IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

AMERICAN HISTORICAL)	
ASSOCIATION, et al.,)	
Plaintiffs,)	
)	
v.)	No. 1:01CV02447 (CKK)
)	
NATIONAL ARCHIVES AND)	
RECORDS ADMINISTRATION, et al.,)	
Defendants.)	
)	
)	

DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION TO ALTER OR AMEND THE JUDGMENT

PRELIMINARY STATEMENT

After the Court issued its March 28, 2004 Memorandum Opinion ("Op.") in this case dismissing, on justiciability grounds, plaintiffs' facial challenge to numerous provisions of Executive Order 13,233, 66 Fed. Reg. 56025 (Nov. 1, 2001) ("EO 13,233"), and denying plaintiffs' cross-motion for summary judgment on their principal challenge, plaintiffs filed a motion to alter or amend the judgment under Fed. R. Civ. P. 59(e) ("Pl. Mot."). Plaintiffs contend the Court's justiciability decision is based on two "critical" (Pl. Mot. at 2) mistakes of fact: (i) that EO 13,233 is "not currently being applied, on an ongoing basis, to Reagan presidential documents (and Bush vice presidential documents)"; id.; and (ii) that plaintiffs "do not contest the lawfulness" of constitutional privilege claims asserted by both former President Reagan and President George W. Bush over 74 pages of Reagan Administration records subject to the Presidential Records Act, 44 U.S.C. §§ 2201-2207 ("PRA"). See Pl. Mot. at 2. Plaintiffs also submit a declaration alleging that one of the organizational-plaintiffs has pending requests for PRA-covered records at the Ronald Reagan and George Bush libraries to which EO 13,233 is

being or will be applied. <u>See Pl. Mot.</u>, Declaration of Thomas S. Blanton ("Blanton Dec."). Based on these facts and assertions, plaintiffs contend that "the judgment entered on March 29, 2004, and the Memorandum Opinion filed that same date" should be withdrawn. <u>See Pl. Mot.</u> (proposed order).

To the extent the Court's March 28 opinion contains errors of fact (such as whether plaintiffs are challenging the withholding of the 74 pages), it should, of course, be corrected. But there is no basis to amend the *judgment* in this case, which properly dismissed plaintiffs' complaint and denied their motion for summary judgment. Plaintiffs' claim of "delay" based on their pending requests for presidential records constitutes "injury" for purposes of standing, but that injury is not redressable for reasons we established during the briefing (but which the Court did not address in its opinion). Given plaintiffs' filing, the Court should amend its opinion to address these alternative arguments, which lead to the same result the Court previously reached.

Even if the Court were to reject our alternative arguments, plaintiffs' facial challenge, in the main, would still not be justiciable based on their claim of delay. That claim of "delay" affects only their challenge to the EO provision establishing procedures for former and incumbent officeholders to review records for privilege, an issue on which plaintiffs did not even seek summary judgment. Those procedures plainly are facially valid. Thus, if the Court determines to reach the issue, it should uphold the review procedures on the merits.

With respect to the 74 pages, plaintiffs state that they challenge the assertions of privilege, but also that they intend to file an independent action challenging the "resulting denial of access." Pl. Mot. at 5. Plaintiffs can raise any challenges to EO 13,233 as applied to the withholding in that separate case, and there is no reason for the Court to exercise its discretionary authority under the Declaratory Judgment Act to adjudicate plaintiffs' broad facial challenges to

the EO in the context of this case. To the extent the Court determines nonetheless to reach the merits of plaintiffs' facial challenges, the Court should amend its opinion and dismiss any such challenges on the merits for all of the reasons we previously have explained.

In short, the Court should amend its opinion as necessary to deal with the facts presented in plaintiffs' motion. The bottom-line result, however, should be the same: plaintiffs' complaint should be dismissed, and their motion for summary judgment denied.

