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Hearing on the Presidential Records Act and Executive Order 13,233
Before the Subcommittee on Information Policy, Census and National Archives
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Good afternoon, Mr. Chairman and members of the Subcommittee, and thank you for inviting me to testify before you. My testimony concerns Executive Order 13,233, which purports to empower former presidents, former vice presidents, and the representatives of deceased or incapacitated former presidents and vice presidents to block the release of their records under the Presidential Records Act ("PRA" or "Act"). I first testified on this subject before another subcommittee of this Committee more than five years ago. Unfortunately, nothing has changed in the intervening five years. The Executive Order remains in place, and it remains unlawful for the reasons I outlined at that time. Most fundamentally, it violates the PRA—and exceeds the bounds of legitimate protection of executive privilege—because it gives a former president the power to veto public releases of materials by the National Archives even if the former president's assertion of privilege is not supported by the law.

Before I explain the basis for my conclusions, I would like to take a few moments to describe my background in this area of law. I am currently an attorney with the Public Citizen Litigation Group here in Washington. Public Citizen has long had an interest in ensuring public access to governmental records, including the materials of former presidents, and has been involved in much of the litigation that has established the governing legal principles in this area, including litigation over materials of former Presidents Nixon, Reagan, and Bush. My own experience in the area includes not only the five years I have spent litigating the validity of

Executive Order 13,233, but also approximately 15 years spent in private practice representing former President Nixon and, later, his executors, in litigation involving access to the Nixon presidential materials under the special legislation that governs those materials—legislation that is similar in many respects to the PRA. Some of that litigation also involved Public Citizen, and the principles established in that litigation are directly applicable to the issues posed by the new Executive Order.

1. **The Presidential Records Act.** The Presidential Records Act was enacted in 1978 to ensure permanent governmental control over presidential records and to broaden public access to them. In contrast to prior law, under which presidents were considered owners of all their papers, the PRA provides that presidential records are property of the federal government from the moment of their creation. Under the Act, they remain largely under the control of the president during his term in office. Once the president leaves office, however, the Act gives custody and control over the papers to the Archivist of the United States, and the National Archives and Records Administration (“NARA” or “the Archives”) is responsible for processing the materials for release to the public under the Act.

Although the Act vests the Archivist with authority over presidential records, it does give former presidents the right to impose limited restrictions on public access to some of their materials. Specifically, the Act allows a president leaving office to direct that records falling within six specific categories may be kept secret for up to 12 years after the president’s last day in office. The categories of materials that may be restricted include information that is properly subject to national security classification, information whose release would infringe an individual’s right to privacy, and trade secrets. One of the categories, and the one most relevant for present purposes, encompasses confidential communications between the president and his

senior advisers—that is, communications that are potentially within the scope of “executive privilege.”

During the first five years after a president leaves office, the Act provides that none of his records will be generally available to the public, to allow NARA to gain control over the materials, move them into a presidential library, and begin preparing them for public access. After the five years are up, any person may request access to presidential records, and the standards governing the request are generally equivalent to those under the Freedom of Information Act. Between year five and year 12, however, no records that fall within any of the 12-year restriction categories may be released.

After the 12-year restriction period ends, all the former president’s records become available for release to the public under FOIA standards—including, with one exception, FOIA’s exemptions. The applicability of the FOIA exemptions means, for example, that classified materials, which are categorically exempt from release under FOIA, are not subject to release under the PRA even after the 12-year restriction period ends.

The one FOIA exemption that does *not* apply under the PRA is so-called “exemption 5,” which covers materials that are subject to the executive privilege and other legal privileges. Thus, when the 12-year PRA restriction period for materials reflecting confidential communications between the president and his advisers runs out, those materials will generally not fall within any statutory exemption from public release (assuming they do not relate to national security matters). This reflects Congress’s judgment that 12 years will generally be long enough to protect records containing the deliberations of the president and his advisers. After 12 years, the drafters of the Act concluded, the interest in public access to the historical record

would outweigh any embarrassment or residual chilling effect that the prospect of disclosure of the White House decisionmaking process after such a lapse of time might entail.

