HEARINGS REGARDING EXECUTIVE ORDER 13233 AND THE PRESIDENTIAL RECORDS ACT

HEARINGS

BEFORE THE

SUBCOMMITTEE ON GOVERNMENT EFFICIENCY, FINANCIAL MANAGEMENT AND INTERGOVERNMENTAL RELATIONS

AND THE

COMMITTEE ON GOVERNMENT REFORM

HOUSE OF REPRESENTATIVES

ONE HUNDRED SEVENTH CONGRESS

FIRST AND SECOND SESSIONS

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CONTENTS

Page

Hearing held on:
- November 6, 2001 1
- April 11, 2002 235
- April 24, 2002 387

Text of H.R. 4187 391

Statement of:
- Carlin, John W., Archivist of the United States, accompanied by Lewis J. Bellardo, Deputy Archivist 8
- Dallak, Robert, author of "Lone Star Rising: Lyndon Johnson and His Times, 1908–1960," "Franklin D. Roosevelt and American Foreign Policy, 1932–1945," "Hail to the Chief: the Making and Unmaking of American Presidents" 269
- Hoff, Joan, director, Contemporary History Institute, Ohio University, former president, Organization of American Historians, former editor, Presidential Studies Quarterly, author of "Nixon Reconsidered: the Nixon Presidency" 275
- Gaziano, Todd, director, Center for Judicial and Legal Studies, the Heritage Foundation 471
- Kutler, Stanley, professor, University of Wisconsin Law School 255
- Nelson, Anna, professor, American University 30
- Nelson, Scott L., attorney, Public Citizen Litigation Group 78
- Reeves, Richard, author of "President Nixon: Alone in the White House" and "President Kennedy: Profile in Power" 266
- Rosenberg, Morton, specialist in American public law, American Law Division, Congressional Research Service 440
- Rozell, Mark J., professor, Catholic University of America 37, 462
- Shane, Peter M., professor, University of Pittsburgh and Carnegie Mellon University 63
- Turley, Jonathan R., professor of law, George Washington University Law School 400
- Whelan, M. Edward, III, Acting Assistant Attorney General, Office of Legal Counsel, Department of Justice 20

Letters, statements, etc., submitted for the record by:
- Burton, Hon. Dan, a Representative in Congress from the State of Indiana, prepared statement of 487
- Carlin, John W., Archivist of the United States, accompanied by Lewis J. Bellardo, Deputy Archivist, prepared statement of 11
- Cummings, Hon. Elijah E., a Representative in Congress from the State of Maryland, prepared statement of 362
- Dallak, Robert, author of "Lone Star Rising: Lyndon Johnson and His Times, 1908–1960," "Franklin D. Roosevelt and American Foreign Policy, 1932–1945," "Hail to the Chief: the Making and Unmaking of American Presidents", prepared statement of 271
- Hoff, Joan, director, Contemporary History Institute at Ohio University, former president, Organization of American Historians, former editor, Presidential Studies Quarterly, author of "Nixon Reconsidered: the Nixon Presidency", prepared statement of 278
- Gaziano, Todd, director, Center for Judicial and Legal Studies, the Heritage Foundation, prepared statement of 476
- Gilman, Hon. Benjamin A., a Representative in Congress from the State of New York, prepared statement of 352
- Horn, Hon. Stephen, a Representative in Congress from the State of California:
  - Nixon court case 288

Page

Letters, statements, etc., submitted for the record by—Continued
Horn, Hon. Stephen, a Representative in Congress from the State of California—Continued
Prepared statements of 3, 237, 389
Kutler, Stanley, professor, University of Wisconsin Law School, prepared statement of 257
Maloney, Hon. Carolyn B., a Representative in Congress from the State of New York:
Editorials 243
Prepared statement of 248
Morella, Hon. Constance A., a Representative in Congress from the State of Maryland, prepared statement of 360
Nelson, Anna, professor, American University, prepared statement of 32
Nelson, Scott L., attorney, Public Citizen Litigation Group, prepared statement of 80
Ose, Hon. Doug, a Representative in Congress from the State of California, prepared statements of 7, 399
Rosenberg, Morton, specialist in American public law, American Law Division, Congressional Research Service, prepared statement of 444
Rozell, Mark J., professor, Catholic University of America, prepared statements of 40, 465
Schakowsky, Hon. Janice D., a Representative in Congress from the State of Illinois, prepared statement of 438
Shane, Peter M., professor, University of Pittsburgh and Carnegie Mellon University, prepared statement of 65
Turley, Jonathan R., professor of law, George Washington University Law School, prepared statement of 404
Waxman, Hon. Henry A., a Representative in Congress from the State of California, prepared statements of 240, 397
Whelan, M. Edward, III, Acting Assistant Attorney General, Office of Legal Counsel, Department of Justice, prepared statement of 22

THE IMPLEMENTATION OF THE PRESIDENTIAL RECORDS ACT OF 1978

TUESDAY, NOVEMBER 6, 2001

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON GOVERNMENT EFFICIENCY, FINANCIAL MANAGEMENT AND INTERGOVERNMENTAL RELATIONS,
COMMITTEE ON GOVERNMENT REFORM,
Washington, DC.

The subcommittee met, pursuant to notice, at 2 p.m., in room 2154, Rayburn House Office Building, Hon. Stephen Horn (chairman of the subcommittee) presiding.

Present: Representatives Horn and Ose.

Staff present: J. Russell George, staff director and chief counsel; Henry Wray, senior counsel; Earl Pierce and Darin Chidsey, professional staff members; Bonnie Heald, deputy staff director; Jim Holmes, intern; Dan Wray, clerk, Census Subcommittee; David McMillen, minority professional staff member; and Jean Gosa, minority clerk.

Mr. HORN. A quorum being present, the Subcommittee on Government Efficiency, Financial Management and Intergovernmental Relations will come to order. We are going to swear in all of the witnesses at this point and the assistants to the witnesses. Please have them stand up. The clerk will put their names in the record. So if you would stand up, raise your right hands.

[Witnesses sworn.]

Mr. HORN. All right. The clerk will note all of the witnesses and their assistants affirm the oath.

As James Madison, the Father of the Constitution appropriately said, "A popular Government without popular information or the means of acquiring it, is but a Prologue to a Farce or a Tragedy or perhaps both. Knowledge will forever govern ignorance, and a people who mean to be their own Governors must arm themselves with the power knowledge gives."

Today's hearing involves the public's right to acquire certain government information. We are here to examine implementation of the Presidential Records Act of 1978. This landmark law established the principle that the records of a President relating to his official duties belong to the American people. The act gives the Archivist of the United States custody of those records after the President leaves office. The act also assigns the Archivist, "an affirmative duty to make such records available to the public as rapidly and completely as possible consistent with the provisions of this act."

At the same time, the act recognizes the need to place some limits on public access. It permits former Presidents to restrict certain records from disclosure for up to 12 years after leaving office. It also allows most of the public disclosure exemptions contained in the Freedom of Information Act to apply to Presidential records. Those exemptions protect records involving national defense, state secrets and other sensitive matters. However, the act did not allow records to be withheld beyond 12 years simply because they contained internal staff advice or deliberation among government officials.

The records of former President Reagan were the first to become subject to the act. The 12-year restriction on the Reagan records expired in January of this year. Therefore, in February, the Archivist of the United States gave former President Reagan and incumbent President George W. Bush notice of his intent to grant public access to thousands of pages of the Reagan records. However, the release of those records has been delayed while the current administration developed new procedures to handle possible claims of "executive privilege" that might be made by former President Reagan or his representative, or by President Bush or his representative.

Last Thursday, President Bush signed a new Executive order establishing the procedures. The new Executive order revoked an order on the same subject issued by President Reagan shortly before he left office. The Reagan order had established a fairly straightforward and expedient process for asserting and reviewing claims of "executive privilege." The new order appears to create a more elaborate process. It also gives both the former and incumbent Presidents veto power over the release of the records.

I appreciate the need to preserve whatever constitutional privileges may still be appropriate for a former President's records after many years. However, I am concerned that the new procedures may create additional delays and barriers to releasing the Reagan records. The public release of these records is already 9 months beyond the release date envisioned by the Presidential Records Act and there is no clear end in sight. Today's hearing will examine these issues. I welcome all of our witnesses and I look forward to their testimony.

[The prepared statement of Hon. Stephen Horn follows:]

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Opening Statement
Rep. Stephen Horn, R-CA
Subcommittee on Government Efficiency,
Financial Management and Intergovernmental Relations
November 5, 2001

A quorum being present, the Subcommittee on Government Efficiency, Financial Management and Intergovernmental Relations will come to order. As James Madison, the Father of the Constitution, appropriately said:

> *"A popular Government without popular information or the means of acquiring it, is but a Prologue to a Farce or a Tragedy or perhaps both. Knowledge will forever govern ignorance, and a people who mean to be their own Governors, must arm themselves with the power knowledge gives."*

Today's hearing involves the public's right to acquire certain government information. We are here to examine implementation of the Presidential Records Act of 1978. This landmark law established the principle that the records of a president relating to his official duties belong to the American people. The act gives the archivist of the United States custody of those records after the president leaves office. The act also assigns the archivist "an affirmative duty to make such records available to the public as rapidly and completely as possible consistent with the provisions of this act."

At the same time, the act recognizes the need to place some limits on public access. It permits former presidents to restrict certain records from disclosure for up to 12 years after leaving office. It also allows most of the public disclosure exemptions contained in the Freedom of Information Act to apply to presidential records. Those exemptions protect records involving national defense, state secrets, and other sensitive matters. However, the act did not allow records to be withheld beyond 12 years simply because they contained internal staff advice or deliberations among government officials.

The records of former President Reagan were the first to become subject to the act. The 12-year restriction on the Reagan records expired in January of this year. Therefore, in February, the archivist gave former President Reagan and incumbent President George W. Bush notice of his intent to grant public access to thousands of pages of the Reagan records. However, the release of those records has been delayed while the current administration developed new procedures to handle possible claims of "executive privilege" that might be made by former President Reagan or by President Bush.

Last Thursday, President Bush signed a new executive order establishing the procedures. The new executive order revoked an order on the same subject issued by President Reagan shortly before he left office. The Reagan order had established a fairly straightforward and expedient process for asserting and reviewing claims of executive privilege. The new order appears to create a more elaborate process. It also gives both the former and incumbent presidents veto power over the release of the records.

I appreciate the need to preserve whatever constitutional privileges may still be appropriate for a former president's records after many years. However, I am concerned that the new procedures may create additional delays and barriers to releasing the Reagan records. The public release of these records is already nine months beyond the release date envisioned by the Presidential Records Act. And there is no clear end in sight. Today's hearing will examine these issues.

I welcome all of our witnesses, and I look forward to their testimony.

Mr. HORN. Mr. Ose has a short statement. We are delighted to have him here.

Mr. OSE. Thank you, Mr. Chairman. Unaccustomed as I am to making these statements, I frankly flew back today because of the importance of this hearing, and I appreciate you convening us here today.

Last February, after press accounts of President Clinton's last financial disclosure report and some furniture gifts which were ultimately returned to the White House residence, the Subcommittee on Energy Policy, Natural Resources and Regulatory Affairs, which I chair, began an investigation of Presidential gifts pursuant to legislation I am preparing. Among other records, the subcommittee sought to examine the White House Gifts Unit's database and related records for the Clinton administration. As a consequence, I have direct, firsthand experience with such requests under the Presidential Records Act of 1978 for Presidential records relevant to a congressional investigation.

President Reagan's 1989 Executive order expanded on the implementing regulations issued by the National Archives and Records Administration. NARA's regulations were authorized by Section 2206 of the act. The order, that is, the Executive order of 1989, clarified some areas not specifically addressed in NARA's regulations. Most importantly, the order identified only three areas where access to Presidential records could be limited: If disclosure might impair national security, law enforcement, or the deliberative processes of the executive branch. I asked President Clinton's representative which of these privileges, if any, could be asserted to deny my request for access to specific records. In the end, President Clinton's representative claimed no privileges for any of the requested records. And, as a result, NARA provided the subcommittee with unfettered access to the requested records and we are appreciative of President Clinton's cooperation on that.

President Bush's new Executive order, issued last Thursday, changed these access limitations. In a nutshell, law enforcement was dropped, so we went from three to two, and two areas were added, so it went from two to four: those two areas being communications of the President or his advisors—that is, the Presidential communications privileges—and legal advice or legal work, meaning the attorney/client or attorney/work product privilege.

I am deeply concerned about the two new broad limitations in the order. Both of them, especially the Presidential communications privilege, could severely limit congressional access to key documents in its investigations of any former administration.

In today's hearing I plan to question the Bush administration's witnesses about the legal and substantive justification for this restrictive policy change. The bottom line is that the new order appears to violate not only the spirit but also the letter of the Presidential Records Act. In 1978, Congress very clearly expressed its intent to make Presidential records available for congressional investigations and then for the public after a 12-year period. This

new order undercuts the public's right to be fully informed about how this government, the people's government, operated in the past.

Thank you, Mr. Chairman.

Mr. HORN. Thank you.

[The prepared statement of Hon. Doug Ose follows:]

Representative Doug Ose
Opening Statement
Opening a New Door to History: The Presidential Records Act Takes Effect
November 6, 2001

Last February, after press accounts of President Clinton's last financial disclosure report and some furniture gifts which were ultimately returned by the Clintons to the White House residence, the Subcommittee on Energy Policy, Natural Resources and Regulatory Affairs, which I chair, began an investigation of Presidential gifts. Among other records, the Subcommittee sought to examine the White House Gifts Unit's database and related records for the Clinton Administration. As a consequence, I have first-hand experience with requests, under the Presidential Records Act of 1978, for Presidential records relevant to a Congressional investigation.

President Reagan's 1989 Executive Order (E.O. 12267) expanded on the implementing regulations issued by National Archives and Records Administration (NARA). NARA's regulations were authorized by Section 2206 of the Act. The Order clarified some areas not specifically addressed in NARA's regulations. Most importantly, the Order identified only three areas where access to Presidential records could be limited -- if disclosure might impair national security, law enforcement, or the deliberative processes of the executive branch. I asked President Clinton's representative which of these three privileges, if any, could be asserted to deny my request for access to specific records. In the end, President Clinton's representative claimed no privileges for any of the requested records. As a result, NARA provided the Subcommittee with unfettered access to the requested records.

President Bush's new Executive Order (E.O. 13223), issued last Thursday, changed these access limitations. In a nutshell, law enforcement is dropped and two areas are added: "communications of the President or his advisors (the presidential communications privilege); [and] legal advice or legal work (the attorney-client or attorney work product privileges)." I am deeply concerned about the two new, broad limitations in the Order. Both - especially the Presidential communications privilege - could severely limit Congressional access to key documents in its investigations of a former Administration.

In today's hearing, I plan to question the Bush Administration's witnesses about the legal and substantive justification for this restrictive policy change. The bottom line is that the new Order appears to violate not only the spirit but also the letter of the Presidential Records Act. In 1978, Congress expressed its clear intent to make Presidential records available for Congressional investigations and then for the public after a 12-year period. This new Order undercuts the public's rights to be fully informed about how its government operated in the past.

Mr. HORN. And we will now start with the witnesses in the order they are on the agenda. The first witness is the Honorable John W. Carlin, the Archivist of the United States. He is accompanied by Mr. Bellardo, who is the Deputy Archivist of the United States. Glad to have you here.

STATEMENT OF JOHN W. CARLIN, ARCHIVIST OF THE UNITED STATES, ACCOMPANIED BY LEWIS J. BELLARDO, DEPUTY ARCHIVIST

Mr. CARLIN. Chairman Horn, Mr. Ose, subcommittee staff.

Mr. OSE. You have got to turn it on.

Mr. CARLIN. Thank you. But you did hear that I acknowledged your presence, Mr. Ose, so I will not repeat that. Thank you.

I am John Carlin, Archivist of the United States. I thank you for the opportunity to appear before you this morning. As you know, we were scheduled at 10 o'clock—I did not catch the redraft there—this afternoon to speak about the implementation of the Presidential Records Act.

Mr. Chairman, I particularly want to thank you for holding this hearing and for your continued interest in the programs and responsibilities of the National Archives and Records Administration. We are fully aware that with the jurisdiction of this subcommittee, attention to NARA is your job. However, you have taken a particular interest in our mission during your career in Congress, and the people of NARA along with our many constituent's groups thank you for that interest.

In order to set the foundation for this dialog today, I would like to lay out a brief history of the Presidential Records Act and provide the subcommittee with an overview of our implementation to date. The Presidential Records Act [PRA], was enacted, as we have heard here already today, in 1978 to establish public ownership of the records created by subsequent Presidents and their staffs and to establish procedures governing the preservation and public availability of these records.

The PRA mandates that the Presidential records of an administration be transferred to the legal and physical custody of the National Archives and Records Administration immediately upon the end of the President's last term of office. The Archivist of the United States is given the responsibility for the custody, control, preservation and access to these Presidential records. The PRA also requires the Archivist to appointment a Library Director "in consultation with the former President."

Since the enactment of the PRA, NARA has taken legal custody of the Presidential records of Presidents Ronald Reagan, George Herbert Walker Bush, and William Jefferson Clinton.

The PRA applies to all Vice Presidential records in the same manner as Presidential records, and affords the former Vice Presidents the same authority as the former Presidents. Accordingly, all of the procedures and authorities that I will discuss in reference to the former Presidents also apply to the former Vice Presidents, except that Vice Presidential records may be stored in a separate location from the Presidential records.

Overall, the PRA represents an effort to legislate a careful balance between the public's right to know with its vast implications

to historians, other academic interests, and the rights of privacy and confidentiality of certain sensitive records generated by the President and his staff during the course of their White House activities. The PRA mandates that the Archivist shall have an affirmative duty to make such records available to the public as rapidly and completely as possible consistent with the provision of this act.

Presidential records are not subject to public access requests during the President's term of office, and may be made available only by decision of the incumbent President. After the President leaves office, the records are generally not available to the public for 5 years. This 5-year period was intended principally to give NARA an opportunity to organize the records and begin systematic archival processing.

At the end of the 5-year period, all Presidential records are subject to public access requests in accordance with FOIA. However, for a period up to 12 years from when the President leaves office, the President is authorized, but not required, to impose up to six Presidential restrictions on the records. These restrictions must be imposed before the President leaves office and are not subject to judicial review. In addition, the PRA establishes that eight of the nine FOIA exemptions shall also apply to the Presidential records and stay in effect after the Presidential restrictions expire.

Furthermore, four of the six Presidential restrictions are identical to corresponding FOIA exemptions. They are: exemptions for classified national security information; exemptions for information protected by other statute; exemptions for trade secrets and confidential business information; and exemptions for unwarranted invasions of personal privacy.

The Presidential exemption concerning confidential communications between the President and his advisors or between such advisors themselves, is similar to the FOIA exemption and protects the disclosure of Presidential communications, deliberations, and other information that could be subject to a common law or constitutionally based privilege.

However, after the 12-year period, the FOIA exemption does not apply to Presidential records. The PRA itself notes that Presidents have clear legal authority to assert executive privilege over the Presidential records of former Presidents. Specifically, the PRA does not prevent a former or incumbent President from arguing, even after the 12-year period, that a particular confidential communication between the President and an advisor should not be released.

With the exception of the materials of former President Richard Nixon, the Presidential papers and materials created prior to the PRA and maintained under NARA's control at the Presidential libraries of former Presidents Hoover, Roosevelt, Truman, Eisenhower, Kennedy, Johnson, Ford and Carter, are controlled by the terms of the deeds of gift under which the former Presidents donated their records to the National Archives.

The records of President Nixon are governed by the Presidential Recordings and Materials Preservation Act, passed by the Congress in 1974 to ensure government control over the Nixon papers and tapes.

Each of the Presidential deeds has provisions outlining categories of records that may be withheld from public access for some period of time. All of them seek to protect information that could harm national security, invade personal privacy, or cause embarrassment or harassment to an individual. Some also seek to protect documents involving confidential communications directly with the President.

The deeds of Presidents Ford and Carter model the restrictions of the PRA exemptions. In all instances, the director of the Presidential library was given the independent authority and discretion to process and open the papers, with very limited involvement by the former President or his representative.

Because the materials at these libraries were donated to the United States, they are not subject to requests under the Freedom of Information Act or any other public access statute. This means that the libraries' staffs are able to process and open most records in an organized and systematic way based on archival considerations.

However, researchers have no judicial recourse to challenge the withholding of records or delays in responding to requests. In contrast, because the PRA subjects all Presidential records beginning with the Reagan administration to public access through the Freedom of Information Act, Presidential libraries now open records almost exclusively in response to FOIA requests or mandatory declassification review requests. Therefore, there is very little opportunity to conduct systematic processing of records after the first 5 years. Moreover, congressional and grand jury investigations and other litigation has significantly limited systematic processing even during the first 5 years.

As you know, last Thursday the President signed a new Executive Order 13233 on the Presidential Records Act. We are now beginning the process of understanding how this Executive order will work in practice. I intend to work with the former and incumbent Presidents to implement this order in a manner consistent with my statutory responsibility to make Presidential records available to the public as rapidly and completely as possible.

That concludes my formal statement, Mr. Chairman, and at the appropriate time I would be happy to answer questions.

Mr. HORN. Thank you very much.

[The prepared statement of Mr. Carlin follows:]

STATEMENT
by John W. Carlin
Archivist of the United States

to the
Subcommittee on Government Efficiency, Financial Management,
and Intergovernmental Relations
of the Committee on Government Reform
House of Representatives
Congress of the United States

On the Implementation and Effectiveness of the Presidential Records Act of 1978

November 6, 2001

Chairman Horn, Congresswoman Schakowsky, members of the Subcommittee, and Subcommittee staff, I am John Carlin, Archivist of the United States, and I thank you for the opportunity to appear before you this morning on the implementation of the Presidential Records Act. Mr. Chairman, I particularly want to thank you for holding this hearing and for your continued interest in the programs and responsibilities of the National Archives and Records Administration. We are fully aware that with the jurisdiction of this subcommittee, attention to NARA is your job. However, you have taken a particular interest in our mission during your career in Congress and the people of NARA and our many constituent groups thank you for that interest.

In order to set the foundation for this dialogue today, I would like to set out the history of the Presidential Records Act and provide the Subcommittee with an overview of our implementation to date. The Presidential Records Act (PRA) was enacted in 1978 to establish public ownership of the records created by subsequent Presidents and their staffs and to establish procedures

governing the preservation and public availability of the records. As noted in the House Report accompanying the pending bill:

> The legislation would terminate the tradition of private ownership of Presidential papers and the reliance on volunteerism to determine the fate of their disposition. Instead, the preservation of the historical record of future Presidents would be assured and public access to the materials would be consistent under standards affixed in law. The primary function of the Presidential libraries remains unchanged. The libraries are to continue to provide information about their holdings and to make records available to researchers upon request on an impartial basis.

H. Rep. 95-1487, at 2-3 (95th Cong., 2d Sess., Aug. 14, 1978).

The PRA mandates that the Presidential records of an Administration be transferred to the legal and physical custody of the National Archives and Records Administration (NARA) immediately upon the end of the President's last term of office. The Archivist of the United States is given the "responsibility for the custody, control, and preservation of, and access to, the Presidential records of th[e former] President." 44 U.S.C. § 2203(f)(1). The PRA also requires the Archivist to appoint a Library Director in "consultation with the former President." *Id.* § 2203(f)(2). The Library Director balances archival and public access considerations with national security, confidentiality, and privacy concerns.

Since its enactment, NARA has taken legal custody of the Presidential records of Presidents Ronald Reagan, George H.W. Bush, and William J. Clinton. The Reagan and Bush records are housed in Presidential Libraries in Simi Valley, California and College Station, Texas, respectively. The Clinton records are stored in a records storage facility in Little Rock, Arkansas, until they can be transferred to a Presidential Library that is being constructed by former President Clinton.

The PRA applies to all Vice-Presidential records in same manner as Presidential records, and affords the former Vice-Presidents the same authority as the former Presidents. Accordingly, all of the procedures and authorities that are ascribed in this testimony to the former Presidents also apply to the former Vice-Presidents (except that Vice-Presidential records may be stored at a separate location from the Presidential records).

Responsibilities of the Archivist of the United States Under the PRA

The PRA established Government control over Presidential records while codifying and preserving some of the basic practices that long existed with respect to the papers that Presidents had donated to the National Archives (dating back to President Hoover). As the House Report on the PRA bill stated: "It is anticipated that the Archivist will process the former Administration's papers in a manner roughly similar to current practices." H. Rep. 95-1487, at 15. The report also stated that "the determination whether access to a Presidential record or reasonably segregable portion thereof shall be restricted shall be made by the Archivist, in his discretion, after consultation with the former President." *Id.* § 2204(b)(3).

The PRA mandates that "[t]he Archivist shall have an affirmative duty to make such records available to the public as rapidly and completely as possible consistent with the provisions of this Act." *Id.* § 2203(f)(1). Overall, the PRA represents an effort to legislate a "careful balance between the public's right to know, with its vast implications to historians and other academic interests, and the rights of privacy and confidentiality of certain sensitive records generated by

the President and his staff during the course of their White House activities." Floor Statement of Congressman Thompson, *Cong. Rec.*, Oct. 10, 1978, at 34897.

Presidential Papers and Materials Prior to the PRA

Prior to the PRA, and with the exception of the materials of former President Richard M. Nixon, the Presidential papers and materials maintained under NARA's control at the Presidential Libraries of former Presidents Hoover, Roosevelt, Truman, Eisenhower, Kennedy, Johnson, Ford, and Carter are controlled by the terms of the deeds of gift by which the former Presidents donated their records to the National Archives. Each of these deeds has provisions outlining categories of records that may be withheld from public access for some period of time. All of them seek to protect information that could harm national security, invade personal privacy, or cause embarrassment or harassment. Some also seek to protect documents involving confidential communications directly with the President. The deeds of Presidents Ford and Carter model the restrictions on the PRA exemptions.

In all instances, the Director of the Presidential Library, who is appointed by NARA in close consultation with the former President or representative, was given the independent authority and discretion to process and open the papers, with very limited involvement by the former President or representative. Living former Presidents in some cases would establish priorities for the processing of particular subjects or series of records. In other cases, a representative or review board was established – such as for Presidents Roosevelt and Kennedy because they died in office, as well as for Truman and Eisenhower – that exercised limited control over the decisions

made by the Libraries. The boards' principal concern was with respect to the President's personal and family matters, and, in most cases, they disbanded after a short period of time.

Under these deeds of gift, NARA processed and opened Presidential materials based on the deeds and professional archival considerations. Moreover, because the materials at these Libraries were donated to the United States, they are not subject to request under the Freedom of Information Act (FOIA) or any other public access statute. This meant that the Library staff were able to process and open most records in an organized and systematic way based on how the records were filed or arranged. Such "systematic processing" is generally much more efficient and less time consuming than processing in response to FOIA requests. However, researchers have no legal recourse to challenge the withholding of records or delays in responding to requests.

The records of President Nixon are governed by the Presidential Recordings and Materials Preservation Act (PRMPA), 44 U.S.C. § 2111, note, which was passed by Congress in 1974 to ensure government control over the Nixon papers and tapes. The PRMPA also established a National Study Commission on Records and Documents of Federal Officials, which was charged with studying, among other things, "whether the historical practice regarding the records and documents produced by or on behalf of Presidents of the United States should be rejected or accepted and whether such practice should be made applicable with respect to all federal officials." Pub. L. 93-526, 88 Stat. 1695 (December 19, 1974), sec. 202. That commission produced a final report in 1977, and its recommendations were considered by Congress in drafting the PRA. *See* Hearings before a Subcommittee of the Committee on Government

Operations on H.R. 10998 (the Presidential Records Act of 1978) and Related Bills, 95th Cong., 2d Sess., (Feb. 23, 28, Mar. 2, 7, 1978) (PRA Hearings).

Public Access to Presidential Records

Presidential records are not subject to public access requests during the President's term of office, and may be made available only by decision of the incumbent President. After the President leaves office, the records are also not available to public access requests for five years, unless NARA has processed an integral file segment sooner than five years. This five year period was intended principally to give NARA an opportunity to organize the records and begin systematic archival processing. At the end of the five year period, all Presidential records are subject to public access requests in accordance with the FOIA. However, for a period not to exceed 12 years from when the President leaves office, the President is authorized, but not required, to impose up to six Presidential restrictions (which must be imposed before the President leaves office and which are not subject to judicial review).

In addition, the PRA establishes that eight of the nine FOIA exemptions shall apply to Presidential records, which stay in effect after the Presidential restrictions expire. Congress specifically excluded Presidential records from the FOIA (b)(5) exemption concerning the deliberative process and other recognized privileges. Four of the six presidential restrictions are identical to corresponding FOIA exemptions: exemptions 1, for classified national security information; exemptions 3, for information protected by other statute; exemptions 4, for trade secrets and confidential business information; and exemptions 6, for unwarranted invasions of personal privacy. Presidential exemption 2 ("P2"), for "appointments to Federal office," has no

FOIA counterpart, but is subsumed, in large part, under FOIA exemption (b)(6). Presidential exemption 5 ("P5"), concerning "confidential communications requesting or submitting advice, between the President and his advisers, or between such advisers," is similar to FOIA exemption (b)(5), and protects the disclosure of presidential communications, deliberations, and other information that could be subject to a common law or constitutionally-based privilege.

Because the PRA subjects all Presidential records to public access through the FOIA, PRA Libraries open records almost exclusively in response to FOIA requests (or mandatory declassification review requests under Executive Order 12958 on Classified National Security Information), and have very little opportunity to conduct systematic processing of records after the first five years. Moreover, Congressional and grand jury investigations and other litigation has significantly limited systematic processing even during the first five years.

PRA Restrictions

The PRA does not mandate the Presidential restrictions, but rather makes clear that they may be narrowed or waived any time after the President leaves office. Moreover, in the legislative history, Congress anticipated that the Archivist to do just that:

> It is also expected that the Archivist will follow past practice in applying the restrictive categories in former Presidents' deeds of gift, and negotiate with the ex-President or his representative on an on-going basis to lessen the number of years chosen for particular mandatory restriction categories, to eliminate entire categories, or to permit release of particular records otherwise restricted.

H. Rep. 95-1487, at 15. Former Presidents Reagan and Bush have both narrowed the application of PRA exemptions P2 and P5 to their records, allowing significantly more records to be opened

than what might otherwise be authorized. NARA will work with former President Clinton and his representative regarding the application of these exemptions as well.

The PRA also removes the authority to withhold Presidential records under FOIA exemption (b)(5) after the expiration of the P5 exemption. The elimination of a statutory exemption in no way prevents a proper assertion of Executive privilege by the former or incumbent President. As the PRA itself notes, the incumbent and former Presidents have clear legal authority to assert an Executive privilege over the Presidential records of former Presidents: "Nothing in this Act shall be construed to confirm, limit, or expand any constitutionally-based privilege which may be available to an incumbent or former President." 44 U.S.C. § 2204(c)(2). This provision reflects the holding by the Supreme Court that the constitutionally based privileges available to a President "survive[] the individual President's tenure." *Nixon v. Administrator of General Services*, 433 U.S. 425, 449 (1977). Although the Supreme Court also noted the privileges are "subject to erosion over time after an administration leaves office." *Id.* at 451.

Special Access to Presidential Records

In addition to establishing procedures for public access, the PRA also establishes procedures for what NARA calls "special access" to Presidential records that are otherwise closed from public access. These special access provisions are designed to accommodate requests by Congressional investigators, Federal prosecutors, other parties in litigation, and the incumbent President for the ongoing business of the current Administration. However, prior to providing such access, NARA must notify the former and incumbent Presidents and provide them an opportunity to review the records and consider whether to assert any constitutionally-based privilege. Accordingly, either House of Congress, or a Committee or Subcommittee with appropriate

jurisdiction, may request access to Presidential records. Similarly, Federal prosecutors may seek access through a grand jury subpoena, and other parties in litigation may seek access through court orders. The incumbent President may also obtain access to the records of a predecessor on behalf of his staff, such as the NSC, or any other agency, "for the conduct of current business." 44 U.S.C. § 2205(2)(B). The former President and his designated representative are always entitled to access to the Presidential records of his Administration.

That concludes my formal statement, Mr. Chairman, and I would be happy to answer any questions at the appropriate time.

Mr. HORN. We will now get to the representative of the Department of Justice, Mr. Edward Whelan III, Acting Assistant Attorney General, Office of Legal Counsel.

Glad to have you with us, Mr. Whelan.

STATEMENT OF M. EDWARD WHELAN III, ACTING ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGAL COUNSEL, DEPARTMENT OF JUSTICE

Mr. WHELAN. Thank you, Mr. Chairman. Mr. Chairman, Congressman Ose, thank you very much for affording me the opportunity to speak on behalf of the administration before this subcommittee on this important topic.

As was discussed, last week President Bush signed an Executive order that implements the Presidential Records Act. Specifically, the Executive order implements section 2204(c) of that act. That section provides that the act shall not be, "construed to confirm, limit or expand any constitutionally based privilege which may be available to an incumbent or former President."

In enacting the act, Congress thus expressly recognized that both the incumbent President and former Presidents might invoke constitutionally based privileges to prevent the disclosure of Presidential records that might otherwise be disclosed pursuant to other provisions of the act, including after the expiration of the 12-year period of presumptive nondisclosure under the act.

As Senator Percy explained at the time the act was enacted, if a President believed that the 12-year closure period does not suffice "that President could object to release of some document in the 13th or 15th or 20th year."

Congress' recognition that former Presidents as well as an incumbent President might assert constitutionally based privileges is consistent with and indeed compelled by Supreme Court case law. In the 1977 case of *Nixon* v. *Administrator of General Services,* the Supreme Court in an opinion by Justice Brennan embraced the view that unless the President can give his advisors some assurance of confidentiality "a President cannot expect to receive the full and frank submissions of facts and opinions upon which effective discharge of his duties depends." In order to provide this necessary assurance of confidentiality, the Court ruled that the President's constitutionally based privileges for confidential communications must survive the individual President's tenure. The court further held that a former President, although no longer a government official, is entitled to assert constitutionally based privileges with respect to his administration's Presidential records, and it expressly rejected the argument that only an incumbent President can assert the privilege of the Presidency.

This Supreme Court ruling, together with Congress's express accommodation of that ruling in section 2204(c) of the Presidential Records Act entail a need for procedures to govern review of any records to which such privileges may apply. President Bush's Executive order establishes clear, sensible and workable procedures that will govern the decisions by former Presidents and the incumbent President whether to withhold or release privileged documents.

Consistent with the Supreme Court's decision in *Nixon* v. *Administrator of General Services,* and with sound policy, President Bush's Executive order confers on former Presidents the primary responsibility for asserting privileges with respect to their Presidential records. Indeed, by providing that the incumbent President will, absent compelling circumstances, concur in the former President's decision whether or not to invoke a privilege, President Bush's Executive order grants the incumbent President less authority over the records of a former President than the incumbent President had under the previous 1989 Executive order implementing the act.

Let me emphasize, moreover, that the Executive order is wholly procedural in nature. By its express terms, it does not and is not intended to indicate whether and under what circumstances a former President should assert or waive any privilege, nor does it in any respect purport to redefine the substantive scope of any constitutional privilege.

Before the Presidential Records Act took effect, former Presidents generally released the vast majority of their Presidential records even though they were under no legal obligation to do so. The administration anticipates that this historical practice will continue. Indeed, because the act and the Executive order give former Presidents less power to withhold records than they had before the act was enacted, there is no reason to anticipate that former Presidents will exercise their constitutional privileges in a way that leads to greater withholding of records.