ARGUMENT

1. Plaintiffs contend, first, that the Court's justiciability ruling is incorrectly "premised on" the mistaken notion that the application of EO 13,233 to PRA-covered records "is a one-time event . . . occurring when the [PRA's] restriction period expires 12 years after" a President leaves office. Pl. Mot. at 2. Defendants do not read the Court's opinion in this way. It is true, as plaintiffs note (see Pl. Mot. at 2), that the Court stated "there are no presidential records currently subject to" EO 13,233 other than the 74 pages, see Op. at 19, but the Court apparently was referring to records over which privilege has been asserted. See id. The Court's principal point on justiciability appeared to be that, as far as the Court knew, "[a]t this stage, Plaintiffs have no outstanding requests for presidential records." Id.; see also id. at 15 (noting that "the materials Plaintiffs seek have been gradually released"); see also id. at 19 (noting the

¹See, e.g., Op. at 12 ("'[T]hese 68,000 pages are not the *only* Reagan records [in dispute] Since only a little more than 10% of the Reagan records have so far been processed for opening to the public, there are very likely [many] more pages of documents . . . that will now be subject to the Bush Order"') (quoting Plaintiffs' Opposition to Motion to Dismiss at 6 n.2) (alterations and emphasis in Op.); <u>id.</u> at 22 ("[t]he Archivist and NARA will continue to apply the Bush Order to presidential records, but the only redressable injury Plaintiffs might have is speculative").

"significant likelihood that Plaintiffs will again seek access to presidential records").²

Plaintiffs now have submitted a declaration stating that one of the plaintiffs has pending requests for presidential records to which EO 13,233 is being or will be applied. That declaration, however, is no basis for altering the result in this case. Even if one of the plaintiffs can establish present or imminent "injury-in-fact" by virtue of "delays" occasioned by the EO 13,233 review process, the Court's final disposition — which both denied plaintiffs' motion for summary judgment and granted defendants' motion to dismiss (see Order) — would still be correct for the reasons demonstrated below. The Court should amend its March 28 opinion to make these alternative grounds for dismissal clear.

a. Section 3 of EO 13,233 establishes procedures ("Section 3 procedures") by which incumbent and former Presidents may review presidential records for constitutional privilege after the Archivist receives a request for such records under 44 U.S.C. § 2204(c)(1). See EO 13,233, §§ 3(a)-(d).³ As the Court noted in its opinion (see Op. at 17), defendants conceded,

²Defendants agree that EO 13,233 applies any time a requester seeks access to a presidential record under 44 U.S.C. § 2204(c)(1). See EO 13,233, § 3(a). Defendants also agree that, after any otherwise applicable period of restriction ends, see, e.g., 44 U.S.C. § 2204(a), presidential records are opened in part on an ongoing basis in response to specific access requests. See id. § 2204(c)(1). As plaintiffs note (see Pl. Mot. at 3-4), defendants have never contended otherwise. See also, e.g., Def. Br. at 29 n.20.

³Section 3(a) provides that the Archivist shall provide notice to the former President and the incumbent President "[a]t an appropriate time" after receiving a request for access to presidential records under 44 U.S.C. § 2204(c)(1); it also provides that the Archivist shall provide any requested copies to the former President and the incumbent President "as soon as practicable." EO 13,233, § 3(a). Section 3(b) provides that the former President shall review any requested records "as expeditiously as possible, and for no longer than 90 days for requests that are not unduly burdensome." Id. § 3(b). This section also provides that the Archivist "shall not permit access to the records by a requester during this period of review or when requested by the former President to extend the time for review." Id. Section 3(c) provides that the former President, "[a]fter review of the records in question" or any other potentially privileged records, shall indicate to the Archivist whether the former President "requests withholding of or

arguendo, in their dismissal papers ("Def. Br." and "Def. Reply") that any "delay" in access caused by the Section 3 review process would constitute "injury" for purposes of standing.⁴ But, we explained, any such injury would not be redressable. See Def. Mot. at 17-21; Def. Reply at 9-11. Nor, we explained, would such an "injury" make plaintiffs' claims prudentially ripe. See, e.g., Def. Reply at 14-15.