To be sure, the Act provides that it is not intended to limit (nor to confirm or expand) any constitutionally based privilege that may be available to the former president, or to the incumbent. And, at some level, the executive privilege is constitutionally based. But the Supreme Court has also emphasized that executive privilege is subject to “erosion over time” after a president leaves office. *See Nixon v. Administrator of General Services*, 433 U.S. 425 (1977). The congressional judgment underlying the PRA is that that erosion would be such that, after the passage of 12 years, there would be little (if anything) in the president’s communications with his advisers that should legitimately remain secret. To the extent that there may be some presidential communications that would remain constitutionally privileged against public release even after a lapse of 12 years, the Act’s recognition of the possibility that the former president may have a constitutional privilege to assert provides the necessary safety valve to prevent any possible claim that its provisions for public access are unconstitutional.

2. The Reagan Presidential Records. To avoid problems that might result from the retroactive application of the PRA, it was made applicable beginning with the president who took office on January 20, 1981. That turned out to be President Ronald Reagan. Before leaving office, President Reagan invoked the maximum 12-year restriction for all categories of materials permitted under the Act, including the category of communications between the president and his advisers. President Reagan left office on January 20, 1989, and thus the 12-year restrictions expired on January 20 of 2001, marking the first time in the history of the PRA that materials subject to the Act were available without regard to such restrictions—at least in theory.

Over the seven years preceding expiration of the 12-year restriction period, many requests for the release of Reagan presidential materials had been made at the new Reagan Presidential Library operated by NARA in Simi Valley, California. According to NARA estimates, over 4 million pages of records, from among the Library's total holdings of in excess of 40 million pages, had been opened to the public in response to those requests. From those files, however, NARA had withheld materials that were subject to the 12-year restriction imposed by President Reagan under the PRA. Among the materials withheld were about 68,000 pages that were withheld solely as communications between the former president and his advisers. In other words, these 68,000 pages were not subject to any other restriction (such as the restriction for materials that were national security classified).

When the 12-year restriction expired in January 2001, the 68,000 pages reflecting communications between the former president and his advisers were no longer subject to any limitation on public access under the PRA. Accordingly, NARA advised the White House in February of 2001 that it intended to release those materials to the public. NARA provided this notification as required by an Executive Order issued by President Reagan shortly before he left office. That Order (Executive Order No. 12,667) provided that before the Archives released such materials, it must give at least 30 days' notice to both the incumbent and the former president to give them the opportunity to assert any claim that a constitutionally based privilege would prevent release of the materials. Notably, the Reagan Executive Order contemplated that if a former president made a privilege claim, the records that were the subject of the claim could still be released by NARA if the Archivist (acting subject to the direction of the incumbent president) rejected the claim of privilege. In that event, it would be up to the former president to seek judicial relief if he continued to press his claim of privilege.

Following the White House's receipt of the Archives' notice of intent to release the 68,000 pages of Reagan records, then-White House Counsel Gonzales three times extended the time permitted for the incumbent president's review of the materials under the Reagan Executive Order. The stated purpose of these extensions was to provide the White House Counsel's Office time to review what Mr. Gonzales referred to as "many constitutional and legal questions" raised by the impending release of these materials under the PRA. Pending the White House's review, the 68,000 pages of records remained closed to the public for nearly ten months beyond the date when the restriction on their release under the PRA expired, even though no claim of a constitutionally based privilege had yet been made by the incumbent president.

3. **The Bush Order.** On November 1, 2001, the White House's review of "many constitutional and legal questions" culminated in the issuance of Executive Order 13,233 (the "Bush Order"), which purports to govern the implementation of the PRA and abrogates and supersedes the Reagan Order. The Bush Order sets forth procedures and substantive standards governing the assertion of claims of executive privilege by both former and incumbent Presidents following the expiration of the 12-year restriction period for materials involving communications between presidents and their advisers. The Bush Order has a number of troublesome features, which are described in detail below. The most striking of these is that it grants a former president the unfettered power to block the Archivist from releasing any materials to the public simply by making a claim of privilege (however unfounded that claim may be), leaving the burden on those who desire public access to challenge that claim in court.

The Bush Order not only reverses the burden of seeking judicial review, but also, in contrast to the PRA (which makes access to presidential materials after the 12-year restriction period has ended available under FOIA standards that do not require requesters to show a need

for access), asserts 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, a standard that turns on the nature of the proceeding and the importance of the information to that proceeding.” Bush Order, § 2(c).

