

**STATEMENT
by Allen Weinstein
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**to the
Subcommittee on Information Policy, Census, and National Archives
of the Committee on Government Oversight and Reform
House of Representatives
Congress of the United States**

On the Implementation and Effectiveness of the Presidential Records Act of 1978

March 1, 2007

Chairman Clay, Congressman Turner, members of the Subcommittee, and Subcommittee staff, I am Allen Weinstein, Archivist of the United States, and I want to thank you for the opportunity to appear before you this morning on the implementation of the Presidential Records Act of 1978 (PRA) under Executive Order 13233. Mr. Chairman, I particularly want to thank you for holding this hearing and for your continued interest in the programs and responsibilities of the National Archives and Records Administration (NARA). We are fully aware that under the jurisdiction of this subcommittee, attention to NARA is your job. However, during your career in Congress, you have taken a particular interest in our mission. The people of NARA and our many constituent groups thank you for that interest.

Five years ago, shortly after E.O. 13233 was promulgated, my predecessor, John Carlin, appeared before this Subcommittee as then comprised. Governor Carlin provided historical background on the PRA and how NARA had worked to implement public access to Presidential records. Since that time, NARA has had extensive experience under the order, and there has also been much public discussion about it. Today I would like to update the Subcommittee on

NARA's experience in working with the PRA and E.O. 13233, and I would also like to clarify some of the concerns that have arisen. For further background on this issue, let me recommend to the Subcommittee an article that two of my senior staff members published last summer in *The Public Historian*, entitled "A Historical Review of Access to Records in Presidential Libraries," by Nancy Kegan Smith and Gary M. Stern. A copy of the article is attached to this testimony, and I request that it be included in the record of this hearing.

Background on the Presidential Records Act

Since the enactment of the PRA, NARA has taken legal custody of the Presidential records of Presidents Ronald Reagan, George H.W. Bush, and William J. Clinton. The PRA also applies to all Vice-Presidential records in same manner as Presidential records, and affords the former Vice-Presidents the same authority as the former Presidents.

The PRA established Government control over Presidential records while codifying and preserving some of the basic practices that long existed with respect to the papers that Presidents had donated to the National Archives (dating back to President Hoover). The PRA mandates that "[t]he Archivist shall have an affirmative duty to make such records available to the public as rapidly and completely as possible consistent with the provisions of this Act." 44 U.S.C. § 2203(f)(1). As noted during the floor debate in 1978, among other places, the PRA represents an effort to legislate a "careful balance between the public's right to know, with its vast implications to historians and other academic interests, and the rights of privacy and confidentiality of certain sensitive records generated by the President and his staff during the course of their White House activities." Floor Statement of Congressman Thompson, *Cong. Rec.*, Oct. 10, 1978, at 34897.

Prior to the PRA, and with the exception of the materials of former President Richard M. Nixon, the Presidential papers and materials maintained under NARA's oversight at the Presidential Libraries of former Presidents Hoover, Roosevelt, Truman, Eisenhower, Kennedy, Johnson, Ford, and Carter are controlled by the terms of the deeds of gift by which the former Presidents donated their records to the National Archives. Each of these deeds has provisions outlining categories of records that may be withheld from public access for some period of time. NARA processed and opened Presidential materials based on the deeds and professional archival considerations. Moreover, because the materials at these Libraries were donated to the United States, they are not subject to request under the Freedom of Information Act (FOIA) or any other public access statute. This meant that the Library staff were able to process and open most records in an organized and systematic way based on how the records were filed or arranged. Such "systematic processing" is generally much more efficient and less time consuming than processing in response to FOIA requests. However, researchers have no legal recourse to challenge the withholding of records or delays in responding to requests.

In contrast, because the PRA subjects all Presidential records to public access through the FOIA five years after the end of the Administration, PRA Libraries in practice open records almost exclusively in response to FOIA requests (or mandatory declassification review requests under Executive Order 12958 on Classified National Security Information), and have less opportunity to conduct systematic processing of records.

During the first twelve years after the end of an Administration, the PRA allows the President to assert six Presidential restrictions. Four of the six presidential restrictions are identical to corresponding FOIA exemptions: exemptions 1, for classified national security information; exemptions 3, for information protected by other statute; exemptions 4, for trade secrets and confidential business information; and exemptions 6, for unwarranted invasions of personal privacy. Presidential exemption 2 (“P2”), for “appointments to Federal office,” has no FOIA counterpart, but is subsumed, in large part, under FOIA exemption (b)(6). Presidential exemption 5 (“P5”), concerning “confidential communications requesting or submitting advice, between the President and his advisers, or between such advisers,” is similar to FOIA exemption (b)(5), and protects the disclosure of presidential communications, deliberations, and other information that could be subject to a common law or constitutionally-based privilege.

Once the Presidential restrictions expire after twelve years, the PRA establishes that only eight of the nine FOIA exemptions shall apply to Presidential records. Congress specifically excluded Presidential records from the FOIA (b)(5) exemption, which applies to records subject to the Executive privilege, deliberative process privilege, and other recognized privileges. Accordingly, after twelve years, there is no *statutory* basis to withhold records that might be subject to a constitutionally based privilege.