For example, with respect to redressability, we explained that, regardless of EO 13,233, former and incumbent Presidents would have authority to review PRA-covered documents for privilege, and that there inevitably would be some delay in the release of such documents whether or not EO 13,233 existed. See, e.g., Def. Reply at 9-11; Def. Br. at 20-21 & n.17 (explaining that, to satisfy the redressability requirement, a plaintiff must show that relief is likely to flow from a favorable judicial decision). Plaintiffs, in fact, effectively have conceded that the Constitution requires that the incumbent have an adequate opportunity to review records for privilege. See Plaintiffs' Opposition to Motion to Dismiss at 15 n.6 ("the plaintiffs in this case do not seek an order that requires NARA to release materials before the White House has had an adequate opportunity to review them"); id at 23 (similar); see also 44 U.S.C. § 2204(c)(2) (PRA should not be construed to "limit . . . any constitutionally-based privilege which may be

authorizes access to any privileged records." <u>Id.</u> § 3(c). Section 3(d) provides that, "[c]oncurrent with or after the former President's review of the records," the incumbent President or his designee "may also review the records in question, or may utilize whatever other procedures the incumbent President deems appropriate to decide whether to concur in the former President's decision to request withholding of or authorize access to the records." <u>Id.</u> § 3(d).

⁴Plaintiffs also claimed injury based on "continuing unlawful *denial[s]* of access," Op. at 17 (emphasis in the Court's Opinion), which the Court interpreted as a claim of injury based on "NARA's unwillingness to provide access to records as soon as they were authorized for release . . . as well as NARA's unwillingness to release documents while they were the subject of privilege review." <u>Id.</u> (internal citations omitted). Thus, plaintiffs claimed the Section 3 review procedures caused both a "delay" in, and a (temporary) denial of, access to requested records.

available to an incumbent or former President").⁵ We also explained that the Court would lack authority to provide any relief which effectively would require the Archivist to release records covered by the PRA prior to the incumbent President's completion of any privilege review. See Def. Reply at 9-10; Def. Br. at 17-20. Because the Court granted defendants' motion on other grounds, it did not address these alternative arguments in its opinion, which are independently dispositive of the justiciability issue. In light of plaintiffs' filing, the Court should amend its prior opinion to address defendants' alternative arguments and make the basis for dismissal clear.

b. Even if the Court were to reject these arguments, the Court's justiciability dismissal would still be correct as to all but one of plaintiffs' challenges. As the Court noted in its opinion, in addition to the Section 3 review procedures, plaintiffs' complaint presents facial challenges to numerous other provisions of EO 13,233. See Op. at 12-13 n.5 (describing plaintiffs' various challenges). Indeed, plaintiffs' principal challenge — and the *sole* challenge on which they sought summary judgment — is directed to a provision of the EO which is triggered only upon a *unilateral* assertion of privilege by a former officeholder (i.e., an assertion of privilege in which the incumbent does not concur). See Op. at 13-14 ("'[P]laintiffs seek summary judgment declaring that the Bush order is unlawful and may not be implemented by the Archivist and NARA to the extent it purports to give former Presidents, Vice Presidents, and their representatives unilateral authority to direct the Archivist to withhold presidential and vice

⁵Plaintiffs' declarant states that the "processing time for requested documents [at the Reagan Library] is now 48 months," and that "[s]taff at the Reagan Library have advised us informally that reviews under Executive Order 13,233 are a major factor in these delays." Blanton Dec. at 2, ¶ 4. To make sure the record is clear on this point, defendants attach the declaration of Richard Claypoole, Assistant Archivist for Presidential Libraries at NARA ("Claypoole Dec."). Mr. Claypoole's declaration makes clear that, with respect to requests for presidential records at the Reagan Library, the EO 13,233 review process currently adds, on average, a total of 140 days to the Library's processing time. See Claypoole Dec. at ¶ 6.

presidential records from the public'") (quoting Plaintiffs' Motion for Summary Judgment at 2-3) (alterations in the Court's Opinion). Plaintiffs also challenge, for example, the EO provisions addressing assertions of constitutional privileges by former Vice Presidents. See Op. at 13 n.5. Plaintiffs do not claim that these provisions have been applied to any record that they seek.

