

STATEMENT BY HAROLD C. RELYEA
CONGRESSIONAL RESEARCH SERVICE
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SUBCOMMITTEE ON INFORMATION POLICY,
CENSUS, AND NATIONAL ARCHIVES
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THE PRESIDENTIAL RECORDS ACT OF 1978:
A REVIEW OF EXECUTIVE BRANCH IMPLEMENTATION
AND COMPLIANCE

Mr. Chairman and members of the Subcommittee, thank you for your invitation to appear here today to offer testimony regarding the subject matter of this hearing, executive branch implementation of, and compliance with, the Presidential Records Act of 1978. I am Harold C. Relyea, a Specialist in American National Government with the Congressional Research Service of the Library of Congress.

Tradition established. During the first 150 years of the federal government, the management and preservation of federal records was generally neglected.¹ Inattentiveness to the maintenance of official papers prevailed within both the infant bureaucracy and the White House. While the Secretary of State bore responsibility for retaining copies of the most important government documents during these initial years, lesser papers without immediate administrative significance disappeared in a clutter, disintegrated, became otherwise lost, or were destroyed by design.

In this atmosphere, departing Presidents had little choice with regard to the disposition of their records: there was no national archive to receive such papers, and, for reasons of etiquette, or politics, or both, there was reluctance to leave them behind. Thus, the early Chief Executives carried away their documents of office, entrusting them to their family, estate executors, and, often, to fate. After several decades of the perils of private ownership, many collections of presidential records

¹ See H. G. Jones, *The Records of a Nation* (New York: Atheneum, 1969), pp. 3-23.

came to be established within the libraries of state and private universities, state historical societies, and the Library of Congress. However, time levied a price on some caches of such documents before they came to rest in friendly institutions.

As the federal establishment began to grow and to realize increasing responsibility for maintaining or regulating the economic and social affairs of the nation, questions arose about the propriety and wisdom of neglecting the management and preservation of federal records, including the practice of regarding presidential papers as personal property to be taken away by the incumbent when he left office. By the 20th century, historians had become alarmed that such papers were being accidentally destroyed, lost, and sometimes only selectively released for scrutiny. Archivists at the National Archives (established in 1934) and elsewhere lamented omissions in the national governmental record that the situation created. Not only might entire files be carried from the White House, but presidential correspondence might also be taken from departmental files. The situation became particularly acute with the creation of the Executive Office of the President in 1939. Franklin D. Roosevelt established a panoply of emergency and wartime agencies within this domain, all of which served the President in immediate and direct capacities and all of which, therefore, could be considered producers of “presidential papers.” The potential loss of the documentary materials of these entities presented both a records management and an administrative continuity problem.

Modifying tradition. Addressing this situation, Franklin D. Roosevelt sought to return presidential papers to the public realm through a new type of institution — the federally maintained presidential library. Deciding to build a presidential library on the grounds of his family home in Hyde Park, NY, FDR approved private funding arrangements for the construction of an archival edifice to house and preserve such documentary materials as he might donate, bequeath, or transfer to it. Chartering legislation for the Roosevelt presidential library was enacted in 1939,² and the

² 53 Stat. 1062.

Archivist of the United States, acting on behalf of the federal government, accepted the completed facility for federal maintenance on July 4, 1940.³

Succeeding to the presidency in 1945, Harry S. Truman began pursuing his predecessor's presidential library model in 1950. While private fund-raising was getting underway, Congress enacted the Presidential Libraries Act of 1955, which established the basic policy for the creation of subsequent federally maintained presidential libraries for Presidents Herbert Hoover, Dwight D. Eisenhower, John F. Kennedy, Lyndon B. Johnson, Gerald R. Ford, Jimmy Carter, Ronald Reagan, George H. W. Bush, and William J. Clinton.⁴

As a consequence of the so-called Watergate incident — the June 17, 1972, burglary at the Democratic National Committee headquarters located in the Watergate office building in Washington, DC — and related matters, the official papers and records of President Richard M. Nixon were placed under federal custody by the Presidential Recordings and Materials Preservation Act of 1974 to assure their availability to federal prosecutors.⁵ The statute required that these materials remain in Washington, DC, where they are maintained under the supervision of the Archivist. Thus, Nixon could neither take his presidential records with him when he left office, nor place them in a presidential library outside the nation's capital. Subsequently, a Nixon library was constructed at the former President's birthplace — Yorba Linda, CA. The completed facility was dedicated in July 1990, and, thereafter, remained under private operation. A few years ago, however, negotiations were begun with a view to adding the Nixon library to the presidential library system administered by the National Archives and Records Administration (NARA). Anticipating the subsequent deeding of this facility to the federal government, Congress enacted legislation in

³ Waldo Gifford Leland, "The Creation of the Franklin D. Roosevelt Library: A Personal Narrative," *American Archivist*, vol. 18, Jan. 1955, pp. 11-29; Donald R. McCoy, "The Beginnings of the Franklin D. Roosevelt Library," *Prologue*, vol. 7, fall 1975, pp. 137-150.

