

## Calendar No. 64

111<sup>TH</sup> CONGRESS  
1<sup>ST</sup> SESSION**H. R. 35****[Report No. 111-21]**


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 IN THE SENATE OF THE UNITED STATES

JANUARY 8, 2009

Received; read twice and referred to the Committee on Homeland Security and  
Governmental Affairs

MAY 19, 2009

Reported by Mr. LIEBERMAN, with an amendment

[Strike out all after the enacting clause and insert the part printed in italic]

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**AN ACT**

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.

1 *Be it enacted by the Senate and House of Representa-*  
 2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Presidential Records  
 5 ~~Act Amendments of 2009~~”.

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

4 (a) IN GENERAL.—Chapter 22 of title 44, United  
 5 States Code, is amended by adding at the end the fol-  
 6 lowing:

7 **“§ 2208. Claims of constitutionally based privilege**  
 8 **against disclosure**

9 “(a)(1) When the Archivist determines under this  
 10 chapter to make available to the public any Presidential  
 11 record that has not previously been made available to the  
 12 public, the Archivist shall—

13 “(A) promptly provide notice of such deter-  
 14 mination to—

15 “(i) the former President during whose  
 16 term of office the record was created; and

17 “(ii) the incumbent President; and

18 “(B) make the notice available to the public.

19 “(2) The notice under paragraph (1)—

20 “(A) shall be in writing; and

21 “(B) shall include such information as may be  
 22 prescribed in regulations issued by the Archivist.

23 “(3)(A) Upon the expiration of the 20-day period (ex-  
 24 cepting Saturdays, Sundays, and legal public holidays) be-  
 25 ginning on the date the Archivist provides notice under  
 26 paragraph (1)(A), the Archivist shall make available to the

1 public the record covered by the notice, except any record  
2 (or reasonably segregable part of a record) with respect  
3 to which the Archivist receives from a former President  
4 or the incumbent President notification of a claim of con-  
5 stitutionally based privilege against disclosure under sub-  
6 section (b).

7       “(B) A former President or the incumbent President  
8 may extend the period under subparagraph (A) once for  
9 not more than 20 additional days (excepting Saturdays,  
10 Sundays, and legal public holidays) by filing with the Ar-  
11 chivist a statement that such an extension is necessary  
12 to allow an adequate review of the record.

13       “(C) Notwithstanding subparagraphs (A) and (B), if  
14 the period under subparagraph (A), or any extension of  
15 that period under subparagraph (B), would otherwise ex-  
16 pire after January 19 and before July 20 of the year in  
17 which the incumbent President first takes office, then such  
18 period or extension, respectively, shall expire on July 20  
19 of that year.

20       “(b)(1) For purposes of this section, any claim of  
21 constitutionally based privilege against disclosure must be  
22 asserted personally by a former President or the incum-  
23 bent President, as applicable.

24       “(2) A former President or the incumbent President  
25 shall notify the Archivist, the Committee on Oversight and

1 Government Reform of the House of Representatives, and  
2 the Committee on Homeland Security and Governmental  
3 Affairs of the Senate of a privilege claim under paragraph  
4 (1) on the same day that the claim is asserted under para-  
5 graph (1).

6 “(c)(1) The Archivist shall not make publicly avail-  
7 able a Presidential record that is subject to a privilege  
8 claim asserted by a former President until the expiration  
9 of the 20-day period (excluding Saturdays, Sundays, and  
10 legal public holidays) beginning on the date the Archivist  
11 is notified of the claim.

12 “(2) Upon the expiration of such period the Archivist  
13 shall make the record publicly available unless otherwise  
14 directed by a court order in an action initiated by the  
15 former President under section 2204(e).

16 “(d)(1) The Archivist shall not make publicly avail-  
17 able a Presidential record that is subject to a privilege  
18 claim asserted by the incumbent President unless—

19 “(A) the incumbent President withdraws the  
20 privilege claim; or

21 “(B) the Archivist is otherwise directed by a  
22 final court order that is not subject to appeal.

23 “(2) This subsection shall not apply with respect to  
24 any Presidential record required to be made available  
25 under section 2205(2)(A) or (C).