The Bush Order further provides that the Archivist must notify both the former president and the incumbent of any request for access to presidential records that are subject to the PRA, and must provide them with copies of the relevant records upon their request. Bush Order, § 3(a). The Order states that the former president shall review the records “as expeditiously as possible, and for no longer than 90 days for requests that are not unduly burdensome.” Bush Order § 3(b). However, the Order goes on to provide that if the Archivist receives a request for an extension of time from the former president, the Archivist “shall not permit [public] access” to the materials, regardless of whether the former president’s request is reasonable. *Id.* The Bush Order thus permits a former president to delay the release of materials indefinitely simply by requesting additional time to review them. Only after the former president has used whatever time he chooses to review the records must he advise the Archivist whether he “authorizes” access to the materials or whether he requests that some or all of the documents be withheld on the basis of a constitutionally based claim of privilege. Bush Order, § 3(c).

The Bush Order further provides that either concurrently with or after the review by the former president, the incumbent president has an unlimited amount of time to review any presidential materials that are subject to a request for access under the PRA. Bush Order, § 3(d). The Order states that, upon completion of the incumbent’s review, the incumbent is to decide whether he “concur[s] in” the former president’s decision either to “request withholding of or authorize access to the records.” Bush Order § 3(d). The Order tilts the scale in favor of secrecy

by providing that “[a]bsent compelling circumstances, the incumbent President will concur in the privilege decision of the former President” and “will support” a former president’s privilege claim “in any forum in which the privilege claim is challenged.” Bush Order § 4.

When the incumbent president “concur[s] in” a former president’s request that materials be withheld on privilege grounds, the Order provides that the incumbent shall so inform the Archivist, and that the Archivist thereafter shall not permit access to the materials unless both presidents change their minds or a court orders that the materials be released. Bush Order § 3(d)(1)(i). (Such a court order could only come about if a requester sued for access, since nothing in the PRA would permit the Archivist to sue the former president or the incumbent to require that materials be released.)

Moreover, even when the incumbent president has found that there are “compelling circumstances” that require him to *disagree* with a former president’s request that materials be withheld on grounds of privilege, the Bush Order provides that the Archivist is still forbidden to disclose the assertedly privileged materials to the public, “[b]ecause the former President independently retains the right to assert constitutionally based privileges.” Bush Order, § 3(d)(1)(ii). Under such circumstances, the Bush Order provides that the Archivist must deny public access to the materials claimed to be privileged by the former president unless and until the incumbent president informs the Archives that both he and the former president agree to their release, or there is a final, nonappealable court order requiring that the records be released.

The Bush Order also provides that when the former president has “authorized access,” the Archivist must nonetheless deny public access to records when the incumbent president so directs. Bush Order § 3(d)(2)(ii). Only when both the former president and the incumbent president “authorize access” does the Order permit the Archivist to grant public access to

presidential records under the PRA. The Bush Order also forbids the Archivist to make presidential records available in response to judicial or congressional subpoenas unless both the incumbent and former presidents “authorize access” or there is a final, nonappealable court order requiring access. Bush Order, § 6.

In addition, the Bush Order purports to authorize private citizens other than a former president to assert constitutionally based privileges on behalf of a former president after he dies or when he is disabled. The Order provides that a former president may designate such a representative (or representatives) “to act on his behalf for purposes of the Presidential Records Act and this order.” Bush Order, § 10. Upon the former president’s death or disability, such a designated representative “shall act” on the former president’s behalf, “including with respect to the assertion of constitutionally based privileges.” *Id.* If the former president fails to designate such a representative, the Order provides that his family may do so. *Id.*

Finally, under the Bush Order, former vice presidents have the same right to assert purported claims of constitutionally based *vice presidential* privilege that former presidents have to assert claims of presidential privilege. Bush Order, § 11. Assertions of privilege by former vice presidents, like assertions of privilege by former presidents, must be honored by the Archivist regardless of their merit absent a court order.

4. The Bush Order’s Legal Flaws. The Bush Executive Order is fundamentally flawed—legally, constitutionally, and as a matter of policy. To begin with, the Bush Order is unauthorized. The PRA does not give the president the authority to issue implementing directives through the fiat of executive orders. Rather, it provides that the Archivist is to implement it through regulations issued through the notice-and-comment process established by the Administrative Procedure Act. The Archivist has done so, and the governing regulations,

which remain in place, are incompatible with the Bush Order in that they not only place limits on the time in which a former president may assert a claim of privilege (unlike the Bush Order, which gives a former president or his representative the unilateral authority to take as much time as he pleases to review records the Archivist proposes to release), but also require the Archivist not to defer automatically to a former president's claims of privilege, but rather to release records in the face of such a claim if the Archivist determines that the claim is improper. *See* 36 C.F.R. § 1270.46. An executive order cannot override duly promulgated regulations issued pursuant to statutory authority.