⁴ 69 Stat. 695.

⁵ 88 Stat. 1695.

November 2003 amending the Presidential Recordings and Materials Preservation Act to give the Archivist discretionary authority to transfer the Nixon records to an archival depository in accordance with prescribed law.⁶ Recently, the National Archives indicated in the congressional justification for its FY2008 budget request that it “has an interim occupancy agreement with the Richard Nixon Library and Birthplace Foundation ... that will soon lead to adding the Yorba Linda, California, library facility to NARA’s Presidential Library System.” Moreover, NARA stated that it had “begun transferring Nixon Presidential holdings to that facility” and was preparing to hire “the staff in FY 2008 needed to operate the library.”⁷

Vacating tradition. Following the enactment of the Presidential Recordings and Materials Preservation Act, Congress developed the Presidential Records Act of 1978, which defined “presidential records” and, for all such materials created on or after January 20, 1981, effectively made them federal property that was to remain under the custody and control of the Archivist when each incumbent President left the White House.⁸ Prior to the conclusion of his term of office, the departing President was authorized to specify durations, not to exceed 12 years, for which access to certain specified categories of information shall be restricted. After the expiration of these periods of restriction, the records of the former President could be protected by the exemptions to the rule of disclosure specified in the Freedom of Information Act.⁹ Records outside the specified categories of information for which the former President could set the duration of restriction were disclosable either five years after the Archivist obtained custody or on the date the Archivist completed the processing and organization of such records. The records of former Vice Presidents were subject

⁶ Sec. 543 at 118 Stat. 346; George Lardner, Jr., “Nixon Data May Be Calif.-Bound,” *Washington Post*, Nov. 13, 2003, p. A12; Associated Press, “Legislators Take First Step Toward a Nixon Library,” *Washington Times*, Nov. 13, 2003, p. A4.

⁷ U.S. National Archives and Records Administration, *2008 Performance Budget: Congressional Justification* (Washington: Feb. 2007), p. I-11.

⁸ 92 Stat. 2523.

⁹ 5 U.S.C. §552(b)(1)-(9).

to these same arrangements. A former President was to be notified by the Archivist when records were about to be disclosed, particularly “when the disclosure of particular documents may adversely affect any rights and privileges which the former President may have.”¹⁰ The statute also stated: “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.”¹¹ This provision addressed the so-called “executive privilege” or the privilege of the Executive to exercise a claim of constitutionally based privilege against the disclosure of presidential records. A subsequent, related report by the House Committee on Government Reform offered the following commentary.

With respect to [this provision], the authors of the Presidential Records Act were mindful of two Supreme Court decisions that affirmed the existence of executive privilege covering presidential records: *United States v. Nixon*, 418 U.S. 683 (1974), and *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977). In the latter decision, the Court specifically recognized the right of a former President to claim executive privilege. However, there is sparse judicial precedent concerning the parameters of executive privilege. For example, in *United States v. Nixon*, 418 at 706, the Court observed that a “broad, undifferentiated claim of public interest in the confidentiality of” Presidential communications is less weighty than “a claim of need to protect military, diplomatic, or sensitive national security secrets.”

The scope of the privilege is particularly uncertain in the case of a former President and in the case of records that are 12 or more years old. In *Nixon v. Administrator of General Services*, 433 U.S. at 450-451, the Supreme Court observed:

[T]here has never been an expectation that the confidences of the Executive Office are absolute and unyielding. All former Presidents from President Hoover to President Johnson have deposited their papers in presidential libraries *** for governmental preservation and eventual disclosure *** The expectation of the

¹⁰ 44 U.S.C. §2206.

¹¹ 44 U.S.C. §2204(c)(2).

confidentiality of executive communications thus has always been limited and subject to erosion over time after an administration leaves office.¹²

Jimmy Carter was the last occupant of the Oval Office who could freely take away his records and papers. However, Carter's successor, Ronald Reagan, in the closing days of his second term as President, issued E.O. 12667 of January 18, 1989, "in order to establish policies and procedures governing the assertion of Executive privilege by incumbent and former Presidents in connection with the release of Presidential records by the National Archives and Records Administration pursuant to the Presidential Records Act of 1978."¹³ Basically, the order required the Archivist to notify the incumbent President and the former President whose papers were involved of his intent to disclose publicly presidential records which were not otherwise subject to protection under the terms of the Presidential Records Act. The Archivist was to identify any specific materials in the records to be disclosed which "may raise a substantial question of Executive privilege." As defined in the order, a "substantial question of Executive privilege" exists if "disclosure of Presidential records might impair the national security (including the conduct of foreign relations), law enforcement, or the deliberative processes of the Executive branch." The incumbent President and the former President whose papers were involved might assert executive privilege to prevent the disclosure of records either as a consequence of the Archivist's notice and identification or on their own initiative. The first incumbent President to exercise this authority — on at least three occasions — was President George W. Bush.¹⁴ To date, no former President has directly exercised this

¹² U.S. Congress, House Committee on Government Reform, *Presidential Records Act Amendments of 2002*, report to accompany H.R. 4187, 107th Cong., 2nd sess., H. Rept. 107-790 (Washington: GPO, 2002), p. 5.