In our dismissal papers, we explained that plaintiffs must establish justiciability—
standing, ripeness, and a lack of mootness — with respect to *each* provision of EO 13,233 they
contend is unlawful. See Def. Reply at 3-4 & n.2 (citing numerous cases on this point). We also
explained that, to the extent plaintiffs are injured by "delay," such injury is a result solely of the
Section 3 review procedures, and would not create standing to challenge other provisions of EO
13,233 which have caused plaintiffs no injury (nor would plaintiffs' challenge to such provisions
be ripe). See, e.g., Def. Reply at 7-9 (standing), 11-14 (constitutional ripeness); id. at 14-15
(prudential ripeness).⁶ Because the Court granted defendants' motion on other grounds, it did not
address these arguments. See, e.g., Op. at 17 ("[t]he Court... will not consider the causation
prong of the standing analysis"). Thus, even assuming that plaintiffs' challenge to the Section 3
review procedures is justiciable, there can be no question that the Court's justiciability dismissal
was correct with respect to the other EO provisions plaintiffs challenge, as was the Court's

⁶Nor is there any reason to think that the Section 3 review process is likely to lead to assertions of privilege — let alone "unilateral" assertions of privilege — with respect to particular documents under review. As defendants noted in an attachment to their April 24, 2003 notice to the Court, as of that date, more than 164,000 pages of former President Reagan's records had been cleared for release since EO 13,233 took effect (including tens of thousands of pages formerly restricted under the PRA's "P5" exemption for confidential communications requesting or submitting advice). See Notice With Respect to Processing of Records, Tab A (Docket # 25). Mr. Claypoole's declaration updates the Court on these figures, explaining that "[s]ince EO 13233 went into effect, a total of 612,333 pages of Presidential and Vice Presidential records have been opened to the public, including 265,956 pages of Reagan Presidential records, and only 74 pages have been withheld under a constitutional privilege." Claypoole Dec. at ¶ 7.

decision denying, on justiciability grounds, plaintiffs' motion for summary judgment on their challenge to the EO's "unilateral assertion" provision. Again, the Court should amend its opinion to make these points clear.

c. To the extent the Court determines to consider plaintiffs' Section 3 challenge,⁷ it should dismiss that challenge on the merits. See Op. at 14-15 ("[b]ecause the Court finds that Plaintiffs' claims are not justiciable, the Court will not address the merits of the parties' dispositive motions"). In the briefs in support of our motion to dismiss, we set forth at length the basis for our argument that the Section 3 review procedures are lawful, and incorporate those arguments by reference here. See Def. Br. at 28-30; Def. Reply at 18-19.

In short, the PRA expressly states that it should not be construed to "limit . . . any constitutionally-based privilege," 44 U.S.C. 2204(c)(2), and the Constitution plainly requires that former and incumbent Presidents have a meaningful opportunity to determine whether to assert any such privilege over particular documents prior to release. Section 3 merely provides a framework within which former and incumbent officeholders may exercise that right. Indeed, plaintiffs' acknowledgment that the President must have "an adequate opportunity" to review presidential records for privilege prior to release compels the conclusion that the Section 3 procedures are facially valid. See Def. Reply at 18 (explaining that, to succeed in a facial challenge to an Executive Order, the challenger must establish that no set of circumstances exist