Moreover, although the Bush Order was described by administration officials upon its release as merely establishing a procedural mechanism for the assertion of privilege claims, the Reagan Executive Order that the Bush Order supersedes already provided more than adequate *procedures* for the assertion of privileges. What the Bush Order adds are new and improper substantive standards that displace and subvert the PRA's provisions for public access to presidential materials.

It must be remembered that the PRA is based on the concept that a president leaving office can impose only a 12-year restriction on materials reflecting communications with his advisers. Thereafter, those materials are presumptively open to the public unless they involve national security matters or other specific content exempt from disclosure, or unless they fall within the small category, which steadily diminishes with the passing of time, of materials that are subject to a constitutionally based privilege of the former or incumbent president. Thus, to the extent that the Bush Order imposes standards that extend the secrecy of such materials beyond the PRA's 12-year limit, it is lawful only if those standards are constitutionally required. Clear judicial precedent indicates that they are not.

The most plainly improper feature of the Bush Order is its requirement that the Archivist withhold materials from the public whenever the former president has asserted a claim of privilege, *even if the incumbent president disagrees with that claim*. The Bush Order claims to find authority for this requirement in the Supreme Court's decision in *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977), which held, among other things, that a former president retains a limited right to assert executive privilege independently from the incumbent president. Although the Court recognized this right, it also emphasized that the protection afforded historical presidential records was limited and eroded steadily as time passed. Thus, while recognizing a former president's right to *assert* a claim of privilege, the Supreme Court by no means implied that all such claims were valid or that incumbent executive branch officials were bound to honor such claims regardless of their merit. Rather, the implication of *Nixon v. Administrator* was that although former presidents could make claims of privilege, the Constitution permits such claims to be evaluated and rejected by current executive branch officials when, as is usually the case, the public's need for access to historical materials involving official government actions outweighs the former president's attenuated interest in confidentiality after he has been out of office for a number of years.

These implications of *Nixon v. Administrator* were made explicit by the United States Court of Appeals for the District of Columbia Circuit a few years later in its decision in *Public Citizen v. Burke*, 843 F.2d 1473 (D.C. Cir. 1988). That case concerned a directive by the Reagan Justice Department that closely parallels the terms of the Bush Executive Order. The Justice Department directive at issue in *Public Citizen v. Burke* instructed the Archives that it must defer to any claim of privilege asserted by former President Nixon to block public release of any of his presidential materials, which are held by the Archives under legislation that is applicable only to

President Nixon but is similar to the PRA in its provisions encouraging public access to presidential records. The Justice Department argued that such deference was constitutionally required to protect the former president's ability to assert privilege claims under *Nixon v. Administrator*.

In an opinion written by Judge Silberman and joined by Judge Sentelle and the late Judge Harold Greene, the D.C. Circuit roundly rejected the Justice Department's view. The court held that the Archivist, as an executive branch official obligated to assist the incumbent president in fulfilling his constitutional duty to take care that the laws be faithfully executed, could not permissibly defer to a former president's claim of privilege if the claim was not legally proper. Thus, the court held, the Archivist (and the incumbent president) was obligated to assess independently a former president's assertion of privilege, to reject the claim if it were not well founded legally, and to release materials to the public as required by the statute if the privilege claim were rejected. The court further rejected the government's assertion—again echoed in the Bush Executive Order—that it is permissible for the Archivist to rubber-stamp a former president's privilege claim as long as a member of the public can challenge it in court. The court stated: "To say ... that [the former president's] invocation of executive privilege cannot be disputed by the Archivist, a subordinate of the incumbent President, but must rather be evaluated by the Judiciary in the first instance is in truth to delegate to the Judiciary the Executive Branch's responsibility" to carry out the law. 843 F.2d at 1479.

The reasoning of *Public Citizen v. Burke* applies fully here, and the Bush Executive Order is plainly incompatible with it. Under the PRA, the Archivist is *required* to make materials available to the public after the expiration of the 12-year restriction period, *unless* there is some valid constitutionally based privilege that bars their release. By compelling the Archivist

to withhold release of materials whenever the former president makes a claim of privilege, regardless of its legal merit, the Bush Executive Order, like the Justice Department directive struck down in *Burke*, allows current executive branch officials (including the incumbent president) to abdicate their responsibility to conform their actions to the law. Indeed, by requiring materials to be kept secret *even when the incumbent president disagrees with a former president's claim of privilege*, the Bush Order explicitly requires the executive branch to take actions the president has determined are *not* legally justified, in violation of the constitutional duty to execute the law faithfully and in defiance of the PRA. Moreover, the Bush Order goes so far as to bind the administration to support the former president's privilege claims in court even when it disagrees with them—an extraordinary abdication of the executive branch's obligation of fidelity to the law. In these respects, the Bush Order is even more obviously unlawful than the Justice Department directive at issue in *Burke*.

