

CLASSIFIED NATIONAL SECURITY INFORMATION

For provisions authorizing Archivist to review, downgrade, and declassify information of former Presidents under control of Archivist pursuant to this section, see Ex. Ord. No. 13526, §3.5(b), Dec. 29, 2009, 75 F.R. 718, set out as a note under section 3161 of Title 50, War and National Defense.

§ 2204. Restrictions on access to Presidential records

(a) Prior to the conclusion of a President's term of office or last consecutive term of office, as the case may be, the President shall specify durations, not to exceed 12 years, for which access shall be restricted with respect to information, in a Presidential record, within one or more of the following categories:

(1)(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) in fact properly classified pursuant to such Executive order;

(2) relating to appointments to Federal office;

(3) specifically exempted from disclosure by statute (other than sections 552 and 552b of title 5, United States Code), provided that such statute (A) requires that the material be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of material to be withheld;

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) confidential communications requesting or submitting advice, between the President and the President's advisers, or between such advisers; or

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

(b)(1) Any Presidential record or reasonably segregable portion thereof containing information within a category restricted by the President under subsection (a) shall be so designated by the Archivist and access thereto shall be restricted until the earlier of—

(A)(i) the date on which the former President waives the restriction on disclosure of such record, or

(ii) the expiration of the duration specified under subsection (a) for the category of information on the basis of which access to such record has been restricted; or

(B) upon a determination by the Archivist that such record or reasonably segregable portion thereof, or of any significant element or aspect of the information contained in such record or reasonably segregable portion thereof, has been placed in the public domain through publication by the former President, or the President's agents.

(2) Any such record which does not contain information within a category restricted by the President under subsection (a), or contains information within such a category for which the duration of restricted access has expired, shall

be exempt from the provisions of subsection (c) until the earlier of—

(A) the date which is 5 years after the date on which the Archivist obtains custody of such record pursuant to section 2203(d)(1);¹ or

(B) the date on which the Archivist completes the processing and organization of such records or integral file segment thereof.

(3) During the period of restricted access specified pursuant to subsection (b)(1), the determination whether access to a Presidential record or reasonably segregable portion thereof shall be restricted shall be made by the Archivist, in the Archivist's discretion, after consultation with the former President, and, during such period, such determinations shall not be subject to judicial review, except as provided in subsection (e) of this section. The Archivist shall establish procedures whereby any person denied access to a Presidential record because such record is restricted pursuant to a determination made under this paragraph, may file an administrative appeal of such determination. Such procedures shall provide for a written determination by the Archivist or the Archivist's designee, within 30 working days after receipt of such an appeal, setting forth the basis for such determination.

(c)(1) Subject to the limitations on access imposed pursuant to subsections (a) and (b), Presidential records shall be administered in accordance with section 552 of title 5, United States Code, except that paragraph (b)(5) of that section shall not be available for purposes of withholding any Presidential record, and for the purposes of such section such records shall be deemed to be records of the National Archives and Records Administration. Access to such records shall be granted on nondiscriminatory terms.

(2) 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.

(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.

(e) The United States District Court for the District of Columbia shall have jurisdiction over any action initiated by the former President asserting that a determination made by the Archivist violates the former President's rights or privileges.

(f) The Archivist shall not make available any original Presidential records to any individual claiming access to any Presidential record as a designated representative under section 2205(3) of this title if that individual has been convicted of a crime relating to the review, retention, removal, or destruction of records of the Archives.

(Added Pub. L. 95-591, §2(a), Nov. 4, 1978, 92 Stat. 2525; amended Pub. L. 98-497, title I, §107(b)(7), Oct. 19, 1984, 98 Stat. 2287; Pub. L. 113-187, §§2(a)(2)(A), (d), 8(4), Nov. 26, 2014, 128 Stat. 2005, 2006, 2011.)

¹ So in original. Probably should be “2203(g)(1);”.

REFERENCES IN TEXT

This Act, referred to in subsec. (c)(2), probably means Pub. L. 95-591, Nov. 4, 1978, 92 Stat. 2523, known as the Presidential Records Act of 1978, which enacted this chapter, amended sections 2107 and 2108 of this title, and enacted provisions set out as notes under section 2201 of this title. For complete classification of this Act to the Code, see Short Title of 1978 Amendment note set out under section 101 of this title and Tables.

AMENDMENTS

2014—Subsec. (a). Pub. L. 113-187, §8(4)(A)(i), substituted “a President’s” for “his” in introductory provisions.

Subsec. (a)(5). Pub. L. 113-187, §8(4)(A)(ii), substituted “the President’s” for “his”.

Subsec. (b)(1)(B). Pub. L. 113-187, §8(4)(B)(i), substituted “the President’s” for “his”.

Subsec. (b)(3). Pub. L. 113-187, §8(4)(B)(ii), substituted “the Archivist’s discretion” for “his discretion” and “the Archivist’s designee” for “his designee”.

Subsec. (d). Pub. L. 113-187, §2(a)(2)(A), inserted “, except section 2208,” after “chapter”.