I hope that this information is helpful, and I would be pleased to answer any questions you may have about this matter.

Mr. HORN. Thank you. We will have questioning after the presenters have all presented.

[The prepared statement of Mr. Whelan follows:]

STATEMENT BEFORE
THE SUBCOMMITTEE ON GOVERNMENT EFFICIENCY
OF THE HOUSE COMMITTEE ON GOVERNMENT REFORM
ON EXECUTIVE ORDER NO. 13,233 "FURTHER IMPLEMENTATION
OF THE PRESIDENTIAL RECORDS ACT"
November 6, 2001

Mr. Chairman and Distinguished Members:

I am honored by your invitation to speak to you today about Executive Order No. 13,233, "Further Implementation of the Presidential Records Act," issued by President Bush on November 1, 2001. My views of the legal issues raised by the Order are informed, no doubt, by my three years as a Justice Department and OMB lawyer from 1978-1981, but are shaped even more by my nearly 20 years as a teacher and researcher in the field of separation of powers law. My opinion is that the impact of Executive Order No. 13,233 is very hard to predict from its terms. It does not seek to change executive privilege law, as much as to fill gaps necessarily posed by the Presidential Records Act (PRA), 44 U.S.C. §§ 2201-2207. How it is implemented, however, could have a significant impact on the pace by which records of former Presidents are disclosed.

In order to understand Executive Order No. 13,233, it is necessary to understand the basic structure of the PRA. In essence, the Act gives the Archivist custody of a former President's

records upon the conclusion of the President's term of office, and requires the Archivist, within specific procedural guidelines, to make presidential records "available to the public as rapidly and completely as possible." 44 U.S.C. §2203(f)(1). The key procedural guidelines are two-fold. First, a President is entitled to restrict access for up to 12 years to any of his records that fall within six specified categories. These do not include the full scope of the executive's so-called deliberative privilege, but do include records relating to appointments to federal office, records consisting of confidential communications requesting or submitting advice between the President and his advisers, or between such advisers,"and certain other files, "the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 44 U.S.C. §2204(a). Second, at such time as a record becomes available for disclosure – either because no President has restricted access or because the time for restricted access has expired – the Archivist is to handle requests to view such records as FOIA requests, except that FOIA's exemption 5, the so-called deliberative privilege exemption, is not available as a ground for withholding a record. 44 U.S.C. §2204(c).

This structure, while thoughtful in its conception, leaves certain important questions unanswered. Those questions exist in part because, in providing for a staged release of records from past Presidents, the Act is also explicit in leaving untouched "any constitutionally-based privilege which may be available to an incumbent or former President." 44 U.S.C. §2204(c)(2). It provides for consultation between the archivist and a former President before the release of any presidential record that the former President had designated for up to twelve years of restricted access. 44 U.S.C. §2204(b)(3). It requires the Archivist to promulgate rules governing notice to a former President "when the disclosure of particular documents may adversely affect any

rights and privileges which the former President may have." 44 U.S.C. §2206(3). It also envisions judicial review to protect presidential privilege, vesting jurisdiction in the U.S. District Court for the District of Columbia "over any action initiated by [a] former President asserting that a determination made by the Archivist violates the former President's rights or privileges." 44 U.S.C. §2204(d). In short, in enacting the PRA, Congress envisioned a balancing act -- an orderly process for making presidential records "available to the public as rapidly and completely as possible," 44 U.S.C. §2203(f)(1), while preserving opportunities for former Presidents, at least, to assert constitutionally based privileges as grounds for withholding documents from mandatory disclosure.

It is in implementing that balance that the PRA leaves two obvious procedural issues unaddressed. First, it provides no administrative procedures for handling disagreements between the Archivist and either a former or sitting President with regard to a document's release. Second, it provides no process to permit incumbent Presidents to consider whether privilege ought be asserted to prevent the mandatory withholding of a predecessor's records.

Regulations issued by the Archivist of the United States have since addressed both problems, at least in part. Under 36 C.F.R. §1270.46(a)(2000), the Archivist commits to notifying a former President whenever *any* records of his Administration are to be disclosed. In paragraph (d) of that same regulation, the Archivist is ordinarily not to disclose any such records for at least 30 calendar days from receipt of such notice by the former President. Implicit, but unsaid, is the corollary that the Archivist will continue to withhold records over which a former President claims privilege if the former President files suit for that purpose within 30 days. Paragraph (e) of the regulation states that "[c]opies of all notices provided to former Presidents

under this section shall be provided at the same time to the incumbent President."

President Reagan sought to build further specificity into the processes of consultation and review through Executive Order No. 12,667, issued on January 18, 1989. First, he required that, in providing notice of intended disclosure of presidential records, the Archivist would use whatever guidelines incumbent or former Presidents might provide to identify for the Presidents any records that might raise a substantial question of executive privilege. The Order provided that either an incumbent or former President could extend by a claim of executive privilege the 30 day period otherwise provided between notice and disclosure by the Archivist. And, in the event that a former President claims executive privilege, Executive Order No.12,667 required the Archivist to heed the incumbent President's determination whether or not to respect the former President's claim of privilege.

Executive Order No. 13,233 takes a somewhat different approach. Perhaps most important, Executive Order No. 12,667 – the Reagan Order – was triggered by any Archivist notice of an intent to disclose presidential records pursuant to 36 C.F.R. §1270.46. Because §1270.46 provides that the Archivist is to notify the former and incumbent Presidents upon any disclosure whatsoever, it would follow that the Reagan Order applied to any and all releases of presidential records.

In contrast, the new Bush order applies only upon requests for access to presidential records that occur under 42 U.S.C. §2204(c)(1) – requests that the Act requires the Archivist to treat as FOIA requests. Depending on how the Archivist implements the PRA, this could conceivably expedite the release of numerous presidential records. I say that because, upon the expiration of a former President's designated period for restricted access, there are presumably

numerous such records for which FOIA would not provide any plausible ground for withholding. This would include, for example, all presidential deliberative documents that only FOIA's exemption (5) – the deliberative privilege exemption – would protect from mandatory disclosure. One way that an Archivist could fulfill the "affirmative obligation" to provide for the speedy and complete release of records would be to determine as quickly as possible upon assuming custody of presidential records which such records – upon the expiration of the former President's access restrictions – will immediately become non-withholdable under FOIA criteria. The Archivist could lawfully provide for the wholesale disclosure of such documents at precisely that time and without waiting for any FOIA-type request for access. If I read Executive Order 13,233 correctly, President Bush has added nothing by way of additional presidential review with regard to such documents.

On the other hand, for documents that the Archivist has not previously disclosed and which would thus become disclosable only upon a FOIA-type request, the Bush order contemplates notice to both the former and incumbent Presidents and an opportunity to determine whether to assert privilege. Unlike the Reagan Order, the Bush Order limits the former President's review to 90 days, except in unusual circumstances. There is no time limit on the incumbent President's review.[1] The Bush Order also provides that, "[a]bsent compelling circumstances, the incumbent President will concur in the privilege decision of the former President in response to a request for access." Should either the former or incumbent President lodge a claim of privilege, the Archivist is directed to withhold the requested records until the

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[1] Where the requester is a court or either House or any committee of Congress, the former President is limited to 21 days to conduct his review, and the incumbent President is to

Presidents direct otherwise or "a final and nonappealable court order" mandates release.

The effect of the Bush Order, in contrast with the Reagan order, is not necessarily easy to predict in terms of prolonging otherwise restricted access authorized by PRA longer than the statutory maximum of twelve years. If two conditions really exist, then the Bush Order should lead to speedier release than the Reagan order. The first condition is that there is a substantial volume of presidential records that FOIA minus exemption 5 would *not* protect from mandatory disclosure. The second condition is that the Archivist would be willing to exercise discretion to provide for the public release of all such documents on the Archivist's own initiative – that is, without waiting for any request. In such circumstances, the Bush order would not contemplate any review by the incumbent President, and it would appear much easier to achieve the release of presidential records after 12 years.

If, however, either of these conditions does not exist, then the Bush Order could slow the release of documents considerably. That is – if there are relatively few presidential records that FOIA fails to protect or if the Archivist decides not release any presidential records except pursuant to specific request – then the Bush Order would impede access considerably. The Bush order plainly provides for slower deliberation than the Reagan Order because, under the Reagan Order, both former and incumbent Presidents get only 30 days (unless extended) in which to decide whether to assert privilege following notice of the Archivist's intent to disclose. Under the Bush Order, the former President typically gets 90 days, and the incumbent President has no time limit to decide.

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have 21 further days to make his own determination. §6.

There is, however, an arguably even more intriguing way that the Bush Order could slow access to presidential records. The PRA provides only six grounds upon which a former President may restrict access to his records for up to 12 years. At the same time, the statute holds all constitutionally based privileges intact. This holds open at least the theoretical possibility that the statutory grounds for restricted access might leave unprotected at least some records that executive privilege might cover. Section 8 of the Bush Order provides that, in such cases, a former President or an incumbent President may seek restricted access to those records for up to 12 years from the conclusion of the former President's term. In such cases, a record that the PRA would not have protected at all might become subject to withholding for up to 12 years absent a court order.

As it happens, however, the number of documents implicated is unlikely to be very large. The broadest form of executive privilege that courts have recognized and that Presidents are likely to care about is a privilege for presidential communications. This privilege goes very far even in covering documents solicited or received not by the President himself, but rather by his advisers. In re Sealed Case, 121 F.3d 729 (D.C. Cir. 1997). Such documents are protected only if created in the course of preparing advice for the President, only if they concern official governmental operations calling ultimately for the President's decision making, and only if the advisers are involved are senior. But, once those conditions are met, a document may be privileged even if the President never saw it. The PRA, however, already allows Presidents to seek up to twelve years of restricted access for such memoranda. Indeed, the PRA provision may be yet broader than the constitutionally based privilege recognized by the D.C. Circuit. Thus, although Section 8 of the Bush Order would allow Presidents to request the withholding of

privileged documents from disclosure for up to twelve years, whether or not their subject matter falls within the PRA's six grounds for restricting access to presidential records, it is just not clear how many documents are likely to be implicated in practice.

It may be said, of course, that any prospect that exists to extend executive privilege beyond the four corners of the PRA exists not because of any executive order, but because of the Constitution, and because Congress itself recognizes that courts have afforded constitutional status to presidential claims of confidentiality. Whether this prerogative turns into a brick wall of resistance to the disclosure of any former President's records, however, depends upon how the Presidents use it. Just as FOIA typically permits federal agencies to disclose even those records that are not subject to mandatory disclosure, the Constitution does not command that Presidents invoke privilege to disclose records when out of office or with regard to their predecessors. Whether the law is used for good or for mischief in this case turns again, as it often does, not on the letter of the law, but on the spirit in which it is implemented -- both by our Presidents, current and past, and by the Archivist charged with preserving and sharing our nation's precious historic record.

Mr. HORN. Our next witness is Anna Nelson, professor, distinguished American University. Dr. Nelson.

STATEMENT OF ANNA NELSON, PROFESSOR, AMERICAN UNIVERSITY

Ms. NELSON. Thank you, Mr. Chairman.

I have done research in five Presidential libraries, and I was a staff member of the Public Documents Commission in 1976–1977, which was the—whose report was actually responsible for the passage of the Presidential Records Act.

Today I am here representing the members of the American Historical Association, the Organization of American Historians, and the Society of American Archivists.

Influenced by the actions of former President Nixon, then, as the Archivist Mr. Carlin noted, Congress passed the Presidential Records Act for two reasons: one, to ensure the protection of these records so that they could not be destroyed, since Mr. Nixon was in that business; and, second, to ensure that the records of the Presidents would be open within a reasonable period of time. Declaring Presidential records to be Federal records, they protected documents through archives oversight, as he pointed out. Establishing a time for disclosure, the statute gives the President 12 years to protect his records before they become available to the public. And, of course, there are all of the other safeguards in the act. With these exemptions, Congress felt it had duly protected the former President.

It was unfortunate that 2 days before he left office, President Reagan issued his Executive order which is now being used to nullify the congressional intent to open Presidential records within a reasonable time. This Executive order required the Archivist to notify both the former and the incumbent President when records are to be released after the 12-year period. After examining these records, the incumbent and the former President can invoke "executive privilege." An incumbent President is given 30 days to respond. The Bush administration has taken 9 months to make their decision, thus delaying the release of the records until they could in fact issue their own Executive order.

The Bush administration did not look at each record, or groups of records, so much as they went looking for a way not to release these records. And yet the Reagan Executive order, if one reads it carefully, assumes that there will be certain records among the group that will be held back, not whole groups of records.

The papers of President Reagan are the first to be organized and opened under the Presidential Records Act. The Reagan papers will set the precedent for all other papers opened under the act. We must look ahead and not think in terms of 10, 12, 15 years. This act will continue for 30 years. It has enormous political implications.

It is difficult to know why President Reagan chose to allow the incumbent to review the records, but by capitalizing on this review and further extending its provisions, the Bush administration, perhaps unwittingly, has thwarted the intention of Congress to open these government records to the public.

This Executive order, I would argue, goes beyond management and process. For example, theoretically a President in 2050 can continue to review for closure the records of the current Bush administration. Now more than ever, we need to know the history of our recent past. The policies made more than 12 years ago still affect us. We need to know about these policies, the failures as well as the successes, so that we can understand our own recent history.

The release of 12 to 25-year-old records is not the same as yesterday's leak to a favorite journalist. Nor need we fear the release of national security information which is protected by the Presidential Records Act, the Freedom of Information Act, and the Presidential Executive Order on National Security.

The records in Presidential libraries have become more important in American history as the power of the Presidency has grown with each passing year. It is not unusual, however, for past Presidents and their staffs to worry about the content of papers they no longer remember. And yet most Presidents gain stature from an examination of their records which tend to highlight the pervasive problems and illustrate the competence and the skills of the President and his staff.

Congress passed the Presidential Records Act so that the American people could learn about their recent past. Congress acted wisely. This Executive order should not be allowed to nullify that act.

I would be happy to answer questions, Mr. Chairman, at the appropriate time.

Mr. HORN. Thank you very much.

[The prepared statement of Ms. Nelson follows:]

Testimony

OF

Anna K. Nelson

Subcommittee on Government Efficiency, Financial Management and Intergovernmental Relations

Committee on Government Reform

November 6, 2001

My name is Anna K. Nelson. I am the Distinguished Adjunct Historian in Residence at the American University. I have done research in five presidential libraries, Roosevelt, Truman, Eisenhower, Kennedy and Johnson. I have also used the Nixon papers and done extensive research over the years at the National Archives in Washington. I was a staff member of the Public Documents Commission, 1976-77. Their report was partly responsible for the passage of the Presidential Records Act. From 1994-1998 I was a member of the John F. Kennedy Records Review Board.

Today I am representing the members of the American Historical Association, the Organization of American Historians, and the Society of American Archivists.

Influenced by the actions of former president Nixon, Congress passed the Presidential Records Act in 1978 for two reasons that are very apparent in the statute. First, to insure the protection of these records so they could not

be destroyed. Second, to insure the records of the incumbent president would be open within a reasonable period of time. Declaring presidential records to be Federal Records, they protected the documents through Archives oversight. Establishing a time for disclosure, the statute gives a president twelve years to protect his records before they become available to the public. Meanwhile, other safeguards within the Act guaranteed that certain records, including national security records, could continue to be exempt from public scrutiny for many years to come. This law also deliberately excludes many personal papers of the president including diaries and private, political papers. With these exemptions, the Congress felt it had duly protected each former president.

Unfortunately, two days before he left office, President Ronald Reagan issued Executive Order 12667 which is now being used to nullify the Congressional intent to open presidential papers within a reasonable time. This Executive Order (E.O) required the U.S. Archivist to notify both the former and incumbent president when records are to be released after the 12 year period. After examining the records, the incumbent and former president can invoke Executive Privilege if they find records they do not wish to open. An incumbent president was given 30 days after

notification by the Archivist to make his decision and respond. In other words, this E.O. allows Executive Privilege to be invoked long after the president has left office.

Taking advantage of the Reagan Executive Order, the Bush administration took 9 months to make their decision thus delaying the release of the Reagan records three time since taking office. Although the original E.O. provides for the president to "identify any specific materials," the Bush administration proceeded in a different way. Rather than examine the records, they began reviewing legal and constitutional issues raised by the potential release of sensitive documents, including, one assumes, the use of Executive Privilege to keep 12 year old records closed. The result of that review is new Executive Order dated November 29, 2001 which confirms the previous order while adding an additional set of regulations.

The papers of President Reagan are the first to be organized and opened under the Presidential Records Act. Thus the Reagan papers will set the precedent for all other papers opened under the Act. It is difficult to know just why President Reagan chose to allow the incumbent to review these records but by capitalizing on this review and further extending its provisions, the Bush Administration,

unwittingly perhaps, has thwarted the intention of Congress to open these government records to the public. We should also note that neither Mr. Reagan nor President Bush put a time limitation on the incumbent's ability to review . For example, theoretically a president in 2050 can continue to review for closure the records of the current Bush Administration.

Mr. Chairman, now more than ever we need to know the history of our recent past. The policies made more than 12 years ago still affect us. We need to know about those policies, the failures as well as the successes so that we can understand our own recent history. The release of 12 - 25 year old records is not the same as yesterday's leak to a favorite journalist. Nor need we fear the release of national security information which is protected by the Presidential Records Act, the Freedom of Information Act and other statutes.

The records in presidential libraries have become more important to American history as the power of the presidency has grown with each passing year. Unfortunately, it is not unusual for past presidents and their staffs to worry about the content of papers they no longer remember. Yet, most presidents gain stature from an examination of their records which tend to highlight pervasive problems

and illustrate the competence and skills of the president and his staff.

Congress passed the Presidential Records Act so that the American people could learn about their recent past. Congress acted wisely. This E.O. should not be allowed to nullify that Act.

Mr. HORN. And our next professor is Mark J. Rozell, professor at Catholic University of America.

STATEMENT OF MARK J. ROZELL, PROFESSOR, CATHOLIC UNIVERSITY OF AMERICA

Mr. ROZELL. Thank you, Mr. Chairman, for the invitation to speak to the committee on the constitutional principle of executive privilege.

Although nowhere mentioned in the Constitution, executive privilege has a long history in Presidential politics. Presidents since George Washington have claimed the right to withhold information from either Congress or the judicial branch. Despite this long history and many precedents for its exercise, executive privilege remains a controversial power. And that is understandable because the very notion that a President may withhold information from those who have compulsory powers strikes at the core of our democratic principles, especially accountability in government.

My prepared statement, submitted for the record, focuses on the proper definition of executive privilege and the evolution of its exercise. Very briefly, executive privilege is a legitimate Presidential power when it is exercised under appropriate circumstances. Like most other Presidential powers, it is limited by the legitimate needs of the other branches. Executive privilege also is limited by the democratic principle of openness in government. Therefore, throughout U.S. history, claims of executive privilege have been subject to various balancing tests.

No claim of executive privilege should stand merely because a President or a high-ranking administration official has uttered the words "national security" or "ongoing criminal investigation." A President's claim of executive privilege must be balanced against other needs and must also meet certain standards of acceptability.

Some scholars have argued that executive privilege is a myth, and during the Watergate scandal, former President Nixon claimed that executive privilege was a power that belonged to the entire executive branch of the government and therefore was not subject to any limits.

Both of these views are unsupportable. The relevant debate today is over the proper scope and limits of executive privilege. Few any longer argue that executive privilege is a myth, fewer still cling to the belief that the privilege is an absolute Presidential power not subject to the compulsory powers of the other branches.

Presidents have legitimate needs of confidentiality. The other branches and the public have legitimate needs of access to executive branch information. The question is not whether executive privilege is a legitimate power, but, rather, how to balance competing needs when a President makes a privilege claim.

Now, some critics of executive privilege are quick to point out that the phrase "executive privilege" does not appear anywhere in the Constitution. To be precise, that phrase was not a part of the common language until the Eisenhower administration, leading some to suggest that executive privilege therefore can never be constitutional. This argument ultimately fails, because every President since George Washington has exercised some form of what we

today call executive privilege, regardless of the words used to describe their actions.

Executive privilege is an implied power derived from Article II. It is most easily defined as the right of the President and high-level executive branch officers to withhold information from those who have compulsory power, particularly Congress and the courts, and therefore to withhold information ultimately from the public. But this right is not absolute.

The modern understanding of executive privilege has evolved over a long period, the result of Presidential actions, official administration policies, and court decisions. In the statement that I am submitting to the committee for the record, I provide a detailed explanation of the evolution of the meaning of executive privilege and of its exercise by modern Presidents.

For our immediate purposes, I will focus my comments on President Bush's Executive order, which I see as a big part of an emerging pattern by this administration to expand executive privilege and governmental secrecy more broadly. As you are aware, the administration has been embroiled in other controversies over access to information disputes, particularly the refusal to provide certain requested Department of Justice documents.

The Bush administration is making far-reaching efforts to expand the scope of executive privilege. In one such case, the administration has made the claim that Congress can be refused access to documents in the Department of Justice regarding prosecutorial matters. In this particular case, the administration maintains that it has the right to refuse a congressional request for access to such documents, even though the Department of Justice has closed down the particular investigation under dispute.

A congressional hearing on that controversy scheduled in mid-September was understandably postponed. But in due time, Congress needs to take up this issue again, because if allowed to stand, the administration's position on expanding executive privilege anytime the Department of Justice utters the words "prosecutorial" would set an impossible standard for Congress to overcome in trying to conduct its oversight function. In short, it would set a terrible precedent.

Today Congress is rightly concerned about the administration's Executive order that would allow executive privilege to be vastly expanded to prevent the release of past Presidents' official papers. I have a few reactions, very quickly. First, the handling of Presidential papers is a matter that should be handled by statute and not by Executive order. Presidential papers are ultimately public documents, a part of our national records, and they are paid for with public funds. They should not be treated merely as private papers.

Second, there is legal precedent for allowing ex-Presidents to assert executive privilege, yet the standard for allowing such a claim is very high, and executive privilege cannot stand merely because an ex-President has some personal or political interest in preserving secrecy. An ex-President's interest in maintaining confidentiality erodes substantially once he leaves office, and it continues to erode even further over time.

Third, this Executive order makes it easy for such claims by former Presidents to stand, and almost impossible for those challenging the claims to get information in a timely way in order to be useful. The legal constraints will effectively delay requests for information for years as these matters are fought out in the courts. These obstacles alone will settle the issue in favor of former Presidents, because many with an interest in access to information will conclude that they do not have the ability or the resources to stake a viable challenge. The burden will shift from those who must justify withholding information to fall instead on those who have made a claim for access to information.

Fourth, executive privilege may actually be frivolous in this case, because there are already other secrecy protections in place for national security purposes. Why expand executive privilege so dramatically to cover what is already potentially covered by existing statutes and regulations? Furthermore, a general interest in confidentiality is not enough to sustain a claim of executive privilege over old documents that may go back as far as 20 years.

Executive privilege traditionally has been limited to withholding information regarding current matters of substantial national interest. In a democratic system, the presumption is generally in favor of openness, not secrecy. There is no denying that Presidents have need of confidentiality, yet the President's current efforts appear designed to substantially tip the balance in favor of secrecy.

If the President's support for limiting access to Department of Justice memoranda and this Executive order are allowed to stand, the administration will be able to withhold just about any materials going back many years, as long as someone in the administration utters the words "national security" or "prosecutorial."

Congress and the American public have an interest in making sure that does not happen. What is striking about these latest executive privilege controversies is that the administration seeks to protect secrecy; in the one case, over documents regarding a terminated investigation; and in the other case, over the Presidential papers of past administrations. Usually when an administration seeks to protect secrecy with executive privilege, it does so with regard to some matter of immediate national concern. That is not to suggest that all such claims necessarily are valid, but just that current administration has chosen some very untraditional cases with which to expand executive privilege.

With regard to legislative executive disputes over information, the burden is on the President to demonstrate a need for confidentiality and not on Congress to prove that it has the right to conduct oversight. Similarly, the burden should be on a President or ex-President to demonstrate a need to close off access to past Presidential records, and not on citizens to prove that they have a right to examine public records. The Bush administration actions on executive privilege dramatically shift the burden away from where it belongs.

Thank you.

Mr. HORN. Thank you.

[The prepared statement of Mr. Rozell follows:]

Congressional Testimony/November 6, 2001

Mark J. Rozell
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The Catholic University of America

Thank you Mr. Chairman for the invitation to address the committee on the constitutional principle of executive privilege. Although nowhere mentioned in the Constitution, executive privilege has a long history in presidential politics. Presidents since George Washington have claimed the right to withhold information from either Congress or the judicial branch. Despite this long history and the many precedents for its exercise, executive privilege remains a controversial power. That is understandable because the very notion that a president may withhold information from those who have compulsory powers strikes at the core of our democratic principles, especially accountability in government.

My comments today focus on the proper definition of executive privilege and the evolution of its exercise. Executive privilege is a legitimate presidential power when exercised under the appropriate circumstances. Like most other presidential powers, it is limited by the legitimate needs of the other branches. Executive privilege also is limited by the democratic principle of openness in government. Therefore, throughout U.S. history claims of executive privilege have been subject to various balancing tests. No claim of executive privilege should stand merely because a president or a high ranking administration official has uttered the words "national security" or "ongoing criminal investigation". A president's claim of executive privilege must be balanced against other needs and also must meet certain standards of acceptability.

Some scholars have argued that executive privilege is a "myth" (Berger, 1974). During the Watergate scandal former president Richard Nixon claimed that executive privilege was a power that belonged to the entire executive branch of the government and that it was not subject to any limits. Both of these views are unsupportable. The relevant debate today is over the proper scope and limits of executive privilege. Few any longer argue that executive privilege is a "myth". Fewer still cling to the belief that the privilege is an absolute presidential power not subject to the compulsory powers of the other branches. Presidents have legitimate needs of confidentiality. The other branches and the public have legitimate needs of access to executive branch information. The question is not whether executive privilege is a legitimate power, but rather how to balance competing needs when a president makes a privilege claim.

The Definition and Application of Executive Privilege

Critics of executive privilege are quick to point out that the phrase "executive privilege" does not appear in the Constitution. To be precise, that phrase was not a part of the common language until the Eisenhower administration, leading some to suggest that executive privilege therefore cannot be constitutional (Berger, 1974; Prakash, 1999). This argument ultimately fails because every president since Washington has exercised some form of what we today call executive privilege, regardless of the words used to describe their actions. As Louis Fisher has pointed out, "one could play similar word games with 'impoundment', also of recent vintage, but only by ignoring the fact that, under different names, Presidents have from an early date declined to spend funds appropriated by Congress" (Fisher, 1978: 181).

Executive privilege is an implied power derived from Article II. It is most easily defined as the right of the president and high-level executive branch officers to withhold information from those who have compulsory power – Congress and the courts (and, therefore, ultimately the public). This right is not absolute. The modern understanding of executive privilege has evolved over a long period, the result of presidential actions, official administration policies, and court decisions.

As he did in so many areas, President Washington had a profound influence on the development of executive privilege because of the precedents he established. In the first controversy over executive withholding of information from Congress, the president decided that he indeed possessed such a power, but only if his actions were in the service of the public interest. Washington determined that he could not withhold information merely for the purpose of concealing politically damaging or embarrassing information.

The particular circumstance involved the disastrous November 1791 St. Clair military expedition against Native American Indians in which General St. Clair lost many of his troops and supplies. A huge embarrassment to the administration, Congress convened an investigation and directed the president to turn over any documents or information germane to the decision to initiate the expedition. The political temptation for the president not to cooperate was clear.

With the unanimous advice of his cabinet, the president determined that he had the right under the Constitution to withhold the information, as long as it was in the public interest to do so. Thomas Jefferson attended the Cabinet discussion and later recorded in his notes that the Cabinet members had all determined "that the executive ought to communicate such papers as the public good would permit, and ought to refuse

those, the disclosure of which would injure the public" (Ford, 1892: 189-190). In the end Washington determined that there were no potentially serious public consequences to divulging the information and he cooperated with the congressional investigation.

That Washington turned over all information requested by Congress in this controversy leads some to argue that this incident actually argues against the constitutional legitimacy of executive privilege (Berger, 1974; Prakash, 1999). The key point is that Washington first addressed the issue of the legitimacy of presidential withholding of information from Congress and concluded that the Constitution allows such an action. And of equal importance is that Washington set the precedent for use of executive privilege to protect the public interest, not the president's own political interests. On other occasions Washington asserted a right to withhold information and he followed through on those claims.

Washington established the appropriate standard when he determined that any presidential withholding of information must be in the service of the public interest, not the administration's own political interest. Unfortunately, not all of our presidents have acted so honorably. But over the course of U.S. history executive privilege has evolved into a constitutional principal that is recognized as legitimate when used under the proper circumstances. An examination of the modern evolution of executive privilege better helps us to understand how to resolve controversies over the exercise of that power today.

Executive Privilege and the Modern Presidents

Most prominently, President Eisenhower holds the presidential record for assertions of executive privilege at more than 40. Many of those assertions amounted to refusals to comply with congressional requests for testimony from White House officials.

Eisenhower felt so strongly about the principle that at one point he stated "any man who testifies as to the advice he gave me won't be working for me that night" (Greenstein, 1982: 205). A key event in the development of executive privilege was Eisenhower's letter of May 17, 1954 to the secretary of defense instructing department employees not to comply with a congressional request to testify about confidential matters in the army-McCarthy hearings. Eisenhower articulated the principle that candid advice was essential to the proper functioning of the executive branch and that limiting candor would ultimately harm "the public interest" (Public Papers of the Presidents, 1954: 483-484).

Although many of Eisenhower's uses of executive privilege were clearly justified, the breadth of his understanding of that power disturbed many. At one point he effectively declared that executive privilege belonged to the entire executive branch, when in fact over the course of history the practice had been to confine its use to the president and high-level White House officials when directed by the president. He declared all advice to the president not subject to the compulsory powers of the other branches, although the development of executive privilege law more recently has resulted in a key distinction between discussions about official governmental matters and those about private matters.

Eisenhower's administration originated the use of the phrase executive privilege and expanded the actual practice of that power. Members of Congress rightfully concerned about the expanded practice sought to rein in Eisenhower's successors through the articulation of standards for the use of executive privilege. Rep. John Moss (D-CA), the chairman of the House Subcommittee on Government Information, led the effort. Beginning with the Kennedy administration, Moss sent letters to successive presidents

requesting written clarification of policy toward the use of executive privilege. President John Kennedy replied that executive privilege "can be invoked only by the president and will not be used without specific presidential approval" (Mollenhoff, 1962: 239). President Lyndon Johnson similarly responded to a letter from Moss that "the claim of 'executive privilege' will continue to be made only by the president" (Executive Privilege, 1971: 35).

Ironically, President Richard Nixon responded most forthrightly to Moss's inquiry when he wrote: "the scope of executive privilege must be very narrowly construed. Under this Administration, executive privilege will not be asserted without specific presidential approval.... I want open government to be a reality in every way possible" (Letter from President Richard M. Nixon to Rep. John E. Moss). Nixon issued the first detailed presidential memorandum specifically on the proper use of executive privilege.

> The policy of this Administration is to comply to the fullest extent possible with Congressional requests for information. While the Executive branch has the responsibility of withholding certain information the disclosure of which would be incompatible with the public interest, this Administration will invoke this authority only in the most compelling circumstances and after a rigorous inquiry into the actual need for its exercise. For those reasons Executive privilege will not be used without specific Presidential approval (Memorandum from President Richard M. Nixon to Executive Department Heads).

The memorandum outlined the procedure to be used whenever a question of executive privilege was raised. If a department head believed that a congressional request for information might concern privileged information, he would consult with the attorney general. The two of them would then decide whether to release the information to Congress, or to submit the matter to the president through the counsel to the president. At that stage, the president either would instruct the department head to claim executive

privilege with presidential approval, or request that Congress give some time to the president to make a decision.

The story of Nixon's vast abuse of executive privilege is well known and analyzed in detail elsewhere (Rozell, 1994: chapter 3). Nonetheless, Nixon's response to Moss and the executive privilege memorandum were important to the development of standard procedures on the scope and application of that doctrine.

Unfortunately Nixon's practices gave executive privilege a bad name and had a profoundly chilling effect on the ability of his immediate successors either to clarify procedures or properly exercise that power. President Gerald Ford began what became a common post-Watergate practice of avoiding executive privilege inquiries and using other constitutional or statutory powers to justify withholding information. Within a week of Ford's inauguration, Rep. Moss sent his usual inquiry to the president requesting a statement on executive privilege policy (Letter from Rep. John E. Moss to President Gerald R. Ford). Unlike Presidents Kennedy, Johnson, and Nixon, Ford ignored the letter. Other members of Congress weighed in with their own requests and Ford ignored their letters too. Numerous discussions took place within the White House over the need for the president to either reaffirm or modify Nixon's official executive privilege procedures. Ford took no action on the recommendations.

The associate counsel to the president summed up the dilemma nicely when he suggested three options: (1) cite exemptions from the Freedom of Information Act as the basis for withholding information "rather than executive privilege"; (2) use executive privilege only as a last resort – even avoid the use of the phrase in favor of "presidential" or "constitutional privilege"; (3) issue formal guidelines on executive privilege

(Memorandum from Dudley Chapman to Philip W. Buchen). Ford chose to handle executive privilege controversies on a case-by-case basis rather than to issue general guidelines. He understood that for many people "executive privilege" and "Watergate" had become joined.

President Jimmy Carter similarly did not respond to congressional requests for clarification of administration policy on executive privilege. It was not until the week before the 1980 election that the Carter administration established some official executive privilege procedures. On October 31, 1980, the White House Counsel Lloyd Cutler issued an executive privilege memorandum to White House staff and heads of units within the Executive Office of the President. The memorandum established that those considering the use of executive privilege must first seek the concurrence of the office of counsel to the president. The memorandum also emphasized that only the president had the authority to waive executive privilege (Memorandum from Lloyd Cutler, 1980). Cutler later would become counsel to the president in the Clinton administration and would write new procedures on the use of executive privilege in 1994.

On November 4, 1982 President Ronald Reagan issued an executive privilege memorandum to heads of executive departments and agencies. The Reagan procedures dovetailed closely with the 1969 Nixon memorandum. For example, Reagan's guidelines affirmed the administration policy "to comply with congressional requests for information to the fullest extent consistent with the constitutional and statutory obligations of the executive branch". The memorandum reaffirmed the need for "confidentiality of some communications" and added that executive privilege would be used "only in the most compelling circumstances, and only after careful review

demonstrates that assertion of the privilege is necessary". Finally, "executive privilege shall not be invoked without specific presidential authorization".

The Reagan memorandum developed greater clarity of procedures than before. All congressional requests must be accommodated unless "compliance raises a substantial question of executive privilege." Such a question arises if the information "might significantly impair the national security (including the conduct of foreign relations), the deliberative process of the executive branch or other aspects of the performance of the executive branch's constitutional duties". Under these procedures, if a department head believed that a congressional request for information might concern privileged information, he or she would notify and consult with both the attorney general and the counsel to the president. Those three individuals would then decide to release the information to Congress, or have the matter submitted to the president for a decision if any one of them believes that it is necessary to invoke executive privilege. At that point, the department head would ask Congress to await a presidential decision. If the president chose executive privilege, he instructed the department head to inform Congress "that the claim of executive privilege is being made with the specific approval of the president". The Reagan memorandum allowed for the use of executive privilege, even if the information originated from staff levels far removed from the Oval Office (Memorandum from President Reagan to Heads of Executive Departments and Agencies).