Another respect in which the Bush Order departs from the terms of the PRA and from judicial precedents involving access to presidential historical materials is in its apparent insistence that a person requesting access to presidential materials must, even after the Act's 12-year restriction period has expired, show some specific, demonstrable need for access to overcome executive privilege. This requirement is a departure from the plain terms of the PRA, which makes such materials available under FOIA standards—standards that do not require the showing of any specific need. See 44 U.S.C. § 2204(c)(1). Moreover, the Order conflicts with another ruling of the D.C. Circuit in litigation over the Nixon materials, *Nixon v. Freeman*, 670 F.2d 346 (D.C. Cir.), *cert. denied*, 459 U.S. 1035 (1982). In that decision, the Court of Appeals specifically rejected the argument that the constitutional privilege requires persons seeking access to presidential historical materials years after the president leaves office to show a specific

need for access. *Id.* at 359. Because the privilege erodes with the passing of time, the court held that it was proper for the Archives to open materials to all comers, without a showing of need, and to place the burden on the former president to establish that particular disclosures would violate the privilege. That is exactly what the Presidential Records Act is designed to do. The new Executive Order, by contrast, turns the Act's requirement of public access on its head.

These are not the only features of the Bush Order that are unlawful. The Order's provision that the constitutional executive privilege may be asserted by a deceased or disabled former president's family or personal representative is fundamentally at odds with the principles underlying the privilege. The privilege is not, after all, a personal right of the former president. He is authorized to assert it solely on behalf of the branch of government that he once headed. His family members or designees have no such claim of authority. The Bush Order nonetheless grants these private citizens the power to *direct* the Archivist to withhold from the public records whose release is otherwise required by law. By delegating to private citizens the power to assert a governmental privilege to which they have no legitimate claim and to dictate to a government official how he must carry out his responsibilities, the Order not only expands the privilege beyond all legitimate bounds but abdicates the executive branch's own constitutional responsibility to see that the laws are faithfully executed.

Equally unsupportable by law is the Order's de facto creation of a vice presidential privilege, a previously unknown legal concept. The Order explicitly provides that a former vice president may assert a privilege of his own, and that the Archivist must defer to such a claim of privilege. (The Order makes clear that the privilege in question is a vice presidential privilege, because it provides that a former vice president may *not* assert a claim of presidential privilege. Bush Order, § 11(b).) The considerations that led the Supreme Court to recognize the existence

of a constitutional presidential privilege, all of which relate to the fundamental importance of the duties the Constitution assigns to the president, are inapplicable to the vice president, whose constitutional duties are few and do not require that he have the ability to obtain confidential policy advice independent of the president. To the extent the vice president functions as an adviser to the president, their communications may fall within the scope of the president's privilege. But there is no basis for the Bush Order's recognition of a separate privilege held by a vice president, nor for the Order's delegation to former vice presidents of the power to direct the Archivist to withhold materials from the public by the mere assertion of this fictitious privilege.

5. The Bush Order Is Bad Policy. Beyond its legal flaws, the Bush Order threatens to subvert significantly the policies underlying the PRA. The PRA's premise is that public access to historically significant presidential records is desirable and that, once a decent interval has passed after a president leaves office, the grounds for restricting public access should be quite limited.

The Bush Order represents a substantial threat to the PRA's fundamental goals. First, it creates the possibility that a former president may indefinitely delay access to records while he simply *considers* whether to assert a claim of privilege. Second, it permits him to declare large blocks of the materials off-limits to the public merely by asserting a claim of privilege, which the Archivist must respect however unfounded it may be, and which may only be challenged in court by a requester who can show a specific, demonstrable need for access (whatever that means).

One need not believe that the representatives of a former president will consciously act in bad faith to bar access to their materials to be concerned here. With the ability to block access comes the temptation to use it, particularly when records that are (or may be) embarrassing to a former president or his close associates are at stake. It is easy in such a situation for a former

president to confuse his own personal interest in denying access with an institutional executive branch interest that might support a claim of privilege. And experience teaches time and again that, given the chance, officials often err on the side of over-withholding materials and asserting interests in secrecy that, upon inspection, are without justification. For these reasons, it is a bad idea to give former presidents carte blanche authority to direct the Archivist to withhold materials from the public. And since this bad idea is plainly not constitutionally required, there can be no justification for enshrining it in an executive order.