Subsec. (f). Pub. L. 113-187, §2(d), added subsec. (f).
1984—Subsec. (c)(1). Pub. L. 98-497 substituted “National Archives and Records Administration” for “National Archives and Records Service of the General Services Administration”.

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98-497 effective Apr. 1, 1985, see section 301 of Pub. L. 98-497, set out as a note under section 2102 of this title.

EFFECTIVE DATE

Section effective with respect to Presidential records created during a term of office of President beginning on or after Jan. 20, 1981, see section 3 of Pub. L. 95-591, set out as a note under section 2201 of this title.

EXECUTIVE ORDER NO. 12667

Ex. Ord. No. 12667, Jan. 18, 1989, 54 F.R. 3403, which established policies and procedures governing the assertion of Executive privilege by incumbent and former Presidents in connection with the release of Presidential records by the National Archives and Records Administration pursuant to this chapter, was revoked by Ex. Ord. No. 13233, §13, Nov. 1, 2001, 66 F.R. 56029, formerly set out below.

EXECUTIVE ORDER NO. 13233

Ex. Ord. No. 13233, Nov. 1, 2001, 66 F.R. 56025, which related to further implementation of the Presidential Records Act, was revoked by Ex. Ord. No. 13489, §6, Jan. 21, 2009, 74 F.R. 4671, set out below.

EX. ORD. NO. 13489. PRESIDENTIAL RECORDS

Ex. Ord. No. 13489, Jan. 21, 2009, 74 F.R. 4669, provided:
By the authority vested in me as President by the Constitution and the laws of the United States of America, and in order to establish policies and procedures governing the assertion of executive privilege by incumbent and former Presidents in connection with the release of Presidential records by the National Archives and Records Administration (NARA) pursuant to the Presidential Records Act of 1978, it is hereby ordered as follows:

SECTION 1. *Definitions.* For purposes of this order:

(a) “Archivist” refers to the Archivist of the United States or his designee.

(b) “NARA” refers to the National Archives and Records Administration.

(c) “Presidential Records Act” refers to the Presidential Records Act, 44 U.S.C. 2201-2207.

(d) “NARA regulations” refers to the NARA regulations implementing the Presidential Records Act [of 1978], 36 C.F.R. Part 1270.

(e) “Presidential records” refers to those documentary materials maintained by NARA pursuant to the

Presidential Records Act, including Vice Presidential records.

(f) “Former President” refers to the former President during whose term or terms of office particular Presidential records were created.

(g) A “substantial question of executive privilege” exists if NARA’s disclosure of Presidential records might impair national security (including the conduct of foreign relations), law enforcement, or the deliberative processes of the executive branch.

(h) A “final court order” is a court order from which no appeal may be taken.

SEC. 2. *Notice of Intent to Disclose Presidential Records.*

(a) When the Archivist provides notice to the incumbent and former Presidents of his intent to disclose Presidential records pursuant to section 1270.46 of the NARA regulations, the Archivist, using any guidelines provided by the incumbent and former Presidents, shall identify any specific materials, the disclosure of which he believes may raise a substantial question of executive privilege. However, nothing in this order is intended to affect the right of the incumbent or former Presidents to invoke executive privilege with respect to materials not identified by the Archivist. Copies of the notice for the incumbent President shall be delivered to the President (through the Counsel to the President) and the Attorney General (through the Assistant Attorney General for the Office of Legal Counsel). The copy of the notice for the former President shall be delivered to the former President or his designated representative.

(b) Upon the passage of 30 days after receipt by the incumbent and former Presidents of a notice of intent to disclose Presidential records, the Archivist may disclose the records covered by the notice, unless during that time period the Archivist has received a claim of executive privilege by the incumbent or former President or the Archivist has been instructed by the incumbent President or his designee to extend the time period for a time certain and with reason for the extension of time provided in the notice. If a shorter period of time is required under the circumstances set forth in section 1270.44 of the NARA regulations, the Archivist shall so indicate in the notice.

SEC. 3. *Claim of Executive Privilege by Incumbent President.*

(a) Upon receipt of a notice of intent to disclose Presidential records, the Attorney General (directly or through the Assistant Attorney General for the Office of Legal Counsel) and the Counsel to the President shall review as they deem appropriate the records covered by the notice and consult with each other, the Archivist, and such other executive agencies as they deem appropriate concerning whether invocation of executive privilege is justified.

(b) The Attorney General and the Counsel to the President, in the exercise of their discretion and after appropriate review and consultation under subsection (a) of this section, may jointly determine that invocation of executive privilege is not justified. The Archivist shall be notified promptly of any such determination.

(c) If either the Attorney General or the Counsel to the President believes that the circumstances justify invocation of executive privilege, the issue shall be presented to the President by the Counsel to the President and the Attorney General.

(d) If the President decides to invoke executive privilege, the Counsel to the President shall notify the former President, the Archivist, and the Attorney General in writing of the claim of privilege and the specific Presidential records to which it relates. After receiving such notice, the Archivist shall not disclose the privileged records unless directed to do so by an incumbent President or by a final court order.

