## IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

AMERICAN HISTORICAL ASSOCIATION, <i>et al.</i> ,	)	
Plaintiffs,	)	
V.	) ) No	o. 1:01CV02447 (CKK)
THE NATIONAL ARCHIVES AND RECORDS ADMINISTRATION, et al.,	)	
Defendants.	)	

#### PLAINTIFFS' MOTION TO ALTER OR AMEND THE JUDGMENT

Pursuant to Federal Rule of Civil Procedure 59(e), plaintiffs hereby respectfully request that the Court alter or amend the judgment entered on March 29, 2004, which dismissed plaintiffs' action on standing and ripeness grounds. Plaintiffs ask that the Court reconsider its dismissal of the action for two reasons: (1) the Court's decision overlooks the uncontested fact that Executive Order 13,233 is *currently* being applied on an ongoing basis to all requests for releases of Reagan presidential documents and Bush vice presidential documents, so that the repetition of the injuries the Court acknowledges the plaintiffs have suffered is by no means speculative or hypothetical; and (2) the Court's opinion rests in part on a misapprehension of fact as to whether plaintiffs are challenging the assertion of privilege by the former and incumbent Presidents as to 74 pages of materials that are still being withheld under the Executive Order. These grounds are explained in full below.

#### **ARGUMENT**

The Court's opinion recognizes that plaintiffs have suffered injuries from the application of Executive Order 13,233 in the form of both delays in access to and ultimate withholding of

presidential records. Mem. Op. 17-18. However, the opinion states that plaintiffs' past injuries are no longer redressable and that similar future injuries are too speculative to support either standing or ripeness. Mem. Op. 20-22. Critical to the Court's decision are two factual assumptions: (1) that the Executive Order is not currently being applied, on an ongoing basis, to Reagan presidential documents (and Bush vice presidential documents), *see* Mem. Op. 19; and (2) that plaintiffs do not contest the lawfulness of the claim of executive privilege as to the 11 documents, comprising 74 pages, for which claims of privilege have been asserted under the Executive Order, *see* Mem. Op. 16 n.7. Neither basis for the Court's opinion is correct.

1. The Court's opinion appears to be premised on the view that the application of the Executive Order to formerly restricted presidential and vice presidential documents is a one-time event for each former President or Vice President, occurring when the Presidential Records Act's restriction period expires 12 years after he leaves office. The Court recognizes that delays in access attributable to the Executive Order injured the plaintiffs, but holds that this injury is no longer redressable. Moreover, although the Court acknowledges that "[p]laintiffs face substantially similar delays in the future should the terms of the Bush Order continue to be applied," and that "[t]here is ... a significant likelihood that Plaintiffs will again seek access to presidential records, and face indeterminate delays in accessing them," Mem. Op. 19, it holds that this injury is "conjectural and hypothetical" because "[a]t this stage Plaintiffs have no outstanding requests for presidential records, because there are no presidential records currently subject to the Bush Order, other than the 74 pages over which privilege has been asserted."

Mem. Op. 19 (emphasis added). The Court's opinion suggests that the next occasion for

<sup>&</sup>lt;sup>1</sup> Although the Court frames this as an issue of standing and redressability, it is more properly viewed as one of mootness. When the issue is so viewed, the case falls within the

applying the Order will not occur until the 12-year restriction period for George H.W. Bush presidential records expires on January 20, 2005, and the opinion concludes that it is speculative whether the President who takes office on that date will continue to apply the Bush Executive Order. Mem. Op. at 19-20.

What the Court's opinion overlooks is that the Executive Order is not applied only once, to whatever presidential or vice presidential documents have been withheld as of the end of the 12-year restriction period. Because the PRA provides that presidential records must be made available, on an ongoing basis, in response to specific FOIA requests (*see* 44 U.S.C. § 2204(c)(1)), not all documents whose restriction expires at the end of the 12-year period will be immediately released, because many, if not most, of them will not yet even have been *requested* at that time. Thus, even after the 12-year period ends, presidential or vice presidential documents continue to be released on a piecemeal basis in response to individual FOIA requests.<sup>2</sup> Each time a request is processed, responsive documents are evaluated to determine whether they are subject to statutory restriction. In addition, under the Executive Order, *each request for access to materials triggers the provisions for a privilege review by representatives of the former President or Vice President. See* Executive Order 13,233, § 3(a)-(c). Therefore, as plaintiffs stated (without contradiction by the government) in ¶ 5 of their Supplemental

mootness exception for injuries that are "capable of repetition, yet evading review." *See*, *e.g.*, *Biodiversity Legal Foundation v. Babbitt*, 63 F. Supp. 2d 31, 33 (D.D.C. 1999).

<sup>&</sup>lt;sup>2</sup> See, e.g., John W. Carlin, *Opening the Reagan Records* (August 2001), at www.archives.gov/presidential\_libraries/presidential\_records/opening\_reagan\_records.html ("We anticipate additional openings in the near future, and are continuing to process the millions of records remaining to be opened at the Reagan Library, the Bush Library, and the future Clinton Library.").

continuing to comply with Executive Order 13,233 with respect to each proposed release of documents from the Reagan and Bush Presidential Libraries."