By avoiding executive privilege, presidents Ford and Carter actually succeeded more than Reagan did at protecting secrecy. Ford and Carter understood in the post-Watergate era the negative connotations of executive privilege. President Reagan tried to reestablish the legitimacy of executive privilege, only to be harshly criticized and fought

every step of the way by the opposition party-led Congress. Reagan ultimately backed down from his several claims of executive privilege and did more to weaken the doctrine as a result (Rozell, 1994: chapters 4-5).

President George H.W. Bush did not initiate any new executive privilege procedures. The 1982 Reagan memorandum remained in effect as official executive privilege policy during the Bush years. Bush frequently withheld information without invoking executive privilege. Like Ford and Carter, he avoided the negative taint of executive privilege and generally used other bases of authority for withholding information. When the Bush administration wanted to withhold information from the Congress, it used a variety of names other than executive privilege to justify that action. Among them were "internal departmental deliberations", "deliberations of another agency", and the "secret opinions policy" (Rozell, 1994: chapter 5). The chief investigator to the House Committee on the Judiciary during the Bush years said that Bush "avoided formally claiming executive privilege and instead called it other things. In reality, executive privilege was in full force and effect during the Bush years, probably more so than under Reagan" (Lewin interview).

President Clinton used executive privilege elaborately. Unlike former president Bush, he did not conceal executive privilege. Like Nixon, he concealed wrongdoing – or tried to – by resorting to executive privilege. Like Nixon, Clinton gave executive privilege a bad name and made it difficult once again for a future president to reestablish the legitimacy of this constitutional doctrine.

In 1994, the Clinton administration issued its own executive privilege procedures. The memorandum from the special counsel to the president Lloyd Cutler stated: "The

policy of this Administration is to comply with congressional requests for information to the fullest extent consistent with the constitutional and statutory obligations of the Executive Branch.... [E]xecutive privilege will be asserted only after careful review demonstrates that assertion of the privilege is necessary to protect Executive Branch prerogatives. The memorandum further stated that: "Executive privilege belongs to the President, not individual departments or agencies".

The Cutler memorandum described formal procedures for the use of executive privilege and these were not significantly different from those outlined in the Reagan memorandum. In light of Clinton's aggressive use of executive privilege in the presidential scandal of 1998-1999, one sentence stands out: "In circumstances involving communications relating to investigations of personal wrongdoing by government officials, it is our practice not to assert executive privilege, either in judicial proceedings or in congressional investigations and hearings" (Memorandum from Lloyd Cutler, 1994).

The Clinton administration also adopted the very broad view that all White House communications are presumptively privileged and that Congress has a less valid claim to executive branch information when conducting oversight than when considering legislation (Letters from Attorney General Janet Reno to President Clinton).[i] On several occasions the Clinton administration used executive privilege to thwart congressional investigations of alleged White House wrongdoing.

The George W. Bush Administration

The Bush administration is making far-reaching efforts to expand the scope of executive privilege. In one such case the administration has made the claim that Congress

can be refused access to documents in the Department of Justice regarding prosecutorial matters. In this particular case the administration maintains that it has the right to refuse a congressional request for access to such documents, even though the Department of Justice has closed down the particular investigation under dispute. A congressional hearing on that controversy scheduled for September 13 was understandably postponed due the overriding emphasis on fighting terrorism. In due time Congress needs to take up this issue again because if allowed to stand, the administration's position on expanding executive privilege any time the Department of Justice utters the words "prosecutorial" would set an impossible standard for Congress to overcome in trying to conduct its oversight function. In short, it would set a terrible precedent.

Today Congress rightly is concerned about the administration's executive order that would allow executive privilege to be vastly expanded to prevent the release of past presidents' official papers. I have several reactions:

First, the handling of presidential papers is a matter that should be handled by statute and not by executive order. Presidential papers are ultimately public documents – a part of our national records - and they are paid for with public funds. They should not be treated merely as private papers.

Second, there is legal precedent for allowing an ex-president to assert executive privilege. Yet the standard for allowing such a claim is very high and executive privilege cannot stand merely because an ex-president has some personal or political interest in preserving secrecy. An ex-president's interest in maintaining confidentiality erodes substantially once he leaves office and it continues to erode even further over time.

Third, this executive order makes it easy for such claims by former presidents to stand and almost impossible for those challenging the claims to get information in a timely way to be useful. The legal constraints will effectively delay requests for information for years as these matters are fought out in the courts. These obstacles alone will settle the issue in favor of former presidents because many with an interest in access to information will conclude that they do not have the ability or the resources to stake a viable challenge. The burden will shift from those who must justify withholding information to fall instead on those who have made a claim for access to information.

Fourth, executive privilege may actually be frivolous in this case because there are already other secrecy protections in place for national security purposes. Why expand executive privilege so dramatically to cover what is already potentially covered by existing statutes and regulations? Furthermore, a general interest in confidentiality is not enough to sustain a claim of executive privilege over old documents that may go back as far as twenty years.

Executive privilege traditionally has been limited to withholding information regarding current matters of substantial national interest. In a democratic system the presumption is generally in favor of openness, not secrecy. There is no denying that presidents have needs of confidentiality. Yet the president's current efforts appear designed to substantially tip the balance in favor of secrecy. If the president's support for limiting access to Department of Justice memoranda and this executive order are allowed to stand, the administration will be able to withhold just about any materials going back many years as long as someone in the administration utters the words "national security"

or "prosecutorial". Congress and the American public have an interest in making sure that does not happen.

What is striking about these latest executive privilege controversies is that the administration seeks to protect secrecy in the one case over documents regarding a terminated investigation and in the other case over the presidential papers of past administrations. Usually when an administration seeks to protect secrecy with executive privilege, it does so with regard to some matter of immediate national concern. That is not to suggest that all such claims necessarily have been valid, but just that the current administration has chosen some very untraditional cases with which to expand executive privilege. Neither case fits the traditional standards for valid claims of executive privilege.

With regard to legislative-executive disputes over information, the burden is on the president to demonstrate a need for confidentiality and not on Congress to prove that it has the right to conduct oversight. Similarly, the burden should be on a president or ex-president to demonstrate a need to close off access to past presidential records and not on citizens to prove that they have a right to examine public records. The Bush administration actions on executive privilege dramatically shift the burden away from where it belongs.

Resolving Executive Privilege Disputes

Executive privilege clearly is a constitutional power when exercised under the proper circumstances. Since the Nixon years, presidents have not made effective use of that power. Some have devised means of concealing executive privilege and some have used that power improperly. Congress has shown little deference toward presidential

secrecy. The reality is that presidents have some needs of confidentiality and Congress has investigative powers. Executive privilege inevitably leads to interbranch clashes – usually between the president and Congress, but also recently between a president and the Office of the Independent Council (OIC).

It is understandable why, especially in light of recent events, that some would find appealing a statutory definition of executive privilege or a judicial clarification of the limits of that power. Yet over the course of presidential history there has evolved an understanding of executive privilege that has been established through precedent, court decisions, and presidential declarations. Executive privilege is legitimate when it applies to two broad circumstances: (1) protecting the national security, and (2) protecting the privacy of official White House deliberations when it is in the public interest to do so. In our democratic system, the presumption must be in favor of openness. The burden is on presidents to prove that they have a compelling need for secrecy, not on those who have legitimate compulsory powers to prove that they need information.

Resolving such disputes cannot occur through statutory guidelines or court-directed definitions. The proper resolution to conflict over presidential secrecy is rooted in the separation of powers. Congress and the courts already have the institutional means to challenge executive privilege. The proper solution to the potential abuse of executive privilege is not legalistic precision, but rather for the other branches to fully use the powers that they already possess.

If members of Congress are not satisfied with the president's response to their requests for information or testimony, they have numerous options. Congress can issue a subpoena and perhaps ultimately a contempt of Congress resolution, or retaliate by

withholding support for the president's agenda or for one or more of his nominees, or simply withhold funding for presidential favored programs. These actions give the president the option of weighing the importance of secrecy against such interbranch conflict and the problems it may cause for him. If executive privilege can be exercised only for the most compelling reasons – a real threat to the national security or compromising internal discussions in a way that will clearly harm the public – then it is not unreasonable to force the president's hand in this fashion. Presumably, information being withheld for such vital purposes would take precedence over pending legislation or a presidential appointment.

In most cases in which presidents have withheld information or testimony and Congress has retaliated in some form, presidents ultimately have either ceded to Congress's demands or worked out some form of agreement to accommodate both sides in the dispute. In my studies of the history of executive privilege I have not come across a single incident in which a president gave in to Congress's demands and thereby committed a substantial harm to the national security or created a precedent that undermined the right of confidential deliberations for his successors.

Presidents simply are not powerless in these disputes. They have the ability to rally opinion against members of Congress for bottling up the agenda, program spending, or nominations. They can shift the burden to Congress to decide how important the information they seek is and how much political heat they should withstand. Presidents also have the powers of their office to help or to frustrate the needs of individual members of Congress.

The history of executive privilege shows that the president and Congress usually resolve these disputes and that the lack of precise legal guidelines on the use of that power has not resulted in constitutional crises. Someone gives in or there is an agreed upon accommodation. The extreme case would of course involve Congress using its power of impeachment against the president who refused to cooperate with demands for information. President Theodore Roosevelt in one case personally seized government papers and dared Congress to impeach him for doing so. But Congress could have tried to get the documents by retaliating in less dramatic ways. The key point is that in legislative-executive disputes over information, the legislative possesses the ultimate weapon of impeachment should no action short of that step resolve the situation.

Rarely does either side benefit from disputes over information that result in retaliatory measures. There are powerful incentives for both branches to reach some accommodation. One approach has been for the executive to allow a few members of Congress – for example, the chair and ranking minority member of the committee seeking the information – to privately review confidential documents. There is nothing improper with having the executive limit access to secret information to some members of Congress who can attest to the validity of the need for secrecy.

The judicial branch sometimes is a party to an interbranch dispute over access to information. President Clinton tried to shield White House information and testimony from the Office of Independent Counsel (OIC) in 1998, but a federal judge ultimately decided that the constitutional balancing test weighed in favor of the OIC's need for information. The process of accommodation is obviously more difficult between the president and a judicial entity than between a president and Congress. But the same

principle applies: each side should use the powers already at its disposal as fully as possible.

When a dispute over information rises to the level of a constitutional crisis, the courts may get involved, as happened in the Watergate episode. The unanimous court in U.S. v. Nixon declared the privilege "constitutionally based" and that on matters of national security or foreign policy deliberations, such a power is difficult for another branch to overcome. Yet the court made it clear that the privilege may, at times, have to defer to the constitutionally based powers of the coordinate branches of the government. In that case, the need for information in a criminal trial had to outweigh any presidential claim to secrecy. The Supreme Court in that case upheld the legitimacy of the judicial to pose as a viable check on the abuse of executive privilege.

There is also considerable legal precedent for in camera review of sensitive information by the courts. Rather than compelling disclosure of information for open court review, the executive may satisfy the court in secret chambers of the need for non-disclosure. The courts have repeatedly affirmed their right to decide in particular cases whether the necessity of protecting sensitive information does indeed outweigh the need for evidence in criminal justice matters.

Disputes over executive privilege cannot be resolved with constitutional or statutory exactitude. Such disputes can best be resolved through the normal ebb and flow of politics as provided for in the system of separation of powers.

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[i] The administration draws its view that Congress lacks a compelling need for executive branch information in cases of oversight from a dubious interpretation of the D.C. Circuit Court's 1974 ruling in Senate Select Committee on Presidential Campaign Activities v. Nixon (498 F. 2d 725). Although the court did not explicitly acknowledge Congress's need for information in cases of oversight, that is not the same as saying that the court over-ruled the well-established investigative powers of legislative committees. The Reagan and Bush administrations made similarly too broad claims in this regard.

Mr. HORN. Our next witness is Peter M. Shane, professor, the University of Pittsburgh and Carnegie Mellon University. Dr. Shane.

STATEMENT OF PETER M. SHANE, PROFESSOR, UNIVERSITY OF PITTSBURGH AND CARNEGIE MELLON UNIVERSITY

Mr. SHANE. Thank you, Mr. Chairman, Mr. Ose. Is this microphone on? Better.

I want to thank you also for the privilege of appearing before you today to discuss these very important issues. It is an honor to be part of this distinguished panel. The new Executive Order 13233 addresses some gaps in the system for managing Presidential records that exist under the terms of the Presidential Records Act.

My own review suggests that whether this order on its face would impede or expedite the process actually is not so much related to the terms of the order but the kinds of circumstances outlined by the Archivist with respect to his capacity to process those records in the years of restricted access. I will try to explain that conclusion.

The Presidential Records Act seeks on one hand the rapid and complete disclosure of Presidential records, but it leaves intact the constitutionally based privileges of both incumbent and former Presidents.

It leaves open two questions. It really provides no direction as to how cases should be handled of disagreements between the Archivist and former or incumbent Presidents about the release of Presidential records. It doesn't provide any procedure for a review of former Presidents' records by incumbent Presidents trying to decide whether or not to assert their own privileges.

The Archivist, by regulation, addressed the second problem, in part, by mandating that whenever notice went forward to a former President that records might be disclosed, that notice would also go to the incumbent President. But the regulations of the National Archives do not tell the President, the incumbent President, how to conduct his review.

President Reagan tried to fill this gap through Executive Order 12677. That order provided that the President would review all notices by the Archivist that the Archivist intended to disclose the records of past Presidents. Under the order, that review would last no longer than 30 days, unless lengthened on request of an incumbent or former President.

Executive Order 13233 changes both parts of the procedure. On one hand, it lengthens the period for review, although I don't know whether in practice the 30 days was kept under 12677, or I guess we don't know because it was never actually implemented. But under 13233, the Bush order, the former President now gets 90 days to review documents. There is no time limit in the order for the incumbent.

The potential good news here, however, is that the Bush order does not apply to all disclosures; it only applies to disclosures pursuant to specific requests that are managed by the Archivist, in a manner like a FOIA request. So the real question is how large will this category be?

As it has already been explained, the Presidential Records Act allows a former President to ask for up to 12 years of protection for documents in six categories that the statute provides. When any such access restriction expires, the Archivist manages records under the Freedom of Information Act standards, except that the section 5 exemption for deliberative records no longer is available to limit withholding.

Under this scheme, it is at least theoretically possible that the Archivist could process documents during the period of restrictions and identify thousands of documents for potentially immediate post-restriction release on the grounds that FOIA would not permit withholding these documents under any standard. That is, there is no theoretical reason why it couldn't be determined within the 12-year period that a great many Presidential documents, upon the expiration of the restricted access, will simply be automatically disclosable. And if that is the case, then 13233 will not kick in.

As I read it, the Executive order would not restrict the authority of the Archivist to arrange the wholesale disclosure of such documents at his own initiative. It only restricts—it only kicks in when there is a specific FOIA-type request that triggers the Archivist's intent to disclose.

Following up Professor Rozell's suggestion, one wonders whether a statute might direct that Presidential records be handled this way. If Presidential records were handled this way, if the Archivist had that capacity either under his own initiative or pursuant to statute, or if the President is simply expeditious in reviewing disclosures sought under FOIA criteria, then 13233 need not slow down disclosure. Most documents, however, are released, if at all, only based on specific requests. Then 13233 does auger a slower process than 12677 would have provided. Some irony here, because, of course, 12677 was the order written by the President, whose records would now be protected by the new order.

But, in either case, the problem is not because of a facial conflict between 13233 and the Presidential Records Act, the question is whether the Presidential Records Act will be observed in spirit as well as in its letter based on the actual implementation of the Executive order. Thank you.

Mr. HORN. Thank you.

[The prepared statement of Mr. Shane follows:]

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STATEMENT BEFORE
THE SUBCOMMITTEE ON GOVERNMENT EFFICIENCY
OF THE HOUSE COMMITTEE ON GOVERNMENT REFORM
ON EXECUTIVE ORDER NO. 13,233 "FURTHER IMPLEMENTATION
OF THE PRESIDENTIAL RECORDS ACT"
November 6, 2001

Mr. Chairman and Distinguished Members:

I am honored by your invitation to participate in your consideration of Executive Order No. 13,233, "Further Implementation of the Presidential Records Act," issued by President Bush on November 1, 2001. My views of the legal issues raised by the Order are informed, no doubt, by my three years as a Justice Department and OMB lawyer from 1978-1981, but are shaped even more by my 20 years as a teacher and researcher in the field of separation of powers law.

On the assumption that this hearing was prompted primarily by anxiety about the potential impact of the executive order in delaying public access to presidential records, I have tried to focus substantially on that question. From its terms alone, the impact of Executive Order No. 13,233 is, in fact, hard to predict. In the main, it does not seek to change executive privilege law, as much as to fill gaps posed by the Presidential Records Act (PRA), 44 U.S.C. §§ 2201-2207. Nonetheless, given the current conditions surrounding the processing of presidential records, there is reason for serious concern that the executive order, if implemented, could delay

access to these records quite substantially.

The executive order, moreover, raises significant problems of law beyond the possibility of delay. The President's direction to the Archivist to withhold the disclosure of presidential records, when neither the Archivist nor the incumbent President believes that a constitutional claim of privilege over the documents is justified, is itself plainly unconstitutional. I also believe that, contrary to the Order, claims of constitutional privilege may not properly be asserted on behalf of former Presidents by anyone other than the former President himself or by an incumbent President. Nor, contrary to the order, is there any basis for supposing that vice presidents, former or incumbent, may claim executive privilege.

1. The PRA's Unanswered Questions

In order to understand Executive Order No. 13,233, it is necessary to understand the basic structure of the PRA. In essence, the Act gives the Archivist custody of a former President's records upon the conclusion of the President's term of office, and requires the Archivist, within specific procedural guidelines, to make presidential records "available to the public as rapidly and completely as possible." 44 U.S.C. §2203(f)(1). The key procedural guidelines are two-fold. First, a President is entitled to restrict access for up to 12 years to any of his records that fall within six specified categories. These do not include the full scope of the executive's so-called deliberative privilege, but do include records relating to appointments to federal office; records consisting of confidential communications requesting or submitting advice between the President and his advisers, or between such advisers; and certain other files, "the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 44 U.S.C. §2204(a). Second, at such time as a record becomes available for disclosure – either because no President

has restricted access or because the time for restricted access has expired – the Archivist is to handle requests to view such records as FOIA requests, except that FOIA's exemption 5, the so-called deliberative privilege exemption, is not available as a ground for withholding a record. 44 U.S.C. §2204(c).

This structure, while thoughtful in its conception, leaves certain important questions unanswered. Those questions exist in part because, in providing for a staged release of records from past Presidents, the Act is also explicit in leaving untouched "any constitutionally-based privilege which may be available to an incumbent or former President." 44 U.S.C. §2204(c)(2). It provides for consultation between the archivist and a former President before the release of any presidential record that the former President had designated for up to twelve years of restricted access. 44 U.S.C. §2204(b)(3). It requires the Archivist to promulgate rules governing notice to a former President "when the disclosure of particular documents may adversely affect any rights and privileges which the former President may have." 44 U.S.C. §2206(3). It also envisions judicial review to protect presidential privilege, vesting jurisdiction in the U.S. District Court for the District of Columbia "over any action initiated by [a] former President asserting that a determination made by the Archivist violates the former President's rights or privileges." 44 U.S.C. §2204(d). In short, in enacting the PRA, Congress envisioned a balancing act -- an orderly process for making presidential records "available to the public as rapidly and completely as possible," 44 U.S.C. §2203(f)(1), while preserving opportunities for former Presidents, at least, to assert constitutionally based privileges as grounds for withholding documents from mandatory disclosure.

It is in implementing that balance that the PRA leaves two obvious procedural issues

unaddressed. First, it provides no administrative procedures for handling disagreements between the Archivist and either a former or sitting President with regard to a document's release. Second, it provides no process to permit incumbent Presidents to consider whether privilege ought be asserted to prevent the mandatory withholding of a predecessor's records.

Regulations issued by the Archivist of the United States have since addressed both problems, at least in part. Under 36 C.F.R. §1270.46(a)(2000), the Archivist commits to notifying a former President whenever *any* records of his Administration are to be disclosed. In paragraph (d) of that same regulation, the Archivist is ordinarily not to disclose any such records for at least 30 calendar days from receipt of such notice by the former President. Implicit, but unsaid, is the corollary that the Archivist will continue to withhold records over which a former President claims privilege if the former President files suit for that purpose within 30 days. Paragraph (e) of the regulation states that "[c]opies of all notices provided to former Presidents under this section shall be provided at the same time to the incumbent President."

2. Supplementing the PRA through Executive Orders

President Reagan sought to build further specificity into the processes of consultation and review through Executive Order No. 12,667, issued on January 18, 1989. First, he required that, in providing notice of intended disclosure of presidential records, the Archivist would use whatever guidelines incumbent or former Presidents might provide to identify for the Presidents any records that might raise a substantial question of executive privilege. The Order provided that either an incumbent or former President could extend by a claim of executive privilege the 30-day period otherwise provided between notice and disclosure by the Archivist. And, in the event that a former President claims executive privilege, Executive Order No.12,667 required the

Archivist to heed the incumbent President's determination whether or not to respect the former President's claim of privilege.

Executive Order No. 13,233 takes a different approach. Executive Order No. 12,667 – the Reagan Order – was triggered by any Archivist notice of an intent to disclose presidential records pursuant to 36 C.F.R. §1270.46. Because §1270.46 provides that the Archivist is to notify the former and incumbent Presidents upon any disclosure whatsoever, it would follow that the Reagan Order applied to any and all releases of presidential records.

In contrast, Section 3 of the new Bush order applies only upon requests for access to presidential records that occur under 42 U.S.C. §2204(c)(1) – requests that the Act requires the Archivist to treat as FOIA requests. Depending on how the Archivist implements the PRA, this could conceivably expedite the release of numerous presidential records. I say that because, upon the expiration of a former President's designated period for restricted access, there are presumably numerous such records for which the FOIA would not provide any plausible ground for withholding. This would include, for example, all presidential deliberative documents that only FOIA's exemption (5) – the deliberative privilege exemption – would protect from mandatory disclosure. There is thus an obvious way in which an Archivist could fulfill the "affirmative obligation" to provide for the speedy and complete release of records once the period for restricted access ends. The Archivist could determine as quickly as possible upon assuming custody of presidential records which such records – upon the expiration of the former President's access restrictions – will immediately become non-withholdable under FOIA criteria. The Archivist could lawfully provide for the wholesale disclosure of such documents at precisely that moment, without waiting for any FOIA-type request for access. If I read Executive Order

13,233 correctly, President Bush has added nothing by way of additional presidential review with regard to such documents.[1]

On the other hand, for documents that the Archivist has not previously disclosed and which would thus become disclosable only upon a FOIA-type request, the Bush order contemplates notice to both the former and incumbent Presidents and an opportunity to determine whether to assert privilege. Unlike the Reagan Order, the Bush Order limits the former President's review to 90 days, not 30, except in unusual circumstances. There is no time limit on the incumbent President's review.[2]

The effect of the Bush Order, in contrast with the Reagan order, is not necessarily easy to predict in terms of prolonging otherwise restricted access authorized by PRA longer than the statutory maximum of twelve years. If two conditions really exist, then the Bush Order could lead to speedier release than the Reagan order. The first condition is that there is a substantial volume of presidential records that FOIA minus exemption 5 would *not* protect from mandatory disclosure. The second condition is that the Archivist would be willing to exercise discretion to

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[1] The oral testimony of Acting Assistant Attorney General Whelan that Executive Order No. 13,233 would apply to *all* potential disclosures of presidential records is flatly contradicted by the express language of the order. Section 3 is triggered, "[a]t an appropriate time after the Archivist receives a request for access to Presidential records under section 2204(c)(1) [of Title 44]." Section 5 provides somewhat shorter deadlines for presidential responses to judicial or congressional requests for information under 44 U.S.C. §2205(2). These matters are not left for inference, but are explicit on the face of the order. There is simply nothing in the order that addresses presidential review of documents the Archivist proposes to release on his or her own initiative following the expiration of a presidentially requested period of restricted access.

[2] Under Section 6 of the Bush order, where the requester is a court or either House or any committee of Congress, the former President is limited to 21 days to conduct his review, and the incumbent President is to have 21 further days to make his own determination.

provide for the public release of all such documents on the Archivist's own initiative – that is, without waiting for any FOIA-type request. In such circumstances, the Bush order would not contemplate any review by the incumbent President, and it would appear much easier to achieve the release of presidential records after 12 years.

If, however, either of these conditions does not exist, then the Bush Order would slow the release of documents considerably. Based on the testimony of Archivist Carlin, this is quite worrisome. According to Mr. Carlin, there is currently little time to process the mass of presidential records prior to the expiration of the statutory period for restricted access. If I understood Mr. Carlin's testimony correctly, this means that virtually all presidential records are released, if at all, only through FOIA-type requests.

Under such circumstances, the Bush order will plainly provide for a slower release of records than would have occurred had the Reagan Order been implemented. Under the Reagan Order, both former and incumbent Presidents would get only 30 days (unless extended) in which to decide whether to assert privilege following notice of the Archivist's intent to disclose. Under the Bush Order, the former President would typically get 90 days, and the incumbent President has no time limit to decide.

There is, however, another and equally troubling way that the Bush Order could slow access to presidential records. The PRA provides only six grounds upon which a former President may restrict access to his records for up to 12 years. At the same time, the statute holds all constitutionally based privileges intact. This holds open the theoretical possibility that the statutory grounds for restricted access might leave unprotected some records that executive privilege might cover. Section 8 of the Bush Order provides that, in such cases, a former

President or an incumbent President may seek restricted access to those records also for up to 12 years from the conclusion of the former President's term. In such cases, a record that the PRA would not have protected at all might become subject to withholding for up to 12 years absent a court order.

This could become especially troublesome if Presidents seek to invoke constitutional privilege to cover not only documents protected by presidential communications privilege, but all predecisional, deliberative documents produced anywhere in the executive bureaucracy that the President, his staff, or any advisory unit of the Executive Office of the President happened to receive – whether or not the President or his senior advisers ever saw or even requested such documents. It is plainly the intent of the PRA not to insulate such documents from mandatory disclosure unless they fall also within a statutory ground for restricting access as specified in § 2204(a)(1). It is presumably for this very reason that, in processing record requests after the expiration of restricted access, the Archivist is directed by the PRA not to invoke exemption (5) of the Freedom of Information Act. Yet, under Section 8 of the Order, all these records could be withheld for up to 12 years.

A question of law also arises about the permissibility of the time limits for review posed by the executive order. To the extent the order provides a process for presidential review of documents sought for release during a period of statutorily authorized restricted access, there is no obvious conflict between the time limits in the order and the PRA. After the expiration of restricted access, however, the PRA directs the Archivist to administer the records in accordance with 5 U.S.C. § 552, the FOIA. That presumably includes the provision of § 552(a)(6)(A)(1), requiring an agency to "determine within 20 days (excepting Saturdays, Sundays, and legal

public holidays) after the receipt of any . . . request whether to comply with such request and [to] . . . immediately notify the person making such request of such determination and the reasons therefor, and of the right of such person to appeal to the head of the agency any adverse determination."

The provisions of the Bush Order that allow a former President to review a request for a release of records for 90 days, with a subsequently unlimited period for review by the incumbent President, will render it impossible for the Archivist to comply with the 20-day time limit. Although Congress would not properly eviscerate executive privilege by denying to Presidents any time whatever to review documents sought for release, Congress does retain the power to determine what would be an appropriate time period for such review. According to the Supreme Court, the power to assert executive privilege is vested implicitly by the Constitution, *United States v. Nixon*, 418 U.S. 684 (1974), but Article I, § 8, permits Congress to "make all laws necessary and proper for carrying into execution . . . all . . . powers vested by this Constitution in the government of the United States, or in any department or officer thereof." If the President believes a 20-day limit is not proper for presidential review of the records of former Presidents, it would be most appropriate to so notify Congress and to request the legislative promulgation of a more generous period of review.

3. The Role of Former Presidents

The Bush Order poses several additional serious questions of law. For example, Section 3(d)(1)(ii) of the Bush Order provides:

> If . . . the incumbent President does not concur in the former President's decision to request withholding of the records as privileged, the incumbent President shall so inform the former President and the Archivist. Because the former President

> independently retains the right to assert constitutionally based privileges, the Archivist shall not permit access to the records by a requester unless and until the incumbent President advises the Archivist that the former President and the incumbent President agree to authorize access to the records or until so ordered by a final and nonappealable court order.

In other words, the Bush Order directs the Archivist to deny disclosure of a presidential record upon request even when the incumbent President believes – and presumably, even when the Archivist believes – there is in fact no constitutional or statutory ground to support withholding the record.

Implementation of this provision would be flatly unconstitutional. It has been axiomatic since *Marbury v. Madison*, 5 U.S. 137 (1803), and *Kendall v. U.S. ex rel. Stokes*, 37 U.S. 524 (1838), that a President may not command an executive officer to perform an unlawful act. The only basis on which an incumbent President might be entitled to direct the Archivist to withhold a document whose release is otherwise mandatory under the PRA would be that the incumbent wishes to assert a claim of constitutional privilege. This is a function that the incumbent President may not delegate to anyone, not even to a former President. If the incumbent President is not prepared to assert the existence of a constitutional ground for withholding a requested record, then he lacks any legal basis to direct the Archivist to violate the PRA. If the former President wishes to assert privilege, his only permissible recourse is to file an injunctive suit against the Archivist.

Equally startling is Section 10 of the Bush Order which provides:

> The former President may designate a representative (or series or group of alternative representatives, as the former President in his discretion may determine) to act on his behalf for purposes of the Presidential Records Act and this order. Upon the death or disability of a former President, the former President's designated representative shall act on his behalf for purposes of the

> Act and this order, including with respect to the assertion of constitutionally based privileges. In the absence of any designated representative after the former President's death or disability, the family of the former President may designate a representative (or series or group of alternative representatives, as they in their discretion may determine) to act on the former President's behalf for purposes of the Act and this order, including with respect to the assertion of constitutionally based privileges.

Under this provision, executive privilege could be asserted not only by a former President, but also by an individual without any experience of the Presidency or any political accountability whatsoever.

The PRA permits former Presidents to arrange for a designee to exercise such authorities as former Presidents are granted by the PRA itself. 44 U.S.C. § 2204(d). This is chiefly the right to be consulted by the Archivist during the period of restricted access before disclosure of any presidential record. No court has ever suggested, however, that claims of executive privilege – which are based on the Constitution, not on the PRA – may be formally lodged by anyone other than the President himself. To permit a delegate to exercise executive privilege would violate the principle that executive privilege exists to protect the presidency, not a particular person. The determination whether a requested a release portends harm to the Presidency is a determination that only a President may make. It is only by virtue of having been President that a former President retains any right to lodge a claim of executive privilege. If a sitting President may not delegate the function of claiming privilege even to another executive officer, it is absurd to think that a former President may delegate that function to a private person. No determination by a former President's designee about the constitutional basis for withholding a presidential document could furnish a lawful basis for directing the Archivist to withhold a release of records that the PRA otherwise commands.

4. The Role of Vice-Presidential Records

There is one other puzzling aspect of the Bush Order on which I would like to comment. Section 11 of the Order states:

> (a) Pursuant to section 2207 of title 44 of the United States Code, the Presidential Records Act applies to the executive records of the Vice President. Subject to subsections (b) and (c), this order shall also apply with respect to any such records that are subject to any constitutionally based privilege that the former Vice President may be entitled to invoke, but in the administration of this order with respect to such records, references in this order to a former President shall be deemed also to be references to the relevant former Vice President.
>
> (b) Subsection (a) shall not be deemed to authorize a Vice President or former Vice President to invoke any constitutional privilege of a President or former President except as authorized by that President or former President.
>
> (c) Nothing in this section shall be construed to grant, limit, or otherwise affect any privilege of a President, Vice President, former President, or former Vice President.

Section (a) is perplexing in its reference to "any constitutionally based privilege that the former Vice President may be entitled to invoke." So far as I know, there is none. The PRA makes no reference to any constitutionally-based vice-presidential privilege, and it has been the consistent understanding of the federal executive that only Presidents may claim executive privilege.

Of course, vice-presidential documents may be covered by executive privilege, either because they fall within the domain of privileged "presidential communications," or because they fall within some other recognized category of executive privilege, such as state or military secrets. In such cases, however, the Vice President is presumably no different from any other executive branch officer subordinate to the President, such as a cabinet officer. The determination whether to claim executive privilege with regard to his documents can properly be made only at the presidential level. As noted above, Presidents may not delegate this function, so

the suggestion in Section 11(b) that a President might authorize his vice-president to claim the executive privilege has no foundation in law. There is further, to the best of my knowledge, no judicial support for the proposition that a former vice president may claim executive privilege, any more than a former cabinet officer might do so.

Mr. HORN. Our last presenter is Scott L. Nelson, the attorney for the Public Citizen Litigation Group. Mr. Nelson.

STATEMENT OF SCOTT L. NELSON, ATTORNEY, PUBLIC CITIZEN LITIGATION GROUP

Mr. NELSON. Thank you, Mr. Chairman. I have set forth my testimony in detail in writing. In my remarks this afternoon, I would like to get right to what I conceive to be the heart of the matter as to the legality of the new Executive order.

Archivist Carlin this afternoon has announced his intention to implement the order in a manner consistent with his statutory responsibility under the Presidential Records Act. I am afraid he has taken on an impossible task because the terms of the Executive order, in fact, cannot be reconciled with the Archivist's responsibilities under the act. In short, the act requires that the Archivist must release, after the 12-year restriction period, materials relating to communications between the President and his advisors upon request, and that the Archivist can only withhold those materials from public release if they are subject to a valid constitutionally based claim of privilege.

The new Executive order, far from simply providing new procedures, turns that requirement on its head. It provides that if the former President makes a claim of privilege, even if the incumbent President and the Archivist disagree and find that there are compelling circumstances that render that claim of privilege legally unfounded, the Archivist must still withhold those records from the public, and anyone who doesn't like it is relegated to going to court.

Beyond that, the order also purports to require those who would seek access to demonstrate a particularized specific need for the information, which again is contrary to the public—or the Presidential Records Act premise that FOIA standards, under which such a need need not be shown, are applicable to requests under the PRA.

The only possible justification for the new standards imposed by the Presidential Records Act is if, as the Executive order tries to suggest, these new standards are required by the constitutional nature of the executive privilege.

But judicial precedents on that subject make it clear that the order's standards are not constitutionally compelled. In the *Nixon* v. *Administrator of General Services* decision of the Supreme Court, the court emphasized two features of executive privilege that I think are particularly relevant here. The first is that it erodes over time, and that years after the President leaves office it can be overridden by a public need for access to historical materials.

The second is that the President—the former President's ability to claim privilege is adequately protected so long as he has the ability to make a claim and present it for consideration by the Archivist and by the sitting President.

There is no suggestion in *Nixon* v. *Administrator of General Services,* as there is in this order, that the current administration has to rubber stamp a claim of privilege by the former President.

More to the point even than the *Nixon* v. *Administrator of General Services* is a decision rendered by the D.C. Circuit in 1988, *Public Citizen* v. *Burke.* In that case the Justice Department had

attempted precisely the same thing that is now being attempted by the Executive order. In that case pertaining to Nixon Presidential records, the Justice Department had issued a directive requiring that if a former President, in that case Mr. Nixon, claimed privilege, the Archivist was required to withhold those materials and let anyone who wanted access bear the burden of going to court. The D.C. Circuit held that order was unlawful, that the Archivist could not shirk his responsibility to rule on a claim of executive privilege made by a former President and release materials to the public as required by statute if that was in fact what the law required, in his view.