Nor can the Bush Order's expansion of the secrecy of historical presidential records be justified, as some in the administration suggested at the time of its promulgation, on the basis of national security concerns. Even without the new Order, the Presidential Records Act and existing Executive Orders on national security classification provide ample authority to prevent the release of materials that could potentially damage national security. Simply put, the Act already provides protection to properly classified information even after the expiration of the 12-year restriction period, and it will continue to do so with or without the Bush Order. See 44 U.S.C. §§ 2204(a)(1) & (c)(1).

The Bush Order extends the secrecy not of information relating to national security, but of materials relating to communications between the former president and his advisers that do *not* implicate national security. The 68,000-some pages of Reagan materials that the Archives notified the White House it was prepared to release in February 2001, for example, were materials that were not subject to protection for national security reasons (or to restriction under any of the other categories that survive the 12-year limit under the Act). Rather, they had been withheld from release solely because they reflected communications between the former president and his advisers that were subject to the 12-year restriction. The Bush Order would

allow the former President (or the incumbent) to impose an indefinite, blanket ban on release of these materials even though they contain *no* sensitive national security information.

In addition, national security reasons can provide no possible justification for the Order's provisions that effectively give a former president veto power over the release of materials by the Archivist. It is the incumbent president, not his predecessors, who has the constitutional power and duty to make judgments about the nation's security needs. If the incumbent president sees no national security justification for keeping particular materials secret, there can be no reason to allow a former president to override that determination.

In the final analysis, what the Bush Order reflects is a fundamental change in the PRA. The PRA is premised on the notion that the public is *entitled* to access to historical presidential materials subject only to defined exceptions set forth in the statute. Only for a limited, 12-year period is that access subject to restrictions imposed by the will of the former president. After the 12 years expire, the only limits are those imposed by the statute or, in rare cases, by constitutional doctrines of privilege.

The Bush Order reflects another model entirely. It is an attempt to resurrect the pre-PRA regime in which access to presidential materials was controlled by the former presidents (usually through restrictions in the deeds of gift through which the former presidents donated their materials to the public). Thus, the Bush Order repeatedly states that the public will be permitted access to materials only if the former president and the incumbent decide to "authorize" access.

That is not what the PRA is all about. Under the PRA, it is the statute that "authorizes" public access, whether the former president (or the incumbent) approves or not. Only in the exceptional circumstances where the former or incumbent president has a legally enforceable,

constitutionally based privilege can the access authorized by the statute be denied. The Bush Order is incompatible with this statutory scheme. It is bad policy and bad law.

6. **The Litigation over the Bush Order.** In December 2001, Public Citizen and a number of other organizations and individuals filed suit against the National Archives and Records Administration in the U.S. District Court for the District of Columbia, seeking declaratory and injunctive relief to prevent the Archivist from carrying out the executive order. The lawsuit, *American Historical Association v. National Archives & Records Administration*, No. 01-2447, remains pending and unresolved today.

From the outset, the strategy of the Justice Department in defending the lawsuit has been to avoid adjudication of the merits of the legal challenges to the executive order by arguing that the claims are not ripe, that the plaintiffs lack standing, and even that the claims are moot. Thus, soon after the lawsuit was filed, the Archives began to release some of the 68,000 pages of Reagan records that had been withheld until that point, and the Justice Department used the release of the materials to argue that the plaintiffs were not really injured by the Bush Order. Even with the impetus of the administration's desire to derail our lawsuit, however, the reviews required by the Executive Order for the 68,000 pages of records took until late July 2002 to complete, so that the release of those records was ultimately delayed by 18 months beyond the statutory 12-year period that had ended in January 2001. Meanwhile, we discovered that another 1654 pages of Reagan records that should have been noticed for release in January 2001 had been omitted by the Archives from its notice of intent to release records at that time because of concerns that the documents might be particularly sensitive to former President Reagan. We requested that those documents be released as well, but as a result of the Bush Order, reviews of the documents delayed their release for another 18 months, until January 2004.

