

**PRESIDENTIAL RECORDS AS *OUR* RECORDS:
REACTIONS TO EXECUTIVE ORDER 13233**

WILLIAM R. CRON, JR.

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SI 580 – DR. PAUL CONWAY

I. INTRODUCTION

Archivist Raymond Geselbracht argued in 1983 that the history of presidential papers could be divided into four distinct eras. The most recent of those eras began with President Reagan's swearing into office on January 20, 1981 – the date that the Presidential Records Act of 1978 went into effect. As Geselbracht wrote, at that point in time, “the papers and other materials that began to accumulate around the new administration were presumed, with certain specified exceptions, to belong to the nation, not to the president.” (Geselbracht, 1983)

With the signing of Executive Order 13233, President George W. Bush opened the door to a potential “fifth era” of presidential papers.¹ Bush's order moved to give presidents (and their heirs and designees) more control over their papers. E.O. 13233 extended the time period during which presidential records could remain unreleased, and expanded the scope of reasons that could be cited for restricting release of or access to those records. Concerns over national security were the grounds most often cited by the Bush administration to justify issuance of the order.

Negative reaction to Executive Order 13233 was immediate and broad. Professionals in the fields of archives, history, and political science; scholars; and the popular press all criticized the president for violating the spirit of the Presidential Records Act. Many argued that E.O. 13233 specifically disregarded laws necessary to protect our freedoms in a democratic society. This paper attempts to synthesize the flood of criticism levied at E.O. 13233 from all corners. In doing so, it supports the notion that

¹ The full text of Executive Order 13233 can be found in: George W. Bush, “Source Material: Executive Order 13233 [Federal Register Vol. 66, No. 214, November 5, 2001] Further Implementation of the Presidential Records Act,” *Presidential Studies Quarterly* 32(1) (Mar. 2002): 185-189.

even at a time when national security is in a state of elevated importance, access to public records remains a strong and sacred democratic value.

II. PROFESSIONAL ORGANIZATIONS

Initial response to President Bush's Executive Order 13233 was swift among professional organizations. The American Political Science Association, Society of American Archivists, and American Historical Association all directed response statements to United States Representative Stephen Horn, Chairman of the Subcommittee on Government Efficiency, Financial Management, and Intergovernmental Relations, within weeks of the order's issuance. Although the statements differed somewhat in their phrasing, they were unanimous in their criticism of E.O. 13233, each finding (1) that the order violated the spirit and laws underlying the Presidential Records Act, and (2) that the order threatened to undermine the work of the professionals that constituted their membership.

APSA Response Statement

The American Political Science Association, representing the professional interests of 13,500 political scientists, found Executive Order 13233 to be "troubling in several respects." APSA stressed the role of its members in studying and educating the public about the presidency and public policy, and that these activities relied on access to presidential records. In their response to E.O. 13233, APSA asserted that the order violated the basic premise of the Presidential Records Act: that presidential records would inevitably become public, and that the government would assume the burden for

ensuring that records were opened in a timely manner. APSA was particularly critical of the requirement that researchers demonstrate a “specific need” to request records, citing precedent established in *Nixon v. Freeman*. APSA decried the administration’s use of national security as a justification for issuing E.O. 13233, noting that existing law already protected such documents. Other parts of the order to which APSA objected included (1) the expansion of the scope of records that could be restricted, (2) the newly established power of a former president (and their heirs) to designate a representative to make decisions about the release of records, (3) the lengthening of the process for reviewing requests for records, and (4) the diminished role of the Archivist of the United States in calling for the release of records. APSA felt that access to public records was an integral part of their profession’s mission, writing that “the only way we can improve the operation of government, enhance the accountability of decision-makers, and ultimately help maintain public trust in its government is for people to understand how it has worked in the past.” (Putnam and Spitzer, 2002)

SAA Response Statement

Society of American Archivists President Steve Hensen referenced his organization’s mission in his formal response to Executive Order 13233. The SAA, wrote Hensen, was to serve the educational and informational needs of its 3,400 members, while providing “leadership to ensure the identification, preservation, and use of records of historical value.” Like APSA, the SAA had several concerns about how E.O. 13233 would affect their members’ profession. First, the order violated the law regarding access to presidential records as laid out in the PRA, which established the idea

that presidential records are the property of the United States government (not the presidents themselves) and that custody of and access to the records should be governed by the Archivist of the United States as dictated by law. In Hensen's words, "access to the vital historical records of this nation should not be governed by executive decree; this is why the existing law was created." Secondly, Hensen asserted that Bush's order undermined the free and open access to information that served as "one of the very foundations of our nation." To threaten that access was to imperil freedom and democracy. The SAA response took a tack that was different from other professional groups' criticisms of E.O. 13233, opting to include a statement about the need for potential revision of the PRA, and offering members' services as consultants in developing "new and workable legislation" that recognized both the need for open access to information and the government's concern over national security. (Hensen, 2001)