I speak from sad experience here, as I was among the losing attorneys in that case. Now I feel like it is deja vu all over again. Once again, a policy is being advocated by the administration that would give a former President carte blanche to direct the Archivist in effect not to comply with his statutory responsibilities. That is bad law, it is bad policy, it is contrary to the notion that the Presidential Records Act exists in order to give citizens access to government records and after the 12-year period expires, to place the burden of justifying any withholding of those materials on the person who seeks withholding, not on the person who wants access. Thank you.

Mr. HORN. Thank you very much.

[The prepared statement of Mr. Nelson follows:]

Testimony of Scott L. Nelson

Attorney, Public Citizen Litigation Group

Hearing on "Oversight of the Presidential Records Act"
Before the Subcommittee on Government Efficiency, Financial Management
and Intergovernmental Affairs of the House Committee on Government Reform

November 6, 2001

Good afternoon, Mr. Chairman and members of the Subcommittee, and thank you for inviting me to testify before you this afternoon. The subject of my testimony is the most immediate and controversial issue affecting implementation of the Presidential Records Act ("PRA" or "Act") – namely, the legality of the recently issued Executive Order concerning the assertion of constitutional privileges to bar releases of records under the Act. The Order is troubling in a number of respects. Most significantly, 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.

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 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 terms of 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 from the public for up to 12 years after the president's last day in office. The categories of materials that may be restricted include, by way of example, 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 of most relevance 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, in order to allow NARA to gain control over the

materials, move them into a presidential library, and begin the process of preparing them for public access. After the five years are up, any person may request access to presidential records, and the standards governing such a 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 the so-called FOIA "exemption 5," which covers materials that are subject to the executive privilege. 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' judgment that 12 years will generally be long enough to protect records containing the deliberations of the president and his advisers. After that lapse of time, the drafters of the Act concluded, the interest in public access to the historical record would outweigh any embarrassment that might otherwise attend the disclosure of the inner workings of the White House decisionmaking process.

To be sure, the Act does provide 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 this year, marking the first time in the history of the PRA that materials subject to the Act are available without regard to such restrictions – at least in theory.

Over the seven years that preceded the 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 of records that were withheld solely because they fell within the restriction category for 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 of this year, the 68,000 pages of materials 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 this year 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, in order to give them the opportunity to assert any claim that a constitutionally based privilege prevents 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, 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 of those questions, the 68,000 pages of records have 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 has yet been made by the incumbent president. It is not yet known whether former President Reagan's representatives have asserted any claim of privilege as to any of the materials.

3. **The New Executive Order.** On November 1, 2001, the White House's review of "many constitutional and legal questions" culminated in the issuance of a new Executive Order governing the implementation of the PRA, which 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 does not only reverse the burden of seeking judicial review. It 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 in which to review any presidential materials that are subject to a request for access under the PRA. Bush Order, § 3(d). Upon completion of the incumbent's review process, the Order states that the incumbent is to decide whether he "concurs 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 "concurs 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 bring an action against 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.

Finally, 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.*

4. The Bush Order's Legal Flaws. The Bush Executive Order is fundamentally flawed, legally, constitutionally, and as a matter of policy. 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 at the outset 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 in order to protect the former president's ability to assert privilege claims under *Nixon v. Administrator*.

The D.C. Circuit, in an opinion written by Judge Silberman and joined by Judge Sentelle (both Reagan appointees) 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 clear violation of the constitutional duty to execute the law faithfully and in plain 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 – a truly extraordinary abdication of the executive branch's obligation of fidelity to the law. In these respect, 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 in order 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 legally suspect. 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 novel and highly debatable. The privilege is not, after all, a personal right of the former president. He is authorized to exercise it solely on behalf of the branch of government that he once headed. His family members or designees have no such claim of authority. To suggest, as does the Bush Order, that the incumbent president must defer to claims of privilege asserted not by a former officeholder, but simply by the former president's family, friends, or designees, threatens to expand the constitutional privilege beyond legitimate bounds.

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 public access 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 may mean).

This is not to suggest that the representatives of former President Reagan, or any other former president, will consciously act in bad faith to bar access to their materials. But with the ability to block access will come the temptation to use it, particularly when records that are (or may be) embarrassing to the former president or his close associates are concerned. 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 have suggested, 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 new 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 of this year, 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 new 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 paradigm. 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. I urge this Subcommittee to do anything it can to discourage the administration from implementing it.

Thank you.

Mr. HORN. We are now going to ask questions. We have got two of us here for the majority. We haven't seen the minority. But it will be 10 minutes a side, and I am starting with 10 minutes and then Mr. Ose will have 10 minutes.

Governor, I think earlier this year you notified the former and current Presidents of your intention to release to the public about 68,000 pages of records that former President Reagan had restricted for the last 12 years under the Presidential Records Act. Is that correct?

Mr. CARLIN. That is correct.

Mr. HORN. When you gave this notice, had you completed your review of the records and determined that there was no basis to withhold them down—under any of the exemption categories specified in the act?

Mr. CARLIN. My staff had worked with the Reagan representatives to come to that conclusion, yes.

Mr. HORN. What steps do you take to protect against disclosures of records that might contain military, diplomatic, or national security secrets?

Mr. CARLIN. The staff at the Reagan Library, as well as my immediate staff, as well as the representatives of the former President, look very closely at all of those records to make sure that we are complying with all of those restrictions, whether they be for national security or classified documents, obviously. At the Reagan Library, I think there are about 8 million pages of classified records that will be open down the road several years from now.

Mr. HORN. How did you ensure that the other exceptions from disclosure are properly applied? What is the archival staff criteria?

Mr. CARLIN. Well, the staff has—I have been fortunate to inherit as well as add some very talented people to the staff that has had experience and developed more experience in implementing the Presidential Records Act. And the key to that success I think for the most part has been with the staff working very closely with the reps of the former President to, in a dialog, almost partnership way, work through so that over a period of time more guidance and direction could be given to the NARA staff, to the Reagan—in this case the Reagan Presidential Library staff, so a lot of the work has moved forward in a rapid, efficient way.

But the key has been, obviously, talented staff committed to the appropriate implementation of the law and the Executive order.

Mr. HORN. Did your notice, when you identified the two Presidents, any of these records that raised, "a substantial question of executive privilege" as defined in Executive Order 12667?

Mr. CARLIN. Well, obviously, the incumbent has the right to make the judgment call as to whether there is something that rises to that level.

The former in this case, and based on our experience with opening some—I think we are at about 5.3 million pages of records that we have opened in the Reagan Library, that we have had a very small, modest number, percentage-wise that have fallen under further scrutiny, for records that come under P5.

Mr. HORN. You want to define P5?

Mr. CARLIN. Well, this is the exemption that deals with the confidential advice to the President from staff, or from staff to staff,

in terms of the process of moving forward on various decision-making activities.

Mr. HORN. When a scholar goes into the Reagan Library, and when you are faced with 5 to 8 million, the question would be, is the best way to get at it is with the certain—White House personnel, let's say, national security, or urban planning or whatever, is—what is the best way for any scholar to get at such a vast bit of material?

Mr. CARLIN. Well, because as I explained in my opening statement, systematic processing has been hampered by an extensive use of FOIA, which is—we are not being critical of, but just sharing our professional experience, it has been very difficult to move as fast as we would like in opening as many records as possible in an efficient manner.

From a practical point of view, FOIA, it has been the FOIA line that has determined how records have been opened and processed. And to anyone now, you know, get in line is my first bit of advice and get your FOIA request in, because between court order and congressional requests and FOIA, there is not much opportunity for just a general request to be made, because the chances are the records have not been processed. The way to bring that request to the top is to make a FOIA request.

Mr. HORN. When you receive a request for these records, do you conduct an initial review and make your own determination on whether any of the act's exemptions from release have any application?

Mr. CARLIN. Yes. We do some initial work ourselves, and then obviously—if somebody makes a request for Record A and it is a classified record, we don't need to proceed any further. It is obvious that record is not going to be opened up. And if no other exemption stands out, obviously, then we proceed to take the next step, which is sharing the request with both the former and the incumbent representative.

Mr. HORN. Has the White House started a substantive review of those records to determine whether to invoke executive privilege for any of them?

Mr. CARLIN. The current incumbent?

Mr. HORN. Current.

Mr. CARLIN. No.

Mr. HORN. I understand that the White House Counsel's Office consulted extensively with you and your agency in developing the new Executive order; is that true? Did you provide——

Mr. CARLIN. That is correct. We would have to acknowledge on the record that we have had unprecedented access and opportunity to share our experiences and share our professional concerns that we may have. It has been over a several-month period, and we certainly cannot in any way be critical of the administration as far as leaving us out in any fashion.

Mr. HORN. In terms of any type of transition of Presidents, whether they are in the same party or not, would you give us some advice as to—or if a President was thinking about it—should you be putting archivists right in the White House now, if you want to get a decent archival file? Is any of that ever done, or are Presidents just a little leery of that?

Mr. CARLIN. Well, consistent with the interest that you had, Mr. Chairman, with transition in the last few years, we likewise were committed with the then-coming change of administrations, as a result of the last election, to be in a position to work with the new administration on records management, particular emphasis on the electronic side, to try to avoid some of the problems that we had, make use of lessons learned from the previous administration. And we were privileged to have had the opportunity to work extensively in the very short transition period that did eventually develop, and then since then, and are working very closely with the White House, with the Office of Administration on Records Management issues. So, come whenever that time is when those records are transferred to us, there is a much better opportunity they will be in a condition that will allow the maximum efficiency of processing.

Mr. HORN. What views or comments do you have about the final Executive order that the administration put in the Federal Register?

Mr. CARLIN. Well, obviously, as you are well aware, policy is developed by you and/or the administration, and it is our role to implement. We did share some—what we would call professional concerns, and, as I indicated earlier, appreciate the fact that we were given the opportunity to do so, based on 12 years of experience with now three former Presidents.

But the policy side of things we will let the Congress and the administration work out.

Mr. HORN. Thank you. I now yield 10 minutes to Mr. Ose.

Mr. OSE. Thank you, Mr. Chairman.

Mr. Whelan—before I go there, Mr. Chairman I just want to—I am relatively new here. One of the things that I have always come to admire about President Reagan is the fact that when he had finished his work, he was not afraid to put his stuff in the public domain. He just said, I got these three exemptions, But, you know, let's just trust the people and tell them what it is that we know. And if there were to be one thing that I would say to President Reagan today, it would be that I am most appreciative of his faith in the citizens of this country in that respect.

Mr. Whelan, I am curious about something. In President Bush's—or in the Executive order of last Thursday, the—three exemptions, if you will, that were embedded in the Presidential Records Act—that would be national security, deliberative process and law enforcement—were changed. Law enforcement was dropped. And Presidential communications in one case, and legal advice and legal work in another were added. Am I correct in that?

Mr. WHELAN. You are certainly correct that the wording is different from the previous Executive order.

Mr. OSE. Now, under my interpretation, that is an expansion of the Presidential Records Act. Am I correct in that?

Mr. WHELAN. No, you are not, sir. No substantive change is intended or effected by the difference in words used to describe the privilege, nor could any President through an Executive order change the contours of the constitutional privileges available to existing and former Presidents. So certainly nothing is intended by it.

I will note, for example, you note that the previous Executive order didn't use the term "communications of the President." Well, the communications privilege was at the core of the two Nixon cases. It was clearly covered by this Executive order, which just used different labels.

Mr. OSE. We are going to get to that. But you are saying that there was no intended change meant by the change in wording?

Mr. WHELAN. That's correct, sir.

Mr. OSE. So why did you change the words?

Mr. WHELAN. The language used to describe the constitutional privileges of the President, as one of the other panelists indicated, has changed over time. Different people have different phrasings that they find appropriate.

The Department of Justice has long described the constitutional privileges as subsuming the privileges that are listed here in the Executive order.

Mr. OSE. Attorney General Reno—just for an ordinary person like me, what does subsuming mean, just in common person's language?

Mr. WHELAN. Well, I won't pretend to serve as a thesaurus, but the notion that the very materials that would in other contexts be covered in these privileges are for the President covered by his constitutional privilege.

Mr. OSE. So it's analogous to including something, basically?

Mr. WHELAN. That is at least a rough——

Mr. OSE. I am kind of a rough guy, so you will have to bear with me. I didn't mean to interrupt you on the other.

So going back to my original question, why the change in the wording? If there is no intended change in the interpretation, why do you need to change the words?

Mr. WHELAN. I am not aware of any decision on that other than the Department of Justice, say, from Assistant Attorney General Olson in the Reagan administration through Attorney General Reno, has used language that we used in this Executive order.

Mr. OSE. This brings me to a very specific question, and that is, the Presidential Records Act in Section 2204(a) talks about confidential communications—focusing in on one of the new words that didn't have any change in meaning, it talks about confidential communications between the President and his advisors; and yet the Executive order under section 2(a) makes no distinction between confidential and regular communications between the President and his advisers. Now, are you attempting to expand the protections, if you will, that the President might seek to exercise?

Mr. WHELAN. No. There is no intention via this order to expand or redefine the constitutional privileges available to the President. This order is procedural.

Mr. OSE. A plain reading of the Executive order suggests to me in no uncertain terms that it's all communications between the President and his advisors that are covered by what you contend is not an expanded Presidential Records Act.

Mr. WHELAN. Insofar as such communications are subsumed by the President's constitutionally based privileges.

Mr. OSE. OK. Let's talk about that. Are the attorney/client or work product or deliberative process privileges common law privileges or constitutional privileges?

Mr. WHELAN. When invoked by you or me, these are common law privileges. But, again, the Department of Justice has consistently maintained that these common law privileges are subsumed or incorporated under the President's constitutional privilege.

Mr. OSE. OK. This is very interesting. Don't court cases hold that an executive privilege does not include attorney/client privilege? Isn't that what court cases hold?

Mr. WHELAN. The Supreme Court has never held that the President's constitutional privilege does not subsume materials that would otherwise be protected by attorney/client privilege.

Mr. OSE. Can I ask you a favor? Instead of using the word "subsume," can you just use regular language with me, however long the definition you might substitute? I mean, you are confusing me with the word subsume.

Mr. WHELAN. You can use incorporate, if you would like.

Mr. OSE. You are saying the President, whether it's this President or a future President, has a constitutional privilege to exercise this exclusion, if you will, this protection?

Mr. WHELAN. That much is clear from the *Nixon* v. *Administrator of General Services* case.

Mr. OSE. And yet——

Mr. WHELAN. I am sorry. From the *Nixon* v. *Administrator of General Services,* case.

Mr. OSE. Mr. Chairman, I just need a moment, please.

Mr. HORN. While you are doing that, let me get a question in here.

Mr. Whelan, I'm curious, when we talk about a former President, a current President and/or their representative, how do we get the—what kind of representative? Is there any legitimacy to that? And, if so, who is it? Is it their cousin? Is it their little brother? Is it another President or what? How do you know that is the representative and how that would be agreed to by either the counsel in the White House or the Department of Justice, etc? Can you give us some advice on that?

Mr. WHELAN. Well, Mr. Chairman, the former President is to designate his representative. So the person he has designated as such shall be his representative.

Mr. HORN. And who would that be?

Mr. WHELAN. That depends whom the former President designates. He may designate whomever he sees fit.

Mr. HORN. Well, is a person that is an expert on, let's say, national security policy or whatever, does it have to be an attorney? Could it be anybody that the former President has faith in?

Mr. WHELAN. Well, let me go back to the *Nixon* v. *Administrator of General Services,* case, and I think that will help explain some of the considerations that a former President would take into account in selecting a representative. As that case and the *Nixon* v. *Administrator of General Services,* case recognized, the constitutional privilege of the other President is essential and serves the public interest by guaranteeing that advisors to the President have some real assurance of confidentiality so that they can give their

full, frank advice and not worry about how they might be portrayed. The essential goal is that the President and the country benefit from their full advice.

With that said, a former President presumably would want to select as his representative someone who was knowledgeable about and sensitive to the interests that advisors would have so that advisors in the future would have confidence that they could give their full, frank advice.

Mr. HORN. The Presidential Records Act clearly envisions that the Archivist will initially decide whether claims of executive privilege by a former President are justified. The act specifically provides a judicial remedy that, "a former President asserting that a determination made by the Archivist to the United States violates the former President's rights or privileges." What's your reaction to that? For example, can an Executive order take away from the Federal official authority and responsibility granted by Congress?

Mr. WHELAN. Mr. Chairman, I don't believe anything in this Executive order takes away any authority conferred by Congress. So I am not—perhaps I missed the specifics of your question, but I don't believe the Executive order does that in any respect.

Mr. HORN. Well, I get the—it might not mean that, but I would think that the Executive order is attempting to make laws that Congress makes.

Mr. WHELAN. No, that is not right. I believe Professor Shane mentioned the Executive order is designed to set forth procedures, to fill gaps, to implement the Presidential Records Act. It is not designed and does not in any respect override any of the provisions of that act.

Mr. HORN. Well, where—the representative bit, how would you know? How would anybody in the government know? Is it simply a letter from the former President and that does it on the representative, or what?

Mr. WHELAN. Yes. A notice concerning—given via letter to the current President or the Archivist.

Mr. HORN. Well, that would be a good idea.

Mr. Ose, 10 minutes.

Mr. OSE. Thank you, Mr. Chairman. I appreciate the moment to gather my thoughts.

Mr. Whelan, would you please cite for me the legal or constitutional precedent that subsumes or incorporates the attorney/client or work product privilege under the executive privilege?

Mr. WHELAN. I don't know that there is case law on that point, Congressman Ose.

Mr. OSE. Is there any law on that point?

Mr. WHELAN. Well, there certainly is a long-established practice of the Executive Department with respect to the constitutional privilege, which practice has been recognized.

Mr. OSE. OK. But is the attorney/client and work product privilege a constitutional privilege or a common law privilege?

Mr. WHELAN. Well, I'm going to have to go back to the phrasing that I think we used before, which is the President's constitutional privilege subsumes or incorporates the attorney/client or work product privilege. There was a letter from Attorney General Reno

citing the Office of Legal Counsel opinions by Ted Olson and Chuck Cooper to this effect in this last administration.

Mr. OSE. I have some passing knowledge of former Attorney General Reno's positions.

Mr. Nelson, do you have any observations on these points? I'd be curious what input you might provide.

Mr. SCOTT NELSON. Well, I think that there might be circumstances where there would be some overlap between attorney/client privilege and the constitutional executive privilege. For example, if the President were consulting with his White House counsel on some matter of legal policy, I would think that conversation would likely fall within the bounds of both the potential at least constitutional executive privilege and the attorney/client privilege. I don't think that those two categories necessarily are mutually exclusive, but I also don't think that they necessarily are co-extensive. In other words, I think there might very well be some communications and certainly some writings that could fall within the common law attorney/client and work product privileges that would not necessarily qualify for the constitutional executive privilege attaching to confidential communications between the President and his advisors.

Mr. OSE. Are you familiar with the 8th Circuit or the D.C. Court's rulings with respect to Mr. Lindsey that have occurred since the Supreme Court ruling Mr. Whelan referred to?

Mr. SCOTT NELSON. Well, I believe that the courts have held that attorney/client privilege is not constitutionally compelled in that context, but I would want to go back, frankly, and study them before I was prepared to give detailed testimony on what they meant before a congressional subcommittee, I am afraid.

Mr. OSE. Professor Nelson, Professor Rozell, Professor Shane, do you have any thoughts on this matter?

Ms. ANNA NELSON. I can't talk about the legal matters, but I've been very interested in this conversation. Going back to the chairman's question of what the researcher finds when they go into a Presidential library, and I think it's an esoteric conversation for those of us who go looking for documents, what will happen——

Mr. OSE. Before you leave that, it is not esoteric in the sense the citizens of this country deserve this information——

Ms. ANNA NELSON. You are quite right.

Mr. OSE [continuing]. In terms of what their leaders are basing their decisions on.

Ms. ANNA NELSON. You are quite right, and what will happen, in spite of the insistence that this is a management problem, is that records will be withheld. It's very dangerous—secrecy is a dangerous thing. It always causes conspiracy theories. As a member of—former member of the John F. Kennedy Assassination Record Board, I can tell you all about that. It was secrecy that bred those conspiracy theories, and I think that's one aspect about it.

In your question about what you will find when you go into the 68,000 pages, you will find that the Archivists have done a wonderful job of organizing them, and there will be file folders that will tell you where to go for your research. That's why people like Presidential libraries.

The problem of using FOIA requests and not having systematic review is one that has persisted in many Presidential libraries over the years. The difference is that we have to regard these as government papers, government documents. In the past, the designated individual when the President dies is a member of the family or a member of the administration protecting the family's interests. This is not going to be possible when the records are Federal records, and I think we have to rethink many of these aspects for public access, which is the very key issue here.

When the subcommittee staff that created the Presidential Records Act and the committee decided to include the 12 years, they felt that was enough for confidentiality. It may not be, but, in any case, their motive was to open records.

President Nixon managed through the courts to keep his records closed for over 20 years. Just by using legal attempts through the courts, he tied them up. And this was on the minds of people when he began to do that before that act was passed. So I think that anything that hinders public access is hindering the American people from understanding the recent past.

Mr. OSE. Professor Rozell. Professor Shane.

Mr. ROZELL. Thank you.

There are many things about this Presidential Executive order that disturb me, but one in particular that you raised before is a provision that allows a former President to designate someone, whomever he may choose, to make a decision with regard to asserting executive privilege. I would like to know specifically who would be considered qualified to render such judgments.

If you follow the history of case law and Presidential practice with regard to the use of executive privilege, executive privilege has come to mean the right of the President and high executive branch officers with the President's consent to withhold information that has a direct impact on the national security or information that, if released publicly, would cause undue embarrassment to individuals within an administration for no public gain whatsoever.

It bothers me greatly to see in this Executive order that a former President may designate someone who may at heart have the former President's own political interests or standing in history primarily in mind rather than the traditional categories for which executive privilege normally would be asserted. And, again, executive privilege exists to protect the national security or the privacy of internal deliberations when it is in the political interest to do so, not when it's in the public interest of an administration or of a past Presidential administration.

Mr. OSE. You bring up an interesting point, because the cases that were actually before us have to do with previous administrations.

Mr. ROZELL. Yes.

Mr. OSE. It's nothing where President Bush is on the line. It's just——

Mr. ROZELL. That's right. That's what I find so curious, that they are taking a stand on an executive privilege issue with regard to past Presidential administrations' papers, and that's not the tradi-

tional category for which an administration would be staking a claim for executive privilege.

I am not, by the way, opposed to the concept of executive privilege. I am not opposed to the concept of secrecy. As I said in my statement, I believe that Presidents have needs of confidentiality, but as with other constitutional powers there is a balancing test. There has to be a balancing test with regard to different needs—the needs of Congress, the needs of the public. To have access to information must be weighed against the need of an administration to withhold information or the presumed need of a past administration to withhold documents from public review.

And one final point. One thing that hasn't been raised is this question. As I understand the Executive order, if a past President's designant or a past President wants to withhold information, wants to withhold Presidential documents from his administration and the current President disagrees, then the former President's claim of executive privilege stands. What if the current administration needs access to such information for current policy deliberations and development? You mean to tell me that the current administration cannot have access to the historic records and documents of a past administration when those records, those documents may be crucial to the development of policy in the current context? What's more important here?

Mr. OSE. Professor.

Mr. SHANE. Thank you.

I think, the starting point, I would underscore in reaction to what the other speakers have said, with which I agree, is it's important to remember that executive privilege is intended to protect the Presidency. It's not a privilege to protect particular individuals in their individual capacity as incumbent President or their individual capacity as past President. It's intended to protect the office.

Now, with regard to the wording of the Executive order, I would say that operationally, with one caveat, with one sort of warning, operationally it doesn't make much difference what verbiage the Executive order chooses to describe the contours of executive privilege. What counts is—because even if they assert in the Executive order that they could conceivably assert privilege on 4 or 5 or 25 grounds, the order obviously doesn't compel them to do it. The President, this President, successor Presidents, former Presidents could decide I'm not going to rest on privilege even if hypothetically I could assert one. So in practice, except for one thing, the verbiage doesn't much matter.

The reason why it might matter, the one exception is that, for reasons Professor Rozell has mentioned, this administration seemed to develop what might be called a kind of idealogy of executive privilege. It is picking fights over records of past administrations. In one case, with regard to the Vice President's meetings in his contest with GAO, I have to say it is a current President, but the information seems almost trivial. It seems like almost an intent to pick a fight. And in that context leaving the verbiage unchallenged by Congress does raise the possibility if that verbiage just stays on the books unchallenged by Congress some subsequent President will say, well, we asserted that Presidents could claim

privilege on this particular ground and Congress never objected, so we must have the law right. That's——

Mr. OSE. Just for the record, Congress objects.

Mr. SHANE. Well, I think that's quite significant. It's more than mere ritual to do that.

Could I just add one other puzzle that I have about Executive order and—but I have to say, with regard to the Presidential Records Act, too, and that is both documents say with regard to the Vice President's record, the Vice President shall be treated as the President. And if I may ask rhetorically, why in heaven's name would that be?

The Vice President's privileges, such as they are, could only be part and parcel of the privilege that protects the Presidency. I don't read into the Constitution—I know of no authority that suggests there's independent executive privilege to protect the Office of the Vice Presidency. As a Presidential advisor, Vice Presidents are undoubtedly protected in their communications in order to protect the Presidency, but I would imagine that huge quantities of what Vice Presidents read and deliberate upon are no more protected by executive privilege than, say, the records of the Federal Energy Regulatory Commission or the Small Business Administration. He's just another Federal administrator. And I wonder whether Congress might want to turn its attention to that question.

Mr. OSE. Thank you, Mr. Chairman. You've been very generous.

Mr. HORN. If I might just add on a question on this, Aaron Burr and Thomas Jefferson would not have gotten along. And in terms of Franklin Roosevelt, his Postmaster General, Mr. Farley, wanted to run and then he was thrown aside when the boss won three battles on that. And I am just curious about the Vice President relationship. It isn't the first ones that have turned on a President or later said I will run in the next time and I'll get the votes. So what do you think on who deals with those papers which can really be damaging to the Vice President as with the incumbent, present President?

Mr. SHANE. Constitutionally, my intuition is—and I use the word "intuition" because there's not a lot of law on this subject, but my intuition is that only a President can assert executive privilege. So for better or worse with regard to Aaron Burr, whether or not his records would remain secret would be up to Thomas Jefferson, not Aaron Burr.

Mr. HORN. Any other comments from the professor?

Ms. ANNA NELSON. Well, I think there is one more thing to add, and that is that records at Presidential libraries, you know, don't come out in one or two times. We're still getting records out of the Kennedy Library, and we're getting records—we're getting a lot of records out of the Johnson Library. So that we do have to look ahead. I want to emphasize that. And we have to look ahead to the political ramifications as Presidents of one party make some determinations of the papers of Presidents of another party.

And I think that if it is true, and I didn't read it this way, that this only applies to FOIA, I suppose that's not nearly as bad. When I read the Executive order I read it to mean that every time records were released that they would be subject to the incumbent as well as the past President, and that's a terrible burden and a

terrible chore for the National Archives, and it just means that we'll see the papers less and less. Because even now the national security records are held back so long that—because it must go through so many different people. The more people you have to go through, the longer records are kept out of the public eye.

Mr. HORN. There's obviously a certain number of years in the law that's there. When that was put together, to what degree, if any, did the issue come up of why don't we do it until the President dies and then you don't have to worry about it?

Ms. ANNA NELSON. Well, some Presidents live very long.

Mr. HORN. Adams and Jefferson, as a matter of fact.

Ms. ANNA NELSON. That's right.

Mr. HORN. They were healthier than we are.

Ms. ANNA NELSON. They were very healthy men, and even Harry Truman lived a long time. So I think that there's no question about the fact—but even when Presidents died young in the past the families have taken over their papers, much as President Kennedy's family, and so there's no guarantee that they will be opened. But I think that was the reason. I think they felt that just too many years would pass.

For the historian I have to say that it's wonderful to get records out that are within the lifetime of the people who wrote them. Documents don't tell you everything. Especially I think this is true of Congress where a lot's done in the halls and elsewhere. But documents even in the executive branch don't tell you everything, and when you have people to interview, to counter, you get a much better picture of it. When you don't have those and you don't have the records, then you're dealing with people's memoirs.

So in the case of the Nixon administration, for example, there are a lot of memoirs. And in the case of the Reagan administration there were a lot of disaffected White House personnel who wrote memoirs, and you get an incorrect view of history. You need the documents, and you also need the interviews.

Mr. HORN. They didn't do anything more in their memoirs that they did in sort of being a cat scratcher and media of doing in one of their people, and I don't know how President Reagan really was able to get through that, because they had three little cliques there, and I think some of those memoirs show it rather——

Ms. ANNA NELSON. Yes, they do. And I think the next generation won't understand what went on; and, therefore, they're going to be reading memoirs as, in fact, history.

Mr. HORN. Let me ask Mr. Carlin and Mr. Whelan this. Is it correct that the Executive order applies only to Freedom of Information Act [FOIA], requests?

Mr. WHELAN. No, it's not. It applies to all records, ones that are requested by the former President.

Mr. HORN. Is that your view of it?

Mr. CARLIN. That's one of the views. I don't think it's maybe as clear as it maybe should be, but in practice we'll certainly accept the interpretation of the drafters in terms of their intent.

Mr. SHANE. Mr. Chairman, may I just say that I find the answer puzzling. Because the Executive order says it's triggered at the appropriate time after the Archivist receives a request for access for

Presidential records under 2204(c)(1). It strikes me as fairly unambiguous as to when the order applies.

Mr. HORN. Is that the way you all feel on this?

Mr. SCOTT NELSON. Mr. Chairman, I think that the President read a proper reading of the words in the order. I think as the Archivist explained, however, it may not really make that much difference since in the Presidential Records Act libraries, of which the Reagan Library is the first one, almost all the records that are being opened up are being opened up in response to requests, unlike in the prior libraries where the President's directions as to the order in which materials would be processed tended to govern. So to say that this applies to FOIA requests in the Reagan Library really means that it applies to almost any document that gets opened up in the Reagan Library.

Ms. ANNA NELSON. But one reason these FOIA requests are coming in is because there's uncertainty as to when systematic review will be completed. Generally, if you have a set system, for example, the State Department pretty much opens in 25–30 years or no more than 30, then people are willing to wait a little bit. Not everyone. I know——

Mr. HORN. Excuse me. I was curious. Maybe you can tell me this, that the First World War records were still bottled up in the Department of State, is that correct?

Ms. ANNA NELSON. They were in the archives. However, they were code records, as I understand them. I am sure Mr. Carlin could——

Mr. HORN. How do you break something like that loose? I mean, that's just silly.

Ms. ANNA NELSON. Well, all records that are classified have to go through the agencies that classified them. The archive has no declassification authority.

Mr. CARLIN. That is correct, Mr. Chairman. In fact, as long as the original agency or in many cases there are several equities involved in a piece of classified information, as long as they feel they have justification for keeping it classified, it stays classified. We can do a lot of work at order to declassify if we're given guidance to do so, but if we get no guidance, we're totally dependent on the agency.

Mr. HORN. That's interesting. You are saying we haven't put up a law to solve that problem?

Mr. CARLIN. The past administration's Executive order, which is still standing today, went a long ways toward pushing the envelope as far as declassification, setting a deadline. But that deadline included the fact that, if the creating agency had justification, they could raise that issue at the time and there was a process by which they could proceed and have their day in court, so to speak, and unless they were overruled at some point by another process the record would remain classified. And we do have classified records that go back to the early 20th century.

Mr. HORN. I wonder, Mr. Archivist, whether you can give us some language to get at that problem. It just seems to me to have the First World War still around, I mean, was the Kaiser a secret spy for us and we might hurt German feeling or what? This is crazy time, that those documents aren't free and available.

Mr. CARLIN. I'm sure my staff will be very happy to work with your staff on creative ideas that might be of interest to this committee.

Mr. HORN. Mr. Whelan, the Executive order requires the Archivist to automatically accept any claim of executive privilege by a former President even if the Archivist and the incumbent President, for that matter, believes the claim is beyond the scope of executive privilege. Is that reading correct?

Mr. WHELAN. I'm sorry, Mr. Chairman. Could I ask you to repeat the beginning of that question?

Mr. HORN. The Executive order, the one we're talking about, requires the Archivist to automatically accept any claim of executive privilege by a former President even if the Archivist and the incumbent President, for that matter—in other words, you have got the former President and you have got the incumbent President and let's say the incumbent President believes the claim is beyond the scope of executive privilege. Is that reading correct? Who has it finally? Is it the incumbent——

Mr. WHELAN. In that event—I'm sorry.

Mr. HORN. Isn't it basically incumbent, the President there, and they can overrule the former Presidents?

Mr. WHELAN. In that event, pursuant to the Executive order, the incumbent President directs the Archivist not to make the records available until such time as the incumbent President and the former President agree on disclosure.

I should add, however, that in the event that the former President makes a claim that in the incumbent President's view is outside the scope of a constitutionally based privilege, the incumbent President, pursuant to this Executive order, need not concur in that privilege decision.

Mr. HORN. Is this consistent with the President's obligation to see that the laws are faithfully executed?

Mr. WHELAN. Absolutely, Mr. Chairman.

Again, the central recognition in the *Nixon* v. *Administrator of General Services,* case is that the former President has a constitutional privilege that he may invoke. President Bush has determined that the best way to provide procedures with respect to such privileges is pursuant to his Executive order. In the same way that the court recognized in *Nixon* v. *Administrator of General Services,* that the incumbent President must be presumed to be in the best position to assess the present and future needs of the executive branch, so President Bush has determined that this Executive order is the best way to respect the privilege claims that the former President has with respect to the records created during his administration.

Now, again what we are trying to do here is create procedures for an orderly, workable process that in the end we believe will facilitate disclosure in an expeditious manner while respecting the former President's constitutional privilege. I think we can look to the lessons of history. As I indicated at the outset, under the old regime where the former President was under no legal obligation whatsoever to make his records available, former Presidents always did so, and there's simply no reason to anticipate that under the much more limited protections that the former President now

has that he will seek to withhold more documents than he previously did.

Mr. OSE. Mr. Chairman, can I chime in here for a minute?

Mr. HORN. Ten minutes.

Mr. OSE. Thank you.

Mr. Whelan, I am not quite sure I understood your question. Under the old regime that would have been under President Reagan's Executive order, you suggested that the past Presidents were under no obligation to release. It's my understanding that they only had three bases on which they could refuse to release, that absent one of these three bases they could not refuse to release.

Mr. WHELAN. Congressman Ose, pardon me for the ambiguity. When I referred to the old regime, I meant the regime prior to the Presidential Records Act.

Mr. OSE. Prior to 1978?

Mr. WHELAN. That's correct.

Mr. OSE. Thank you for clarifying that.

I want to follow up with Governor Carlin on something. Chairman Horn has asked about the 68,000 pages of records that President Reagan's administration is involved in. Do you have any information on where former President Reagan's representatives are in reviewing these records and whether they are likely to object to their release or have objected or have communicated in any manner whatsoever about whether or not to go ahead and release these records?