While the process of releasing the documents dragged on, the parties completed briefing on the merits of our challenges to the Executive Order in the spring of 2002. We moved for summary judgment on our claims that the Order violated the PRA and exceeded the proper bounds of the constitutional privilege; the government contested our motion and filed its own motion to dismiss based on its claim that the suit was not ripe and/or that the plaintiffs lacked standing until such time as a former president actually asserted privilege under the Order and documents were withheld as a result. In response to those arguments, we pointed out that the Order was being applied to withhold or delay release not only of the 68,000 pages of records (and the 1654 pages of newly discovered documents), but also, on an ongoing basis, of every presidential and vice presidential record that anyone requested from the Ronald Reagan and George Bush Presidential Libraries, all of which were subject to review under the terms of the Bush Order, and all of which were being withheld until such time as the former officeholders authorized release.

In April 2003, approximately a year after the completion of the briefing in the district court, we received notice that as a result of the Reagan representative's review of the 1654 pages of records referred to above, the Reagan representative was asserting a claim of privilege as to 11 documents. After almost another nine months, in January 2004, the White House announced that the President would defer to that assertion of privilege; thus, under the terms of the Bush Order, the Archivist would be obliged to withhold the records. Shortly thereafter, we were informed by the Archives that the documents were indeed being withheld, and we received a formal, final notification from the Archives that it would not release the records because of the Bush Order on April 1, 2004.

Meanwhile, on March 28, 2004, the district court issued an order dismissing the case on ripeness and standing grounds. The court's holding was premised on the understanding that the release of the 68,000 pages of Reagan records that had originally been withheld in January 2001 had effectively resolved the issue, and that there was no further relief that the court could provide. The court's decision in this regard reflected its understanding that the Order was not currently being applied to delay or withhold access to any presidential or vice presidential records other than the 68,000 pages that had already been released.

We sought reconsideration of the court's order on the ground that it overlooked that the Bush Order was being applied on an ongoing basis to records at the Reagan and Bush Libraries that the plaintiffs had requested, and that it was causing, at a minimum, months of delays in access to records. In addition, we pointed out that, as of April 1, 2004 (only days after the court's ruling), the Order had been relied on by the Archives as a basis for withholding the 11 records as to which the Reagan representative had claimed privilege. The government conceded both points.

As a result, the court permitted us to amend our complaint to challenge the withholding of the 11 documents and to submit a new round of briefing. While the briefing process was in midstream, in September 2004, the White House announced that President Bush had given further consideration to the 11 documents and had determined that, as to nine of them, he would independently claim privilege (as opposed to merely deferring to the Reagan representative's claim of privilege). The White House further announced that the Reagan representative had withdrawn the claim of privilege as to the other two documents, so they would be released by the Archives. As a result, the withholding of the nine remaining documents was no longer based on the former president's unilateral claim of privilege and thus did not depend on the lawfulness of

the Bush Order's provisions requiring the Archivist to comply with a former president's privilege assertion. With respect to those particular documents, therefore, the parties submitted briefs solely on the question whether the incumbent's claim of privilege was valid. (The parties also renewed their cross-motions on the question of the validity of the Bush Order, relying on arguments that had already been presented to the court in earlier briefs.)

In September 2005, the district court issued a ruling on the nine documents, holding that President Bush's claim of privilege with respect to them was valid and required that the documents be withheld unless the plaintiffs could show a special need for access to them. The court held that the erosion of the privilege due to the passage of time, and the congressional judgment in the PRA that a 12-year period was presumptively sufficient to protect the confidentiality of presidential advice, did not eliminate the requirement (based on the Supreme Court's decision in the Nixon tapes case) that a special need similar to the grand jury's need for evidence be shown to overcome a president's claim of privilege.

At the same time, however, the court granted the plaintiffs' motion that it reconsider the March 2004 order dismissing the challenge to the validity of the Bush Order, which had been based on the factually erroneous premise that the Order was not being applied to records sought by the plaintiffs on an ongoing basis. The court ordered that the parties submit new briefs on the merits of the challenge to the Bush Order (as well as on the government's motion to dismiss on standing and ripeness grounds) to ensure that the court had up-to-date information in light of any changes in factual circumstances that had occurred since the original briefing in 2002 and the briefs that had been submitted in 2004.