SEC. 4. *Claim of Executive Privilege by Former President.*

(a) Upon receipt of a claim of executive privilege by a living former President, the Archivist shall consult with the Attorney General (through the Assistant Attorney General for the Office of Legal Counsel), the Counsel to the President, and such other executive

agencies as the Archivist deems appropriate concerning the Archivist's determination as to whether to honor the former President's claim of privilege or instead to disclose the Presidential records notwithstanding the claim of privilege. Any determination under section 3 of this order that executive privilege shall not be invoked by the incumbent President shall not prejudice the Archivist's determination with respect to the former President's claim of privilege.

(b) In making the determination referred to in subsection (a) of this section, the Archivist shall abide by any instructions given him by the incumbent President or his designee unless otherwise directed by a final court order. The Archivist shall notify the incumbent and former Presidents of his determination at least 30 days prior to disclosure of the Presidential records, unless a shorter time period is required in the circumstances set forth in section 1270.44 of the NARA regulations. Copies of the notice for the incumbent President shall be delivered to the President (through the Counsel to the President) and the Attorney General (through the Assistant Attorney General for the Office of Legal Counsel). The copy of the notice for the former President shall be delivered to the former President or his designated representative.

SEC. 5. *General Provisions.* (a) Nothing in this order shall be construed to impair or otherwise affect:

- (i) authority granted by law to a department or agency, or the head thereof; or
- (ii) functions of the Director of the Office of Management and Budget relating to budget, administrative, or legislative proposals.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

SEC. 6. *Revocation.* Executive Order 13233 of November 1, 2001, is revoked.

BARACK OBAMA.

§ 2205. Exceptions to restricted access

Notwithstanding any restrictions on access imposed pursuant to sections 2204 and 2208 of this title—

- (1) the Archivist and persons employed by the National Archives and Records Administration who are engaged in the performance of normal archival work shall be permitted access to Presidential records in the custody of the Archivist;
- (2) subject to any rights, defenses, or privileges which the United States or any agency or person may invoke, Presidential records shall be made available—

(A) pursuant to subpoena or other judicial process issued by a court of competent jurisdiction for the purposes of any civil or criminal investigation or proceeding;

(B) to an incumbent President if such records contain information that is needed for the conduct of current business of the incumbent President's office and that is not otherwise available; and

(C) to either House of Congress, or, to the extent of matter within its jurisdiction, to any committee or subcommittee thereof if such records contain information that is needed for the conduct of its business and that is not otherwise available; and

- (3) the Presidential records of a former President shall be available to such former

President or the former President's designated representative.

(Added Pub. L. 95-591, §2(a), Nov. 4, 1978, 92 Stat. 2527; amended Pub. L. 98-497, title I, §107(b)(7), Oct. 19, 1984, 98 Stat. 2287; Pub. L. 113-187, §§2(a)(2)(B), 8(5), Nov. 26, 2014, 128 Stat. 2005, 2012.)

AMENDMENTS

2014—Pub. L. 113-187, §2(a)(2)(B)(i), substituted “sections 2204 and 2208 of this title” for “section 2204” in introductory provisions.

Par. (2)(A). Pub. L. 113-187, §2(a)(2)(B)(ii), substituted “subpoena” for “subpena”.

Par. (2)(B). Pub. L. 113-187, §8(5)(A), substituted “the incumbent President's” for “his”.

Par. (3). Pub. L. 113-187, §8(5)(B), substituted “the former President's” for “his”.

1984—Par. (1). Pub. L. 98-497 substituted “National Archives and Records Administration” for “National Archives and Records Service of the General Services Administration”.

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98-497 effective Apr. 1, 1985, see section 301 of Pub. L. 98-497, set out as a note under section 2102 of this title.

EFFECTIVE DATE

Section effective with respect to Presidential records created during a term of office of President beginning on or after Jan. 20, 1981, see section 3 of Pub. L. 95-591, set out as a note under section 2201 of this title.

§ 2206. Regulations

The Archivist shall promulgate in accordance with section 553 of title 5, United States Code, regulations necessary to carry out the provisions of this chapter. Such regulations shall include—

- (1) provisions for advance public notice and description of any Presidential records scheduled for disposal pursuant to section 2203(f)(3);¹
- (2) provisions for providing notice to the former President when materials to which access would otherwise be restricted pursuant to section 2204(a) are to be made available in accordance with section 2205(2);
- (3) 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; and
- (4) provisions for establishing procedures for consultation between the Archivist and appropriate Federal agencies regarding materials which may be subject to section 552(b)(7) of title 5, United States Code.

(Added Pub. L. 95-591, §2(a), Nov. 4, 1978, 92 Stat. 2527.)

REFERENCES IN TEXT

Section 2203(f)(3), referred to in par. (1), was redesignated section 2203(g)(3) of this title by Pub. L. 113-187, §2(c)(3), Nov. 26, 2014, 128 Stat. 2006, and subsequently redesignated section 2203(g)(4) of this title by Pub. L. 114-136, §3(1), Mar. 18, 2016, 130 Stat. 305.

EFFECTIVE DATE

Section effective with respect to Presidential records created during a term of office of President beginning

¹ See References in Text note below.