Mr. CARLIN. I don't think that there's any way I can answer that today, because I think they were, one, waiting for the final product and will now with the new Executive order make their decision which would allow them to object.

Mr. OSE. Let me just make sure I got this right. There is a request for the release of these 68,000 pages that predates last Thursday?

Mr. CARLIN. Pardon?

Mr. OSE. There's a request for these 68,000 pages from the Reagan administration days that was existing prior to last Thursday?

Mr. CARLIN. Yeah. There was 68,000 pages shortly after the first of the year that we advised both the former and the incumbent that these papers were ready for release.

Mr. OSE. And did I just understand you to say that the Executive order that was issued last week will be applied retroactively to a request predating the Executive order?

Mr. CARLIN. It's my understanding that is the case, because these records have not been OKed, and that they will have the opportunity to insert—that's what my counsel has advised me that the interpretation will be, not ours, but how the implementation will be from the current administration, that the former will have the opportunity to exert executive privilege on those records. They can't go back to records that have already been released. We have 5.3 million papers that are out there, pages of records.

Mr. OSE. I have a request in to you dated March 5 of this year for two items. Are you going to apply last Thursday's Executive order retroactively—now that you found those items retroactively to deny me access to those items?

Mr. CARLIN. Have we provided you access to them?

Mr. OSE. Not yet. Are you going to apply this Executive order retroactively to two items that you've told us you found pursuant to a request of March 5 of this year?

Mr. CARLIN. I would have to check with staff. I would not want to comment for sure in terms—it would depend on exactly what steps had been taken and where we were in the process.

Mr. BELLARDO. If I could just add, we have been in—these—if I remember correctly, these are records of the previous administration which there has been a congressional request for.

Mr. OSE. Correct.

Mr. BELLARDO. I believe that this Executive order lays out an abbreviated process, and I would defer to Mr. Whelan on that in the case of special access requests, as opposed to what we are talking about in the Executive order for the period after 12 years. So you would have a different set of processes for these special access requests. But I would defer to you.

Mr. OSE. Mr. Whelan.

Mr. WHELAN. Congressman, let me first say, with respect to the 68,000 documents, that the administration is committed to processing those documents expeditiously and we expect that those documents will be available expeditiously.

On your question——

Mr. OSE. Before you leave that, what does that mean? Does that mean 30 days, 60 days? Because we have been waiting 9 months.

Mr. WHELAN. Well, the wait that you referred to is I think the desire to process those records consistent with the procedures. And I don't know the timetable, but I think it will be relatively soon.

Mr. OSE. What does that mean?

Mr. WHELAN. I am not in a position to say, sir. That's the information I have received.

Mr. OSE. Could we direct a letter to somebody who's in a position to say, if you could give us their name?

Mr. WHELAN. I will provide a name for you.

Mr. OSE. I appreciate that.

Mr. WHELAN. Now, with respect to your other question, I am not familiar with the particular matter you have in mind. I do not think that the concepts of prospective and retrospective are meaningful in this context. An Executive order applies from the date forward to the conduct of the executive branch, except as otherwise provided.

Mr. OSE. You're telling me you are going to apply it retroactively?

Mr. WHELAN. I'm saying I am not familiar with the particular matter that you raised. I simply don't know about it.

Mr. OSE. Well, the logic—I don't want to be argumentative. Never mind. I hear you loud and clear, and I can tell you that I am going to get those documents. OK?

Now I want to go to Section 2204 of the Presidential Records Act—and this is directed to you, Mr. Whelan—2204(c)(2), which you cite in your testimony that the act shall not be "the section provides that the Act shall not be construed to confirm, limit, or expand any constitutionally based privilege which may be available to an incumbent or former President."

We've had some discussion whether this is a common law privilege or a constitutional privilege. More erudite people than me will resolve that.

The question I have is, when we talk about confirming, limiting, or expanding any constitutionally based privilege, when I look at 2204(a) (1) through (6), it lists the items that are subject to restrictions, and down under item (a)(5) it talks about confidential communications. Then I look at the Executive order in paragraph—or section (2)(a) and it clearly does not talk about confidential communications between the President and his or her advisors but communications of the President and his or her advisors. The question I have is that you have eliminated or this Executive order eliminates the word confidential which to me is an expansion because it goes from a select group to the entire portfolio.

Mr. WHELAN. Congressman—I'm sorry.

Mr. OSE. Can you reconcile that?

Mr. WHELAN. Certainly. Section 2204(a) does not purport to be a definition of constitutionally based privileges, and the fact that there may be some overlap between the provisions that govern the first 12 years and the scope of constitutionally based privileges does not create any conflict whatsoever. Obviously, communications protected by the constitutionally based privilege, if the President gives a communication on television, no one's going to claim that is protected. So I think you are going to find in practice constitutionally based privileges protect confidential communications, but there's no particular reason to borrow language from a section which has nothing to do with constitutionally based privileges in describing the order of——

Mr. OSE. But it's your testimony, not mine. That's why I'm asking. It's not my testimony. It's yours.

But I come back to my central question. Why was the word "confidential" eliminated from the Executive order of last Thursday? Why was it expanded to all communications?

Mr. WHELAN. My point is there is no expansion, and I do not believe that—we are certainly not maintaining that nonconfidential communications—so far as I am aware of the scope of the privilege, it probably does not apply to such communications. But the fact that we have not included that word here is not some effort to edit a section of the Presidential Records Act that doesn't relate to this.

Mr. OSE. I want to go back to a question I asked Mr. Shane earlier. Are you familiar with the 8th Circuit or the D.C. Court's rulings as it relates to, for instance, Mr. Lindsey's claims?

Mr. WHELAN. I am not. I am told, however, that the description that another panelist gave is not accurate, but I do not know that myself.

Mr. OSE. Thank you, Mr. Chairman. I have got more.

Mr. HORN. Go ahead. We're very liberal in this group.

Mr. Ose has some questions here, and then we're going to wrap it up.

Mr. CARLIN. Mr. Chairman, would be it be possible for me to respond to an earlier question from Mr. Ose and then excuse myself, if at all possible?

Mr. HORN. Sure.

Mr. OSE. Are you going to talk about the retroactive——

Mr. CARLIN. Yes.

Mr. OSE [continuing]. Application?

Mr. CARLIN. Yes, I am.

Mr. OSE. We may not be out of here very soon.

Mr. CARLIN. I actually think you might be pleased in some respect. Because one of the things we've been told here today and that has been told to us by this administration over the last several weeks and months is that, in practice, this is going to work much better than your fears.

I was advised by staff in the interim from the time you asked the original question that the two records you make reference to we have just found. They have not been shared with either the former or the incumbent. We will now test the current process. We will have an example now to take those two records quickly to the former—to the current incumbent, and the process would be that, if it follows like it should, that within 90 days we should have an answer and hopefully the records to you.

Mr. OSE. Is it 90 days or is there some other time limitation?

Mr. CARLIN. Well, it could be 10 days, it could be 5, it could be immediately. But 21 days they're now saying.

Mr. OSE. Under the new Executive order.

Mr. WHELAN. It's 21 days under section 6 of the new Executive order, that's correct.

Mr. OSE. It used to be 30 and 30——

Mr. CARLIN. Oh, that's on special. Excuse me, sir. Yes, on special access it's to move faster. But what I'm saying is we will have an opportunity to find out with experience how this is really going to work and the record we will take to both sides and see how they want us to proceed.

Mr. OSE. All right. I appreciate that. I just want to be very clear. I certainly want to look at those two documents.

Mr. CARLIN. And we have them. We've now found them, and we will follow the process, follow the law and Executive order to hopefully give you the opportunity to see them.

Mr. OSE. I appreciate your cooperation.

Mr. Chairman, if I might go on.

Mr. HORN. You certainly can.

Mr. OSE. Mr. Whelan, under section 4 of the Executive order last Thursday, there is a provision that, with respect to noncongressional requests, "absent compelling circumstances, the incumbent President will concur in the privileged decision of the former President." With respect to congressional requests, however, no such standard is applied. In effect, therefore, the Executive order makes it easier for——

Mr. HORN. Excuse me. The Archivist has another appointment. Will you have your deputy here so he can answer some of these questions that Mr. Ose might have?

Mr. CARLIN. Unfortunately, we have the same obligation we're trying to get to. I will have staff that will remain behind that are sworn in and would be able to testify, and obviously we will get any answers back post committee action if necessary.

Mr. HORN. OK. Mr. Ose.

Mr. OSE. To continue, in effect, therefore, the Executive order makes it easier for the incumbent and former Presidents to exer-

cise independent vetoes over congressional requests. The question is, why are congressional requests under this Executive order treated, from my perspective, less fairly than noncongressional requests?

Mr. WHELAN. Congressman Ose, if I heard your question—I'm sorry, your voice came through softly. But I believe the opposite is the result. That is, section 4 operates as a rule that the incumbent President will concur in a decision of the former President to request withholding of records. There is no such rule with respect to requests under section 6. Therefore, that makes it easier for Congress.

Mr. OSE. Does section 6 trump section 4?

Mr. WHELAN. Section 6 is independent of section 4.

Mr. OSE. How do you resolve an incumbent President declining to provide access and Congress seeking to exercise its rights under section 6?

Mr. WHELAN. Ultimately, that is what we have the third branch for. The courts can decide that when push comes to shove.

Mr. OSE. What's the legal authority for the establishment of the 21 and 21-day timeframe within the Executive order beyond what is permitted by the Constitution and the Presidential Records Act? What's the basis for the 21 and 21-day windows?

Mr. WHELAN. Well, it is necessary to have procedures that accommodate the constitutional privileges of the former and incumbent Presidents. When you refer to time periods beyond the Constitution or beyond statute, I don't know what—sorry. I just don't know what you're referring to there.

Mr. OSE. Let's focus on the statute then. The Presidential Records Act has a certain timeframe that is established in statute for a response back and forth. That's being changed. What is the basis for the change? All right. It was a 1989 Reagan order that had the 30-day timeframe for a response and what have you and yet that's now being changed under this Executive order. And my question is, what's the legal authority for such a change?

Mr. WHELAN. Well, first of all, I would call to your attention that the 1989 Executive order does not simply provide a 30-day rule. Among other things, that 30 days can be extended to no limit. But, beyond that, as a purely legal matter, the answer to your question is that just as the President had the authority to issue the Executive order in 1989 so he has the authority to issue the Executive order in 2001.

Mr. OSE. Does he have the authority to establish a review period of any length whatsoever?

Mr. WHELAN. Yes, he does. There is certainly no conflict with any applicable constitutionally valid statutory provision. Obviously, if there were such a conflict, that would be a different issue.

Mr. OSE. Is it the position of the administration that under the Presidential Records Act the President has the right to establish a time window of whatever he or she determines?

Mr. WHELAN. As in 1989 so in 2001 the administration understands that the Presidential Records Act does not purport to set time limits with respect to assertion of constitutionally based privileges and with respect to procedures implementing those privileges.

Mr. OSE. And that would be regardless of which committee is asking for it, whether it's Senate, House, what have you? I mean, the President can establish the timeframe, and the timeframe is the timeframe.

Mr. WHELAN. That's correct.

Mr. OSE. OK.

Mr. HORN. Well, is it correct in terms of, say, 30 days, that what the President could do is to do the 30 days or because of some overload or loss of archivists or whatever to change things that they might do less than that, or would they do more than that, in which case there being the article one, they're taking out of the Congress this? What do you think on that, either way?

Mr. WHELAN. Well, surely, Chairman Horn, the time limits need to be reasonable in terms of implementing the constitutional protections. I would emphasize that I believe there seems to be a reading of the 1989 Executive order that construes its time provisions in the light most favorable to it and a reading of this Executive order that construes the time provisions in the opposite way. I would call to your attention that section (3)(b) specifies that the former President shall review those records as expeditiously as possible. So there's certainly no effort here to delay.

Mr. OSE. Is there a requirement under—excuse me, Mr. Chairman, I am sorry.

Mr. HORN. No. Go ahead.

Mr. OSE. Under FOIA is there a requirement for timely response to a request for records?

Mr. WHELAN. The Freedom of Information Act has its own time limits.

Mr. OSE. So after 12 years there's a time statute, if you will, by which somebody has to respond to a request for records; is that correct?

Mr. WHELAN. I could not hear your question. I apologize.

Mr. OSE. If I understand how this would work, is it under 12 years under a FOIA request there is a statutory time window during which a response must be proffered?

Mr. WHELAN. That is my understanding. I believe from what the Archivist was saying there may be a question as to how those FOIA time limits are operating in practice.

Mr. OSE. My understanding is that FOIA says there's 20 days to reply.

Mr. WHELAN. I believe that is the case, at least for requests that are not burdensome. I am not an expert on FOIA.

Mr. OSE. If I understand correctly from the new Executive order, if Congress puts forward a request for records after 12 days, the President can determine the period of time during which a response can be made. Am I correct or incorrect?

Mr. WHELAN. Under the Executive order——

Mr. OSE. For a congressional request.

Mr. WHELAN. Yes. Under section 6, the former President shall review the records in question and within 21 days of receiving the notice from the Archivist indicate to the Archivist his decision with respect to any privilege.

Mr. OSE. So it's a 21-day window for a request from Congress or the courts and it's a 20-day window under FOIA?

Mr. WHELAN. The FOIA simply does not apply and does not purport to apply to assertion of constitutional privileges under this act.

Mr. OSE. I'm just trying to get to response windows. You know, I'm trying to figure out what difference, if any, there is in response windows under FOIA versus the Executive order. I mean, it's nominal, if anything. It's 20 days in one case and 21 in the other, from what I understand; is that—I mean, the rest of the panelists? Professor Nelson.

Ms. ANNA NELSON. Well, the response is a letter saying we received your request. That's the response you have to get back in 10 or 20 days. If the information, for example, is security classified, you may wait 7 years. I have. You can wait 5 years. You can wait 30 days. But the request must be responded to to the public simply by a letter saying we've received your question. I hope that hasn't happened with Congress.

Mr. HORN. It did, and then we did get some appropriations to move these things along in the various executive agencies.

Ms. NELSON. Because many of them do not have the staff to handle that.

Mr. SHANE. Mr. Ose, just to follow up, both panelists have indicated that the practice may not, with regard to all agencies, may not comply in fact with the 20-day rule of FOIA. But the 20-day rule of FOIA—what the law requires is simply not that you get notice of the receipt of your request, the law actually does require that the agency tell you within 20 days whether it will comply with your request.

That does raise an interesting question, because since the Presidential Records Act says that following the expiration of restricted access, requests are to be handled pursuant to FOIA except with regard to exemption 5, that could well be read as setting that same 20-day limit, which would mean on its face any procedure that requires the Archivist to wait longer than 20 days directs him to violate the terms of the Presidential Records Act.

Mr. OSE. I wonder whether the Executive would prosecute the Archivist under a situation such as that, not that I am suggesting that.

Mr. SHANE. I think it is not a criminal offense.

But, Mr. Ose.

Mr. OSE. You see my concern here is it seems to me that you can—the Executive can indefinitely extend the response period by claiming—or writing a new Executive order or whatever it is.

Mr. NELSON. Mr. Ose, if I could respond to that concern. I think you will find in the terms of this Executive order, they don't even have to write a new Executive order to extend the time. All they have to do is request an extension of time, and it is automatically granted to them under this Executive order.

So the 90-day period for responding to requests for access by a citizen is 90 days, unless the former President requests a further extension of time, in which case the Archivist is forbidden to release the records.

As to the congressional request, it is 21 days unless either the incumbent or the former President says this request is burdensome and I would like more time, in which case they get the discretion to set the amount of time that they take to respond.

And further, with respect to congressional requests, if either one of them says no, under this Executive order Congress is out of luck. So I think that is yet another respect in which the order departs from the language and spirit of the PRA. And I would further add that the notion that it is up to the President, by Executive order, to set all of these timeframes seems contrary to another provision of the PRA, which grants the Archivist the authority to promulgate regulations through the lawful notice and comment process for implementation of the act and, in fact, the Archivist has promulgated such regulations which themselves set timeframes during which claims must be made to restrict access, and the Executive order's timeframes are different from those set forth in the archives regulations.

Mr. WHELAN. Congressman Ose, if I may. The time limits under this Executive order are effectively identical to the time limits under the 1989 Executive order.

On the second point, I simply do not see how the delegation of authority to the Archivist to issue regulations can be seen to detract from the President's inherent authority to issue Executive orders. The Archivist answers to the President. I don't think there is any serious legal issue there.

Mr. OSE. I have but a couple more questions, if you will.

Mr. HORN. Go ahead.

Mr. OSE. We have talked about the legal basis for the new exemptions, whether it is common law or constitutionally based. There is clearly some disagreement there. I have asked why this word "confidential" was removed from the new Executive order and why the previous three exemptions are now four. Those are all legal questions.

Let me go to policy. What is the policy basis for the two new broad categories of records with access restrictions, that being the—I got it here, don't leave me—the Presidential communications; and then, second case, legal advice/legal work. I mean, national security and deliberative process remain, law enforcement is dropped, the Presidential communications; and then in the second case, legal advice/legal work is added.

What is the policy basis for that?

Mr. WHELAN. Congressman Ose, there is no expansion, therefore there is no policy basis for an expansion. This is just simply a different way of listing matters. It is a listing. Were it not exhaustive, there could be confusion as to what happens when there is an assertion of a constitutionally based privilege that isn't listed.

Again, there is no expansion, there is no policy basis for the expansion.

Mr. OSE. Is this new Executive order—I mean, I asked this question earlier, and I would hope that whether in writing or otherwise we can get a response. Is this new Executive order consistent with the Eighth Circuit's or the D.C. Court's decisions?

Mr. WHELAN. If you are asking me about the decisions before, which I told you I am not fully aware of, I obviously can't answer your question. This Executive order is fully consistent with applicable law.

Mr. OSE. I think there is some question here about that. Professor Shane.

Mr. SHANE. Just to echo I think what Mr. Nelson said before, there may be examples. I think this is consistent with the Lindsey case in which a President's conversation with a senior advisor who is an attorney might be a Presidential communication and privileged on that ground.

But, my understanding, my recollection—I confess I didn't read the case for today. My recollection of the case is, except for that Presidential communications privilege, there is not a separate constitutionally based attorney/client privilege; that otherwise the attorney/client privilege exists as it would between any client and any attorney.

Mr. OSE. Thank you.

Mr. Whelan, if I might, I would like to direct a written question at you, and then you can provide a response accordingly.

Mr. WHELAN. OK.

Mr. OSE. Subsequent to this hearing—and I want to be clear; I am not averse to what you are trying to do, which is protect the President's ability to act. But I have a slightly different role here in the legislative branch, and I am trying to exercise that. And I will tell you, someday I am going to go back to that position of just being a citizen, "just being a citizen," and I expect my leaders to share with me, to the extent that they can, every piece of information on which they base their decisions.

I am just absolutely convinced that the American people can face up to that and are willing to do so. And I have to say that the way I read this Executive order last Thursday, with all due respect, it is an expansion of what had been the regime previously.

With that, Mr. Chairman, I will yield back the rest of my time.

Mr. HORN. I thank the gentleman. And I would like to thank the staff that put the hearing together: J. Russell George, the staff director and chief counsel of the Government Efficiency Subcommittee. On my left here is Henry Wray, the senior counsel for this; Earl Pierce, professional staff; Bonnie Heald, deputy staff director; Darin Chidsey, professional staff; Dan Wray, clerk of the Census Subcommittee, who has helped us in this hearing; Jim Holmes, intern; Michael Sazonov, intern; David McMillen, for the minority; and Jean Gosa for the minority.

And thank you, reporters Mark Stuart and Lori Chetakian.

Let me just note that this has been an enlightening hearing, and we must ensure that the spirit of this law, the Presidential Records Act, needs to be upheld. And in light of the issues raised today and research conducted by the committee staff, the administration should revisit the issue.

In a meeting yesterday, with Judge Gonzalez, the counsel to the President, he graciously said that any suggestions the subcommittee might have would be welcomed. And we plan to take him up on that offer.

And so we—any of you want to put some more written views for the hearing record, we will have 2 weeks for that. And with that, we are adjourned.

[Whereupon, at 4:10 p.m., the subcommittee was adjourned.]

[Additional information submitted for the hearing record follows:]

AMERICAN ASSOCIATION OF LAW LIBRARIES
WASHINGTON AFFAIRS OFFICE

Mary Alice Baish
Acting Washington Affairs Representative
Georgetown University Law Center

November 19, 2001

The Honorable Stephen Horn
Chairman, Subcommittee on Government Efficiency, Financial Management
and Intergovernmental Relations
House Committee on Government Reform
2157 Rayburn House Office Building
Washington, DC 20515-6143

Dear Chairman Horn:

We write to you today on behalf of the American Association of Law Libraries, the American Library Association, the Association of Research Libraries and the National Humanities Alliance to express our serious concerns with Executive Order 13,233 on Further Implementation of the Presidential Records Act. The library and humanities communities have a strong interest in federal information policy and open government. Our organizations represent librarians and information professionals, researchers and archivists who are committed to the principle that public access to government information is a core tenet of our democracy. Our members know first-hand, on a daily basis, the importance and impact that government information has on the lives of all Americans, on the public's trust and confidence in our government, and on the preservation of our democratic ideals. An open government is the hallmark of our democracy.

Congress enacted the Presidential Records Act (PRA) of 1978 to ensure that the public records of our presidents are government property and therefore belong to the American people. The PRA, as amended by Executive Order 12,667 issued by President Reagan in 1989, provides for a limited time period of 12 years during which presidential records, including confidential communications between a former president and his advisers, could be withheld from public access under custody of the U.S. Archivist. At the end of the 12-year period, FOIA requests could be made to the Archivist for access to view these records. The PRA provides for an exception only if providing public access would violate a constitutionally based executive privilege of the former or incumbent president, in which case public access could be denied. The PRA was intended by Congress to craft a careful balance between a president's ability to withhold certain records for a limited time period and the right of the public to access them. We believe this balance has been seriously thwarted by provisions of Executive Order 13,233.

Executive Order 13,233 effectively denies the public's legitimate right of access under the PRA by giving an incumbent or former president veto power over any public release of materials by the Archivist even after the 12-year restriction period has expired. The library and humanities communities oppose this effort to deny the public's legitimate right to access presidential records that are the property of our government, not of any one individual or of a former president's family or heirs. E.O. 13,233 imposes restrictive barriers to the public's legitimate right to access presidential records that must be overturned.

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We urge you to consider the following specific flaws in E.O. 13,233 that we believe must be corrected to bring it into compliance with both the spirit and substance of the PRA:

- Section 2(a) of the Executive Order states that the former president's constitutional privileges include not only the privilege for confidential communications with his advisers that has been recognized by the Supreme Court, but also the state secrets privilege, the attorney-client privilege and attorney work product privileges, and the deliberative process privilege. There is no precedent, however, for invocation of the state secrets privilege by a *former* president, as opposed to the incumbent. Moreover, the attorney-client and attorney work product privileges are clearly common-law, not constitutional privileges. And the deliberative process privilege, to the extent it would go beyond the privilege for confidential communications between the president and his advisers, is also a common-law, not a constitutional privilege.

- Section 2(b) of the Executive Order states that a party seeking access to presidential records must assert a "demonstrated, specific need" for those records, even after the end of the 12-year period, in order to overcome the former president's privilege. This provision is contrary to the PRA, which makes access available under FOIA standards that require no such showing of need. Moreover, the concept that the constitutional executive privilege requires a person seeking access to historical presidential records to make a showing of need was rejected by the U.S. Court of Appeals for the D.C. Circuit in *Nixon v. Freeman*, 670 F.2d 346 (D.C. Cir.), *cert. denied*, 459 U.S. 1035 (1982).

- Sections 3(a) and 3(c) of the Executive Order provide both a former president and the incumbent president an unlimited amount of time to review records to determine whether to object to their release to the public. These provisions are contrary to the PRA's requirement that the Archivist make such materials available to the public at the earliest possible date.

- Sections 3(d) and 4 of the Executive Order require the incumbent president to "concur in" and support in court an assertion of privilege by the former president, regardless of whether it is legally valid, unless there are compelling circumstances. Even if the incumbent president does not concur in a former president's assertion of privilege, the order requires the Archivist to bow to the former president's claim and withhold public access to any records to whose release the former president objects. These provisions are contrary to the PRA insofar as they require the Archivist to withhold documents from the public without determining the validity of the former president's claim of privilege. *See Public Citizen v. Burke*, 843 F.2d 1473 (D.C. Cir. 1988).

- Section 3(d)(2) empowers the incumbent president to order the Archivist to withhold access to the former president's records on grounds of privilege even if the former president does not object to their being made public, and even in the absence of any claim that national security would be affected by public release. Outside of the realm of national security, there is no precedent for an assertion of executive privilege by a sitting president as to 12-year-old records of a former president.

- Section 10 of the Executive Order permits a former president (or his family) to designate a "representative" to assert constitutionally based executive privileges in the event of the former president's death or disability. This provision allows for potentially eternal withholding of records. There is no precedent supporting the notion that a private citizen "representing" a deceased or disabled president can assert the constitutional executive privilege.

- Section 11 of the Executive Order allows a former vice president to assert constitutionally based privileges to bar release of records after the end of the 12-year restriction period applicable to his records under the PRA. There is no precedent supporting the concept that there is a constitutional privilege protecting vice presidential communications (except insofar as they may fall within the president's executive privilege).

Chairman Horn, changes in the PRA as embodied in E.O. 13,233 are counter to our strong commitment to an open government that is accountable to its citizenry. We concur with the belief of the American Historical Association and others that unless these provisions are eliminated, the Executive Order could not withstand legal scrutiny. We urge you to consider our concerns and respectfully request that our comments be added to the official hearing record of November 6, 2001 on "The Implementation of the Presidential Records Act of 1978." Thank you very much.

Sincerely,

Barbara A. Bintliff

Barbara A. Bintliff
American Association of Law Libraries
President

John W. Berry

John W. Berry
American Library Association
President

Paula T. Kaufman

Paula T. Kaufman
Association of Research Libraries
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19 November 2001

The Honorable Stephen Horn
Committee on Government Reform
2157 Rayburn House Office Building
Washington, D.C. 20515-6143
fax (202) 225-3974

Dear Representative Horn:

I was unable to attend your committee's November 9 hearing on President Bush's recent Executive Order #13233 on presidential papers, but I am an active researcher in the Reagan papers and I have been widely quoted in newspaper and journal articles on this issue since last summer.

Since the beginning of this year I have been living in Santa Barbara, California working in the Reagan papers in Simi Valley and preparing for a conference on the Reagan presidency to be held at the University of California, Santa Barbara (where I am adjunct professor of history) March 28-30, 2002. I include below a copy of an op-ed essay I wrote on the matter and I ask that it be included in the official record of the committee hearing.

Yours sincerely,

Hugh D. Graham

Hugh Davis Graham
Holland N. McTyeire Professor and
Adjunct Professor of History, UCSB

THE REAGAN PAPERS RUNAROUND 11/5/01

By Hugh Davis Graham

President Bush on November 1, 2001 signed an executive order that gives all incumbent and former presidents since 1980 full veto authority in perpetuity over public access to documents in their presidential papers. This was what President Nixon tried to achieve in his

1974 agreement with the head of the General Services Administration (which then included the National Archives), a deal that Congress overturned later that year. To prevent the future destruction or inaccessibility of presidential documents, Congress in 1978 passed the Presidential Records Act (PRA), Washington's major post-Watergate reform.

At the heart of the PRA are two provisions. First, presidential records after 1980 would no longer be the property of individual presidents, but would be owned by the American government and held by the National Archives in trust for the American people. The Archivist of the United States was made custodian of the records and given an "affirmative duty" to make them available to the American public as soon as practicable under the provisions of the PRA. The PRA was thus premised on the primacy of the American public's right to know what their government was doing.

Second, the PRA struck a compromise, seeking to balance legitimate needs for periods of government secrecy against the public's right to know. To achieve this the PRA , borrowing from the Freedom of Information Act (FOIA), provided exemptions to the open-records premise to permit records closure for limited periods in specified areas — for example, national security, personal privacy, trade secrets, confidential commercial or financial information. In addition, the PRA established a novel, 12-year moratorium on access to the president's confidential policy advice in any area. (Archivists called these records P5 documents, named after the 12-year disclosure exemption for the president's policy advice.)

The PRA's 12-year moratorium was a creative compromise that balanced two types of "chill" effect, one desirable and the other not. First, for a period of 12 years following the president's leaving office, the president's policy advisors were protected from the chilling effect that premature disclosure might have on their advice. For the Reagan presidency, for example, the moratorium would last until January 20, 2001. Second, however, the open access premise of the PRA would chill temptations toward abuse of power by executive branch leaders who knew their activities after 12 years would be open to public scrutiny.

During the Reagan presidency the National Archives implemented the PRA smoothly, establishing a White House records management system that would organize and transfer to the presidential library millions of working-file documents when the president left office. Just four days before the PRA's first 12-year moratorium was set to expire, however, the White House threw the first of three monkey wrenches into the PRA machinery.

On January 16, 1989 President Reagan signed an executive order directing the National Archivist to submit to the incumbent president for "review" all proposals for opening the president's advisory communications. Accordingly, when the 12-year moratorium on the Reagan advisory documents expired in January 2001, Archivist John Carlin sent a proposal to open 37,000 pages of documents to President Bush and also to former presidents Reagan, Bush (senior) , and Clinton. The contents of these proposals were withheld from the public.

The second wrench was thrown into the PRA machinery by President Bush's White House Counsel, Alberto R. Gonzales, who immediately blocked release of the P5 documents.

The third wrench was thrown on November 1, 2001, when Bush signed an executive order replacing Reagan's 1989 order.

Bush's new order would turn the PRA on its head, effectively gutting it by reversing its premise of open access. The Bush order gives both incumbent and former presidents, beginning with Reagan, the authority to veto requests to open any records, including advisory communications in any policy area. To request access, researchers must file FOIA requests that identify an undefined "demonstrable, specific need" to know the contents of the documents. Records would remain closed, for an indeterminate period of time, unless both the incumbent and former presidents approved opening them.

The Bush administration, rather than working to persuade Congress to change the PRA, instead attempts to reverse it through an executive decree. Normally an executive order may not trump a public law. But Bush is advantaged by congressional unity and bipartisanship following the terrorist attack of September 11, and by Republican control of the House. In the new era of global antiterrorism, U.S. government involvement in clandestine warfare, possibly including political assassinations, is expected to increase, and in the process to intensify government determination to seal off documents from public scrutiny.

The PRA's 12-year moratorium, rather than expire on 20 January 2001, may thus become permanent. Government officials guilty of abuse of power in the old, Nixonian sense, or of "dirty tricks" antiterrorist warfare, in the new, post-September 11 sense, may pursue their goals with greater vigor, confident that the Bush executive order will protect them from future public disclosure. On the other hand, scholars and journalists accustomed to reconstructing their government's policies and behavior from documents in the presidential libraries may find a new wall of secrecy beginning in 1981. With painful irony, this wall is being raised through presidential decrees justified by an alleged need to "implement" post-Watergate reforms the Reagan and Bush executive orders were designed to subvert.

The Public Citizen, a public interest law firm specializing in health and safety regulation, consumer litigation, and open government, may sue to overturn the Bush executive order. During the Reagan presidency, Public Citizen challenged a similar Justice Department order requiring the Archivist to abide by assertions of executive privilege by former presidents. That lawsuit, *Public Citizen v. Burke*, resulted in a 1988 ruling by the U.S. Court of Appeals for the D.C. Circuit repudiating the Reagan administration's position. Such a lawsuit may now provide the only significant hope for avoiding a permanent wall of secrecy between the American people and their government.

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November 19, 2001

The Honorable Stephen Horn
Chairman, Subcommittee on Government Efficiency, Financial Management, and Intergovernmental Relations
B-373 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Horn,

As President of the American Political Science Association and President of the Presidency Research Group, a section of the American Political Science Association, we join together to express the concern of our members with Executive Order 13233 Further Implementation of the Presidential Records Act, the recent order executed to implement the Presidential Records Act of 1978, 44 U.S.C. 2201-2207. The Association represents the professional interests of 13,500 political scientists while the Presidency Research Group acts on behalf of its 450 members of the Association who study the presidency and the policies associated with those who have served in the office. As people who study and teach America's youth about the presidency and public policy arising from an administration's actions, the members of both groups have a strong interest in the availability of presidential records and the administration of laws relating to the presidential materials. We find Executive Order 13233 to be troubling in several respects.

Access to Public Records. Executive Order 13233 conflicts with the premise of the Presidential Records Act of 1978, which calls for presidential records to become public and places the burden on the government to insure such records are opened for review and done so on a timely basis. When Congress called for public access to presidential records, it meant just that. Congress placed the burden for opening such records solely upon the government without requiring people to offer a "demonstrated, specific need" in order to receive records. In their implementation of the Presidential Records Act, officials at the National Archives do not invoke such a requirement nor do we think they should. In *Nixon v. Freeman* [670 F.2d 346 (D.C. Cir.), *cert. Denied*, 459 U.S. 1035 (1982)] the U.S. Court of Appeals for the District of Columbia Circuit rejected a

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JOHN E. JACKSON, Vice President, University of Michigan
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ROBERT R. KAUFMAN, Treasurer, Rutgers University
W. PHILLIPS SHIVELY, Program Co-Chair, University of Minnesota
KATHRYN SIKKINK, Program Co-Chair, University of Minnesota
LEE SIGELMAN, Editor, *APSR*, George Washington University

requirement that people demonstrate a need for a presidential records in order to acquire them.

While White House officials have referred to national security needs as a reason for the promulgation of Executive Order 13233, we find no such need as existing law provides protection of such documents. Confidential records, which is the corps of documents involved in the 68,000 papers sent to the White House from the Reagan Library, lie at the heart of what people need to know about the operation of their government. In order to understand the decision making process, the public needs to know the chain of advice, the alternatives considered, and the arguments made in presidential discussions. 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.

Presidential Privileges. We are concerned that the presidential privilege categories cited in the order go beyond the protected "confidential communications" found in the Presidential Records Act of 1978 to include the additional categories of "Presidential communications, legal advice, legal work, or the deliberative processes of the President and the President's advisors." As people who study presidential privileges, we do not agree these additional categories are recognized as constitutionally protected privileges. Nor do we believe an incumbent President should be required to support an assertion of privilege made by a former President without questioning the validity of the claim. A President is sworn to uphold the law and cannot, therefore, be placed in a position to support knowingly invalid claims of privilege.

Additionally, we are troubled by the broad reach of the order, including the provision that following a former President's death his representative and then his family can make privilege claims on his behalf. There is no constitutional basis for representatives and family members of a former President to assert constitutional claims related to an office they never held. By having no provision for disputed papers to ever be released, the order fails to recognize the weakening over time of claims of privilege. Yet in *Nixon v. Administrator of General Services Administration* [433 US 435, 451 (1977)], the courts have held privilege erodes over time. In that case, the court said privilege and the need to assert it "has always been limited and subject to erosion over time after an administration leaves office." Thus, it is difficult to make the case for Chief Executives who have left the presidency to invoke privileges associated with the duties of the office they no longer hold.

While Judge Gonzales has publicly indicated the White House intention to have the Counsel's Office handle the record review, the order does not specify such a process. With the heavy work load carried by those serving in the White House Counsel's Office, it is difficult to believe staff members there will have the time to review such records. The group of records currently being reviewed in the Counsel's Office, the 68,000 pages of documents coming from the Reagan Library, could take months to review. If the White House Counsel cannot review the records, any one designated by the President could take over the review, including someone without an expertise in records.

