107TH CONGRESS
2d Session
HOUSE OF REPRESENTATIVES
REPORT
107–790

PRESIDENTIAL RECORDS ACT AMENDMENTS OF 2002

NOVEMBER 22, 2002.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. BURTON, from the Committee on Government Reform, submitted the following

R E P O R T

[To accompany H.R. 4187]

[Including cost estimate of the Congressional Budget Office]

The Committee on Government Reform, to whom was referred the bill (H.R. 4187) 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 an amendment and recommend that the bill as amended do pass.

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The amendment is as follows:

Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Presidential Records Act Amendments of 2002".

SEC. 2. PROCEDURES FOR CONSIDERATION OF CLAIMS OF CONSTITUTIONALLY BASED PRIVILEGE AGAINST DISCLOSURE.

(a) IN GENERAL.—Chapter 22 of title 44, United States Code, is amended by adding at the end the following:

"§ 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 between January 19 and 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, a claim of constitutionally based privilege against disclosure shall 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 Government Reform of the House of Representatives, and the Committee on 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 subpena, judicial subpena, or judicial process.".

(b) CONFORMING AMENDMENTS.—(1) Section 2204(d) of title 44, United States Code, is amended by inserting ", except section 2208," after "chapter".

(2) Section 2207 of title 44, United States Code, is amended in the second sentence by inserting ", except section 2208," after "chapter".

(c) CLERICAL AMENDMENT.—The table of sections at the beginning of chapter 22 of title 44, United States Code, is amended by adding at the end the following:

"2208. Claims of constitutionally based privilege against disclosure.".

SEC. 3. EXECUTIVE ORDER OF NOVEMBER 1, 2001.

Executive Order number 13233, dated November 1, 2001 (66 Fed. Reg. 56025), shall have no force or effect.

I. PURPOSE

H.R. 4187, the "Presidential Records Act Amendments of 2002," would amend the Presidential Records Act of 1978 to establish a process whereby incumbent and former Presidents could, 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 would supersede Executive Order 13233, which establishes a non-statutory process for review of presidential records and assertion of privilege claims.

II. LEGISLATIVE HISTORY

On April 11, 2002, Representative Stephen Horn, Chairman of the Committee on Government Reform's Subcommittee on Government Efficiency, Financial Management and Intergovernmental Relations, introduced H.R. 4187 for himself and 22 other Members. The original co-sponsors included Government Reform Committee Chairman Dan Burton, Ranking Member Henry Waxman, and Representative Janice Schakowsky, Ranking Member of the Subcommittee on Government Efficiency, Financial Management and Intergovernmental Relations. Twenty-one additional Members later joined as co-sponsors of the bill.

H.R. 4187 was referred to the Committee on Government Reform and was subsequently referred to its Subcommittee on Government Efficiency, Financial Management and Intergovernmental Relations. The committee and the Subcommittee on Government Efficiency held three hearings relevant to H.R. 4187.

On November 6, 2001, the subcommittee held an oversight hearing on implementation of the Presidential Records Act, which included consideration of the potential impact of Executive Order 13233 on the Act. On April 11, 2002, the full committee held a similar hearing on the effect of Executive Order 13233 on the public availability of presidential records. On April 24, 2002, the subcommittee held a legislative hearing that focused specifically on H.R. 4187.

Witnesses at these three hearings included historians, lawyers and other experts. These witnesses testified that Executive Order 13233 violates the Presidential Records Act and greatly inhibits the release of presidential records as envisioned by the Act. At the November 2001 hearing, a Justice Department witness defended the legality and appropriateness of Executive Order 13233.

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 supersede 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).

The committee met on October 9, 2002, and favorably reported the bill, as amended, by voice vote to the House of Representatives. The amendments adopted by the committee:

- Allow an incoming President at least 6 months at the outset of his first term to review records proposed for release under the Presidential Records Act;
- Allow the former or incumbent President to automatically extend for an additional 20 working days the 20-working-day deadline for review of records;
- Require that any executive privilege claims be submitted to the Senate Governmental Affairs Committee and the House Government Reform Committee, with notice to the Archivist; and
- Delete provisions in the original bill that specified the content of privilege claims and how they would be communicated. (The amendments retain the requirement that any privilege claim be asserted personally by the former or incumbent President.)

