

SUMMARY OF THE BUSH EXECUTIVE ORDER ON THE PRESIDENTIAL RECORDS ACT

**Minority Staff
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The Presidential Records Act was passed in 1978 to make Presidential records the property of the public and to assure that these records are released to the public in a timely manner. On November 1, 2001, however, President Bush issued Executive Order 13233 which significantly curtails the disclosure of Presidential records under the Presidential Records Act. Under the new executive order, former Presidents are given virtually unlimited discretion to withhold their records indefinitely.

How the Presidential Records Act Works. Prior to passage of the Presidential Records Act, the release or withholding of presidential records was controlled by the President and his heirs. The Presidential Records Act was enacted to establish a new system for these records. The Act assigns the Archivist the responsibility for custody and control of presidential records according to statutory provisions designed to protect the President and his staff during the period immediately after the President leaves office and then expedite the flow of records to the public thereafter.

For the first five years after a President leaves office, there is no access to presidential records under the Act except by the Congress and the courts. During years six through twelve, records are accessible under the Freedom of Information Act (FOIA), with the exception of records that fall within six specific categories. These categories include: (1) national security, (2) records relating to presidential appointments, (3) records specifically exempted by law (4) trade secrets, (5) privacy, and (6) confidential communications between the President and his advisors. If a record falls into one of these categories, the President can elect to deny access to the records for up to twelve years.

After year twelve, the President loses the ability to withhold records based on any of the six categories in the Presidential Records Act. In addition, the FOIA exemption that allows an agency to withhold records reflecting the deliberative process also becomes inapplicable. From this point forward, all presidential records become publicly available unless they are subject to a valid claim of executive privilege or are covered by one of the FOIA exemptions other than the deliberative process exemption. These remaining FOIA exemptions apply to records that include (1) classified documents, (2) personnel rules and practices, (3) records specifically exempted by law, (4) trade secrets, (5) information that would violate an individuals privacy, (6) information about law enforcement, (7) information about financial institutions, and (8) geological and geophysical information.

President Reagan's Executive Order. President Reagan issued Executive Order 12667 in January 1981 to implement the Presidential Records Act. In particular, the Reagan order established procedures for former and incumbent Presidents to invoke executive privilege to block the release of specific documents after twelve years.

The Reagan executive order calls on the Archivist to notify the former President of the Archivist's intent to disclose presidential records prior to their release. The former President then has 30 days to make a claim of executive privilege. If the former President claims executive privilege, the Archivist, in consultation with the Attorney General and the Counsel to the President, determines whether to honor that claim or to release the document. If the Archivist decides to release the document, he is to provide the former President 30 days notice to enable the former President time to seek judicial review of the Archivist's decision.

In the event of a claim of executive privilege by the incumbent President, the Archivist is directed not to release the documents.

President Bush's Executive Order. President Bush's executive order fundamentally restructures the procedures in President Reagan's executive order. It makes the Archivist a functionary to the former and incumbent Presidents, giving both Presidents extensive authority to withhold records from the public.

The Bush executive order directs the Archivist to notify the incumbent and former Presidents of the intent to release documents. The incumbent and former Presidents have 90 days to review those documents and can request an unlimited extension of that review time. Should the former President request that the records be withheld based on a claim of executive privilege, the Archivist is directed to withhold those records. "Absent compelling circumstances," the incumbent President "will concur in the privilege decision of the former President." There is no independent review of the legitimacy of the executive privilege claim by the former President. Moreover, to challenge the claim in court, the requestor must "establish at least a 'demonstrated, specific need' for particular records."

Should a former President decide to release the documents in question, the Bush Executive Order gives the incumbent President the authority independently to block access to those records.

The Bush executive order allows the designated representatives of the former President to invoke executive privilege on the President's behalf, even after the death of the President. In addition, the Bush order designates the former President's family as the representative in the event of the death or disability of a President prior to the designation of a representative. This is in direct conflict with the Presidential Records Act, which says: "Upon the death or disability of a President or former President, any discretion or authority th President or former President may have had under this chapter shall be exercised by the Archivist unless otherwise previously provided by the President or former President in a written notice to the Archivist."