¹³ 3 C.F.R., 1989 Comp., pp. 208-210.

¹⁴ Josh Chafetz, "The White House Hides History: Cover Letter," *New Republic*, Aug. 27 and Sept. 3, 2001, pp. 20, 22-23; George W. Lardner, Jr., "Release of Reagan Documents Put on Hold," *Washington Post*, June 10, 2001, p. A5; Christopher Marquis, "White House Again Delays Release of Reagan Papers," *New York Times*, Sept. 1, 2001, p. A9.

authority. The Reagan order, E.O. 12667, was revoked by E.O. 13233 of November 1, 2001.¹⁵ Key provisions of E.O. 13233, as summarized in a report by the House Committee on Government Reform, are as follow:

- The Archivist will notify the incumbent and former Presidents of all requests for records of a former President after the restriction period [up to 12 years] expires.
- The Archivist is prohibited from releasing any such records unless and until both the incumbent and former President agree to their release, or until the Archivist is directed to release the records by a final court order.
- “Absent compelling circumstances,” the incumbent President will concur in a former President’s determination of whether or not to claim executive privilege. The Order does not define “compelling circumstances.”
- If the incumbent President concurs in a former President’s claim of privilege, the incumbent President will support the claim in any litigation. Even if the incumbent President disagrees with a former President’s claim, the Archivist still must honor that claim and withhold the records.
- A former President may designate a representative or group of representatives to act on his behalf for purposes of the Presidential Records Act and the Executive Order.
- The Order establishes a 90-day target date for review of access requests by members of the public. However, the review period can be extended indefinitely. The Executive Order establishes a shorter target date for review of access requests by Congress or the courts, specifically 21 days for a former President’s decision and another 21 days for the incumbent President’s decision. These target dates likewise can be extended indefinitely.¹⁶

¹⁵ 3 C.F.R., 2001 Comp., pp. 815-819.

¹⁶ U.S. Congress, House Committee on Government Reform, *Presidential Records Act Amendments of 2002*, H. Rept. 107-790), pp. 6-7.

Opposition to the order was expressed by historians, political scientists, journalists, and lawyers, among others. A November 6, 2001, *Los Angeles Times* editorial, for example, indicated that the order “would nudge the nation’s highest office back toward democracy’s dark ages, when history effectively could be kept from the public.” Three days later, the *Washington Post* editorially characterized the order’s procedures as “a flawed approach on records.” *USA Today*, in a November 12 editorial, regarded the order’s arrangements as having a strong potential for “self-serving secrecy.” In a November 15 editorial, the *New York Times* commented that the order “essentially ditches the law’s presumption of public access in favor of a process that grants either an incumbent president or a former president the right to withhold the former president’s papers from the public,” and concluded that, if a remedy for the situation was to be realized, “Congress must pass a law doing so.”¹⁷

A vehicle for overturning the order was introduced in the House as H.R. 4187 on April 11, 2002, by Representative Stephen Horn for himself and 22 bipartisan co-sponsors. It also amended the Presidential Records Act to provide for the exercise of executive privilege in terms more limited than those of E.O. 13233. The Subcommittee on Government Efficiency, Financial Management, and Intergovernmental Relations, under the chairmanship of Representative Horn, held hearings on E.O. 13233 and H.R. 4187, respectively, on November 6, 2001, and April 24, 2002.¹⁸ The Committee on Government Reform held a hearing on the impact of the executive order on the public availability of presidential records.¹⁹ Summarizing these proceedings, the subsequent report

¹⁷ U.S. Congress, House Committee on Government Reform, Subcommittee on Government Efficiency, Financial Management, and Intergovernmental Relations, *Hearings Regarding Executive Order 13233 and the Presidential Recordings Act*, hearings, 107th Cong., 1st and 2nd sess., Nov. 6, 2001; Apr. 11 and 24, 2002 (Washington: GPO, 2002), pp. 243-246.

¹⁸ U.S. Congress, House Committee on Government Reform, Subcommittee on Government Efficiency, Financial Management, and Intergovernmental Relations, *Hearings Regarding Executive Order 13233 and the Presidential Recordings Act*.