Executive Order 13233

President Bush issued Executive Order 13233 in November 2001 “to establish policies and procedures implementing section 2204 of title 44 of the United States Code with respect to constitutionally based privileges.” As the Subcommittee is aware, E.O. 13233 replaced

Executive Order 12667, which was issued by President Reagan and under which NARA operated for the first twelve years that we processed and opened Presidential records under the PRA.

Some researchers have raised concerns that E.O. 13233 would fundamentally alter the process for requesting and opening Presidential Records and would result in a significant withholding of records.

The most important measure in evaluating E.O. 13233 is whether Presidential records are being made available to the public. In that regard, I can report to you that, since E.O. 13233 went into effect in November 2001, NARA has opened over 2.1 million pages of Presidential records.

During this time, there has been only one occasion when Presidential records were kept closed from the public by an assertion of Executive privilege under the order, which occurred in 2004 for a total of 64 pages of records from the Reagan Library (out of which 30 pages were duplicate copies). Thus, there should be no question that, to date, E.O. 13233 has not been used by former Presidents or the incumbent President to prevent the opening of records to the public.

I thought it might also be useful to describe the major practical differences and similarities between the two orders (some of this discussion also appears in *The Public Historian* article mentioned above):

- Under E.O. 13233, like E.O. 12667, an incumbent President can assert privilege and require NARA to withhold records even if a former President supported disclosure of the records. This is consistent with the President's authority to assert privilege over all other Executive branch records.

- Also, under E.O. 13233, like E.O. 12667, records can be withheld based on a claim of privilege solely by a former President, even if the incumbent President does not support the withholding.
- Unlike E.O. 12667, E.O. 13233 requires NARA to honor any assertion of privilege by a former President, even if the incumbent President does not concur, thus eliminating the possibility that the Archivist could decide not to honor a unilateral claim of privilege by a former President. However, this situation never, in fact, occurred under E.O. 12667.
- E.O. 12667 established a concurrent 30 day review period for both former and incumbent Presidents, after which NARA could open the records unless specifically informed not to do so. E.O. 13233 established a 90-day review period for the former President, followed by a non-durational review period for the incumbent President; NARA cannot open the records until specifically informed to do so.

Perhaps the most common misunderstanding that some NARA stakeholders have raised about E.O. 13233 is the view that the order creates *new* authority for the incumbent President to assert privilege over records even when a former President wants them released. In reality, this authority has long existed, regardless of the E.O., because the PRA itself established that Presidential records are owned by the government and therefore subject to the ultimate legal control of the current Administration. This authority to exercise control over government records is no different from the current Administration's authority to control access to federal

agency records that were created during a prior Administration. In addition, the Supreme Court recognized in *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977), that a former President may assert executive privilege even when the incumbent President wants them released. In this regard, E.O. 13233 differs from its predecessor E.O. 12667, in that the Archivist no longer has discretion to reject a former President's privilege assertion in the hypothetical situation when the incumbent President takes no position on whether to withhold the records.

Some NARA stakeholders have also interpreted the sentence in section 2(c) of the order, which describes the "demonstrated, specific need" standard for overcoming a constitutionally based privilege, as establishing a limitation on researchers' ability even to request Presidential records. In fact, researchers do not have to provide NARA with a "specific need" when requesting any Presidential records. Rather, they would only have to demonstrate such a need when appealing or litigating against a decision to withhold Presidential records under an actual assertion of a constitutionally based privilege by the former or incumbent President, a situation that, as noted above, has happened only once to date.

This was the standard that the U.S. District Court applied in rejecting a challenge to the formal assertion of executive privilege in the *American Historical Association v. NARA* lawsuit. 402 F.Supp.2d 171 (D.D.C. 2005). The AHA and other researchers filed a lawsuit in the U.S. District Court for the District of Columbia against NARA in December 2001 challenging a number of provisions in E.O. 13233 as well as the privilege assertion over the 64 withheld pages. Over five years later, the portion of the case challenging the E.O. itself is still pending.

Executive Order 13233 has added to the endemic problem of delay that NARA faces from the PRA in the processing of Presidential records. At the three Presidential Libraries that operate under the PRA – Reagan, George H.W. Bush, and Clinton – NARA has FOIA backlogs that extend up to five years. These queues are the direct result of the archivists at each Library contending with an ever increasing volume of and demand for Presidential records.

Once NARA completes the search and review of a FOIA request, we then must provide notice to the representatives of the former and incumbent Presidents under E.O. 13233 for their review.

The average combined time for the representatives to complete their reviews is currently approximately 210 days. In October 2005, NARA reported to the court in *AHA v. NARA* that the average time was approximately 170 days. In April 2004, NARA reported to the court that the average time was approximately 90 days.

That concludes my formal statement, Mr. Chairman, and I would be happy to answer any questions at the appropriate time.