AHA Response Statement

The American Historical Association, like the APSA and the SAA, made referenced their mission statement in responding to Executive Order 13233. They listed their organization's key functions as promoting historical studies, collecting and preserving historical artifacts and documents, and disseminating historical research. In pursuit of their mission, claimed AHA Executive Director Arnita Jones, "the Association has maintained a steadfast concern for the preservation and availability of federal government records," closely concerning themselves in recent years with supporting the Presidential Records Act of 1978. In light of that support, Jones indicated her organization's dissatisfaction with E.O. 13233, which she claimed "makes a mockery" of

the PRA. The AHA response statement decried the “nearly impenetrable barriers” raised by Bush’s order, pointing specifically to the requirement that both the former and sitting president assent to the release of records, the ability of presidents to designate representatives, the lack of time limits for reviewing requests for release, and the requirement that researchers demonstrate a specific need. Arnita Jones summarized the AHA’s response in no uncertain terms when she wrote that “the public’s right to see its own records is being flouted by Executive Order 13233.” (Jones, 2001)

III. SCHOLARLY CRITICISM

In the wake of the issuance of Executive Order 13233, a body of scholarship evolved as researchers in various professional examined critically the various legal, political, and ethical issues surrounding the order. As with the response statements issued by professional organizations, scholarship regarding E.O. 13233 was consistent in its criticism of the federal government’s actions. Scholars presented a range of arguments that indicted E.O. 13233 on both legal and practical grounds.

The most comprehensive criticism of Executive Order 13233 was probably that levied by archivist Anne Barker. Barker believed that E.O. 13233 significantly altered the Presidential Records Act. She condemned the order on several grounds, relating her criticism to specific language used in the order. Her main criticism stemmed from the order’s expansion of presidential privileges; it invoked “constitutionally based” privileges ordinarily covered by specific FOIA exemptions. By doing so, noted Barker, E.O. 13233 allowed both current and former presidents to restrict records beyond the 12-year period specified by the Presidential Records Act, and also expanded the scope of content for

documents that could be restricted. Specifically, the order afforded the restriction of communications between the president or his advisors, as well as records regarding legal advice or legal work received by the president. Allowing the president to assert these additional restrictions violated the spirit of the PRA. (Barker, 2005)

Barker was particularly critical of the language in E.O. 13233 stating that “a party seeking to overcome the constitutionally based privileges that apply to Presidential records must establish at least a demonstrated, specific need for particular records.” Requiring a person to demonstrate why they “need” a particular document clearly violated the FOIA standards for request of materials established in the original PRA. Echoing concerns raised by other scholars, Barker noted that this part of the order shifted the burden for demonstrating why (or why not) a record should be restricted from the government to the researcher. Few researchers would have the resources necessary to pursue legal claims regarding denial of their requests for access to records.

Another concern Barker voiced about E.O. 13233 was its lack of a specified time period for government review of requests for restricted documents. Under the order, the government might take as long as it sees fit to review requests, as there is no language in the order specifying the amount of time afforded for doing so. Further, the order requires the Archivist of the United States to await determination from both the former and current presidents, opening up the possibility for lengthy (or permanent) delays even more widely. Lack of response from either party would not constitute tacit assent to release of the documents; the Archivist of the United States, contrary to the rules laid out in the PRA, would be rendered impotent by E.O. 13233.

An additional flaw of the order to which Barker pointed was that it empowers presidents to designate representatives to act on their behalf regarding decisions on presidential records. This, Barker noted, was yet another violation of the Presidential Records Act, which makes no provision for the designation of a representative. Under E.O. 13233, there were no limits placed on who could act as a representative, no requirements for offices held nor limitations on the restrictive power of the designated representative. The order appeared to give presidents the right to grant executive privilege to private citizens, clearly violating legal precedent to the contrary. Even more troublesome to Barker was the order's specification that in the absence of the designation of a representative by the president, the family of the former president could act to designate a representative as they saw fit. According to Barker, this created "out of thin air a constitutionally based privilege that could be bequeathed to descendants as if it were a personal property right."

Finally, Barker criticized E.O. 13233's extension of presidential privileges to vice presidents with regards to the records produced while in office. The PRA did not specify any executive privilege claim for vice presidents, nor was such privilege implied anywhere in the Constitution. This is another example of how the executive order appeared to "manufacture" rights to personal ownership of government records – rights that had no basis in law.

