under E.O. 13233 to withhold certain records from disclosure.

[9] E.O. 13233 stated that the President could assert executive privilege for records that reflected "military, diplomatic, or national security secrets (the state secrets privilege); communications of the President or his advisors (the presidential communications privilege); legal advice or legal work (the attorney-client or attorney work product privileges); and the deliberative process of the President or his advisors (the deliberative process privilege)."

E.O. 13489 vests much of the records disclosure authority in the hands of the incumbent President. This broad authority to determine which records of a former President should be released to the public stands in contrast to the designs of the Presidential Records Act, which placed greater authority over records disclosure in the hands of the Archivist. The executive order does not define the boundaries of executive privilege, but it does define a "substantial question of executive privilege" as a situation in which "NARA's disclosure of Presidential records might impair national security (including the conduct of foreign relations), law enforcement, or the deliberative processes of the executive branch."

Legislation in the 111th Congress

In the 111th Congress, Representative Edolphus Towns, with others, introduced The Presidential Records Act Amendments of 2009 (H.R. 35) on January 6, 2009. The bill passed the House under suspension of the rules on January 7, by a vote of 359-58. The bill was referred to the Senate Committee on Homeland Security and Governmental Affairs on January 9.

Among its changes to presidential recordkeeping, H.R. 35 would statutorily revoke E.O. 13233. In addition, the bill would limit the record review period for incumbent and former Presidents to 20 days (10 fewer days than President Obama's executive order mandates).[10] The bill would also require a former President or Vice President personally to request exemptions from records release.

H.R. 35 would modify a few practices mandated by President Obama's E.O. 13489—including granting the Archivist broader control over the disclosure of records of former Presidents. While E.O. 13489 grants the President vast authority to determine whether the records of a former President should be disclosed, H.R. 35 would vest that power in the Archivist. The bill does not attempt to define executive privilege or its boundaries.

Legislation in the 110th Congress

The Presidential Records Act Amendments of 2009 (H.R. 35) is not Congress's first attempt to revoke E.O. 13233. In the 110th Congress, a similar bill (H.R. 1255) was passed under suspension of the rules in the House on March 14, 2007, by a vote of 333-93. A companion bill (S. 886) was introduced in the Senate on March 14. S. 886 was reported by the Committee on Homeland Security and Governmental Affairs without amendment on June 20 and placed on the legislative calendar that same day. No further action was taken on the bill.

Based on a review of the Legislative Information System, a database of congressional legislation, an additional eight bills related to presidential records were introduced in the 110th Congress. The only bill that was enacted (P.L. 110-404) authorized the Archivist to make grants available to help store and preserve the records of former Presidents who do not have an archival depository. Among the other legislative initiatives was a bill that would have required the creation of guidelines for the preservation of electronic presidential records (H.R. 5811), and a few bills that

[10] According to the bill, the Archivist can extend the review period an additional 20 days if the incumbent President, former President, or Vice President claims the additional time is necessary to complete "an adequate review of the record."

would have provided funding or access to presidential archives that are not protected by the 1978 Act (H.R. 6872; H.R. 6669; S. 3350). The remaining pieces of legislation included a resolution that provided consideration for H.R. 5811 (H.Res. 1318), and two bills that would have authorized grants to establish a Woodrow Wilson Presidential Library (H.R. 1664; S. 1878).

Analysis

Presidential documents provide a historical resource that can be used to better understand how the institution of the presidency functions and how individual Presidents have interpreted or modified the institution. Presidents, however, must be able to act quickly and deliberately on issues that are essential to national security, foreign policy, and other sensitive topics. Certain documents may need to be exempted from disclosure—for a period of time or in perpetuity—to protect security or for other reasons.

H.R. 35

H.R. 35 would reinstitute many of presidential records archiving policies that were in effect prior to George W. Bush's issuance of E.O. 13233. First, the bill seeks to shorten the record review period established by President Obama's executive order by 10 days (from 30 to 20 days). Second, it would also require personal requests from an incumbent President, former Presidents, or former Vice Presidents for exemption from the statute. Third, the bill would statutorily revoke Bush's executive order.[11]

If passed, H.R. 35 would reduce the amount of time required for presidential records to be disclosed. Under the proposed bill, an incumbent President, former Presidents, and former Vice Presidents would have to demonstrate why certain records should be afforded protected status for reasons of executive privilege. Under E.O. 13233, any person seeking to access records that had not been released had to demonstrate why these records should have been disclosed—without full knowledge of the information that the record may include. Under E.O. 13489, in contrast, incumbent and former Presidents must demonstrate why records should not be released. H.R. 35 would codify parts of President Obama's executive order. Passage of H.R. 35 would statutorily revoke E.O. 13233 and codify Congress's stance on the disclosure of presidential records. Such action could deter future Presidents from attempting to deny access to certain records or lengthen the records disclosure process because such a statute would delineate the legislative branch's disclosure requirements.