III. Background and Need for Legislation

A. The Presidential Records Act

Before enactment of the Presidential Records Act of 1978,[1] a President's papers relating to his official duties were considered as his personal property to dispose of as he saw fit. Most modern-era Presidents preserved their records and eventually made them public. However, there was no guarantee that either the records would be preserved or that they would be made public. The Presidential Records Act was a landmark law that supplied that guarantee. It declared, for the first time, that the records of a President relating to his official duties belonged to the American people. 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."[2]

At the same time, the Act recognized the need for some limits on public access to presidential records. It permitted a former President to restrict public access to sensitive records for up to 12 years after leaving office. Thereafter, the Act required the Archivist to make the records available to the public in accordance with the provisions of the Freedom of Information Act (FOIA).[3] All but one of the exemptions from disclosure under FOIA apply to presidential records. For example, records dealing with national defense and state secrets as well as sensitive law enforcement matters are protected from disclosure. The one exception is that FOIA's "(b)(5) deliberative process" exemption[4] does not apply. Therefore, records could not be withheld simply because they involved confidential internal advice and deliberations.

Apart from the FOIA exemptions, the Presidential Records Act did not impose any limits on the public's right of access to the

[1] Public Law 95–591, codified at 44 U.S.C. 2201–2207.
[2] 44 U.S.C. 2203(f)(1).
[3] 5 U.S.C. 552.
[4] See 5 U.S.C. 552(b)(5), which exempts from mandatory disclosure inter-agency or intra-agency memorandums or letters that would not be available by law to a party other than an agency in litigation with the agency.

records of a former President once the restriction period expired. However, it did provide 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." [5]

With respect to the above-quoted language, 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 450–51, 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 confidentiality of executive communications thus has always been limited and subject to erosion over time after an administration leaves office.

Senator Percy sponsored a floor amendment that made the FOIA (b)(5) deliberative process exemption inapplicable to requests for records under the Act. His amendment also included the language providing that the Act did not expand or limit claims of constitutional privilege. Senator Percy stated in this regard:

> [N]o document should be withheld [after the 12-year restriction period] simply because it contains confidential materials; such a result would undermine the basic purpose of the legislation. Consequently, the (b)(5) exemption has no place in this statutory scheme. * * * [W]hile we can prohibit the Archivist from withholding documents, after the restricted period, on the basis of the (b)(5) exemption, we cannot prevent a former or incumbent President from arguing, even after the 12-year period that a particular confidential communication between the President and an advisor should not be released. To what extent the concept of "executive privilege" protects the confidentiality of a former or incumbent President's communications with his advisers is an open question. If some future President believes that the 12-year closure period does not suffice, that President could object to the release of some docu-

[5] 44 U.S.C. 2204(C)(2).

ment in the 13th or 14th or 20th year. This legislation does not resolve the outcome of such legal action; the issue would be resolved by the courts.[6]

B. EXECUTIVE ORDER 12667

The Act first applied to the records of former President Ronald Reagan. On January 18, 1989, President Reagan issued Executive Order 12667.[7] This Executive Order established a process to deal with potential executive privilege claims over records covered by the Presidential Records Act. The Reagan Executive Order required the Archivist to give the incumbent and former Presidents 30 days advance notice before releasing presidential records. In this notice, the Archivist would identify any records that raised "a substantial question of executive privilege" under guidelines provided by the incumbent and former President.[8]

Executive Order 12667 authorized the Archivist to release the records after 30 days unless the incumbent or former President claimed executive privilege, or unless the incumbent President instructed the Archivist to extend the period. It further provided for review of potential executive privilege claims by Federal legal officers, and ultimately by the incumbent President, in order to determine whether the claims were justified. 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. The Archivist would give the former President 30 days advance notice of rejection of a privilege 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.