Political scientist Martha Kumar was critical of what she interpreted to be Executive Order 13233's capability for disguising the federal government's decision-making processes. In a pair of articles issued closely after the issuance of E.O. 13233, Kumar pointed to changing federal record-keeping practices that, coupled with the order,

would result in transparency for the “end product” of government while hiding the decisions made in getting to that point. (Kumar, 2002; Kumar, 2003) Kumar viewed this as a threat to democracy, citing Bruce Lindsey, representative of former President Clinton in records matters, who stated that “when decisions are made on behalf of the American people, citizens eventually have to be able to see the process of how those decisions came to be.” (cited in Kumar, 2002) Under E.O. 13233, that process could be hidden under a blanket of restrictions that prevent records from ever being released to researchers.

Thomas Blanton examined Executive Order 13233 from a comparative political science perspective, through the eyes of an archivist. In the aftermath of the September 11 terrorist attacks, explained Blanton, the United States federal government reacted by restricting access to government information. Blanton believed the government felt these restrictions to be a “crucial weapon” in the war against terror. What had been a “tendency” of the Bush administration before September 11 to claim executive privilege in response to requests for information turned into a “habit.” While some of the denials for access were reasonably related to national security, this was not the case for most. Like other critics, Blanton decried the “veto power” that E.O. 13233 granted to former presidents over release of their records, as well as the shifting burden of proof in FOIA requests. (Blanton, 2002)

Blanton placed E.O. 13233, along with other related actions of the Bush administration, within the larger context of global trends in accessing government information. While the United States regressed, many other countries enacted legislation granting increased access to government records. Blanton pointed to the evolution of freedom of information (internationally) from a “moral indictment of secrecy” to a tool

for political and economic growth and market regulation. By empowering citizens, freedom of information actually works as a weapon against terror. The United States government, Blanton noted, has not kept pace with those in the rest of the world in understanding the far-reaching positive implications of less restrictive access to information. The Bush administration in particular has failed to realize that “like markets, governments don’t work well in secret.” Blanton concluded that, as evidenced by E.O. 13233, “secrecy has made the most dramatic comeback in the country that purports to be the most democratic.”

Archivist Bruce Montgomery viewed Executive Order 13233 as the “latest” in a string of attempts by the Executive branch of the federal government to “circumvent or otherwise nullify the key provisions of the Presidential Records Act.” Montgomery felt that presidents had generally not embraced the idea of giving up control of their materials. From Reagan to the present each President used various claims of executive privilege, coupled with regulatory and legal tactics, to “attack” the PRA. (Montgomery, 2003)

Although he discussed several challenges to the PRA, Montgomery was particularly critical of President Bush’s Executive Order 13233. He suggested that Bush’s order signified a return to the concept of private ownership of presidential papers that existed until Nixon-inspired reforms. The order, claimed Montgomery, went well beyond any previous reforms to the PRA, extending the executive privilege claims that both former and sitting presidents could make beyond the twelve-year restriction period.

The author drew a parallel between Nixon’s and Bush’s approaches to presidential records. In *Nixon v. Freeman*, the court rejected Nixon’s claim that the

public had to show a “particularized need” to get access to his records. Bush claimed in E.O. 13233 that if the public wanted to overcome the constitutionally-based privileges that protected presidential records, their FOIA request should be required to demonstrate a “specific need for particular records.” That is, the burden was to shift from those who would restrict records to those who would access them. (Montgomery, 2003)

Montgomery argued elsewhere that although Nixon had his claims of executive privilege rejected by the Supreme Court, Bush used Nixon’s claims to justify his own “legal and regulatory schemes to subvert the PRA,” of which E.O. 13233 was a prime example. (Montgomery, 2002)

Montgomery’s most significant criticism of E.O. 13233, however, regarded the extension of who may restrict records and for how long they may be restricted. Bush’s order extended “constitutionally-based” privileges of restricting records for both presidents and vice presidents to their heirs. Under E.O. 13233, presidents and vice presidents could designate representatives or family members to administer decisions about records should they die or become disabled. As Montgomery stated, “the Bush order expanded executive privilege beyond the incumbent president to past presidents, their heirs, and even to vice presidents, seemingly in perpetuity.” (Montgomery, 2003)

Political scientist Nancy Baker believed that the argument over Executive Order 13233 boiled down to one of national security versus civil liberties. Baker believed that the order was indicative of the pattern of restricting information that characterized the Bush administration’s actions in general. As she wrote, “control of information has been a core component of the Bush administration’s antiterrorism agenda.” For Baker, E.O. 13233, despite its timing, was not issued as a legitimate tool for addressing national

security in the wake of the terrorist attacks of 9/11. Rather, the attacks afforded President Bush with a justification for doing something he had been trying to do since well before 9/11 – restrict access to the records of President Reagan that were due to be released. Rescinding the presumption of release that was supposed to accompany FOIA requests was the tool embedded in E.O. 13233 for accomplishing that goal. According to Baker, the political atmosphere created by 9/11 provided a context in which the abridgement of civil liberties could flourish. (Baker, 2003)

IV. THE POPULAR PRESS

Immediate criticism of Executive Order 13233 was not limited to scholars. Reaction to the order was swift in various channels of the popular press as well. Where scholars were primarily alarmed by how the legislation would affect their ability to access and research presidential records, others expressing concern were taken aback by the idea of sacrificing popular ownership of those records. How could presidents, who served as the elected representatives of the people, claim to own the evidence of their activities in office?