1       “(e) The Archivist shall adjust any otherwise applica-  
2 ble time period under this section as necessary to comply  
3 with the return date of any congressional subpoena, judi-  
4 cial subpoena, or judicial process.”.

5       (b) RESTRICTIONS.—Section 2204 of title 44, United  
6 States Code (relating to restrictions on access to presi-  
7 dential records) is amended by adding at the end the fol-  
8 lowing new subsection:

9       “(f) The Archivist shall not make available any origi-  
10 nal presidential records to any individual claiming access  
11 to any presidential record as a designated representative  
12 under section 2205(3) if that individual has been convicted  
13 of a crime relating to the review, retention, removal, or  
14 destruction of records of the Archives.”.

15       (c) CONFORMING AMENDMENTS.—(1) Section  
16 2204(d) of title 44, United States Code, is amended by  
17 inserting “, except section 2208,” after “chapter”.

18       (2) Section 2207 of title 44, United States Code, is  
19 amended in the second sentence by inserting “, except sec-  
20 tion 2208,” after “chapter”.

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

“2208. Claims of constitutionally based privilege against disclosure.”.

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

2 ~~Executive Order No. 13233, dated November 1, 2001~~  
 3 ~~(66 Fed. Reg. 56025), shall have no force or effect.~~

4 **SECTION 1. SHORT TITLE.**

5 *This Act may be cited as the “Presidential Records Act*  
 6 *Amendments of 2009”.*

7 **SEC. 2. PROCEDURES FOR CONSIDERATION OF CLAIMS OF**  
 8 **CONSTITUTIONALLY BASED PRIVILEGE**  
 9 **AGAINST DISCLOSURE.**

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

12 **“§2208. Claims of constitutionally based privilege**  
 13 **against disclosure**

14 *“(a)(1) When the Archivist determines under this*  
 15 *chapter to make available to the public any Presidential*  
 16 *record that has not previously been made available to the*  
 17 *public, the Archivist shall—*

18 *“(A) promptly provide notice of such determina-*  
 19 *tion to—*

20 *“(i) the former President during whose term*  
 21 *of office the record was created; and*

22 *“(ii) the incumbent President; and*

23 *“(B) make the notice available to the public.*

24 *“(2) The notice under paragraph (1)—*

25 *“(A) shall be in writing; and*

1           “(B) shall include such information as may be  
2           prescribed in regulations issued by the Archivist.

3           “(3)(A) Upon the expiration of the 60-day period (ex-  
4           cepting Saturdays, Sundays, and legal public holidays) be-  
5           ginning on the date the Archivist provides notice under  
6           paragraph (1)(A), the Archivist shall make available to the  
7           public the Presidential record covered by the notice, except  
8           any record (or reasonably segregable part of a record) with  
9           respect to which the Archivist receives from a former Presi-  
10          dent or the incumbent President notification of a claim of  
11          constitutionally based privilege against disclosure under  
12          subsection (b).

13          “(B) A former President or the incumbent President  
14          may extend the period under subparagraph (A) once for not  
15          more than 30 additional days (excepting Saturdays, Sun-  
16          days, and legal public holidays) by filing with the Archivist  
17          a statement that such an extension is necessary to allow  
18          an adequate review of the record.

19          “(C) Notwithstanding subparagraphs (A) and (B), if  
20          the period under subparagraph (A), or any extension of that  
21          period under subparagraph (B), would otherwise expire  
22          after January 19 and before July 20 of the year in which  
23          the incumbent President first takes office, then such period  
24          or extension, respectively, shall expire on July 20 of that  
25          year.

1       “(b)(1) For purposes of this section, any claim of con-  
2       stitutionally based privilege against disclosure of a Presi-  
3       dential record (or reasonably segregable part of a record)  
4       must be asserted personally by a former President or the  
5       incumbent President, as applicable.

6       “(2) A former President or the incumbent President  
7       shall notify the Archivist, the Committee on Oversight and  
8       Government Reform of the House of Representatives, and  
9       the Committee on Homeland Security and Governmental  
10      Affairs of the Senate of a privilege claim under paragraph  
11      (1) on the same day that the claim is asserted under such  
12      paragraph.