C. EXECUTIVE ORDER 13233

On November 1, 2001, President George W. Bush revoked the Reagan Executive Order and issued a new Executive Order—Executive Order 13233—to govern implementation of the Presidential Records Act.[9] The key provisions of Executive Order 13233 are as follows:

- The Archivist will notify the incumbent and former Presidents of all requests for records of a former President after the restriction period expires.
- The Archivist is prohibited from releasing any such records unless and until both the incumbent and former President agree to

[6] 124 Cong. Rec. 36844 (1978).
[7] Fed. Reg. 3403 (1989), 44 U.S.C. 2204 note.
[8] The Reagan Executive Order provided that "a substantial question of executive prilige" existed if disclosure of a record "might impair the national security (including the conduct of foreign relations), law enforcement, or the deliberative processes of the executive branch."
[9] 66 Fed. Reg. 56025 (2001), 44 U.S.C. 2204 note.

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.

D. PROBLEMS WITH EXECUTIVE ORDER 13233

Executive Order 13233 establishes a process whereby incumbent and former Presidents can review records prior to their release under the Presidential Records Act and, if they deem it necessary, invoke executive privilege to prevent release of the records. These objectives are consistent with the constitutional rights of incumbent and former Presidents as recognized in Supreme Court opinions. However, the Executive Order implements these legitimate objectives in a way that violates both the letter and the spirit of the Presidential Records Act of 1978.

The Executive Order 13233 converts the Act's presumption of disclosure into a presumption of non-disclosure. It forces the Archivist of the United States to automatically accept any claim of executive privilege by a former President, regardless of merit, which is in clear violation of the Archivist's duties under the Act. It allows friends, relatives and descendents of a former President to claim executive privilege—an approach lacking in any legal or historical precedent. Perhaps most serious problem of all with the Executive Order is that it allows an incumbent or former President to prevent indefinitely the public disclosure of records under the Act simply by inaction—without ever having to assert a claim of executive privilege.

It is regrettable that the committee needs to move forward with H.R. 4187. Both before and after introduction of H.R. 4187, Representative Horn and other Members of the committee attempted over a period of many months to persuade the Administration to modify the Executive Order. The Administration maintained that the Executive Order could be revised to protect the constitutional prerogatives of incumbent and former Presidents without violating the Act. Indeed, the Reagan Executive Order provided a model for this. However, the Administration was unwilling to make any changes to the Order.

E. THE APPROACH OF H.R. 4187

H.R. 4187 accomplishes what Executive Order 13233 fails to accomplish. It protects the constitutional prerogatives of former and incumbent Presidents while preserving the Act's intent that presidential records be publicly disclosed as promptly and completely as possible.

Similar to Executive Order 13233, the bill establishes a process for the consideration of executive privilege claims. And similar to the Executive Order, the bill requires advanced notice be given to the former and incumbent Presidents before the presidential records are released. This gives them time to review the records and decide whether to claim privilege. Also, similar to the Executive Order, 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.

However, H.R. 4187 differs from Executive Order 13233 in several ways. The bill does not attempt to define the scope of executive privilege. It leaves that to the courts. The bill limits the time the former and incumbent President may take to review the records and claim privilege. The basic review period is 20 working days, which is the same limit imposed on agencies under FOIA. This period may be extended for up to another 20 working days if the incumbent or former President determines that an extension is necessary to permit adequate review of records. If there is no claim of privilege within the applicable review period, the Archivist must release the records.

The other major difference between H.R. 4187 and Executive Order 13233 concerns what happens if a former President claims privilege. As noted previously, the Executive Order forces the Archivist to withhold records any time a former President claims privilege. The requester then has the burden of challenging the privilege claim in court. That feature of the Executive Order is at odds with the Presidential Records Act. The bill reverses the legal burden. 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 then release the records absent a court order to the contrary.

The committee believes this is a reasonable approach, and one that is consistent with the intent of the Presidential Records Act. The Act already provides for lawsuits by a former President to vindicate his rights and privileges. Furthermore, the Act already protects from disclosure those categories of information that would ordinarily be subject to executive privilege claims. Thus, any privilege claim a former President might assert probably would be based on unusual and untested legal grounds that should be initially considered by the court.