Role of the Archivist. Executive Order 13233 effectively takes away from the Archivist of the United States his or her defined role as arbiter of records as provided for in the Presidential Records Act. Instead of acting as a facilitator of claims, the Executive Order requires the Archivist to carry forth a claim he or she may know to be a false one. The Archivist is ordered to withhold records when a former President requests it. Having the Archivist as the arbiter provided for in the Presidential Records Act is useful because when records disputes arise, he can facilitate solutions other than legal ones. If a person requesting records is denied papers, under the order his or her only recourse is to go to court, a costly and lengthy process.

Lengthening the Process of the Release of Information. In addition to potentially increasing the expense of doing research by having to go to Court, the process represents an additional hurdle in terms of time. The presumptive review period in Executive Order 13233 is 90 days for the incumbent President and another 90 days for the former President whose records are in question. These review provisions are far removed from the provision in the original act requiring the government "make records available to the public as rapidly as possible." [44 USC 2203 (f)(1)]. They are substantially greater than the 30day review period provided for in Executive Order 12677, which the current order replaces.

Creating Tensions Within the Community of Presidents. The order could create friction within the select community of presidents through its provision allowing the incumbent President to deny the release of papers a former President designates to be made public. When the incumbent President and the former Chief Executive are of different political parties, his review of records will almost inevitably be viewed in a partisan context. Public suspicion could easily develop where an incumbent President could be viewed as easy in reviewing records from a

President of his same party and as hard on the records of a former President of the opposing party. For the most part, theirs has been a collegial community and this order could add a note of acrimony in their relationships. Yet as we can see in the current terrorism crisis, an incumbent needs to go back to his predecessors and speak with them about how they handled situations. The relationship should be unfettered with arguments over the release of records.

We applaud the manner in which the Reagan Library and the former President's representatives carried out its duty to comply with the requirements of the Presidential Records Act to release confidential advice records twelve years after the close of its administration. Officials from the Reagan Library and the Office of Presidential Libraries established and then adhered to an orderly process for the consideration and release of documents. We believe there is no need for the Executive Order 13233 Further Implementation of the Presidential Records Act. Library and Archives officials were doing quite well in executing the act without the need for such an order.

Respectfully,

Robert D. Putnam
President, American Political Science Association

Robert J. Spitzer
President, Presidency Research Group

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November 6, 2001

Rep. Stephen Horn
Chairman
House Subcomm. on Gov't Efficiency, Financial Management and Intergovernmental Relations
Room B-373-A, Rayburn House Office Building
Washington, D.C. 20515

Dear Chairman Horn:

My name is Ian Marquand. I am national Freedom of Information Committee Chair for the Society of Professional Journalists. My organization is the oldest and largest journalism organization in the United States, with some 9,000 members in every sector of American media.

I write today out of concern over President George W. Bush's November 1 Executive Order allowing former Presidents to have veto power over the release of presidential records which normally would be available for release under federal statute.

My organization became concerned early in the term of George W. Bush that records from the administration of George H.W. Bush might not be released in accordance with the Presidential Records Act (44 U.S.C. 2201-2207.)

Last week, the other shoe dropped, as the current President Bush issued his order requiring the Archivist of the United States to notify former Presidents of requests for records under 2204 (c) (1) and allowing former Presidents to authorize the withholding of those records, with or without the concordance of the sitting president.

The Society of Professional Journalists believes this executive order represents an abuse of presidential authority and violates the spirit, if not the letter, of federal law. Further, we assert that President George W. Bush has a clear conflict of interest in this matter for two reasons:

1) The only presidential records scheduled for release during his current term are from the administration of his father, George H.W. Bush.

2) Many of the current President Bush's top advisers also were in the inner circle of the former President Bush.

The Presidential Records Act, in concert with the federal Freedom of Information Act, clearly is intended to guarantee accountability and accurate scholarship of the top level of the Executive Branch. The fact that the Act allows a 12-year waiting period for the release of presidential records is adequate to protect national security and personal reputations.

In our view, the November 1 Executive Order appears to be an attempt to avoid public accountability for a past administration. Presidential records should be released as scheduled under the law. Congress and the American public deserve no less. The Society has enjoyed an excellent working relationship with you and your committee for nearly a decade to preserve and improve access to government information. We appreciate the leading role you have taken to ensure that appropriate government records are readily available to the public and we thank you for your prompt attention to this issue.

Sincerely,

Ian Marquand
SPJ FOI Committee Chair

Improving & Protecting Journalism

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Representative Stephen Horn, Chairman
Subcommittee on Government Efficiency, Financial Management and Intergovernmental Relations
B-373-A Rayburn Office Building
Washington, DC 20517

November 14, 2001

Dear Representative Horn:

The **Mid-Atlantic Regional Archives Conference (MARAC)** is a professional organization of approximately 1,100 members concerned and actively involved with the access, acquisition, and preservation of all formats of historical materials which document the human experience. I am writing on behalf of **MARAC** members who wish to express great concern with the recent issue of Executive Order 13233 by President George W. Bush, and request that this letter be included as part of the official hearing record of November 6, 2001, entitled "Oversight hearing on the Presidential Records Act of 1978."

EO 13233 purports to establish clear, sensible and workable procedures to determine whether Presidential Records should be released or withheld. Unfortunately, EO 13233 threatens to negate the public's right of access under the Presidential Records Act (PRA) by giving former presidents effective veto power over any public release of their materials by the National Archives, even after the 12-year restriction period under the PRA has expired. The EO's fundamental flaws, which need to be eliminated in order to bring it into conformity with the law, are as follows:

Section 2(a) of the Executive Order states that the former president's constitutional privileges include not only the privilege for confidential communications with his advisers that has been recognized by the Supreme Court, but also the state secrets privilege, the attorney-client privilege and attorney work product privileges, and the deliberative process privilege. There is no precedent, however, for invocation of the state secrets privilege by a *former* president, as opposed to the incumbent.

Section 2(b) of the Executive Order states that a party seeking access to presidential records must assert a "demonstrated, specific need" for those records, even after the end of the 12-year period, in order to overcome the former president's privilege. This provision is contrary to the PRA, which makes access available under Freedom of Information Act standards that require no such showing of need.

Sections 3(a) and 3(c) of the Executive Order provide both a former president and the incumbent president an unlimited amount of time to review records to determine whether to object to their release to the public. These provisions are contrary to the PRA's requirement that the Archivist of the United States make such materials available to the public at the earliest possible date.

Sections 3(d) and 4 of the Executive Order require the incumbent president to "concur in" and support in court an assertion of privilege by the former president, regardless of whether it is legally valid, unless there are compelling circumstances. Even if the incumbent president does not concur in a former president's assertion of privilege, the order requires the Archivist to bow to the former president's claim and withhold public access to any records to whose release the former president objects. These provisions are contrary to the PRA insofar as they require the Archivist to withhold documents from the public without determining the validity of the former president's claim of privilege.

Section 3(d)(2) empowers the incumbent president to order the Archivist to withhold access to the former president's records on grounds of privilege even if the former president does not object to their being made public, and even in the absence of any claim that national security would be affected by public release. Outside of the realm of national security, there is no precedent for an assertion of executive privilege by a sitting president as to 12-year-old records of a former president.

Section 10 of the Executive Order permits a former president (or his family) to designate a "representative" to assert constitutionally based executive privileges in the event of the former president's death or disability. This provision allows for potentially eternal withholding of records. There is no precedent supporting the notion that a private citizen "representing" a deceased or disabled president can assert the constitutional executive privilege.

Section 11 of the Executive Order allows a former vice president to assert constitutionally based privileges to bar release of records after the end of the 12-year restriction period applicable to his records under the PRA. There is no precedent supporting the concept that there is a constitutional privilege protecting vice presidential communications (except insofar as they may fall within the president's executive privilege).

In promulgating the PRA, the Congress and the President, with guidance from the Courts, took notice of the importance of executive privilege in protecting national security, and protecting the privacy of official White House deliberations when it is in the public interest to do so. This does not, however, belie the importance of the public record to the free and spirited debate of our democracy. It is now more important than ever that the release of information take place under the guidance of law, and not through decree.

The **Mid-Atlantic Regional Archives Conference** therefore urges that the President and the Congress work toward guaranteeing the preservation of, and access to, the vital historical records of this nation by revising the seriously flawed Executive Order 13233 through legislation. We believe such legislation would permit executive privilege to be given the full legal protection required by the Constitution and render the EO superfluous and in violation of the statute to the extent its terms were inconsistent with the legislation.

Sincerely yours,

Jeffrey M. Flannery
Chair
Mid-Atlantic Regional Archives Conference

Cortland

State University of New York College at Cortland

Political Science Department
Robert J. Spitzer
Distinguished Service Professor

November 5, 2001

Hon. Stephen Horn
Chair, Government Efficiency Subcommittee
Committee on Government Reform and Oversight
House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

I am faxing with this letter a copy of a letter that has been sent to White House Counsel Alberto Gonzales expressing the concerns of the Presidency Research Group (PRG) regarding the newly issued Executive Order regarding presidential papers. May I ask that you enter the letter for the record at the hearing to be held on November 6?

If I, or other members of our organization, can be of assistance, please feel free to contact me, or past PRG Presidents Karen Hult, Virginia Tech, or Martha Kumar, director, White House 2001 Project.

Thank you for your interest in this issue.

Sincerely,

Robert J. Spitzer
Distinguished Service Professor of Political Science
President, Presidency Research Group

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11/05/01 MON 14:34 FAX

PRG

The Presidency Research Group

Representing professional scholars of the American Presidency
Established in 1979
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SUNY Cortland

Michael Genovese, Vice President
Loyola Marymount University
Bruce Miroff, Secretary
SUNY Albany
Thomas Langston, editor *PRG Report*
Tulane University

Joel Aberbach
University of California, Los Angeles
Lydia Andrade
University of the Incarnate Word
Andrew Barrett, student
Marquette University
MaryAnne Borrelli
Connecticut College
Meena Bose
U.S. Military Academy
James Campbell
SUNY Buffalo
Jeffrey Cohen
Fordham University
Victoria Farrar-Myers
University of Texas - Arlington
Lori Cox Han
Austin College
John Hart
Australian National University
Diane Heith
St. John's University
Nancy Kassop
SUNY New Paltz
Janet Martin
Bowdoin College
Daniel Ponder
University of Colorado, Colorado Springs
Raymond Tatalovich
Loyola University of Chicago
Kathryn Dunn Tenpas
University of Pennsylvania
Martha Kumar, WHIP *ex officio*
Towson State University
Karen Hult, *Past President*
Virginia Tech Institute

November 5, 2001

Hon. Alberto R. Gonzales
White House Counsel
The White House
1600 Pennsylvania Ave., NW
Washington, D.C. 20500

Dear Judge:

I am writing on behalf of the governing board of the Presidency Research Group, an international, nonpartisan organization composed of nearly 500 presidency scholars, to express our grave concerns about the recent executive order, dated November 1, 2001, titled "Further Implementation of the Presidential Records Act."

As we understand it, a large number of categories of records will now be subject to this Act, including confidential advice, attorney-client issues, the deliberative process, military, and national security records. Individuals designated by the president to make pertinent decisions need not have any expertise in these matters; no standards for making these judgments are included; an existing presidential administration would have the ability to keep papers from a prior administration secret, even if the prior administration wants the papers public; executive privilege claims can continue to be made after the president's death by designees; and there appears to be no time limit on when such records would ultimately be made public, nor must any justifications be offered for such decisions.

Contact PRG:
http://metalab.unc.edu/lia/prgnet/

Robert Spitzer (607) 753-4106
spitzerb@cortland.edu

Michael Genovese (310) 338-7379
mgenoves@lmumail.lmu.edu

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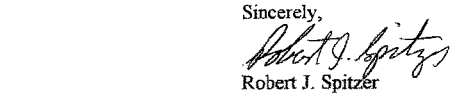
These new limitations on the release of presidential documents would have an immediate and unjustifiably deleterious impact on the ability of the public, as well as presidential scholars, to gain proper access to presidential papers critical for those seeking to study and understand the presidency and presidential decisionmaking.

Further, the new restrictions impose a remedy for which no problem exists. The cumulative research experiences of our member scholars support the proposition that the pre-existing system has worked well in balancing issues of access with those of security and proper confidentiality.

We therefore urge, in the strongest terms, that you reconsider the wisdom and necessity of this new EO. Members of our organization would be pleased to offer more detailed comment and information, should you be interested in receiving it.

Thank you for your attention to this important matter.

Sincerely,



Robert J. Spitzer
Distinguished Service Professor of Political Science
President, Presidency Research Group
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November 16, 2001

By Telecopier

The Honorable Stephen Horn
United States House of Representatives
2331 Rayburn House Office Bldg
Washington, D.C. 20515

Dear Representative Horn:

I respectfully request that my letter of November 8, 2001, to the Honorable Doug Ose, a copy of which was also sent to you and to the House Subcommittee on Government Efficiency, Financial Management and Intergovernmental Relations, be made a part of the record of the Subcommittee's hearing on November 6, 2001, regarding the Presidential Records Act and Executive Order 13,233.

Thank you for the opportunity to appear before the Subcommittee and to submit my views on the subject of its hearing.

Sincerely yours,

Scott L. Nelson

Scott L. Nelson

Attorney

cc: Hon. Doug Ose
House Subcommittee on Government Efficiency,
Financial Management and Intergovernmental
Relations

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PUBLIC CITIZEN LITIGATION GROUP
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November 8, 2001

By Telecopier

The Honorable Doug Ose
United States House of Representatives
215 Cannon House Office Building
Washington, DC 20515

Dear Mr. Ose:

In Tuesday afternoon's subcommittee hearing concerning implementation of the Presidential Records Act, you asked Acting Assistant Attorney General Whelan whether the attorney-client and work product privileges for advice to the president by government attorneys were based on the Constitution or the common law. In addition, you inquired whether this issue was addressed in the opinions of the United States Courts of Appeals for the Eighth and D.C. Circuits in cases involving assertions of privilege by the White House during the Clinton administration. Following Mr. Whelan's attempt to respond to those questions, you put the same questions to me.

The gist of my answer, as I recall it, was: (a) that the attorney-client privilege and the constitutional executive privilege were distinct privileges with different scope, although they were not necessarily mutually exclusive and might overlap in some instances (such as communications between the president and the White House counsel concerning matters of legal policy); and (b) that I believed the courts in the matters you mentioned had stated that the attorney-client privilege was a common-law privilege, not a constitutionally based one. I added, however, that I had not gone back to those opinions in preparation for my testimony and could not confidently testify under oath about what they said.

I have now had an opportunity to review the decisions you were referring to – namely *In re Lindsey*, 158 F.3d 1263 (D.C. Cir. 1998), and *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910 (8th Cir. 1987). Having done so, I now feel fully confident in stating that both opinions hold that the attorney-client privilege attaching to communications between the president and government attorneys is based on the common law, not the Constitution. The D.C. Circuit's opinion in *Lindsey* distinguishes

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the "common law attorney-client privilege" from the "constitutionally based executive privilege for presidential communications" in its very first paragraph, 158 F.3d at 1266, and this fundamental distinction permeates the entire opinion. Even the dissent in *Lindsey*, which would have given much broader protection to the attorney-client privilege than did the majority, agreed that the "attorney-client privilege flows not from the Constitution, but from the common law." 158 F.3d at 1285 (Tatel, J., dissenting in part and concurring in part).

Similarly, in the Eighth Circuit case, the court unambiguously said, "We must ... apply the federal *common law* of attorney-client privilege to the situation presented by this case." 112 F.3d at 910 (emphasis added). Like the D.C. Circuit in *Lindsey*, the Eighth Circuit contrasted the common-law attorney-client privilege with the constitutionally based executive privilege, *see id.* at 919, and it approvingly cited the Independent Counsel's observation that "if the governmental attorney-client privilege exists at all, it is certainly not constitutionally based." *Id.*

After studying these opinions, the only part of my testimony that I might qualify is my statement that executive privilege and attorney-client privilege are not always mutually exclusive. I still think this is an open question, and that there are possible areas of overlap. However, the discussion of the D.C. Circuit majority in *Lindsey* suggests at certain points that the two privileges are in fact mutually exclusive, with the executive privilege applicable only to advice regarding "policy" and the attorney-client privilege applicable to "legal" advice, narrowly defined. *See* 158 F.3d at 1270-71, 1277. Even so, I do not think that *Lindsey* necessarily rules out the theoretical possibility that there might be some communications in which a White House attorney's roles as policy adviser and legal counselor were so intertwined that both the constitutional executive privilege and the common-law attorney-client privilege could apply.

Much more important than this somewhat arcane and theoretical issue is the basic point of both *In re Lindsey* and *In re Grand Jury Subpoena*: The attorney-client privilege is a common-law privilege, not a constitutionally based one. Thus, under the PRA, it *cannot* bar access to presidential records after expiration of the 12-year restriction period. This is because the PRA forbids application of FOIA Exemption 5, through which common-law privileges such as the attorney-client privilege would otherwise be asserted. Under § 2204(c)(2), only a constitutionally based privilege may conceivably bar release of records after the 12-year restriction period expires if those records are not otherwise exempt from release under the Act.

Thus, the point you made in the hearing is completely valid: The Executive Order's inclusion of attorney-client privilege (and work product privilege) within the category of constitutionally based privileges appears to be an attempt to expand the constitutional privilege and to justify withholding of materials that, under the PRA, must be released.

I am sorry I was not able to provide as definite an answer as your question deserved during the hearing itself. I hope that this letter may be of assistance to you in your ongoing consideration of the issues posed by the Executive Order.

Sincerely yours,

Scott L. Nelson

cc: Hon. Stephen Horn
Hon. Henry Waxman
Hon. Ron Lewis
Hon. Dan Miller
Hon. Adam Putnam
Hon. Janice Schakowsky
Hon. Major R. Owens
Hon. Paul Kanjorski
Hon. Carolyn Maloney
House Subcommittee on Government Efficiency, Financial Management and Intergovernmental Relations

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

December 12, 2001

The Honorable Stephen Horn
Chairman
Subcommittee on Government Efficiency,
Financial Management and Intergovernmental Relations
Committee on Government Reform
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

This responds to your letters, dated November 9, 2001 and November 13, 2001, which enclosed written questions to then-Acting Assistant Attorney General Edward Whelan, following his testimony at the Subcommittee's hearing on November 6, 2001, concerning the Presidential Records Act ("PRA") and Executive Order 13233, which sets forth policies and procedures for the implementation of the PRA with respect to the possible assertion of constitutionally-based privileges by former and incumbent Presidents. We are sending a similar letter to Congressman Ose, who also sent follow-up questions regarding the hearing.

On November 28, 2001, a complaint was filed in the United States District Court for the District of Columbia, initiating a lawsuit seeking a declaratory judgment that Executive Order 13233 is unlawful and an injunction requiring the release of approximately 68,000 pages of documents that are under review pursuant to Executive Order 13233. The questions that you and Chairman Ose have posed go to the very heart of the issues raised by the complaint. The Department is representing the defendants in this action and must, therefore, respectfully decline to answer your questions at this time. I trust you will appreciate that the litigation interests of the United States require that we present our legal positions first in the court proceedings themselves, before discussing them in other forums. We have consulted the White House Counsel's Office concerning whether the Department should respond to your questions before we address these issues in court, and that Office concurs in our determination that we should first address these issues in court.

We will keep you informed regarding developments in the litigation and the ongoing review under Executive Order 13233. In the latter regard, we understand that all decisions

regarding whether to assert privilege with respect to any of the 68,000 pages will be completed in the next several months. Please do not hesitate to contact me if you would like additional assistance regarding this or any other matter.

Sincerely,

Daniel J. Bryant
Assistant Attorney General

cc: The Honorable Janice Schakowsky
The Honorable Doug Ose
The Honorable John Tierney

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ONE HUNDRED SEVENTH CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON GOVERNMENT REFORM

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BERNARD SANDERS, VERMONT,
INDEPENDENT

FOR IMMEDIATE RELEASE
November 6, 2001

Contact: Karen Lightfoot (Waxman) 225-5051
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REPS. WAXMAN AND SCHAKOWSKY CALL ON PRESIDENT BUSH TO RESCIND HIS EXECUTIVE ORDER THAT GREATLY RESTRICTS PUBLIC ACCESS TO PRESIDENTIAL RECORDS

"The Executive Order violates the intent of Congress and keeps the public in the dark"

WASHINGTON, D.C. - During a hearing of the Subcommittee on Government Efficiency, Financial Management, and Intergovernmental Relations, U.S. Representatives Henry Waxman (D-CA) and Jan Schakowsky (D-IL) released a letter to President Bush calling on him to rescind his Executive Order limiting the public's access to Presidential records.

Rep. Waxman, Ranking Member of the House Government Reform Committee, and Rep. Schakowsky, Ranking Member of the Government Reform Subcommittee on Government Efficiency, Financial Management, and Intergovernmental Relations, wrote the President that his Executive Order contains provisions that "clearly violate the intent of the law."

"This order blocks the release of historically important documents," said Rep. Waxman. "I am disappointed that the Bush Administration is continuing its course of secrecy and now extending it to documents from past Administrations."

"The American people have a right to know. The Presidential Records Act guarantees that right and a level of transparency and accountability to the public. I see no good reason why President Bush would want to limit the public's access to such critical information. What is he trying to hide?" Rep. Schakowsky said.

In the letter, the members wrote, "We were dismayed to learn that you changed the Executive Order governing the release of Presidential records in a manner that will decrease public access to these records. We urge you to rescind that order."

They added, "The new Executive Order contains provisions that could drastically restrict public access to important records. It allows the sitting President to withhold the records of a former President, even if that President wants those records released. In addition, the order requires the public to show a specific need for a document before it is released."

Reps. Waxman and Schakowsky said that the new Executive Order attempts to rewrite the Presidential Records Act, which was adopted to ensure fair and timely public access to Presidential Records. They urged the President to reverse course, and immediately "begin a dialogue with Congress and the public to determine the need for clarification of this law."

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THE WHITE HOUSE
WASHINGTON

November 2, 2001

Dear Chairman Horn:

I have learned that on November 6 the House Subcommittee on Government Efficiency, Financial Management, and Intergovernmental Relations will hold its previously postponed hearing on the Presidential Records Act. In advance of that hearing, we wanted to inform you of a recent development.

President Bush yesterday signed an executive order implementing section 2204(c) of the Presidential Records Act, the provision of the Act that states: "Nothing in this Act shall be construed to confirm, limit, or expand any constitutionally-based privilege which may be available to an incumbent or former President." That statutory provision is necessary, of course, to the Act's constitutionality, for the Supreme Court held in 1977 that both former and current Presidents retain the constitutional right to assert privileges over the records of a former President, including after expiration of a 12-year period of presumptive non-disclosure. *See Nixon v. Administrator of General Services*, 433 U.S. 425 (1977). Furthermore, Congress contemplated that such constitutional privileges would be available and could be asserted, even after expiration of the 12-year period: At the time the Act was enacted, Senator Percy stated that if a President "believe[d] that the 12-year closure period does not suffice, that President could object to the release of some document in the 13th or 15th or 20th year." Cong. Record S36844 (Oct. 13, 1978).

The Act and its legislative history, as well as the Supreme Court's decision in *Nixon v. Administrator of General Services*, obviously necessitate procedures for former and current Presidents to review Presidential records of a former President and, if they choose, to assert constitutional privileges. President Bush's order responds to that need by establishing clear and sensible procedures for former and current Presidents to exercise their rights and responsibilities in a timely manner. The order replaces an earlier executive order (Executive Order 12667 of January 18, 1989) that had established some skeletal procedures for assertion of privileges over Presidential records and had provided that the *current* President would have the primary responsibility for asserting privileges over the records of a former President. President Bush's new order supercedes that prior order both to set forth clearer procedures and to establish, consistent with the Supreme Court's decision in *Nixon v. Administrator of General Services* and with what the Administration believes to be sound policy and procedure, that *former* Presidents are to have the primary responsibility for asserting privileges over their records. Indeed, section 4 of President Bush's order, which is its most critical component, provides that the current President will defer, absent compelling circumstances, to the decisions of the former President regarding the former President's records. In sum, therefore, the new executive order grants the current President *less* relative authority over the records of a former President than did the prior executive order. We believe this point is critical to a proper understanding of the executive order, and has been largely overlooked in public commentary thus far.

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May 20, 2002

The Honorable Stephen Horn
Chairman, Subcommittee on Governmental Efficiency
Committee on Government Reform
2157 Rayburn House Office Building
Washington, DC 20515-6143

Dear Mr. Chairman,

Thank you for your letter and enclosures concerning the Presidential Records Act of 1978. I want to commend you and your cosponsors for drafting and seeking to enact a reasonable response to the concern raised about the 1978 Act. As a Member of the House when the 1978 Act was passed, I believed that the Act established once and for all the public nature and ownership of official presidential records. It sought to put to rest the claim by some former Presidents that they could withhold such records from the public indefinitely.

However, as is true of most legislation, not all problems were solved by the 1978 Act. A workable procedure for claiming executive privilege was not set forth, nor were the timetables and burdens for release of the records as clear as they could have been. Unfortunately, Executive Order 13233 seeks to resolve those ambiguities in a way that would largely destroy the original purpose of the 1978 Act. The single biggest difficulty that I see in the Executive Order is its effort to "define" executive privilege. That is a task far too awesome for any single executive order, or indeed, for the entire executive branch itself. Having looked at the problems of executive privilege as a participant in all three branches of government, that doctrine defies a simple definition–as it should. Courts have always been reluctant to put too many contours on the claim of executive privilege because the invocation of such privilege frequently means that the first and second branch of government are involved in a serious dispute. The third branch of government is understandably reluctant to choose up sides unequivocally and broadly.

Frequently, those disputes are resolved by accommodations between the political branches. Such accommodations are far better for the country than a judicial ukase. And they certainly are preferable to either of the first two branches declaring for itself, finally and precisely, what the scope of executive privilege ought to be. So often that scope of privilege turns on the

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TO: **MEMBERS OF THE SUBCOMMITTEE ON GOVERNMENT EFFICIENCY, FINANCIAL MANAGEMENT AND INTERGOVERNMENTAL RELATIONS**

FROM: **REPRESENTATIVE STEPHEN HORN, CHAIRMAN**

DATE: **Monday, November 5, 2001**

SUBJECT: **Oversight hearing on The Presidential Records Act of 1978. This hearing will take place at 2 p.m. Tuesday, November 6, 2001, in Room 2154 of the Rayburn House Office Building.**

SUMMARY

The Presidential Records Act of 1978 (Public Law 95-591) declared Presidential records to be Federal property and placed them in the custody and control of the Archivist of the United States. The Act first applied to the records of the Reagan Administration. In January 2001, many of the Reagan records became subject to public disclosure under the terms of the Act. However, concerns over how to handle potential "Executive privilege" claims have delayed actual release of the records. The subcommittee hearing will examine the implementation of the Presidential Records Act of 1978, and particularly the issues surrounding the Reagan records.

BACKGROUND

Before the enactment of the Presidential Records Act, a President's papers relating to his official duties were considered to be his personal property. Most Presidents of the modern era preserved their records and eventually made them public. However, there was no guarantee that this would happen. The Presidential Records Act supplied that guarantee. It declared that the records of a President relating to his official duties belonged to the American people and gave the Archivist of the United States custody of the records of a former President. It also imposed on the Archivist "an affirmative duty to make such records available to the public as rapidly and completely as possible consistent with the provisions of this Act."

At the same time, the Act recognized the need for some limits on public access. It permitted a former President to restrict public access to sensitive records for up to 12 years after he left office. Thereafter, the Act required the Archivist to make the records available to the public in accordance with the provisions of the Freedom of Information Act (FOIA). All but one of the exemptions from disclosure under the FOIA apply to Presidential records. For example, records dealing with national defense and state secrets as well as sensitive law

enforcement matters are protected from disclosure. The one exception is that the FOIA's so-called "(b)(5) deliberative process" exemption does not apply. Therefore, records could not be withheld simply because they involved confidential internal advice and deliberations among Government officials.

Apart from the FOIA exemptions, the Presidential Records Act did not impose any limits on the public's right of access to the records of a former President once the restriction period imposed by the former President expired. However, it did provide that "Nothing in this Act shall be construed to confirm, limit, or expand any constitutionally-based privilege which may be available to an incumbent or former President."

On January 18, 1989, President Reagan issued Executive Order 12667. This Executive Order established a process to deal with potential Executive privilege claims over records covered by the Presidential Records Act. The Reagan Executive Order required the Archivist to give the incumbent and former Presidents 30 days advance notice before releasing Presidential records. In this notice, the Archivist would identify any records that raised "a substantial question of Executive privilege" under guidelines provided by the incumbent and former President.[1] The Order authorized the Archivist to release the records after 30 days unless the incumbent or former President claimed Executive privilege, or unless the incumbent President instructed the Archivist to extend the period. It further provided for review of potential Executive privilege claims by Federal legal officers, and ultimately by the incumbent President, in order to determine whether the claims were justified. If the incumbent President decided to invoke Executive privilege, the Archivist would withhold the records unless directed to release them by a final court order. If the incumbent President decided not to support a former President's claim of privilege, the Archivist would decide whether or not to honor the claim. The Archivist would give the former President 30 days advance notice of rejection of a privilege claim.

Before he left office, former President Reagan exercised his right under the Presidential Records Act to restrict access to some of his records for 12 years. This 12-year restriction period expired in January 2001. In February 2001, the Archivist provided the 30-day notice required by Executive Order 12667 of his intent to release about 68,000 pages of former President Reagan's records. In March, June, and August of this year, the Counsel to the President instructed to Archivist to extend the time for claiming Executive privilege. These extensions are still in effect, and the records covered by the Archivist's February notice have not been released.

On November 1, President Bush revoked the Reagan Executive Order and issued a new Executive Order to govern implementation of the Presidential Records Act. The key provisions of the new Executive Order are as follows:

- The Archivist will notify the incumbent and former President of all requests for records of a former President after the restriction period expires.
- The Archivist is prohibited from releasing any such records unless and until both the incumbent and former President agree to their release, or until the Archivist is directed to release the records by a final court order.
- "Absent compelling circumstances," the incumbent President will concur in a former President's determination of whether or not to claim Executive privilege. The Order does not define "compelling circumstances."

[1] The Reagan Executive Order provided that "a substantial question of Executive privilege" existed if disclosure of a record "might impair the national security (including the conduct of foreign relations), law enforcement, or the deliberative processes of the Executive branch."

- If the incumbent President concurs in a former President's claim of privilege, the incumbent President will support the claim in any litigation.
- Even if the incumbent President disagrees with a former President's claim, the Archivist still must honor that claim and withhold the records.
- A former President may designate a representative or group of representatives to act on his behalf for purposes of the Presidential Records Act and the Executive Order.
- The Order establishes a 90-day target date for review of access requests by members of the public. However, the review period can be extended indefinitely.
- The Order establishes a shorter target date for review of access requests by Congress or the courts, specifically 21 days for a former President's decision and another 21 days for the incumbent President's decision. These target dates likewise can be extended indefinitely.
- The Order establishes no operative guidelines or standards on the scope of Executive privilege claims. It does, however, contain a "background" section that describes some aspects of Supreme Court holdings on Executive privilege.

As stated in the new Executive Order, the Supreme Court affirmed the existence of Executive privilege covering Presidential records in two Nixon era decisions. The Court also recognized the right of a former President to claim Executive privilege. However, there is sparse judicial precedent concerning the parameters of Executive privilege. For example, in United States v. Nixon, 418 U.S. 683, 706 (1974), the Court observed that a "broad, undifferentiated claim of public interest in the confidentiality of" Presidential communications is less weighty than "a claim of need to protect military, diplomatic, or sensitive national security secrets."[2] The scope of the privilege is particularly uncertain in the case of a former President, and in the case of records (such as the Reagan records) that are 12 to 20 years old. In Nixon v. Administrator of General Services, 433 U.S. 425, 450-51 (1977), the Supreme Court observed:

> "[T]here has never been an expectation that the confidences of the Executive Office are absolute and unyielding. All former Presidents from President Hoover to President Johnson have deposited their papers in Presidential libraries . . . for governmental preservation and eventual disclosure. . . . The expectation of the confidentiality of executive communications thus has always been limited and subject to erosion over time after an administration leaves office."

ISSUES TO BE ADDRESSED AT THE HEARING

- What is the current status of reviews of the Reagan records?
- What impact is the new Executive Order likely to have on the scope and timing of release of these records?
- To what extent can or should Executive privilege claims block release of the Reagan records?
- Is the new Executive Order consistent with the Presidential Records Act?
- Why wasn't the Reagan Executive Order adequate to protect claims of Executive privilege?

WITNESSES

The Honorable John W. Carlin, Archivist of the United States;
M. Edward Whelan III, Acting Assistant Attorney General, Office of Legal Counsel, Department of Justice;
Anna Nelson, Professor, American University;
Mark J. Rozell, Professor, Catholic University of America;

Peter Shane, Professor, University of Pittsburgh and Carnegie Mellon University; and
Scott Nelson, Attorney, Common Cause;

STAFF CONTACT

For further information, contact Earl Pierce or Henry Wray, of the subcommittee staff, at (202) 225-5147.

148

UNITED STATES STATUTES AT LARGE

CONTAINING THE

LAWS AND CONCURRENT RESOLUTIONS
ENACTED DURING THE SECOND SESSION OF THE
NINETY-FIFTH CONGRESS
OF THE UNITED STATES OF AMERICA

1978

AND

PROCLAMATIONS

VOLUME 92

IN THREE PARTS

PART 2

PUBLIC LAWS 95–473 THROUGH 95–598

UNITED STATES
GOVERNMENT PRINTING OFFICE
WASHINGTON : 1980

Public Law 95-591
95th Congress

An Act

To amend title 44 to insure the preservation of and public access to the official records of the President, and for other purposes.

Nov. 4, 1978
[H.R. 13500]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Presidential Records Act of 1978".

Presidential Records Act of 1978.

RECORDS MANAGEMENT, PRESERVATION, AND PUBLIC AVAILABILITY

44 USC 101, 2201 notes.

SEC. 2. (a) Title 44 of the United States Code is amended by adding immediately after chapter 21 the following new chapter:

"Chapter 22.—PRESIDENTIAL RECORDS

"Sec.
"2201. Definitions.
"2202. Ownership of Presidential records.
"2203. Management and custody of Presidential records.
"2204. Restrictions on access to Presidential records.
"2205. Exceptions to restriction on access.
"2206. Regulations.
"2207. Vice-Presidential records.

"§ 2201. Definitions

44 USC 2201.

"As used in this chapter—

"(1) The term 'documentary material' means all books, correspondence, memorandums, documents, papers, pamphlets, works of art, models, pictures, photographs, plats, maps, films, and motion pictures, including, but not limited to, audio, audiovisual, or other electronic or mechanical recordations.

"(2) The term 'Presidential records' means documentary materials, or any reasonably segregable portion thereof, created or received by the President, his immediate staff, or a unit or individual of the Executive Office of the President whose function is to advise and assist the President, in the course of conducting activities which relate to or have an effect upon the carrying out of the constitutional, statutory, or other official or ceremonial duties of the President. Such term—

"(A) includes any documentary materials relating to the political activities of the President or members of his staff, but only if such activities relate to or have a direct effect upon the carrying out of constitutional, statutory, or other official or ceremonial duties of the President; but

"(B) does not include any documentary materials that are (i) official records of an agency (as defined in section 552(e) of title 5, United States Code); (ii) personal records; (iii) stocks of publications and stationery; or (iv) extra copies of documents produced only for convenience of reference, when such copies are clearly so identified.