Thus, the Court's view that there are "no presidential records currently subject to the Bush Order, other than the 74 pages over which privilege has been asserted," Mem. Op. 19, is not correct. All of the millions of pages of as-yet unreleased Reagan presidential (and Bush vice presidential) records that are available to be requested and released under the terms of the PRA, and that are being sought by members of the public on a continuous and ongoing basis, are subject to review under the Executive Order. There is therefore nothing speculative about the risk of injury that will result from further application of the Order to materials requested by plaintiffs and their members, who, as the Complaint alleges, "regularly request" such records (Compl. ¶¶ 3, 7 (quoted in Mem. Op. 19)). Nor, indeed, is it the case that "[p]laintiffs have no outstanding requests for presidential records." Mem. Op. 19. Plaintiff National Security Archive, for example, *currently* has many requests outstanding for materials at the Reagan and Bush Presidential Libraries, and the Executive Order is being applied to those requests, as it is to all other requests for access to Reagan presidential records and Bush vice presidential records. See Declaration of Thomas S. Blanton (filed herewith). Thus, it is neither "conjectural" nor "hypothetical," but, rather, it is certain, that the plaintiffs will again be injured by the application of the Executive Order and the resulting delay in or ultimate denial of access to documents. Accordingly, the Court should withdraw its justiciability-based dismissal of plaintiffs' claims and proceed to address the merits of the case.

2. The Court's decision as to redressability also appears to rest in part on the assumption that plaintiffs do not challenge the lawfulness of the assertion of privilege as to the 74 pages of materials with respect to which former President Reagan's representatives (and,

now, the incumbent President) have asserted privilege to block access under the terms of the Executive Order. *See* Mem. Op. 16 n.7. That assumption is also incorrect. The assertion of privilege caused NARA to deny a FOIA request for those 74 pages of materials on January 25, 2004. In order to contesting the lawfulness of the assertion of privilege as to those specific materials, plaintiff Public Citizen had to exhaust its administrative remedies by appealing the denial of the FOIA request, which it did on February 27, 2004. That appeal was denied in a letter dated April 1, 2004.<sup>3</sup> In short, it was not until three days after this Court issued its ruling was the administrative process concerning the 74 pages of materials exhausted, rendering the lawfulness of the privilege claim with respect to those documents ripe for judicial review. (Having exhausted those remedies, plaintiff Public Citizen now intends to file a separate action challenging the assertion of privilege and resulting denial of access with respect to those specific materials.)

To the extent, therefore, that the Court's ruling on standing and ripeness rests on the assumption that the plaintiffs do not challenge the lawfulness of the privilege claim as to those materials, the Court's ruling is erroneous because that assumption is incorrect.<sup>4</sup> Plaintiffs have indeed pressed their challenge to the assertion of privilege over those materials, and whether the

<sup>&</sup>lt;sup>3</sup> Copies of the appeal letter (which includes the original FOIA request and denial letter) and the Archives' letter denying the appeal are attached hereto as Exhibits A and B, respectively.

<sup>&</sup>lt;sup>4</sup> The Court's opinion states that because plaintiffs did not request leave to file any additional briefing regarding justiciability after defendants' last notification that privilege claims had been asserted with respect to the 74 pages, "[t]he Court takes this to mean that Plaintiffs do not challenge the assertion of privilege over the 74 pages, and that neither party wants to add anything to their earlier justiciability arguments." Mem. Op. 16 n.7. The Court correctly inferred that plaintiffs did not wish to add anything to their previous justiciability arguments, but its inference that plaintiffs did not challenge the specific privilege claims as to the 74 pages of documents was incorrect. Plaintiffs did not perceive a need to advise the Court that they were challenging the specific privilege claims as to those documents both because they were still exhausting administrative remedies on that issue, and because they viewed the question whether

privilege was asserted "lawfully" (Mem. Op. 18) has yet to be determined. For this reason, as well, the Court should withdraw its dismissal of plaintiffs' claims.<sup>5</sup>

### **CONCLUSION**

For the foregoing reasons, the plaintiffs' Motion to Alter or Amend the Judgment should be granted.

Respectfully submitted,

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April 12, 2002

those particular documents were properly subject to privilege as a separate matter from the lawfulness of the Executive Order (and from the justiciability of that issue).

<sup>&</sup>lt;sup>5</sup> Even if the Court does not grant the motion to alter or amend its judgment, plaintiffs request that the Court amend its opinion by deleting (1) the phrase "that Plaintiffs do not challenge the assertion of privilege over the 74 pages, and" in footnote 7; and (2) the word "lawfully" in the phrase "the 74 pages over which executive privilege has lawfully been asserted" on page 18. The first phrase, as explained in the text, reflects an inaccurate factual assumption, and the second addresses a legal issue that has not yet been presented for judicial resolution.

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### **ORDER**

Upon consideration of plaintiffs' motion under Federal Rule of Civil Procedure 59(e) to alter or amend the judgment, the response thereto, plaintiffs' reply, and the entire record in this matter, it is hereby

ORDERED, that the motion be and is hereby GRANTED, and it is further ORDERED, that the judgment entered on March 29, 2004, and the Memorandum Opinion filed that same date, be and are hereby WITHDRAWN.

United States District Judge

Dated: April \_\_\_, 2004

Serve:

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