The bill also includes several provisions that are not in the Executive Order. Most of those provisions are intended to ensure greater transparency and public accountability regarding possible claims of executive privilege. For example, a claim of privilege must be made by an incumbent or former President. This is consistent with the settled principle that the right to claim executive privilege is

personal to the incumbent or former President and cannot be delegated to their assistants, relatives or descendants.

F. JUSTICE DEPARTMENT OBJECTIONS

On October 8, 2002, the day of the committee markup, the Department of Justice submitted a letter setting forth its objections to H.R. 4187. The Justice Department's letter is included as Appendix I.

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 an 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 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.

IV. SECTION-BY-SECTION ANALYSIS OF THE BILL

Section 1—Short title

Section 1 provides that the Act may be cited as the "Presidential Records Act Amendments of 2002."

Section 2(a)—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. The new section 2208 establishes procedures to govern the review of records by a former or incumbent President prior to their public release under the Presidential Records Act and their assertion of constitutional privilege claims to prevent release of those records.

Subsection (a)(1) of the new section 2208 provides that, when the Archivist of the United States determines to make records publicly available in accordance with the Presidential Records Act, the Archivist shall promptly give advance notice to the applicable former President and the incumbent President. The Archivist is to make the notice available to the public. Under subsection (a)(2), the notice shall be in writing and shall contain such information as may be prescribed in regulations issued by the Archivist.

Subsection (a)(3)(A) generally requires the Archivist to make the records available upon the expiration of 20 working days following a notice under subsection (a)(1) unless the Archivist has received a claim of constitutional privilege by a former or incumbent President under subsection (b). 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 Government Reform and the Senate Committee on 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 under 44 U.S.C. 2204(e).

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 under 44 U.S.C. 2205(2)(A) or (C).

Section 2(b)—Conforming Amendments

Subsection 2(b) of the bill makes several clarifying and conforming changes to existing provisions of the Presidential Records Act. Paragraph (1) of subsection (b) clarifies that authority to claim executive privilege is personal to a former or incumbent President and cannot be delegated to their representatives. Paragraph (2) clarifies that a former or incumbent Vice President cannot claim presidential privileges. Both of these provisions are consistent with current theory and practice concerning executive privilege.

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.

V. Committee Oversight Findings

In compliance with clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee reports that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

VI. Budget Analysis and Projections

Clause 3(c)(2) of rule XIII, of the Rules of the House of Representatives, is inapplicable because the bill does not provide new budget authority, new spending authority, new credit authority, or an increase or decrease in revenues or tax expenditures.

VII. Cost Estimate of the Congressional Budget Office

U.S. Congress,
Congressional Budget Office,
Washington, DC, October 16, 2002.

Hon. Dan Burton,
Chairman, Committee on Government Reform,
House of Representatives, Washington, DC.

Dear Mr. Chairman: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 4187, the Presidential Records Act Amendments of 2002.

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

Sincerely,

Barry B. Anderson
(For Dan L. Crippen, Director).

Enclosure.

H.R. 4187—Presidential Records Act Amendments of 2002

H.R. 4187 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 20 days' notice before making presidential information public. During that waiting period, a former of incumbent President could claim a constitutionally based privilege against disclosure. If the claim is made by a former President, the Archivist could release the material at the end of the 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. 4187 also would allow a newly elected President additional time—until July 20 of the first year of 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. 4187 would have no significant effect on federal spending. In addition, 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 Robert A. Sunshine, Assistant Director for Budget Analysis.

VIII. Performance Goals and Objectives

H.R. 4187 does not authorize funding. Therefore, clause 3(c)(4) of rule XIII of the Rules of the House of Representatives is inapplicable.

IX. Statement of Constitutional Authority

Pursuant to rule XIII, clause 3(d)(1), the Committee finds that clauses 1 and 18 of Article I, Section 8 of the U.S. Constitution grant Congress the power to enact this law.

X. Committee Recommendation

On October 9, 2002, a quorum being present, the Committee on Government Reform ordered the bill, as amended, favorably reported by voice vote to the House of Representatives for consideration.