"(3) The term 'personal records' means all documentary materials, or any reasonably segregable portion therof, of a purely private or nonpublic character which do not relate to or have an effect upon the carrying out of the constitutional, statutory,

or other official or ceremonial duties of the President. Such term includes—

"(A) diaries, journals, or other personal notes serving as the functional equivalent of a diary or journal which are not prepared or utilized for, or circulated or communicated in the course of, transacting Government business;

"(B) materials relating to private political associations, and having no relation to or direct effect upon the carrying out of constitutional, statutory, or other official or ceremonial duties of the President; and

"(C) materials relating exclusively to the President's own election to the office of the Presidency; and materials directly relating to the election of a particular individual or individuals to Federal, State, or local office, which have no relation to or direct effect upon the carrying out of constitutional, statutory, or other official or ceremonial duties of the President.

"(4) The term 'Archivist' means the Archivist of the United States.

"(5) The term 'former President', when used with respect to Presidential records, means the former President during whose term or terms of office such Presidential records were created.

44 USC 2202.

"§ 2202. Ownership of Presidential records

"The United States shall reserve and retain complete ownership, possession, and control of Presidential records; and such records shall be administered in accordance with the provisions of this chapter.

44 USC 2203.

"§ 2203. Management and custody of Presidential records

"(a) Through the implementation of records management controls and other necessary actions, the President shall take all such steps as may be necessary to assure that the activities, deliberations, decisions, and policies that reflect the performance of his constitutional, statutory, or other official or ceremonial duties are adequately documented and that such records are maintained as Presidential records pursuant to the requirements of this section and other provisions of law.

"(b) Documentary materials produced or received by the President, his staff, or units or individuals in the Executive Office of the President the function of which is to advise and assist the President, shall, to the extent practicable, be categorized as Presidential records or personal records upon their creation or receipt and be filed separately.

Disposal, notification to Archivist.

"(c) During his term of office, the President may dispose of those of his Presidential records that no longer have administrative, historical, informational, or evidentiary value if—

"(1) the President obtains the views, in writing, of the Archivist concerning the proposed disposal of such Presidential records; and

"(2) the Archivist states that he does not intend to take any action under subsection (e) of this section.

Disposal schedule, submittal to congressional committees.

"(d) In the event the Archivist notifies the President under subsection (c) that he does intend to take action under subsection (e), the President may dispose of such Presidential records if copies of the disposal schedule are submitted to the appropriate Congressional Committees at least 60 calendar days of continuous session of Congress in advance of the proposed disposal date. For the purpose of this section, continuity of session is broken only by an adjournment of Congress

sine die, and the days on which either House is not in session because of an adjournment of more than three days to a day certain are excluded in the computation of the days in which Congress is in continuous session.

"(e) The Archivist shall request the advice of the Committee on Rules and Administration and the Committee on Governmental Affairs of the Senate and the Committee on House Administration and the Committee on Government Operations of the House of Representatives with respect to any proposed disposal of Presidential records whenever he considers that—

Consultation with congressional committees.

"(1) these particular records may be of special interest to the Congress; or

"(2) consultation with the Congress regarding the disposal of these particular records is in the public interest.

"(f)(1) Upon the conclusion of a President's term of office, or if a President serves consecutive terms upon the conclusion of the last term, the Archivist of the United States shall assume responsibility for the custody, control, and preservation of, and access to, the Presidential records of that President. The Archivist shall have an affirmative duty to make such records available to the public as rapidly and completely as possible consistent with the provisions of this Act.

"(2) The Archivist shall deposit all such Presidential records in a Presidential archival depository or another archival facility operated by the United States. The Archivist is authorized to designate, after consultation with the former President, a director at each depository or facility, who shall be responsible for the care and preservation of such records.

"(3) The Archivist is authorized to dispose of such Presidential records which he has appraised and determined to have insufficient administrative, historical, informational, or evidentiary value to warrant their continued preservation. Notice of such disposal shall be published in the Federal Register at least 60 days in advance of the proposed disposal date. Publication of such notice shall constitute a final agency action for purposes of review under chapter 7 of title 5, United States Code.

Publication in Federal Register.

5 USC 701 *et seq.*

"§ 2204. Restrictions on access to Presidential records

44 USC 2204.

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

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

"(2) relating to appointments to Federal office;

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

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

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

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

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

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

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

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

"(2) Any such record which does not contain information within a category restricted by the President under subsection (a), or contains information within such a category for which the duration of restricted access has expired, shall be exempt from the provisions of subsection (c) until the earlier of—

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

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

Determination by Archivist, consultation.

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

Administrative appeal procedures.

Administration.

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

"(2) Nothing in this Act shall be construed to confirm, limit, or expand any constitutionally-based privilege which may be available to an incumbent or former President.

"(d) Upon the death or disability of a President or former President, any discretion or authority the President or former President may have had under this chapter shall be exercised by the Archivist unless otherwise previously provided by the President or former President in a written notice to the Archivist.

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

"§ 2205. Exceptions to restricted access 44 USC 2205.

"Notwithstanding any restrictions on access imposed pursuant to section 2204—

"(1) the Archivist and persons employed by the National Archives and Records Service of the General Services Administration who are engaged in the performance of normal archival work shall be permitted access to Presidential records in the custody of the Archivist;

"(2) subject to any rights, defenses, or privileges which the United States or any agency or person may invoke, Presidential records shall be made available—

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

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

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

"(3) the Presidential records of a former President shall be available to such former President or his designated representative.

"§ 2206. Regulations 44 USC 2206.

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

"(1) provisions for advance public notice and description of any Presidential records scheduled for disposal pursuant to section 2203(f)(3);

"(2) provisions for providing notice to the former President when materials to which access would otherwise be restricted pursuant to section 2204(a) are to be made available in accordance with section 2205(2);

"(3) provisions for notice by the Archivist to the former President when the disclosure of particular documents may adversely affect any rights and privileges which the former President may have; and

"(4) provisions for establishing procedures for consultation between the Archivist and appropriate Federal agencies regarding materials which may be subject to section 552(b)(7) of title 5, United States Code.

"§ 2207. Vice-Presidential records 44 USC 2207.

"Vice-Presidential records shall be subject to the provisions of this chapter in the same manner as Presidential records. The duties and responsibilities of the Vice President, with respect to Vice-Presidential records, shall be the same as the duties and responsibilities of the President under this chapter with respect to Presidential records. The authority of the Archivist with respect to Vice-Presidential rec- Depository agreement.

ords shall be the same as the authority of the Archivist under this chapter with respect to Presidential records, except that the Archivist may, when the Archivist determines that it is in the public interest, enter into an agreement for the deposit of Vice-Presidential records in a non-Federal archival depository. Nothing in this chapter shall be construed to authorize the establishment of separate archival depositories for such Vice-Presidential records.".

(b)(1) The table of chapters for title 44, United States Code, is amended by inserting immediately after the item relating to chapter 21 the following new item:

"22. Presidential Records ..... 2201".

(2) Section 2107 of title 44, United States Code, is amended by adding at the end thereof the following new sentence: "This section shall not apply in the case of any Presidential records which are subject to the provisions of chapter 22 of this title.".

(3) Section 2108(c) of title 44 is amended by adding at the end thereof the following: "Only the first two sentences of this subsection shall apply to Presidential records as defined in section 2201(2) of this title.".

EFFECTIVE DATE

44 USC 2201 note.

SEC. 3. The amendments made by this Act shall be effective with respect to any Presidential records (as defined in section 2201(2) of title 44, as amended by section 2 of this Act) created during a term of office of the President beginning on or after January 20, 1981.

SEPARABILITY

44 USC 2201 note.

SEC. 4. If any provision of this Act is held invalid for any reason by any court, the validity and legal effect of the remaining provisions shall not be affected thereby.

Approved November 4, 1978.

LEGISLATIVE HISTORY:

HOUSE REPORT No. 95-1487, pt. 1 (Comm. on Government Operations).
CONGRESSIONAL RECORD, Vol. 124 (1978):
Oct. 10, considered and passed House.
Oct. 13, considered and passed Senate, amended.
Oct. 15, House concurred in Senate amendments.
WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS, Vol. 14, No. 45:
Nov. 6, Presidential statement.

National Archives and Records Administration
Federal Register

Executive Order 12667--Presidential Records

Source: The provisions of Executive Order 12667 of Jan. 16, 1989, appear at 54 FR 3403, unless otherwise noted.

By virtue of the authority vested in me as President by the Constitution and laws of the United States of America, and in order to establish policies and procedures governing the assertion of Executive privilege by incumbent and former Presidents in connection with the release of Presidential records by the National Archives and Records Administration pursuant to the Presidential Records Act of 1978, it is hereby ordered as follows:

Section 1. *Definitions.* For purposes of this Order:
(a) "Archivist" refers to the Archivist of the United States or his designee.
(b) "NARA" refers to the National Archives and Records Administration.
(c) "Presidential Records Act" refers to the Presidential Records Act of 1978 (Pub. L. No. 95-591, 92 Stat. 2523-27, as amended by Pub. L. No. 98-497, 98 Stat. 2287), codified at 44 U.S.C. 2201-2207.
(d) "NARA regulations" refers to the NARA regulations implementing the Presidential Records Act. 53 Fed. Reg. 50404 (1988), codified at 36 C.F.R. Part 1270.
(e) "Presidential records" refers to those documentary materials maintained by NARA pursuant to the Presidential Records Act and the NARA regulations.
(f) "Former President" refers to the former President during whose term or terms of office particular Presidential records were created.
(g) A "substantial question of Executive privilege" exists if NARA's disclosure of Presidential records might impair the national security (including the conduct of foreign relations), law enforcement, or the deliberative processes of the Executive branch.
(h) A "final court order" is a court order from which no appeal may be taken.

Sec. 2. *Notice of Intent to Disclose Presidential Records.*
(a) When the Archivist provides notice to the incumbent and former Presidents of his intent to disclose Presidential records pursuant to section 1270.46 of the NARA regulations, the Archivist, utilizing any guidelines provided by the incumbent and former Presidents, shall identify any specific materials, the disclosure of which he believes may raise a substantial question of Executive privilege. However, nothing in this Order is intended to affect the right of the incumbent or former Presidents to invoke Executive privilege with respect to materials not identified by the Archivist. Copies of the notice for the incumbent President shall be delivered to the President (through the Counsel to the President) and the Attorney General (through the Assistant Attorney General for the Office of Legal Counsel). The copy of the notice for the former President shall be delivered to the former President or his designated representative.
(b) Upon the passage of 30 days after receipt by the incumbent and former Presidents of a notice of intent to disclose Presidential records, the Archivist may disclose the records covered by the notice, unless during that time period the Archivist has received a claim of Executive privilege by the incumbent or former President or the Archivist has been instructed by the incumbent President or his designee to extend the time period. If a shorter time period is required under the circumstances set forth in section 1270.44 of the

NARA regulations, the Archivist shall so indicate in the notice.

Sec. 3. *Claim of Executive Privilege by Incumbent President.*
(a) Upon receipt of a notice of intent to disclose Presidential records, the Attorney General (directly or through the Assistant Attorney General for the Office of Legal Counsel) and the Counsel to the President shall review as they deem appropriate the records covered by the notice and consult with each other, the Archivist, and such other Federal agencies as they deem appropriate concerning whether invocation of Executive privilege is justified.
(b) The Attorney General and the Counsel to the President, in the exercise of their discretion and after appropriate review and consultation under subsection (a) of this section, may jointly determine that invocation of Executive privilege is not justified. The Archivist shall be promptly notified of any such determination.
(c) If after appropriate review and consultation under subsection (a) of this section, either the Attorney General or the Counsel to the President believes that the circumstances justify invocation of Executive privilege, the issue shall be presented to the President by the Counsel to the President and the Attorney General.
(d) If the President decides to invoke Executive privilege, the Counsel to the President shall notify the former President, the Archivist, and the Attorney General in writing of the claim of privilege and the specific Presidential records to which it relates. After receiving such notice, the Archivist shall not disclose the privileged records unless directed to do so by an incumbent President or by a final court order.

Sec. 4. *Claim of Executive Privilege by Former President.*
(a) Upon receipt of a claim of Executive privilege by a former President, the Archivist shall consult with the Attorney General (through the Assistant Attorney General for the Office of Legal Counsel), the Counsel to the President, and such other Federal agencies as he deems appropriate concerning the Archivist's determination as to whether to honor the former President's claim of privilege or instead to disclose the Presidential records notwithstanding the claim of privilege. Any determination under section 3 of this Order that Executive privilege shall not be invoked by the incumbent President shall not prejudice the Archivist's determination with respect to the former President's claim of privilege.
(b) In making the determination referred to in subsection (a) of this section, the Archivist shall abide by any instructions given him by the incumbent President or his designee unless otherwise directed by a final court order. The Archivist shall notify the incumbent and former Presidents of his determination at least 30 days prior to disclosure of the Presidential records, unless a shorter time period is required in the circumstances set forth in section 1270.44 of the NARA regulations. Copies of the notice for the incumbent President shall be delivered to the President (through the Counsel the President) and the Attorney General (through the Assistant Attorney General for the Office of Legal Counsel). The copy of the notice for the former President shall be delivered to the former President or his designated representative.

Sec. 5. *Judicial Review.* This Order is intended only to improve the internal management of the Executive branch and is not intended to create any right or benefit, substantive or procedural, enforceable at law by a party against the United States, its agencies, its officers, or any person.

For Immediate Release
Office of the Press Secretary
November 1, 2001

Executive Order

Further Implementation of the Presidential Records Act

By the authority vested in me as President by the Constitution and the laws of the United States of America, and in order to establish policies and procedures implementing section 2204 of title 44 of the United States Code with respect to constitutionally based privileges, including those that apply to Presidential records reflecting military, diplomatic, or national security secrets, Presidential communications, legal advice, legal work, or the deliberative processes of the President and the President's advisors, and to do so in a manner consistent with the Supreme Court's decisions in Nixon v. Administrator of General Services, 433 U.S. 425 (1977), and other cases, it is hereby ordered as follows:

Section 1. Definitions.

For purposes of this order:

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

(b) "Presidential records" refers to those documentary materials maintained by the National Archives and Records Administration pursuant to the Presidential Records Act, 44 U.S.C. 2201-2207.

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

Sec. 2. Constitutional and Legal Background.

(a) For a period not to exceed 12 years after the conclusion of a Presidency, the Archivist administers records in accordance with the limitations on access imposed by section 2204 of title 44. After expiration of that period, section 2204(c) of title 44 directs that the Archivist administer Presidential records in accordance with section 552 of title 5, the Freedom of Information Act, including by withholding, as appropriate, records subject to exemptions (b)(1), (b)(2), (b)(3), (b)(4), (b)(6), (b)(7), (b)(8), and (b)(9) of section 552. Section 2204(c)(1) of title 44 provides that exemption (b)(5) of section 552 is not available to the Archivist as a basis for withholding records, but section 2204(c)(2) recognizes that the former President

or the incumbent President may assert any constitutionally based privileges, including those ordinarily encompassed within exemption (b)(5) of section 552. The President's constitu-tionally based privileges subsume privileges for records that reflect: military, diplomatic, or national security secrets (the state secrets privilege); communications of the President or his advisors (the presidential communications privilege); legal advice or legal work (the attorney-client or attorney work product privileges); and the deliberative processes of the President or his advisors (the deliberative process privilege).

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(b) In Nixon v. Administrator of General Services, the Supreme Court set forth the constitutional basis for the President's privileges for confidential communications: "Unless [the President] can give his advisers some assurance of confidentiality, a President could not expect to receive the full and frank submissions of facts and opinions upon which effective discharge of his duties depends." 433 U.S. at 448-49. The Court cited the precedent of the Constitutional Convention, the records of which were "sealed for more than 30 years after the Convention." Id. at 447 n.11. Based on those precedents and principles, the Court ruled that constitutionally based privileges available to a President "survive[] the individual President's tenure." Id. at 449. The Court also held that a former President, although no longer a Government official, may assert constitutionally based privileges with respect to his Administration's Presidential records, and expressly rejected the argument that "only an incumbent President can assert the privilege of the Presidency." Id. at 448.

(c) The Supreme Court has held 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. See United States v. Nixon, 418 U.S. 683, 713 (1974). Notwithstanding the constitutionally based privileges that apply to Presidential records, many former Presidents have authorized access, after what they considered an appropriate period of repose, to those records or categories of records (including otherwise privileged records) to which the former Presidents or their representatives in their discretion decided to authorize access. See Nixon v. Administrator of General Services, 433 U.S. at 450-51.

Sec. 3. Procedure for Administering Privileged Presidential Records.

Consistent with the requirements of the Constitution and the Presidential Records Act, the Archivist shall administer Presidential records under section 2204(c) of title 44 in the following manner:

(a) At an appropriate time after the Archivist receives a request for access to Presidential records under section 2204(c)(1), the Archivist shall provide notice to the former President and the incumbent President and, as soon as practicable, shall provide the former President and the incumbent President copies of any records that the former President and the incumbent President request to review.

(b) After receiving the records he requests, the former President shall review those records as expeditiously as possible, and for no longer than 90 days for requests that are not unduly burdensome. 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.

(c) After review of the records in question, or of any other potentially privileged records reviewed by the former President, the former President shall indicate to the Archivist whether the former President requests withholding of or authorizes access to any privileged records.

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(d) Concurrent 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.

(1) When the former President has requested withholding of the records:

(i) If under the standard set forth in section 4 below, the incumbent President concurs in the former President's decision to request withholding of records as privileged, the incumbent President shall so inform the former President and the Archivist. The Archivist shall not permit access to those records by a requester unless and until the incumbent President advises the Archivist that the former President and the incumbent President agree to authorize access to the records or until so ordered by a final and nonappealable court order.

(ii) If under the standard set forth in section 4 below, the incumbent President does not concur in the former President's decision to request withholding of the records as privileged, the incumbent President shall so inform the former President and the Archivist. Because the former President independently retains the right to assert constitutionally based privileges, the Archivist shall not permit access to the records by a requester unless and until the incumbent President advises the Archivist that the former President and the incumbent President agree to authorize access to the records or until so ordered by a final and nonappealable court order.

(2) When the former President has authorized access to the records:

(i) If under the standard set forth in section 4 below, the incumbent President concurs in the former President's decision to authorize access to the records, the Archivist shall permit access to the records by the requester.

(ii) If under the standard set forth in section 4 below, the incumbent President does not concur in the former President's decision to authorize access to the records, the incumbent President may independently order the Archivist to withhold privileged records. In that instance, the Archivist shall not permit access to the records by a requester unless and until the incumbent President advises the Archivist that the former President and the incumbent President agree to authorize access to the records or until so ordered by a final and nonappealable court order.

Sec. 4. Concurrence by Incumbent President.

Absent compelling circumstances, the incumbent President will concur in the privilege decision of the former President in response to a request for access under section 2204(c)(1). When the incumbent President concurs in the decision of the

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former President to request withholding of records within the scope of a constitutionally based privilege, the incumbent President will support that privilege claim in any forum in which the privilege claim is challenged.

Sec. 5. Incumbent President's Right to Obtain Access.

This order does not expand or limit the incumbent President's right to obtain access to the records of a former President pursuant to section 2205(2)(B).

Sec. 6. Right of Congress and Courts to Obtain Access.

This order does not expand or limit the rights of a court, House of Congress, or authorized committee or subcommittee of Congress to obtain access to the records of a former President pursuant to section 2205(2)(A) or section 2205(2)(C). With respect to such requests, the former President shall review the records in question and, within 21 days of receiving notice from the Archivist, indicate to the Archivist his decision with respect to any privilege. The incumbent President shall indicate his decision with respect to any privilege within 21 days after the former President has indicated his decision. Those periods may be extended by the former President or the incumbent President for requests that are burdensome. The Archivist shall not permit access to the records unless and until the incumbent President advises the Archivist that the former President and the incumbent President agree to authorize access to the records or until so ordered by a final and nonappealable court order.

Sec. 7. No Effect on Right to Withhold Records.

This order does not limit the former President's or the incumbent President's right to withhold records on any ground supplied by the Constitution, statute, or regulation.

Sec. 8. Withholding of Privileged Records During 12-Year Period.

In the period not to exceed 12 years after the conclusion of a Presidency during which section 2204(a) and section 2204(b) of title 44 apply, a former President or the incumbent President may request withholding of any privileged records not already protected from disclosure under section 2204. If the former President or the incumbent President so requests, the Archivist shall not permit

access to any such privileged records unless and until the incumbent President advises the Archivist that the former President and the incumbent President agree to authorize access to the records or until so ordered by a final and nonappealable court order.

Sec. 9. Establishment of Procedures.

This order is not intended to indicate whether and under what circumstances a former President should assert or waive any privilege. The order is intended to establish procedures for former and incumbent Presidents to make privilege determinations.

Sec. 10. Designation of Representative.

The former President may designate a represen-tative (or series or group of alternative representatives, as the former President in his discretion may determine) to act on his behalf for purposes of the Presidential Records Act and this order. Upon the death or disability of a former President, the former President's designated represen-tative shall act on his behalf for purposes of the Act and this order, including with respect to the assertion of constitutionally based

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privileges. In the absence of any designated representative after the former President's death or disability, the family of the former President may designate a representative (or series or group of alternative representa-tives, as they in their discre-tion may determine) to act on the former President's behalf for purposes of the Act and this order, including with respect to the assertion of constitutionally based privileges.

Sec. 11. Vice Presidential Records.

(a) Pursuant to section 2207 of title 44 of the United States Code, the Presidential Records Act applies to the executive records of the Vice President. Subject to subsections (b) and (c), this order shall also apply with respect to any such records that are subject to any constitutionally based privilege that the former Vice President may be entitled to invoke, but in the administration of this order with respect to such records, references in this order to a former President shall be deemed also to be references to the relevant former Vice President.

(b) Subsection (a) shall not be deemed to authorize a Vice President or former Vice President to invoke any constitutional privilege of a President or former President except as authorized by that President or former President.

(c) Nothing in this section shall be construed to grant, limit, or otherwise affect any privilege of a President, Vice President, former President, or former Vice President.

Sec. 12. Judicial Review.

This order is intended to improve the internal management of the executive branch and is not intended to create any right or benefit, substantive or procedural, enforceable at law by a party, other than a former President or his designated representative, against the United States, its agencies, its officers, or any person.

Sec. 13. Revocation.

Executive Order 12667 of January 18, 1989, is revoked.

GEORGE W. BUSH

THE WHITE HOUSE,

November 1, 2001.

# # #

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United States v. Nixon, 418 U.S. 683 (1974) (USSC+)

Syllabus

Following indictment alleging violation of federal statutes by certain staff members of the White House and political supporters of the President, the Special Prosecutor filed a motion under Fed.Rule Crim.Proc. 17(c) for a subpoena *duces tecum* for the production before trial of certain tapes and documents relating to precisely identified conversations and meetings between the President and others. The President, claiming executive privilege, filed a motion to quash the subpoena. The District Court, after treating the subpoenaed material as presumptively privileged, concluded that the Special Prosecutor had made a sufficient showing to rebut the presumption and that the requirements of Rule 17(c) had been satisfied. The court thereafter issued an order for an *in camera* examination of the subpoenaed material, having rejected the President's contentions (a) that the dispute between him and the Special Prosecutor was nonjusticiable as an "intra-executive" conflict and (b) that the judiciary lacked authority to review the President's assertion of executive privilege. The court stayed its order pending appellate review, which the President then sought in the Court of Appeals. The Special Prosecutor then filed in this Court a petition for a writ of certiorari before judgment (No. 73-1766), and the President filed a cross-petition for such a writ challenging the grand jury action (No. 73-1834). The Court granted both petitions.

Held:

1. The District Court's order was appealable as a "final" order under 28 U.S.C. § 1291, was therefore properly "in" the Court of Appeals, 28 U.S.C. § 1254, when the petition for certiorari before judgment was filed in this Court, and is now properly before this Court for review. Although such an order is normally not final and subject to appeal, an exception is made in a

limited class of [p*684] cases where denial of immediate review would render impossible any review whatsoever of an individual's claims,

United States v. Ryan, 402 U.S. 530, 533. Such an exception is proper in the unique circumstances of this case, where it would be inappropriate to subject the President to the procedure of securing review by resisting the order and inappropriate to require that the District Court proceed by a traditional contempt citation in order to provide appellate review. Pp. 690-692 .

2. The dispute between the Special Prosecutor and the President presents a justiciable controversy. Pp. 692-697 .

(a) The mere assertion of an "intra-branch dispute," without more, does not defeat federal jurisdiction. *United States v. ICC,* 337 U.S. 426. P. 693 .

(b) The Attorney General, by regulation, has conferred upon the Special Prosecutor unique tenure and authority to represent the United States, and has given the Special Prosecutor explicit power to contest the invocation of executive privilege in seeking evidence deemed relevant to the performance of his specially delegated duties. While the regulation remains in effect, the Executive Branch is bound by it. *United States ex rel. Accardi v. Shaughnessy,* 347 U.S. 260. Pp. 694-696 .

(c) The action of the Special Prosecutor within the scope of his express authority seeking specified evidence preliminarily determined to be relevant and admissible in the pending criminal case, and the President's assertion of privilege in opposition thereto, present issues "of a type which are traditionally justiciable," *United States v. ICC, supra,* at 430, and the fact that both litigants are officers of the Executive Branch is not a bar to justiciability. Pp. 696-697 .

3. From this Court's examination of the material submitted by the Special Prosecutor in support of his motion for the subpoena, much of which is under seal, it is clear that the District Court's denial of the motion to quash comported with Rule 17(c), and that the Special Prosecutor has made a sufficient showing to justify a subpoena for production before trial. Pp. 697-702 .

4. Neither the doctrine of separation of powers nor the generalized need for confidentiality of high-level communications, without more, can sustain an absolute, unqualified Presidential privilege of immunity from judicial process under all circumstances. *See, e.g., Marbury v. Madison,* 1 Cranch 137 , 177 ; *Baker v. Carr,* 369 U.S. 186 , 211 . Absent a claim of need to protect military, diplomatic, or sensitive national security secrets, the confidentiality of [p*685] Presidential communications is not significantly diminished by producing material for a criminal trial under the protected conditions of *in camera* inspection, and any absolute executive privilege under Art. II of the Constitution would plainly conflict with the function of the courts under the Constitution. Pp. 703-707 .

5. Although the courts will afford the utmost deference to Presidential acts in the performance of an Art. II function, *United States v. Burr,* 25 F.Cas. 187, 190, 191-192 (No. 14,694), when a claim of Presidential privilege as to materials subpoenaed for use in a criminal trial is based, as it is here, not on the ground that military or diplomatic secrets are implicated, but merely on the ground of a generalized interest in confidentiality, the President's generalized assertion of privilege must yield to the demonstrated, specific need for evidence in a pending criminal trial and the fundamental demands of due process of law in the fair administration of criminal justice. Pp. 707-713 .

6. On the basis of this Court's examination of the record, it cannot be concluded that the District Court erred in ordering *in camera* examination of the subpoenaed material, which shall now forthwith be transmitted to the District Court. Pp. 713-714 .

7. Since a president's communications encompass a vastly wider range of sensitive material than would be true of an ordinary individual, the public interest requires that Presidential confidentiality be afforded the greatest protection consistent with the fair administration of justice, and the District Court has a heavy responsibility to ensure that material involving Presidential conversations irrelevant to or inadmissible in the criminal prosecution be accorded the high degree of respect due a President, and that such material be returned under seal to its lawful custodian. Until released to the Special Prosecutor, no *in camera* material is to be released to anyone. Pp. 714-716 .

No. 73-1766, 377 F.Supp. 1326, affirmed; No. 73-1834, certiorari dismissed as improvidently granted.

Opinions

BURGER, C.J., delivered the opinion of the Court, in which all Members joined except REHNQUIST, J., who took no part in the consideration or decision of the cases. [p*686]

Nixon v. Administrator of General Services, 433 U.S. 425 (1977) (USSC+)

Syllabus

After appellant had resigned as President of the United States, he executed a depository agreement with the Administrator of General Services that provided for the storage near appellant's California home of Presidential materials (an estimated 42 million pages of documents and 880 tape recordings) accumulated during appellant's terms of office. Under this agreement, neither appellant nor the General Services Administration (GSA) could gain access to the materials without the other's consent. Appellant was not to withdraw any original writing for three years, although he could make and withdraw copies. After the initial three-year period, he could withdraw any of the materials except tape recordings. With respect to the tape recordings, appellant agreed not to withdraw the originals for five years, and to make reproductions only by mutual agreement. Following this five-year period, the Administrator would destroy such tapes as appellant directed, and all of the tapes were to be destroyed at appellant's death or after the expiration of 10 years, whichever occurred first. Shortly after the public announcement of this agreement, a bill was introduced in Congress designed to abrogate it, and, about three months later, this bill was enacted as the Presidential Recordings and Materials Preservation Act (Act), and was signed into law by President Ford. The Act directs the Administrator of GSA to take custody of appellant's Presidential materials and have them screened by Government archivists in order to return to appellant those personal and private in nature and to preserve those having historical value and to make the materials available for use in judicial proceedings subject to "any rights, defenses or privileges which the Federal Government or any person may invoke." The Administrator is also directed to promulgate regulations to govern eventual public access to some of the materials. These regulations must take into account seven guidelines specified by § 104(a) of the Act, including, *inter alia,* the need to protect any person's opportunity to assert any legally or constitutionally based right or privilege and the need to return to appellant or his family materials that are personal and private in nature. No such public access regulations have yet become effective. The day after the [p*426] Act was signed into law, appellant filed an action in District Court challenging the Act's constitutionality on the grounds, *inter alia,* that, on its face, it violates (1) the principle of separation of powers; (2) the Presidential privilege; (3) appellant's privacy interests; (4) his First Amendment associational rights; and (5) the Bill of Attainder Clause, and seeking declaratory and injunctive relief against enforcement of the Act. Concluding that, since no public access regulations had yet taken effect, it could consider only the injury to appellant's constitutionally protected interests allegedly caused by the taking of the Presidential materials into custody and their screening by Government archivists, the District Court held that appellant's constitutional challenges were without merit, and dismissed the complaint.

Held:

1. The Act does not, on its face, violate the principle of separation of powers. Pp. 441-446 .

(a) The Act's regulation of the Executive Branch's function in the control of the disposition of Presidential materials does not, in itself, violate such principle, since the Executive Branch became a party to the Act's regulation when President Ford signed the Act into law and President Carter's administration, acting through the Solicitor General, urged affirmance of the District Court's judgment. Moreover, the function remains in the Executive Branch in the person of the GSA Administrator and

the Government archivists, employees of that branch. P. 441 .

✠ (b) The separate powers were not intended to operate with absolute independence, but, in determining whether the Act violates the separation of powers principle, the proper inquiry requires analysis of the extent to which the Act prevents the Executive Branch from accomplishing its constitutionally assigned functions, and only where the potential for disruption is present must it then be determined whether that impact is justified by an overriding need to promote objectives within Congress' constitutional authority. Pp. 441-443 .

✠ (c) There is nothing in the Act rendering it unduly disruptive of the Executive Branch, since that branch remains in full control of the Presidential materials, the Act being facially designed to ensure that the materials can be released only when release is not barred by privileges inhering in that branch. Pp. 443-446 .

✠ 2. Neither does the Act, on its face, violate the Presidential privilege of confidentiality. Pp. 446-455 .

✠ (a) In view of the specific directions to the GSA Administrator in § 104(a) of the Act to take into account, in determining public access to the materials, "the need to protect any party's opportunity to assert any constitutionally based right or privilege," and the need to return to [p*427] appellant his purely private materials, there is no reason to believe that the restrictions on public access ultimately established by regulation will not be adequate to preserve executive confidentiality. Pp. 449-451 .

✠ (b) The mere screening of the materials by Government archivists, who have previously performed the identical task for other former Presidents without any suggestion that such activity in any way interfered with executive confidentiality, will not impermissibly interfere with candid communication of views by Presidential advisers, and will be no more of an intrusion into Presidential confidentiality than the *in camera* inspection by the District Court approved in *United States v. Nixon,* 418 U.S. 683 . Pp. 451-452 .

✠ (c) Given the safeguards built into the Act to prevent disclosure of materials that implicate Presidential confidentiality, the requirement that appellant's personal and private materials be returned to him, and the minimal nature of the intrusion into the confidentiality of the Presidency resulting from the archivists' viewing such materials in the course of their screening process, the claims of Presidential privilege must yield to the important congressional purposes of preserving appellant's Presidential materials and maintaining access to them for lawful governmental and historical purposes. Pp. 452-454 .

✠ 3. The Act does not unconstitutionally invade appellant's right of privacy. While he has a legitimate expectation of privacy in his personal communications, the constitutionality of the Act must be viewed in the context of the limited intrusion of the screening process, of appellant's status as a public figure, his lack of expectation of privacy in the overwhelming majority of the materials (he having conceded that he saw no more than 200,000 items), and the virtual impossibility of segregating the apparently small quantity of private materials without comprehensive screening. When this is combined with the Act's sensitivity to appellant's legitimate privacy interests, the unblemished record of the archivists for discretion, and the likelihood that the public access regulations to be promulgated will further moot appellant's fears that his materials will be reviewed by "a host of persons," it is apparent that appellant's privacy claim has no merit. Pp. 455-465 .

✠ 4. The Act does not significantly interfere with or chill appellant's First Amendment associational rights. His First Amendment claim is clearly outweighed by the compelling governmental interests

promoted by the Act in preserving the materials. Since archival screening is the least restrictive means of identifying the materials to be returned to appellant, the burden of that screening is the measure of the First Amendment claim, and any such burden is speculative in light of the Act's provisions protecting appellant from improper public disclosures [p*428] and guaranteeing him full judicial review before any public access is permitted. Pp. 465-468 .

5. The Act does not violate the Bill of Attainder Clause. Pp. 468-484 .

(a) However expansive is the prohibition against bills of attainder, it was not intended to serve as a variant of the Equal Protection Clause, invalidating every Act by Congress or the States that burdens some persons or groups but not all other plausible individuals. While the Bill of Attainder Clause serves as an important bulwark against tyranny, it does not do so by limiting Congress to the choice of legislating for the universe, or legislating only benefits, or not legislating at all. Pp. 468-471 .

(b) The Act's specificity in referring to appellant by name does not automatically offend the Bill of Attainder Clause. Since, at the time of the Act's passage, Congress was only concerned with the preservation of appellant's materials, the papers of former Presidents already being housed in libraries, appellant constituted a legitimate class of one, and this alone can justify Congress' decision to proceed with dispatch with respect to his materials while accepting the status of his predecessors' papers and ordering in the Public Documents Act the further consideration of generalized standards to govern his successors. Pp. 471-472 .

(c) Congress, by lodging appellant's materials in the GSA's custody pending their screening by Government archivists and the promulgation of further regulations, did not "inflict punishment" within the historical meaning of bills of attainder. Pp. 473-475 .

(d) Evaluated in terms of Congress' asserted proper purposes of the Act to preserve the availability of judicial evidence and historically relevant materials, the Act is one of nonpunitive legislative policymaking, and there is no evidence in the legislative history or in the provisions of the Act showing a congressional intent to punish appellant. Pp. 475-484 .