Some Members may believe, however, that H.R. 35 would remove a President's, former President's, or former Vice President's constitutionally legitimate claims of privilege for certain information or records. The legislation would statutorily mandate the time frame for the release of presidential documents and would require personal, explicit claims of executive privilege from incumbent or former Presidents. E.O. 13489 does not directly address whether designees of incumbent or former Presidents could assert claims of executive privilege. The executive order does mandate a 30-day record review period.

[11] For more information on the power and limitations of executive orders, see CRS Report RS20846, *Executive Orders: Issuance and Revocation*, by T. J. Halstead.

Congress may also choose not to act on H.R. 35. President Obama's executive order restores much of the Presidential Records Act. If the bill were not enacted, the incumbent President would have greater control over the disclosure of the records of incumbent and former Presidents under the provisions of E.O. 13489. Not enacting H.R. 35 could allow an incumbent President, former President, or former Vice President to keep from disclosure important historical documents for a longer period of time. Such action could increase public mistrust of the presidency, inhibit scholarship, or possibly permit abuses of executive power to go undetected.

Vice Presidential Records Controversy

Neither E.O. 13489 nor H.R. 35 directly addresses the controversy over whether an outgoing Vice President has the authority to determine which records should be handed over to NARA upon leaving office.[12] According to the Presidential Records Act, the incumbent President is the manager of his presidential records prior to leaving office. It is, therefore, his responsibility to maintain records responsibly and turn them over to the Archivist when he leaves office. Former Vice President Dick Cheney challenged a lawsuit filed by an organization that sought to preserve records that Mr. Cheney claims are subject to his control. In September 2008, a judge ordered Mr. Cheney to preserve all records until the case was decided, according to media reports.[13] Mr. Cheney's office submitted to the Federal District Court of Washington, D.C., a motion to dismiss the lawsuit on December 8, 2008, that claimed, "The vice president alone may determine what constitutes vice presidential records or personal records, how his records will be created, maintained, managed and disposed, and are all actions that are committed to his discretion by law."[14]

On January 19, 2009, a federal district court judge found that Citizens for Responsibility and Ethics in Washington (CREW), the organization seeking preservation of the records, could not demonstrate that the Vice President failed to comply with his obligations under the Presidential Records Act. The decision accepted Mr. Cheney's claim that he should have broad discretion over which of his records are to be preserved and released to the public.[15] The court also found that Vice Presidential records were, pursuant to 44 U.S.C. § 2207, to be preserved in the same manner as Presidential records.

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[12] Defendants' Motion to Dismiss or, in the Alternative, for Summary Judgment, and Memorandum of Points and Authorities in Support of Defendants' Motion, *Citizens for Responsibility and Ethics in Washington et al. v. Cheney* (No. 08-1548) (D.D.C. filed Dec. 8, 2008). Neither the Presidential Records Act, nor subsequent executive orders, are explicit about an incumbent Vice President's authority and discretion over the preservation of his records.

[13] Christopher Lee, "Cheney Must Hold His Records," *The Los Angeles Times*, September 21, 2008, pp. A-28, available at http://articles.latimes.com/2008/sep/21/nation/na-cheney21.

[14] Defendants' Motion to Dismiss or, in the Alternative, for Summary Judgment, and Memorandum of Points and Authorities in Support of Defendants' Motion, *Citizens for Responsibility and Ethics in Washington et al. v. Cheney* (No. 08-1548) (D.D.C. filed Dec. 8, 2008). See also Pamela Hess, "Cheney Claims Power to Decide his Public Records," The Associated Press, December 18, 2008, available at http://www.wtop.com/?nid=116&sid=1474512.

[15] Citizens for Responsibility and Ethics in Washington v. Cheney, 2009 U.S. Dist. LEXIS 3113 (D.D.C. 2009).

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