XI. Congressional Accountability Act

The Committee finds that the legislation does not relate to the terms and conditions of employment or access to public services or accommodations within the meaning of section 102(B)(3) of the Congressional Accountability Act (Public Law 104–1).

XII. Unfunded Mandates Reform Act

The Committee finds that the legislation does not impose any Federal mandates within the meaning of section 423 of the Unfunded Mandates Reform Act (Public Law 104–4).

XIII. Federal Advisory Committee Act

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

XIV. 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 (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):

CHAPTER 22 OF TITLE 44, UNITED STATES CODE

CHAPTER 22—PRESIDENTIAL RECORDS

Sec.
2201. Definitions.

* * * * * * *

2208. Claims of constitutionally based privilege against disclosure.

* * * * * * *

§ 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.

* * * * * * *

§ 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 between January 19 and

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, a claim of constitutionally based privilege against disclosure shall 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 Government Reform of the House of Representatives, and the Committee on 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 subpena, judicial subpena, or judicial process.

APPENDIX I

U.S. DEPARTMENT OF JUSTICE,
OFFICE OF LEGISLATIVE AFFAIRS,
Washington, DC, October 8, 2002.

Hon. DAN BURTON,
Chairman, Committee on Government Reform,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: This letter sets forth the Administration's views concerning the manager's amendment version of H.R. 4187, the "Presidential Records Act Amendments of 2002." The Administration has been working and meeting with Committee members and staff to address the Committee's questions and concerns, but we understand that the Committee will be considering this bill on October 9th. We respectfully believe that enactment of this bill is unnecessary and inappropriate and, more importantly, the bill is unconstitutional.

I.

The motivation underlying introduction of H.R. 4187 appears to be some concern in Congress with respect to Executive Order 13233, 66 Fed. Reg. 56025 (Nov. 5, 2001). President Bush issued the Order last November in order to establish polices and procedures governing consideration of the assertion of constitutionally based privileges in connection with the release of presidential records of prior administrations by the National Archives and Records Administration ("NARA") under the Presidential Records Act ("PRA"), 44 U.S.C. §§ 2201–2207. H.R. 4187 would purport to supersede President Bush's Order and put in its place congressionally prescribed procedures.

We respectfully suggests that much of the congressional concern underlying H.R. 4187 is based on a misunderstanding of the purpose and effect of the Executive Order. The Order does not operate to preclude the release of any presidential records. In fact, its most significant policy innovation is a provision establishing that the incumbent President ordinarily will not object to the release of records authorized for release by the former President. The Order merely establishes reasonable and appropriate procedures for review of documents and for privilege determinations to be made. The Order expressly refrains from indicating whether and under what circumstances privileges should be asserted.

Indeed, the Executive Order has operated to facilitate the releases of records. Pursuant to the terms of the Order, representatives of former President Ronald Reagan—the only President whose presidential records are ready for release by NARA after expiration

of the PRAs' 12-year restricted access period—reviewed the 68,000 pages of records for which notice was provided in 2001, and on November 29, 2001, former President Reagan, through his representative, stated that he was not asserting constitutional privilege over any of the 68,000 pages. Since that time, representatives of President Bush have reviewed the records, and all of those 68,000 pages have been released. The procedures of the Order are working well, and presidential records are being released to the public consistent with the review that the Constitution requires be available to the former and incumbent Presidents in order that they can determine whether to exercise their constitutional authority.

Much criticism directed at the Order has apparently been premised on the view that a former President should have no right to assert privileges over his presidential records. That criticism is unfounded because the Supreme Court has definitively held, in an opinion by Justice William Brennan, that both incumbent and former Presidents retain the right to assert constitutionally based privileges with respect to the presidential records of the former President. See *Nixon* v. *Administrator of General Services,* 433 U.S. 425 (1977). And the PRA expressly preserved the authority of former Presidents in this regard. See 44 U.S.C. § 2204(c)(2). We are disappointed that much of the commentary on the Order never confronts the Supreme Court's ruling or this provision of the PRA.

