

GOVERNMENT RELATIONS OFFICE & GOVERNMENT RELATIONS COMMITTEE
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Public Access to Presidential Records and Claims of Executive Privilege

BACKGROUND

Congress enacted the [Presidential Records Act \(PRA\) of 1978](#) (44 U.S.C. §2201-2207) to ensure that the public records of our presidents are government property and therefore belong to the American people. The PRA, as amended by [Executive Order No. 12667](#) issued by President Reagan in 1989, provided for a limited time period of 12 years during which presidential records, including confidential communications between a former president and his advisers, could be withheld from public access under custody of the U.S. Archivist. At the end of the 12-year period, Freedom of Information Act (FOIA) requests could be made to the Archivist for access to view these records. The PRA provided for an exception only if providing public access would violate a constitutionally based executive privilege of the former or incumbent president, in which case public access could be denied. The PRA was intended by Congress to craft a careful balance between a president's ability to withhold certain records for a limited time period and the right of the public to access them. AALL believes this balance has been seriously thwarted by provisions of [Executive Order 13233](#) that President Bush issued in 2001.

E.O. 13233 effectively denied the public's legitimate right of access under the PRA by giving an incumbent or former president veto power over any public release of materials by the Archivist even after the 12-year restriction period has expired. The library and open government communities opposed this effort to deny the public's legitimate right to access presidential records that are the property of the people, not of any one individual or of a former president's family or heirs. E.O. 13233 imposed restrictive barriers to the public's legitimate right to access presidential.

E.O. 13233 placed the National Archives and Records Administration (NARA) under standing orders to honor claims of privilege from either former or incumbent presidents, without judicial action, regardless of whether the former and current presidents were in agreement on the issue, in essence repealing the Presidential Records Act of 1978. E.O. 13233 also made provisions for a former Vice President to claim the privilege on the same basis as a former President and for the family or other designees of the President to claim the privilege after his or her death.

CURRENT STATUS IN THE 111th CONGRESS (AS OF MAY 2009)

In November 2008, AALL signed on to a [proposal](#) organized by the National Security Archive to the Obama-Biden Transition Team recommending that Obama reverse E.O.

13233. We were pleased that, on his first full day in office, President Obama issued an Executive Order on Presidential Records ([E.O. 13489](#)) to revoke E.O. 13233. On April 13, 2009, 245,763 pages of Ronald Reagan and George H.W. Bush presidential records were opened for research at their [respective libraries](#). These records were released in accordance with the Presidential Records Act and the new E.O.13489. We applaud President Obama for taking this important step toward greater transparency and accountability so early in his presidency.

AALL will continue to support congressional efforts to effect statutory change. The *Presidential Records Act Amendments of 2009* (H.R. 35) would restore standards for the timely release of presidential records and nullify E.O. 13233. H.R. 35 passed the House of Representatives on January 7, 2009 and was referred to the Senate Committee on Homeland and Security and Governmental Affairs. This bill is identical to the *Presidential Records Act Amendments of 2007*, which passed the House on March 14, 2007 (see: [Status in the 110th Congress](#)). On April 1, 2009, the Senate Committee on Homeland Security and Governmental Affairs favorable reported an amendment in the nature of a substitute to H.R. 35. On May 19, the bill was placed on the Senate Legislative Calendar under General Orders for consideration by the full Senate.

There are slight differences between the House version of the bill and the version voted out, with amendment, by the Senate Committee on Homeland Security and Governmental Affairs. The major difference is the length of time that the incumbent and former president have to review records before their release by the U.S. Archivist. The House bill allows incumbent and former president a 20-day review period with the possibility of an extension for an additional 20 days to review any records upon notice of intended release by the Archivist. The Senate bill changes those time frames to 60 days for the initial review with a 30 day extension.

STATUS IN THE 110TH CONGRESS (2007-2008)

H.R. 1255 passed the House of Representatives on March 14, 2007, amending the Presidential Records Act to enhance public access to presidential records. In March 2007, the Bush White House threatened to [veto](#) the bill.

H.R. 1255 would limit the ability of former presidents to block release of presidential records slated for release by NARA. Former presidents may not block release of such records through claiming executive privilege, unless such privilege is also affirmed by the incumbent president or by court order within 20-days of notice of the claim of privilege to NARA.

H.R. 1255 makes no such provisions for former vice presidents or for the designees or family of a former president. Because H.R. 1255 obligates NARA to release presidential records unless otherwise excepted in the Act, the use of executive privilege of designees or family member of a former president is removed. However, the effect of claims by a former vice president upon the National Archives remains uncertain.

While H.R. 1255 raises concerns about the separation of powers by placing limitations on

the response of the executive branch to claims of executive privilege by a former president, the Act addresses issues central to AALL's core values—specifically, our commitment to transparency in government, openness and accountability—which are crucial for democracy. In this case, presidential records facilitate important historical research, foster government accountability by the public, and provide access to important textual records necessary for a stable and civil society.