The parties complied with the court's directive and submitted new briefs and updated factual information concerning the application of the Bush Order, a process that was completed

by the submission of our final reply brief in January 2006. As we explained to the court in our papers, the government had continued to apply the Bush Order to all new requests for release of records from the Reagan and Bush Presidential Libraries, resulting in months-long delays in access as requesters awaited authorization from the representatives of the former officeholders before records were released. In addition, just as the Bush Order had delayed the release of tens of thousands of pages of Reagan documents after their 12-year restriction period expired in January 2001, it was also holding up the release of tens of thousands of pages of records of former President Bush, whose 12-year restriction period under the PRA had expired on January 20, 2005. As of that date, an estimated 57,000 pages of Bush presidential records (as well as several thousand pages of Quayle vice presidential records) had been kept secret because they involved confidential communications with advisers. Although that restriction had expired, all of those thousands of pages of documents were withheld pending review under the Bush Order. By the end of October 2005, nine months after the expiration of the statutory restriction period, only about half of those documents (a little more than 30,000 pages) had been released. The remainder were still being withheld when our briefing process was completed in January 2006, a year after the PRA restrictions expired. (The remaining documents were finally released in April and August 2006, over 18 months after the PRA called for them to be available.)

That is where the litigation currently stands. The case has been fully briefed by both parties since early 2006 and could be decided at any time. Of course, the district court is not under any obligation to rule at any particular time, and whichever way it rules, an appeal will likely follow. Thus, although we remain confident that our legal arguments will ultimately prevail, the litigation does not promise to put the issue to rest in the immediate future.

7. **What Can Be Done?** Throughout the more than five years of litigation over the Bush Order, the Justice Department has persistently argued that the court should not reach the merits because, in its view, the Order has not yet harmed the plaintiffs even though the privilege reviews that it authorizes have concededly added many months to the delays in releasing presidential records. At the same time, the government has argued that the Order is a permissible exercise of the president's authority to direct the Archivist with respect to the implementation of the PRA. But one thing that the government has *not* argued is that any of the principal features of the Order to which we object—the power it gives former presidents to veto releases of their records by the Archivist, its authorization of privilege claims by representatives of deceased or incapacitated former presidents and their families, and its de facto recognition of a vice presidential privilege—is constitutionally *required* by the nature of the presidential privilege or the principles of separation of powers.

Thus, the government, throughout the litigation, has effectively conceded that legislation abrogating these features of the order would be constitutional exercise of Congress's power to regulate the disposition of presidential records (a power recognized by the Supreme Court in *Nixon v. Administrator of General Services, supra*). Similarly, nothing in the Constitution can be said to require that former presidents and their representatives be given an unlimited amount of time to review materials proposed for release by the Archives. Legislation addressing these features of the Bush Order would go a long way toward restoring the PRA to its original intent, eliminating the lengthy delays that have accompanied privilege reviews called for by the Bush Order, and preventing the threat that former presidents may arbitrarily direct the Archivist to withhold access to their materials.

The best that can be said of the Bush Order is that it has so far not been invoked by former presidents or vice presidents to direct the outright withholding of large numbers of records from the public. But that is hardly a reason not to act to override it. To begin with, the pendency of the litigation, and the government's strategy of avoiding the merits by arguing that the case is not ripe unless and until records are finally withheld based solely on a claim of privilege by a former president or vice president (or his representative), no doubt accounts for the hesitancy of former officeholders to make claims that would undermine the government's defense of the Order. Moreover, even in the absence of claims of privilege, the Order imposes huge burdens on the process of releasing documents under the PRA by saddling it with lengthy delays that frustrate the legitimate needs of the public for timely access. The small number of actual claims of privilege that have so far been made only underscores how pointless those delays have been.

Finally, that the Order has not so far led to a great number of assertions of privilege by former presidents does not mean that it will not do so in the future. The representatives of former Presidents Reagan and Bush may have been circumspect so far in claiming privilege, but that says little about what might happen if, for example, the current President Bush and Vice President Cheney, who have made clear their obsession for secrecy and control over information, were permitted to invoke the terms of the Order after they leave office. The very point of the Order is to allow former officeholders to control access to their records beyond the 12-year statutory restriction period, and there seems little doubt that if it is left in place, someone will eventually take advantage of that control.

To be sure, the issue will not arise with respect to President George W. Bush and Vice President Cheney until some years after they leave office in January 2009. By that time, the

Order may well be withdrawn by President Bush's successor if it has not been struck down by a court. But that is no reason for Congress to accept the distortions and delays that the Order is already injecting into the process of releasing presidential records under the PRA, nor should Congress be content to hope that someone else addresses a problem that it has the power to fix now. I urge Congress to exercise its authority to pass legislation abrogating Executive Order 13,233 and restoring the PRA to its intended functioning.