An article in *U.S. News and World Report* by Linda Kulman, for example, pointedly asked the question, “Who owns history?” The author equated records with history, inferring that whoever had access to the records “owned” history. In a specific application of E.O. 13233, the Bush administration had placed restrictions on President Reagan’s confidential papers dealing with political and judicial nominations. These restrictions prevented researchers from accessing records after the twelve-year period specified by the Presidential Records Act. The Bush administration cited “national

security” in restricting access to the papers; in this case, however, no legitimate security concern seems to have existed. Kulman, writing for a popular audience, decried the unwarranted and illegal expansion of executive privilege encompassed by E.O. 13233. (Kulman, 2002)

The *Los Angeles Times* issued an editorial shortly after the President’s executive order, referring to the “dark Oval Office” that President Bush’s actions had created. According to the *Times*, E.O. 13233 would “nudge the nation’s highest office back toward democracy’s dark ages, when history could effectively be kept from the public.” (*Los Angeles Times*, 2001) This points to the public’s interest in ownership; the issue of who owns presidential papers lies at the heart of the debate over E.O. 13233. The *New York Times* also issued an editorial criticizing the order, claiming that the inevitable result of it would be to “deprive scholars and members of Congress of material that poses no threat to national security but could do much to help Americans make sense of their nation’s past and to hold government accountable for its actions.” (*New York Times*, 2001) Both editorials, in concerning themselves with the loss of public ownership of presidential records, are representative of the public outcry over Bush’s order.

On its website, the non-profit public interest group Public Citizen roundly criticized the passage of Executive Order 13233 as unlawful. Like the professional organizations discussed previously in this report (AHA, SAA, APSA), Public Citizen addressed their concerns to U.S. Representative Stephen Horn immediately following the order’s issuance in November 2001. Public Citizen was particularly concerned over the extension of secrecy of documents from previous administrations, specifying the extension of time for review and the expansion of who could place restrictions on release

as major problems that violated the Presidential Records Act. Further, the order required the Archivist for the United States to “bow to the direction of a former president that documents not be released,” essentially requiring a public official to disregard the rule of law. Public Citizen drew comparisons between the battle it might be compelled to fight against E.O. 13233 and one they had fought in prior years against similar legislation put forth by the Reagan administration. Claims of national security were in this case, according to Public Citizen, not enough to warrant the possibility of E.O. 13233 overcoming judicial scrutiny. (Public Citizen, 2001)

Two years following the issuance of E.O. 13233, the popular press continued to shed light on the significance of E.O. 13233, placing it in the broader context of the Bush administration’s overall tendency towards secrecy with regards to government records. *U.S. News and World Report* published another article criticizing the “shroud of secrecy” that the Bush administration had dropped across many critical operations of the federal government. The administration, by issuing E.O. 13233 in conjunction with other actions, had reversed a “decades-long trend of openness in government while making increasing amounts of information unavailable to the taxpayers who pay for its collection and analysis.” (Schmitt and Pound, 2003) That “decades-long trend” had begun with the Presidential Records Act of 1978. Again, this article serves as an example of the popular press focusing on E.O. 13233 as a violation of the legislatively established public ownership of presidential papers. The question of “who owns history” was brought into sharp relief by the passage of Bush’s executive order, and the popular press reflected the concerns of its readers by taking notice alongside scholars and calling attention to the actions of the administration.

V. CONCLUSION

Former Historian for the House of Representatives Raymond Smock wrote that “balancing issues of national security with the public’s right to government information is a crucial debate in a democracy that depends on information to make proper judgments about the workings of government.” (Smock, 2003) The terrorist attacks of September 11, 2001 created an environment in which concerns over national security reached unprecedented levels. Some scholars argued that these concerns afforded President Bush the climate necessary to issue Executive Order 13233, modifying the Presidential Records Act in several important ways. Yet despite increased concern over national security, scholars, professionals, and the popular press reacted with swift criticism to E.O. 13233. Legally, practically, and ethically, the order represented a violation of the public ownership of presidential records established by the Presidential Records Act of 1978. The nearly unanimous criticism of E.O. 13233, coming from a range of sources and voices, is strong evidence that access to public records is considered a basic right of citizens in a democracy that few among us are willing to sacrifice.

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