It bears emphasis that, as under the Freedom of Information Act ("FOIA"), a denied requester can bring suit to challenge a privilege assertion any time that a former or incumbent President asserts a privilege. In other words, the courts will have the final word on the validity of any assertion of privilege. Neither the former nor the incumbent President will possess unreviewable authority to withhold records.

Other criticism of the Executive Order has suggested that the Order threatens Congress's exercise of its authority to seek presidential records in order to discharge its legislative responsibilities. This is incorrect. The only provision in the Order that is pertinent to congressional requests and subpoenas is section 6. That section is not intended to change the law in any way with respect to the legal effectiveness of congressional subpoena return dates, the practice of the Executive and Legislative branches of engaging in an accommodation process regarding congressional requests for privileged Executive branch information, or the period of time that the Constitution requires a former or incumbent President be afforded in order to consider whether to assert a constitutionally based privilege. Section 6 merely sets forth the time periods that will generally apply to the reviews undertaken by former and incumbent Presidents in response to congressional bequests for presidential records.

There also have been some questions raised about the fact that under the Executive Order a denied requester must initiate litigation against a former President who asserts a privilege, rather than requiring the former President who asserts a privilege to sue the incumbent President's administration to block release. The Supreme Court has held that former Presidents have the constitutional right to assert privileges over their records. If such a privilege is asserted, we believe it most appropriate for the requester

who disagrees with the privilege assertion to proceed to court—just as the requester would do in ordinary FOIA litigation—rather than requiring the former President to take the extraordinary step of suing the incumbent President's Administration. As a practical matter, it is no more difficult for a requester to file suit when a former President asserts a privilege than for an unsuccessful requester to file an ordinary FOIA suit. Because this procedure is so common in the FOIA context, we think it is an entirely appropriate model for these purposes.

In short, Executive Order 13233 is faithful to the PRA and to the Supreme Court's case law; it sets out appropriate procedures that satisfy both the congressional purposes underlying the PRA and the constitutional prerogatives and interests of former and incumbent Presidents; and implementation of the Order is going well. There is no need for legislation concerning the Order.

II.

In any event, H.R. 4187 is unconstitutional. The PRA, which H.R. 4187 would amend, provides for the release of presidential records of prior administrations, but it expressly recognizes that any such release is subject to assertion of constitutionally based privileges: "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." 44 U.S.C. § 2204(c)(2). And the PRA makes no effort to establish policies or procedures for asserting constitutionally based privileges under the PRA, but instead leaves that to the Executive branch. See 124 Cong. Rec. 34,895 (1978) (statement of Rep. Preyer) (legislation not "designed to prejudge" issues "involving the manner of assertion of the constitutional privilege"); 44 U.S.C. § 2206 ("The Archivist shall promulgate * * * regulations necessary to carry out the provisions of this [Act]. Such regulations shall include * * * provisions for notice by the Archivist to the former President when the disclosure of particular documents may adversely affect any rights and privileges which the former President may have.").

Consistent with the Constitution and Congress's recognition of the constitutional requirements applicable to privilege claims, the Executive branch has been responsible for the establishment of procedures for assertion of constitutionally based privileges under the PRA. The preamble to H.R. 4187, however, states that its purpose is to end that by "establish[ing] procedures for the consideration of claims of constitutionally based privilege against disclosure of Presidential records." That purpose, however, is beyond Congress's legislative authority. The presidential privileges are constitutionally based. Thus, Congress lacks the authority to regulate by legislation the procedures for exercising this constitutional power, which belongs exclusively to the President. This has long been recognized, as reflected in testimony in 1975 by then-Assistant Attorney General for the Office of Legal Counsel Antonin Scalia. See Statement of Antonin Scalia, Assistant Attorney General, Office of Legal Counsel, on S. 2170, the Congressional Right to Information Act, before the Subcommittee on Intergovernmental Relations, Committee on Government Operations, United States Senate, Oct. 23, 1975.