¹⁹ Shortly after the Subcommittee on Government Efficiency, Financial Management, and Intergovernmental Relations held its hearing on E.O. 13233, a complaint was filed on November 28, 2001, in the United States District Court for the District of Columbia to obtain a declaratory

accompanying H.R. 4187, as amended, stated: "Witnesses at these three hearings included historians, lawyers and other experts," who "testified that Executive Order 13233 violat[ed] the Presidential Records Act and greatly inhibit[ed] the release of presidential records as envisioned by the Act."

With one exception, the witnesses who specifically commented on H.R. 4187 strongly supported the bill and testified that the bill did not raise serious constitutional issues. One witness took the position that H.R. 4187 was unconstitutional, and indeed, that virtually any legislation to supercede or alter the Executive Order would be unconstitutional. The Administration declined an invitation to testify at the April 24 hearing on H.R. 4187. However, the Department of Justice later submitted a letter opposing the bill (see Appendix I [of the report]).²⁰

Concerning the Department of Justice letter opposing the bill, the committee report accompanying H.R. 4187, as reported, offered the following comments.

The Justice Department's letter does not require a detailed response. Most legal experts who testified before the committee persuasively refuted the Justice Department's constitutional and other legal arguments against the bill. These witnesses testified that the bill is within the constitutional authority of Congress and represents an appropriate response to the Executive Order that is itself in violation of the Presidential Records Act and is likely unconstitutional.

Nevertheless, the committee wishes to respond briefly to two points in the Justice Department's letter. First, the department maintains that the Executive Order is intended to

¹⁹ (...continued)

judgment that the Archivist and NARA must administer the Presidential Records Act without regard to the terms of E.O. 13233, and to compel the release of presidential materials of former President Reagan that were in the custody of NARA and allegedly were being withheld in violation of the act. The District Court subsequently ruled on March 28, 2004, that plaintiffs' past injury "is simply not redressable by the relief they seek, and their only possible redressable injury at this stage simply is too hypothetical." Finding that "Plaintiffs' claim is not ripe for review, and cannot be ripe until Plaintiffs have some actual or imminent redressable injury," the court concluded that "this suit [is] nonjusticiable, and consequently the Court has no jurisdiction over this case at this time." *American Historical Association v. National Archives and Records Administration*, 310 F. Supp. 2d 216 (D.D.C. 2004). Plaintiffs' motion to alter or amend the judgment granted, plaintiffs required to show a particular need for documents to overcome the presidential communications privilege. 402 F. Supp. 2d 171 (D.D.C. 2005).

²⁰ U.S. Congress, House Committee on Government Reform, *Presidential Records Act Amendments of 2002*, H. Rept. 107-790, p. 3.

facilitate the release of records under the Presidential Records Act and that it has worked well. The Executive Order has not worked well. It has served to delay the public disclosure of records far beyond the release dates envisioned by the Act. Second, the department maintains that opposition to the Executive Order is premised on the view that a former President should not have the right to claim executive privilege. This is simply not true. The bill recognizes that, under Supreme Court precedent, a former President can invoke executive privilege. The purpose of the bill is to ensure that this right is exercised in a manner that does not undermine the Presidential Records Act.²¹

The measure, with an amendment, was favorably reported from committee on a voice vote to the House on November 22, 2002, but did not receive a floor vote prior to the final adjournment of the 107th Congress.²² Representative Horn did not stand for reelection to the next Congress, and no successor legislation was subsequently introduced in either house during the 108th and 109th Congresses. Today, in the course of examining executive branch implementation of, and compliance with, the Presidential Records Act of 1978, this Subcommittee has before it the question of the need for such legislation.

Thank you for your attention. I welcome your questions.

²¹ Ibid., p. 9.

²² U.S. Congress, House Committee on Government Reform, *Presidential Records Act Amendments of 2002*, H. Rept. 107-790.

Biographical Profile

Harold C. Relyea is a Specialist in American National Government with the Congressional Research Service (CRS) of the Library of Congress. A member of the CRS staff since 1971, he has held both managerial and research positions during his career. His principal areas of research responsibility include the presidential office and powers, executive branch organization and management, executive-congressional relations, congressional oversight, and various aspects of government information policy and practice. He has testified before congressional panels on various occasions, and has served as an expert resource for other organizations. In addition to his CRS duties, Dr. Relyea has authored numerous articles for scholarly and professional publications in the United States and abroad. Currently preparing a book on national emergency powers, his recently published titles include *Silencing Science: National Security Controls and Scientific Communication* (1994), *Federal Information Policies in the 1990s* (1996), *The Executive Office of the President* (1997), *United States Government Information: Policies and Sources* (2002), and *Comparative Perspectives on E-government* (2006). He serves on the editorial board of *Government Information Quarterly*, the *International Journal of Electronic Government Research*, and the *Journal of E-Government*, and has held similar positions with several other journals in the past. An undergraduate of Drew University, he received his doctoral degree in government from The American University.