13      “(c)(1) If a claim of constitutionally based privilege  
14      against disclosure of a Presidential record (or reasonably  
15      segregable part of a record) is asserted under subsection (b)  
16      by a former President, the Archivist shall consult with the  
17      incumbent President, as soon as practicable during the pe-  
18      riod specified in paragraph (2)(A), to determine whether  
19      the incumbent President will uphold the claim asserted by  
20      the former President.

21      “(2)(A) Not later than the end of the 30-day period  
22      beginning on the date of which the Archivist receives notifi-  
23      cation from a former President of the assertion of a claim  
24      of constitutionally based privilege against disclosure, the  
25      Archivist shall provide notice to the former President and

1 *the public of the decision of the incumbent President under*  
2 *paragraph (1) regarding the claim.*

3       “(B) *If the incumbent President upholds the claim of*  
4 *privilege asserted by the former President, the Archivist*  
5 *shall not make the Presidential record (or reasonably seg-*  
6 *regable part of a record) subject to the claim publicly avail-*  
7 *able unless—*

8               “(i) *the incumbent President withdraws the deci-*  
9 *sion upholding the claim of privilege asserted by the*  
10 *former President; or*

11               “(ii) *the Archivist is otherwise directed by a*  
12 *final court order that is not subject to appeal.*

13       “(C) *If the incumbent President determines not to up-*  
14 *hold the claim of privilege asserted by the former President,*  
15 *or fails to make the determination under paragraph (1) be-*  
16 *fore the end of the period specified in subparagraph (A),*  
17 *the Archivist shall release the Presidential record subject to*  
18 *the claim at the end of the 90-day period beginning on the*  
19 *date of which the Archivist received notification of the*  
20 *claim, unless otherwise directed by a court order in an ac-*  
21 *tion initiated by the former President under section 2204(e)*  
22 *of this title.*

23       “(d)(1) *The Archivist shall not make publicly available*  
24 *a Presidential record (or reasonably segregable part of a*

1 record) that is subject to a privilege claim asserted by the  
2 incumbent President unless—

3           “(A) the incumbent President withdraws the  
4 privilege claim; or

5           “(B) the Archivist is otherwise directed by a  
6 final court order that is not subject to appeal.

7           “(2) This subsection shall not apply with respect to  
8 any Presidential record required to be made available under  
9 section 2205(2)(A) or (C) of this title.

10           “(e) The Archivist shall adjust any otherwise applica-  
11 ble time period under this section as necessary to comply  
12 with the return date of any congressional subpoena, judicial  
13 subpoena, or judicial process.”.

14           (b) *RESTRICTIONS.*—Section 2204 of title 44, United  
15 States Code (relating to restrictions on access to presi-  
16 dential records) is amended by adding at the end the fol-  
17 lowing new subsection:

18           “(f) The Archivist shall not make available any origi-  
19 nal presidential records to any individual claiming access  
20 to any presidential record as a designated representative  
21 under section 2205(3) if that individual has been convicted  
22 of a crime relating to the review, retention, removal, or de-  
23 struction of records of the Archives.”.

1           (c) *CONFORMING AMENDMENTS.*—(1) *Section 2204(d)*  
2 *of title 44, United States Code, is amended by inserting*  
3 *“, except section 2208,” after “chapter”.*

4           (2) *Section 2207 of title 44, United States Code, is*  
5 *amended in the second sentence by inserting “, except sec-*  
6 *tion 2208,” after “chapter”.*

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

*“2208. Claims of constitutionally based privilege against disclosure.”.*

10 **SEC. 3. TREATMENT OF EXECUTIVE ORDERS 13233 AND**  
11 **12667.**

12           *Executive Order No. 13233, dated November 1, 2001*  
13 *(66 Fed. Reg. 56025), and Executive Order No. 12667,*  
14 *dated January 1, 1989 (54 Fed. Reg. 3403), shall have no*  
15 *force or effect.*

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111<sup>TH</sup> CONGRESS  
1<sup>ST</sup> Session

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