⁷As stated below, even if the Court concludes that plaintiffs' facial challenges are justiciable, the Court should decline to exercise its discretion under the Declaratory Judgment Act to adjudicate plaintiffs' broad claims. See Wilton v. Seven Falls Co., 515 U.S. 277, 288 (1995) ("[i]n the declaratory judgment context, the normal principle that federal courts should adjudicate claims within their jurisdiction yields to considerations of practicality and wise judicial administration"). As noted, plaintiffs can challenge the application of EO 13,233 to specific requests on a case-by-case basis.

under which the order would be valid). Plaintiffs' argument that Section 3 "makes it possible for materials to be withheld for an unlimited time" (Op. at 12 n.5) misreads the EO, and, even if theoretically true, is no basis to invalidate the EO review procedures on their face. See also Claypoole Dec. at ¶ 6 (noting that, with respect to requests for presidential records at the Reagan Library, the EO 13,233 review process currently adds, on average, a total of 140 days to the Library's processing time). If the Court determines to reach this argument, it should amend its prior opinion and make clear the basis for dismissing plaintiffs' challenge to the Section 3 procedures.

2. Plaintiffs also contend that the Court's justiciability analysis "appears to rest in part on the assumption that plaintiffs do not challenge the lawfulness of" the assertions of constitutional privilege by both former President Reagan and President George W. Bush over the 74 pages of Reagan Administration records. See Pl. Mot. at 4-5. Plaintiffs assert that, contrary to the Court's assumption (see Opp. at 16 n.7), they do challenge the "lawfulness of" that withholding, and "intend[] to file a separate action challenging the assertion of privilege and resulting denial of access with respect to those specific materials." Id. at 5.

Plaintiffs' decision to challenge the 74-page withholding does not support adjudication of the merits of their claims in this case. The Supreme Court has "repeatedly characterized the Declaratory Judgment Act as 'an enabling Act, which confers a discretion on the courts rather than an absolute right upon the litigant." Wilton v. Seven Falls Co., 515 U.S. 277, 287 (1995) (quoting Public Serv. Comm'n of Utah v. Wycoff Co., 344 U.S. 237, 241 (1952)). Thus, courts have "discretion in determining whether and when to entertain an action under the Declaratory Judgment Act, even when the suit otherwise satisfies subject matter jurisdictional prerequisites." Wilton, 515 U.S. at 282; see also id. at 288 (noting that, "[i]n the declaratory judgment context,

the normal principle that federal courts should adjudicate claims within their jurisdiction yields to considerations of practicality and wise judicial administration"); Friends of the Earth, Inc. v. Laidlaw Envt'l Servs. (TOC), Inc., 528 U.S. 167, 192 (2000) (a "'federal judge sitting as chancellor is not mechanically obligated to grant an injunction for every violation of law"') (quoting Weinberger v. Romero-Barcelo, 456 U.S. 305, 313 (1982)).

Plaintiffs have stated that they will be filing an independent action challenging the propriety of the withholding, see Pl. Mot. at 5, and they can challenge the application of EO 13,233 to the 74 pages in that separate case. This case, however, already has been dismissed. In these circumstances, the Court should exercise its discretion and decline to entertain plaintiffs' facial challenges to the EO. See Wilton, 515 U.S. at 288 ("[i]n the declaratory judgment context, the normal principle that federal courts should adjudicate claims within their jurisdiction yields to considerations of practicality and wise judicial administration").

To the extent the Court decides to address the merits of plaintiffs' facial claims in light of their stated intention to challenge the 74 pages, the Court should dismiss any such claims on the merits for reasons we have explained at length. See Def. Br. at 17-24; Def. Reply at 26-39. But again, plaintiffs cannot rely on the withholding of the 74 pages as a basis for challenging provisions of the EO not implicated in the withholding decision.

CONCLUSION

For all the foregoing reasons, plaintiffs' motion to alter or amend the judgment in this action should be denied. The Court, instead, should amend its March 28 opinion to reflect the alternative grounds which support the result the Court reached.

Respectfully submitted,

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Date: April 23, 2004