Objecting to legislation setting out requirements governing the manner in which the President's constitutionally based privileges may be asserted, Assistant Attorney General Scalia testified that "[t]he Constitutional basis of Executive privilege means that the President may exercise it without Congressional leave and in spite of Congressional disapproval. In other words, the privilege does not fall within that group of powers which the President may exercise in the silence of Congress but not in derogation of legislation." Id. at 14. To support this position, the Assistant Attorney General quoted several passages from the Supreme Court decision in *United States* v. *Nixon*, 418 U.S. 683 (1974). Id., quoting from 418 U.S. at 705 (executive privilege is derived from "the supremacy of each branch within its own assigned area of constitutional duties"), 708 ("The privilege is fundamental to the operation of government and inextricably rooted in the separation of powers under the Constitution."), and 711 ("Nowhere in the Constitution * * * is there any explicit reference to a privilege of confidentiality, yet to the extent this interest relates to the effective discharge of a President's powers, it is constitutionally based.").

Assistant Attorney General Scalia went on in his testimony to object to a provision "requir[ing] that Executive privilege be claimed only by the President himself in writing, setting forth the grounds on which it is based." Statement at 14. That provision was substantially the same as section 2208(a)(4) of H.R. 4187 as introduced, a portion of which remains in the substitute bill under section 2208(b)(1). The Assistant Attorney General stated "that Congress lacks the power to preclude the President from adopting * * * reasonable alternative methods of claiming privilege, which he feels to be justified in the circumstances." Id. at 15.

The constitutional principle that is applicable here is that, given "the supremacy of each branch within its own assigned area of constitutional duties," *Nixon*, 418 U.S. at 705, it is for the President, not the Congress, to set forth the procedural requirements for exercising the constitutionally based privileges available to former and incumbent Presidents. Although Assistant Attorney General Scalia's testimony focused on a particular provision that is comparable to a particular provision in H.R. 4187, the same analysis applies to the remaining provisions in H.R. 4187 because they also seek to regulate the exercise of the constitutionally based presidential privileges, a process that must remain within the discretion of the President.

Other provisions of H.R. 4187 raise specific constitutional concerns beyond the overarching problem of lack of legislative authority (which renders the bill unconstitutional in its entirety). Section 2208(a)(3) would purport to limit the incumbent and former Presidents to a 20-day period, with the possibility of a 20-day extension, to review records and determine whether to assert privilege. Given the volume of records that are involved in the PRA process, that brief period almost always will be unreasonable and therefore constitute an impermissible burden on the Presidents' exercise of their constitutional authority. A similar constitutional concern is raised by section 2208(c), which directs the Archivist to release records subject to a privilege claim by a former President after expiration of a 20-day period unless otherwise directed by a court in an action

brought by the former President. Providing that a former President's claim of privilege is effective for only 20 days, and thereafter only with the approval of an officer of another branch of government, would significantly undercut the effect of the claim of privilege and may well also constitute an unconstitutional burden on the former President's exercise of his constitutional authority, as recognized by the Supreme Court in *Nixon* v. *Administrator of General Services.*

Section 2208(d)(2) would raise a constitutional concern if it were somehow read to direct the Archivist not to follow an incumbent President's directive to him to withhold records on the basis of privilege if the records have been requested by a congressional committee or the courts. If read in this way, the provision would turn the Executive branch hierarchy on its head, making the Archivist superior to the President—in contravention of the settled principle that the President has the constitutional authority to supervise and direct Executive branch officials in the discharge of their responsibilities. See *Myers* v. *United States,* 272 U.S. 52 (1926).

Finally, to return to the overarching constitutional problem identified earlier in this letter, the attempt in section 3 of the bill to declare that Executive Order 13233 "shall have no force or effect" would itself have no force or effect because Congress lacks the authority to override the President's exercise of his constitutional authority in this area.

In sum, H.R. 4187 constitutes an unconstitutional encroachment on presidential constitutional authority.

III.

Thank you for considering our views. If we can be of further assistance in this matter, please feel free to contact this office. The Office of Management and Budget has advised that there is no objection to the submission of this letter from the standpoint of the Administration's program.

Sincerely,

DANIEL J. BRYANT,
Assistant Attorney General.

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