408 F.Supp. 321, affirmed.

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-CITE-

5 USC Sec. *552* 01/02/01

-EXPCITE-

TITLE 5 - GOVERNMENT ORGANIZATION AND EMPLOYEES

PART I - THE AGENCIES GENERALLY

CHAPTER 5 - ADMINISTRATIVE PROCEDURE

SUBCHAPTER II - ADMINISTRATIVE PROCEDURE

-HEAD-

Sec. 552. Public information; agency rules, opinions, orders, records, and proceedings

-STATUTE-

(a) Each agency shall make available to the public information as follows:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public -

(A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;

(B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

(E) each amendment, revision, or repeal of the foregoing.

Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.

(2) Each agency, in accordance with published rules, shall make available for public inspection and copying -

(A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

(B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register;

(C) administrative staff manuals and instructions to staff that affect a member of the public;

(D) copies of all records, regardless of form or format, which have been released to any person under paragraph (3) and which, because of the nature of their subject matter, the agency determines have become or are likely to become the subject of subsequent requests for substantially the same records; and

(E) a general index of the records referred to under subparagraph (D);

unless the materials are promptly published and copies offered for sale. For records created on or after November 1, 1996, within one year after such date, each agency shall make such records available, including by computer telecommunications or, if computer telecommunications means have not been established by the agency, by other electronic means. To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, staff manual, instruction, or copies of records referred to in subparagraph (D).

However, in each case the justification for the deletion shall be explained fully in writing, and the extent of such deletion shall be indicated on the portion of the record which is made available or published, unless including that indication would harm an interest protected by the exemption in subsection (b) under which the deletion is made. If technically feasible, the extent of the deletion shall be indicated at the place in the record where the deletion was made. Each agency shall also maintain and make available for public inspection and copying current indexes providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by this paragraph to be made available or published. Each agency shall promptly publish, quarterly or more frequently, and distribute (by sale or otherwise) copies of each index or supplements thereto unless it determines by order published in the Federal Register that the publication would be unnecessary and impracticable, in which case the agency shall nonetheless provide copies of such index on request at a cost not to exceed the direct cost of duplication. Each agency shall make the index referred to in subparagraph (E) available by computer telecommunications by December 31, 1999. A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a

member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if -

(i) it has been indexed and either made available or published as provided by this paragraph; or

(ii) the party has actual and timely notice of the terms thereof.

(3)(A) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, upon any request for records which (i) reasonably describes such records and (ii) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

(B) In making any record available to a person under this paragraph, an agency shall provide the record in any form or format requested by the person if the record is readily reproducible by the agency in that form or format. Each agency shall make reasonable efforts to maintain its records in forms or formats that are reproducible for purposes of this section.

(C) In responding under this paragraph to a request for records, an agency shall make reasonable efforts to search for the records in electronic form or format, except when such efforts would significantly interfere with the operation of the agency's automated information system.

(D) For purposes of this paragraph, the term ''search'' means to review, manually or by automated means, agency records for the purpose of locating those records which are responsive to a request.

(4)(A)(i) In order to carry out the provisions of this section, each agency shall promulgate regulations, pursuant to notice and receipt of public comment, specifying the schedule of fees applicable to the processing of requests under this section and establishing procedures and guidelines for determining when such fees should be waived or reduced. Such schedule shall conform to the guidelines which shall be promulgated, pursuant to notice and receipt of public comment, by the Director of the Office of Management and Budget and which shall provide for a uniform schedule of fees for all agencies.

(ii) Such agency regulations shall provide that -

(I) fees shall be limited to reasonable standard charges for document search, duplication, and review, when records are requested for commercial use;

(II) fees shall be limited to reasonable standard charges for document duplication when records are not sought for commercial use and the request is made by an educational or noncommercial scientific institution, whose purpose is scholarly or scientific

research; or a representative of the news media; and

(III) for any request not described in (I) or (II), fees shall be limited to reasonable standard charges for document search and duplication.

(iii) Documents shall be furnished without any charge or at a charge reduced below the fees established under clause (ii) if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.

(iv) Fee schedules shall provide for the recovery of only the direct costs of search, duplication, or review. Review costs shall include only the direct costs incurred during the initial examination of a document for the purposes of determining whether the documents must be disclosed under this section and for the purposes of withholding any portions exempt from disclosure under this section. Review costs may not include any costs incurred in resolving issues of law or policy that may be raised in the course of processing a request under this section. No fee may be charged by any agency under this section -

(I) if the costs of routine collection and processing of the fee are likely to equal or exceed the amount of the fee; or

(II) for any request described in clause (ii) (II) or (III) of this subparagraph for the first two hours of search time or for the first one hundred pages of duplication.

(v) No agency may require advance payment of any fee unless the requester has previously failed to pay fees in a timely fashion, or the agency has determined that the fee will exceed $250.

(vi) Nothing in this subparagraph shall supersede fees chargeable under a statute specifically providing for setting the level of fees for particular types of records.

(vii) In any action by a requester regarding the waiver of fees under this section, the court shall determine the matter de novo: Provided, That the court's review of the matter shall be limited to the record before the agency.

(B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the

burden is on the agency to sustain its action. In addition to any other matters to which a court accords substantial weight, a court shall accord substantial weight to an affidavit of an agency concerning the agency's determination as to technical feasibility under paragraph (2)(C) and subsection (b) and reproducibility under paragraph (3)(B).

(C) Notwithstanding any other provision of law, the defendant shall serve an answer or otherwise plead to any complaint made under this subsection within thirty days after service upon the defendant of the pleading in which such complaint is made, unless the court otherwise directs for good cause shown.

((D) Repealed. Pub. L. 98-620, title IV, Sec. 402(2), Nov. 8, 1984, 98 Stat. 3357.)

(E) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.

(F) Whenever the court orders the production of any agency records improperly withheld from the complainant and assesses against the United States reasonable attorney fees and other litigation costs, and the court additionally issues a written finding that the circumstances surrounding the withholding raise

questions whether agency personnel acted arbitrarily or capriciously with respect to the withholding, the Special Counsel shall promptly initiate a proceeding to determine whether disciplinary action is warranted against the officer or employee who was primarily responsible for the withholding. The Special Counsel, after investigation and consideration of the evidence submitted, shall submit his findings and recommendations to the administrative authority of the agency concerned and shall send copies of the findings and recommendations to the officer or employee or his representative. The administrative authority shall take the corrective action that the Special Counsel recommends.

(G) In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee, and in the case of a uniformed service, the responsible member.

(5) Each agency having more than one member shall maintain and make available for public inspection a record of the final votes of each member in every agency proceeding.

(6)(A) Each agency, upon any request for records made under paragraph (1), (2), or (3) of this subsection, shall -

(i) determine within 20 days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of any such request

whether to comply with such request and shall immediately notify the person making such request of such determination and the reasons therefor, and of the right of such person to appeal to the head of the agency any adverse determination; and

(ii) make a determination with respect to any appeal within twenty days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of such appeal. If on appeal the denial of the request for records is in whole or in part upheld, the agency shall notify the person making such request of the provisions for judicial review of that determination under paragraph (4) of this subsection.

(B)(i) In unusual circumstances as specified in this subparagraph, the time limits prescribed in either clause (i) or clause (ii) of subparagraph (A) may be extended by written notice to the person making such request setting forth the unusual circumstances for such extension and the date on which a determination is expected to be dispatched. No such notice shall specify a date that would result in an extension for more than ten working days, except as provided in clause (ii) of this subparagraph.

(ii) With respect to a request for which a written notice under clause (i) extends the time limits prescribed under clause (i) of subparagraph (A), the agency shall notify the person making the

request if the request cannot be processed within the time limit specified in that clause and shall provide the person an opportunity to limit the scope of the request so that it may be processed within that time limit or an opportunity to arrange with the agency an alternative time frame for processing the request or a modified request. Refusal by the person to reasonably modify the request or arrange such an alternative time frame shall be considered as a factor in determining whether exceptional circumstances exist for purposes of subparagraph (C).

(iii) As used in this subparagraph, ''unusual circumstances'' means, but only to the extent reasonably necessary to the proper processing of the particular requests -

(I) the need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request;

(II) the need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or

(III) the need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request or among two or more components of the agency having substantial subject-matter

interest therein.

(iv) Each agency may promulgate regulations, pursuant to notice and receipt of public comment, providing for the aggregation of certain requests by the same requestor, or by a group of requestors acting in concert, if the agency reasonably believes that such requests actually constitute a single request, which would otherwise satisfy the unusual circumstances specified in this subparagraph, and the requests involve clearly related matters. Multiple requests involving unrelated matters shall not be aggregated.

(C)(i) Any person making a request to any agency for records under paragraph (1), (2), or (3) of this subsection shall be deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with the applicable time limit provisions of this paragraph. If the Government can show exceptional circumstances exist and that the agency is exercising due diligence in responding to the request, the court may retain jurisdiction and allow the agency additional time to complete its review of the records. Upon any determination by an agency to comply with a request for records, the records shall be made promptly available to such person making such request. Any notification of denial of any request for records under this

subsection shall set forth the names and titles or positions of each person responsible for the denial of such request.

(ii) For purposes of this subparagraph, the term ''exceptional circumstances'' does not include a delay that results from a predictable agency workload of requests under this section, unless the agency demonstrates reasonable progress in reducing its backlog of pending requests.

(iii) Refusal by a person to reasonably modify the scope of a request or arrange an alternative time frame for processing a request (or a modified request) under clause (ii) after being given an opportunity to do so by the agency to whom the person made the request shall be considered as a factor in determining whether exceptional circumstances exist for purposes of this subparagraph.

(D)(i) Each agency may promulgate regulations, pursuant to notice and receipt of public comment, providing for multitrack processing of requests for records based on the amount of work or time (or both) involved in processing requests.

(ii) Regulations under this subparagraph may provide a person making a request that does not qualify for the fastest multitrack processing an opportunity to limit the scope of the request in order to qualify for faster processing.

(iii) This subparagraph shall not be considered to affect the requirement under subparagraph (C) to exercise due diligence.

(E)(i) Each agency shall promulgate regulations, pursuant to notice and receipt of public comment, providing for expedited processing of requests for records -

(I) in cases in which the person requesting the records demonstrates a compelling need; and

(II) in other cases determined by the agency.

(ii) Notwithstanding clause (i), regulations under this subparagraph must ensure -

(I) that a determination of whether to provide expedited processing shall be made, and notice of the determination shall be provided to the person making the request, within 10 days after the date of the request; and

(II) expeditious consideration of administrative appeals of such determinations of whether to provide expedited processing.

(iii) An agency shall process as soon as practicable any request for records to which the agency has granted expedited processing under this subparagraph. Agency action to deny or affirm denial of a request for expedited processing pursuant to this subparagraph, and failure by an agency to respond in a timely manner to such a request shall be subject to judicial review under paragraph (4), except that the judicial review shall be based on the record before the agency at the time of the determination.

(iv) A district court of the United States shall not have jurisdiction to review an agency denial of expedited processing of a request for records after the agency has provided a complete response to the request.

(v) For purposes of this subparagraph, the term ''compelling need'' means -

(I) that a failure to obtain requested records on an expedited basis under this paragraph could reasonably be expected to pose an imminent threat to the life or physical safety of an individual; or

(II) with respect to a request made by a person primarily engaged in disseminating information, urgency to inform the public concerning actual or alleged Federal Government activity.

(vi) A demonstration of a compelling need by a person making a request for expedited processing shall be made by a statement certified by such person to be true and correct to the best of such person's knowledge and belief.

(F) In denying a request for records, in whole or in part, an agency shall make a reasonable effort to estimate the volume of any requested matter the provision of which is denied, and shall provide any such estimate to the person making the request, unless providing such estimate would harm an interest protected by the

exemption in subsection (b) pursuant to which the denial is made.

(b) This section does not apply to matters that are -

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

(2) related solely to the internal personnel rules and practices of an agency;

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

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

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

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

(7) records or information compiled for law enforcement

purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source, (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or (F) could reasonably be expected to endanger the life or physical safety of any individual;

(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an

agency responsible for the regulation or supervision of financial institutions; or

(9) geological and geophysical information and data, including maps, concerning wells.

Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection. The amount of information deleted shall be indicated on the released portion of the record, unless including that indication would harm an interest protected by the exemption in this subsection under which the deletion is made. If technically feasible, the amount of the information deleted shall be indicated at the place in the record where such deletion is made.

(c)(1) Whenever a request is made which involves access to records described in subsection (b)(7)(A) and -

(A) the investigation or proceeding involves a possible violation of criminal law; and

(B) there is reason to believe that (i) the subject of the investigation or proceeding is not aware of its pendency, and (ii) disclosure of the existence of the records could reasonably be expected to interfere with enforcement proceedings,

the agency may, during only such time as that circumstance

continues, treat the records as not subject to the requirements of this section.

(2) Whenever informant records maintained by a criminal law enforcement agency under an informant's name or personal identifier are requested by a third party according to the informant's name or personal identifier, the agency may treat the records as not subject to the requirements of this section unless the informant's status as an informant has been officially confirmed.

(3) Whenever a request is made which involves access to records maintained by the Federal Bureau of Investigation pertaining to foreign intelligence or counterintelligence, or international terrorism, and the existence of the records is classified information as provided in subsection (b)(1), the Bureau may, as long as the existence of the records remains classified information, treat the records as not subject to the requirements of this section.

(d) This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section. This section is not authority to withhold information from Congress.

(e)(1) On or before February 1 of each year, each agency shall submit to the Attorney General of the United States a report which shall cover the preceding fiscal year and which shall include -

(A) the number of determinations made by the agency not to comply with requests for records made to such agency under subsection (a) and the reasons for each such determination;

(B)(i) the number of appeals made by persons under subsection (a)(6), the result of such appeals, and the reason for the action upon each appeal that results in a denial of information; and

(ii) a complete list of all statutes that the agency relies upon to authorize the agency to withhold information under subsection (b)(3), a description of whether a court has upheld the decision of the agency to withhold information under each such statute, and a concise description of the scope of any information withheld;

(C) the number of requests for records pending before the agency as of September 30 of the preceding year, and the median number of days that such requests had been pending before the agency as of that date;

(D) the number of requests for records received by the agency and the number of requests which the agency processed;

(E) the median number of days taken by the agency to process different types of requests;

(F) the total amount of fees collected by the agency for processing requests; and

(G) the number of full-time staff of the agency devoted to processing requests for records under this section, and the total amount expended by the agency for processing such requests.

(2) Each agency shall make each such report available to the public including by computer telecommunications, or if computer telecommunications means have not been established by the agency, by other electronic means.

(3) The Attorney General of the United States shall make each report which has been made available by electronic means available at a single electronic access point. The Attorney General of the United States shall notify the Chairman and ranking minority member of the Committee on Government Reform and Oversight of the House of Representatives and the Chairman and ranking minority member of the Committees on Governmental Affairs and the Judiciary of the Senate, no later than April 1 of the year in which each such report is issued, that such reports are available by electronic means.

(4) The Attorney General of the United States, in consultation with the Director of the Office of Management and Budget, shall develop reporting and performance guidelines in connection with reports required by this subsection by October 1, 1997, and may establish additional requirements for such reports as the Attorney General determines may be useful.

(5) The Attorney General of the United States shall submit an annual report on or before April 1 of each calendar year which shall include for the prior calendar year a listing of the number of cases arising under this section, the exemption involved in each case, the disposition of such case, and the cost, fees, and penalties assessed under subparagraphs (E), (F), and (G) of subsection (a)(4). Such report shall also include a description of the efforts undertaken by the Department of Justice to encourage agency compliance with this section.

(f) For purposes of this section, the term -

(1) ''agency'' as defined in section 551(1) of this title includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency; and

(2) ''record'' and any other term used in this section in reference to information includes any information that would be an agency record subject to the requirements of this section when maintained by an agency in any format, including an electronic format.

(g) The head of each agency shall prepare and make publicly available upon request, reference material or a guide for

requesting records or information from the agency, subject to the exemptions in subsection (b), including -

(1) an index of all major information systems of the agency;

(2) a description of major information and record locator systems maintained by the agency; and

(3) a handbook for obtaining various types and categories of public information from the agency pursuant to chapter 35 of title 44, and under this section.

-SOURCE-

(Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 383; Pub. L. 90-23, Sec. 1, June 5, 1967, 81 Stat. 54; Pub. L. 93-502, Sec. 1-3, Nov. 21, 1974, 88 Stat. 1561-1564; Pub. L. 94-409, Sec. 5(b), Sept. 13, 1976, 90 Stat. 1247; Pub. L. 95-454, title IX, Sec. 906(a)(10), Oct. 13, 1978, 92 Stat. 1225; Pub. L. 98-620, title IV, Sec. 402(2), Nov. 8, 1984, 98 Stat. 3357; Pub. L. 99-570, title I, Sec. 1802, 1803, Oct. 27, 1986, 100 Stat. 3207-48, 3207-49; Pub. L. 104-231, Sec. 3-11, Oct. 2, 1996, 110 Stat. 3049-3054.)

-MISC1-

Historical and Revision Notes

1966 Act

Derivation	U.S. Code	Revised Statutes and

Statutes at Large

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5 U.S.C. 1002. June 11, 1946, ch. 324, Sec. 3, 60 Stat. 238.

In subsection (b)(3), the words ''formulated and'' are omitted as surplusage. In the last sentence of subsection (b), the words ''in any manner'' are omitted as surplusage since the prohibition is all inclusive.

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface to the report.

1967 ACT

Section 1 (of Pub. L. 90-23) amends section 552 of title 5, United States Code, to reflect Public Law 89-487.

In subsection (a)(1)(A), the words ''employees (and in the case of a uniformed service, the member)'' are substituted for ''officer'' to retain the coverage of Public Law 89-487 and to conform to the definitions in 5 U.S.C. 2101, 2104, and 2105.

In the last sentence of subsection (a)(2), the words ''A final order * * * may be relied on * * * only if'' are substituted for

''No final order * * * may be relied upon * * * unless''; and the words ''a party other than an agency'' and ''the party'' are substituted for ''a private party'' and ''the private party'', respectively, on authority of the definition of ''private party'' in 5 App. U.S.C. 1002(g).

In subsection (a)(3), the words ''the responsible employee, and in the case of a uniformed service, the responsible member'' are substituted for ''the responsible officers'' to retain the coverage of Public Law 89-487 and to conform to the definitions in 5 U.S.C. 2101, 2104, and 2105.

In subsection (a)(4), the words ''shall maintain and make available for public inspection a record'' are substituted for ''shall keep a record * * * and that record shall be available for public inspection''.

In subsection (b)(5) and (7), the words ''a party other than an agency'' are substituted for ''a private party'' on authority of the definition of ''private party'' in 5 App. U.S.C. 1002(g).

In subsection (c), the words ''This section does not authorize'' and ''This section is not authority'' are substituted for ''Nothing in this section authorizes'' and ''nor shall this section be authority'', respectively.

5 App. U.S.C. 1002(g), defining ''private party'' to mean a party other than an agency, is omitted since the words ''party other than

an agency'' are substituted for the words ''private party'' wherever they appear in revised 5 U.S.C. 552.

5 App. U.S.C. 1002(h), prescribing the effective date, is omitted as unnecessary. That effective date is prescribed by section 4 of this bill.

-COD-

CODIFICATION

Section 552 of former Title 5, Executive Departments and Government Officers and Employees, was transferred to section 2243 of Title 7, Agriculture.

-MISC3-

AMENDMENTS

1996 - Subsec. (a)(2). Pub. L. 104-231, Sec. 4(4), (5), in first sentence struck out ''and'' at end of subpar. (B) and inserted subpars. (D) and (E).

Pub. L. 104-231, Sec. 4(7), inserted after first sentence ''For records created on or after November 1, 1996, within one year after such date, each agency shall make such records available, including by computer telecommunications or, if computer telecommunications means have not been established by the agency, by other electronic means.''

Pub. L. 104-231, Sec. 4(1), in second sentence substituted

''staff manual, instruction, or copies of records referred to in subparagraph (D)'' for ''or staff manual or instruction''.

Pub. L. 104-231, Sec. 4(2), inserted before period at end of third sentence '', and the extent of such deletion shall be indicated on the portion of the record which is made available or published, unless including that indication would harm an interest protected by the exemption in subsection (b) under which the deletion is made''.

Pub. L. 104-231, Sec. 4(3), inserted after third sentence ''If technically feasible, the extent of the deletion shall be indicated at the place in the record where the deletion was made.''

Pub. L. 104-231, Sec. 4(6), which directed the insertion of the following new sentence after the fifth sentence ''Each agency shall make the index referred to in subparagraph (E) available by computer telecommunications by December 31, 1999.'', was executed by making the insertion after the sixth sentence, to reflect the probable intent of Congress and the addition of a new sentence by section 4(3) of Pub. L. 104-231.

Subsec. (a)(3). Pub. L. 104-231, Sec. 5, inserted subpar. (A) designation after ''(3)'', redesignated subpars. (A) and (B) as cls. (i) and (ii), respectively, and added subpars. (B) to (D).

Subsec. (a)(4)(B). Pub. L. 104-231, Sec. 6, inserted at end ''In

addition to any other matters to which a court accords substantial weight, a court shall accord substantial weight to an affidavit of an agency concerning the agency's determination as to technical feasibility under paragraph (2)(C) and subsection (b) and reproducibility under paragraph (3)(B).''

Subsec. (a)(6)(A)(i). Pub. L. 104-231, Sec. 8(b), substituted ''20 days'' for ''ten days''.

Subsec. (a)(6)(B). Pub. L. 104-231, Sec. 7(b), amended subpar. (B) generally. Prior to amendment, subpar. (B) read as follows: ''In unusual circumstances as specified in this subparagraph, the time limits prescribed in either clause (i) or clause (ii) of subparagraph (A) may be extended by written notice to the person making such request setting forth the reasons for such extension and the date on which a determination is expected to be dispatched. No such notice shall specify a date that would result in an extension for more than ten working days. As used in this subparagraph, 'unusual circumstances' means, but only to the extent reasonably necessary to the proper processing of the particular request -

''(i) the need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request;

''(ii) the need to search for, collect, and appropriately

examine a voluminous amount of separate and distinct records which are demanded in a single request; or

''(iii) the need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request or among two or more components of the agency having substantial subject-matter interest therein.''

Subsec. (a)(6)(C). Pub. L. 104-231, Sec. 7(c), designated existing provisions as cl. (i) and added cls. (ii) and (iii).

Subsec. (a)(6)(D). Pub. L. 104-231, Sec. 7(a), added subpar. (D).

Subsec. (a)(6)(E), (F). Pub. L. 104-231, Sec. 8(a), (c), added subpars. (E) and (F).

Subsec. (b). Pub. L. 104-231, Sec. 9, inserted at end of closing provisions ''The amount of information deleted shall be indicated on the released portion of the record, unless including that indication would harm an interest protected by the exemption in this subsection under which the deletion is made. If technically feasible, the amount of the information deleted shall be indicated at the place in the record where such deletion is made.''

Subsec. (e). Pub. L. 104-231, Sec. 10, amended subsec. (e) generally, revising and restating provisions relating to reports to Congress.

Subsec. (f). Pub. L. 104-231, Sec. 3, amended subsec. (f) generally. Prior to amendment, subsec. (f) read as follows: ''For purposes of this section, the term 'agency' as defined in section 551(1) of this title includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency.''

Subsec. (g). Pub. L. 104-231, Sec. 11, added subsec. (g).

1986 - Subsec. (a)(4)(A). Pub. L. 99-570, Sec. 1803, amended subpar. (A) generally. Prior to amendment, subpar. (A) read as follows: ''In order to carry out the provisions of this section, each agency shall promulgate regulations, pursuant to notice and receipt of public comment, specifying a uniform schedule of fees applicable to all constituent units of such agency. Such fees shall be limited to reasonable standard charges for document search and duplication and provide for recovery of only the direct costs of such search and duplication. Documents shall be furnished without charge or at a reduced charge where the agency determines that waiver or reduction of the fee is in the public interest because furnishing the information can be considered as primarily benefiting the general public.''

Subsec. (b)(7). Pub. L. 99-570, Sec. 1802(a), amended par. (7) generally. Prior to amendment, par. (7) read as follows: ''investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel;''.

Subsecs. (c) to (f). Pub. L. 99-570, Sec. 1302(b), added subsec. (c) and redesignated former subsecs. (c) to (e) as (d) to (f), respectively.

1984 - Subsec. (a)(4)(D). Pub. L. 98-620 repealed subpar. (D) which provided for precedence on the docket and expeditious disposition of district court proceedings authorized by subsec. (a).

1978 - Subsec. (a)(4)(F). Pub. L. 95-454 substituted references to the Special Counsel for references to the Civil Service

Commission wherever appearing and reference to his findings for reference to its findings.

1976 - Subsec. (b)(3). Pub. L. 94-409 inserted provision excluding section 552b of this title from applicability of exemption from disclosure and provision setting forth conditions for statute specifically exempting disclosure.

1974 - Subsec. (a)(2). Pub. L. 93-502, Sec. 1(a), substituted provisions relating to maintenance and availability of current indexes, for provisions relating to maintenance and availability of a current index, and inserted provisions relating to publication and distribution of copies of indexes or supplements thereto.

Subsec. (a)(3). Pub. L. 93-502, Sec. 1(b)(1), substituted provisions requiring requests to reasonably describe records for provisions requiring requests, for identifiable records, and struck out provisions setting forth procedures to enjoin agencies from withholding the requested records and ordering their production.

Subsec. (a)(4), (5). Pub. L. 93-502, Sec. 1(b)(2), added par. (4) and redesignated former par. (4) as (5).

Subsec. (a)(6). Pub. L. 93-502, Sec. 1(c), added par. (6).

Subsec. (b)(1). Pub. L. 93-502, Sec. 2(a), designated existing provisions as cl. (A), substituted ''authorized under criteria established by an'' for ''required by'', and added cl. (B).

Subsec. (b)(7). Pub. L. 93-502, Sec. 2(b), substituted provisions relating to exemption for investigatory records compiled for law enforcement purposes, for provisions relating to exemption for investigatory files compiled for law enforcement purposes.

Subsec. (b), foll. par. (9). Pub. L. 93-502, Sec. 2(c), inserted provision relating to availability of segregable portion of records.

Subsecs. (d), (e). Pub. L. 93-502, Sec. 3, added subsecs. (d) and (e).

1967 - Subsec. (a). Pub. L. 90-23 substituted introductory statement requiring every agency to make available to the public certain information for former introductory provision excepting from disclosure (1) any function of the United States requiring secrecy in the public interest or (2) any matter relating to internal management of an agency, covered in subsec. (b)(1) and (2) of this section.

Subsec. (a)(1). Pub. L. 90-23 incorporated provisions of: former subsec. (b)(1) in (A), inserting requirement of publication of names of officers as sources of information and provision for public to obtain decisions, and striking out publication requirement for delegations by the agency of final authority; former subsec. (b)(2), introductory part, in (B); former subsec.

(b)(2), concluding part, in (C), inserting publication requirement for rules of procedure and descriptions of forms available or the places at which forms may be obtained; former subsec. (b)(3), introductory part, in (D), inserting requirement of general applicability of substantive rules and interpretations, added clause (E), substituted exemption of any person from failure to resort to any matter or from being adversely affected by any matter required to be published in the Federal Register but not so published for former subsec. (b)(3), concluding part, excepting from publication rules addressed to and served upon named persons in accordance with laws and final sentence reading ''A person may not be required to resort to organization or procedure not so published'' and inserted provision deeming matter, which is reasonably available, as published in the Federal Register when such matter is incorporated by reference in the Federal Register with the approval of its Director.

Subsec. (a)(2). Pub. L. 90-23 incorporated provisions of former subsec. (c), provided for public copying of records, struck out requirement of agency publication of final opinions or orders and authority for secrecy and withholding of opinions and orders required for good cause to be held confidential and not cited as precedents, latter provision now superseded by subsec. (b) of this section, designated existing subsec. (c) as clause (A), including

provision for availability of concurring and dissenting opinions, inserted provisions for availability of policy statements and interpretations in clause (B) and staff manuals and instructions in clause (C), deletion of personal identifications from records to protect personal privacy with written justification therefor, and provision for indexing and prohibition of use of records not indexed against any private party without actual and timely notice of the terms thereof.

Subsec. (a)(3). Pub. L. 90-23 incorporated provisions of former subsec. (d) and substituted provisions requiring identifiable agency records to be made available to any person upon request and compliance with rules as to time, place, and procedure for inspection, and payment of fees and provisions for Federal district court proceedings de novo for enforcement by contempt of noncompliance with court's orders with the burden on the agency and docket precedence for such proceedings for former provisions requiring matters of official record to be made available to persons properly and directly concerned except information held confidential for good cause shown, the latter provision superseded by subsec. (b) of this section.

Subsec. (a)(4). Pub. L. 90-23 added par. (4).

Subsec. (b). Pub. L. 90-23 added subsec. (b) which superseded

provisions excepting from disclosure any function of the United States requiring secrecy in the public interest or any matter relating to internal management of an agency, formerly contained in former subsec. (a), final opinions or orders required for good cause to be held confidential and not cited as precedents, formerly contained in subsec. (c), and information held confidential for good cause found, contained in former subsec. (d) of this section.

Subsec. (c). Pub. L. 90-23 added subsec. (c).

-CHANGE-

CHANGE OF NAME

Committee on Government Reform and Oversight of House of Representatives changed to Committee on Government Reform of House of Representatives by House Resolution No. 5, One Hundred Sixth Congress, Jan. 6, 1999.

-MISC4-

EFFECTIVE DATE OF 1996 AMENDMENT

Section 12 of Pub. L. 104-231 provided that:

''(a) In General. - Except as provided in subsection (b), this Act (amending this section and enacting provisions set out as notes below) shall take effect 180 days after the date of the enactment of this Act (Oct. 2, 1996).

''(b) Provisions Effective on Enactment (sic). - Sections 7 and 8

(amending this section) shall take effect one year after the date of the enactment of this Act (Oct. 2, 1996).''

EFFECTIVE DATE OF 1986 AMENDMENT

Section 1804 of Pub. L. 99-570 provided that:

''(a) The amendments made by section 1802 (amending this section) shall be effective on the date of enactment of this Act (Oct. 27, 1986), and shall apply with respect to any requests for records, whether or not the request was made prior to such date, and shall apply to any civil action pending on such date.

''(b)(1) The amendments made by section 1803 (amending this section) shall be effective 180 days after the date of enactment of this Act (Oct. 27, 1986), except that regulations to implement such amendments shall be promulgated by such 180th day.

''(2) The amendments made by section 1803 (amending this section) shall apply with respect to any requests for records, whether or not the request was made prior to such date, and shall apply to any civil action pending on such date, except that review charges applicable to records requested for commercial use shall not be applied by an agency to requests made before the effective date specified in paragraph (1) of this subsection or before the agency has finally issued its regulations.''

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98-620 not applicable to cases pending on

Nov. 8, 1984, see section 403 of Pub. L. 98-620, set out as an Effective Date note under section 1657 of Title 28, Judiciary and Judicial Procedure.

EFFECTIVE DATE OF 1978 AMENDMENT

Amendment by Pub. L. 95-454 effective 90 days after Oct. 13, 1978, see section 907 of Pub. L. 95-454, set out as a note under section 1101 of this title.

EFFECTIVE DATE OF 1976 AMENDMENT

Amendment by Pub. L. 94-409 effective 180 days after Sept. 13, 1976, see section 6 of Pub. L. 94-409, set out as an Effective Date note under section 552b of this title.

EFFECTIVE DATE OF 1974 AMENDMENT

Section 4 of Pub. L. 93-502 provided that: ''The amendments made by this Act (amending this section) shall take effect on the ninetieth day beginning after the date of enactment of this Act (Nov. 21, 1974).''

EFFECTIVE DATE OF 1967 AMENDMENT

Section 4 of Pub. L. 90-23 provided that: ''This Act (amending this section) shall be effective July 4, 1967, or on the date of enactment (June 5, 1967), whichever is later.''

SHORT TITLE OF 1996 AMENDMENT

Section 1 of Pub. L. 104-231 provided that: ''This Act (amending

this section and enacting provisions set out as notes under this section) may be cited as the 'Electronic Freedom of Information Act Amendments of 1996'.''

SHORT TITLE OF 1986 AMENDMENT

Section 1801 of Pub. L. 99-570 provided that: ''This subtitle (subtitle N (Sec. 1801-1804) of title I of Pub. L. 99-570, amending this section and enacting provisions set out as a note under this section) may be cited as the 'Freedom of Information Reform Act of 1986'.''

SHORT TITLE

This section is popularly known as the ''Freedom of Information Act''.

DISCLOSURE OF INFORMATION ON JAPANESE IMPERIAL GOVERNMENT

Pub. L. 106-567, title VIII, Dec. 27, 2000, 114 Stat. 2864, provided that:

''SEC. 801. SHORT TITLE.

''This title may be cited as the 'Japanese Imperial Government Disclosure Act of 2000'.

''SEC. 802. DESIGNATION.

''(a) Definitions. - In this section:

''(1) Agency. - The term 'agency' has the meaning given such term under section 551 of title 5, United States Code.

''(2) Interagency group. - The term 'Interagency Group' means the Nazi War Crimes and Japanese Imperial Government Records Interagency Working Group established under subsection (b).

''(3) Japanese imperial government records. - The term 'Japanese Imperial Government records' means classified records or portions of records that pertain to any person with respect to whom the United States Government, in its sole discretion, has grounds to believe ordered, incited, assisted, or otherwise participated in the experimentation on, and persecution of, any person because of race, religion, national origin, or political opinion, during the period beginning September 18, 1931, and ending on December 31, 1948, under the direction of, or in association with -

''(A) the Japanese Imperial Government;

''(B) any government in any area occupied by the military forces of the Japanese Imperial Government;

''(C) any government established with the assistance or cooperation of the Japanese Imperial Government; or

''(D) any government which was an ally of the Japanese Imperial Government.

''(4) Record. - The term 'record' means a Japanese Imperial Government record.

''(b) Establishment of Interagency Group. -

''(1) In general. - Not later than 60 days after the date of the enactment of this Act (Dec. 27, 2000), the President shall designate the Working Group established under the Nazi War Crimes Disclosure Act (Public Law 105-246; 5 U.S.C. 552 note) to also carry out the purposes of this title with respect to Japanese Imperial Government records, and that Working Group shall remain in existence for 3 years after the date on which this title takes effect. Such Working Group is redesignated as the 'Nazi War Crimes and Japanese Imperial Government Records Interagency Working Group'.

''(2) Membership. - (Amended Pub. L. 105-246, set out as a note below.)

''(c) Functions. - Not later than 1 year after the date of the enactment of this Act (Dec. 27, 2000), the Interagency Group shall, to the greatest extent possible consistent with section 803 -

''(1) locate, identify, inventory, recommend for declassification, and make available to the public at the National Archives and Records Administration, all classified Japanese Imperial Government records of the United States;

''(2) coordinate with agencies and take such actions as necessary to expedite the release of such records to the public; and

''(3) submit a report to Congress, including the Committee on Government Reform and the Permanent Select Committee on Intelligence of the House of Representatives, and the Committee on the Judiciary and the Select Committee on Intelligence of the Senate, describing all such records, the disposition of such records, and the activities of the Interagency Group and agencies under this section.

''(d) Funding. - There is authorized to be appropriated such sums as may be necessary to carry out the provisions of this title.

''SEC. 803. REQUIREMENT OF DISCLOSURE OF RECORDS.

''(a) Release of Records. - Subject to subsections (b), (c), and (d), the Japanese Imperial Government Records Interagency Working Group shall release in their entirety Japanese Imperial Government records.

''(b) Exemptions. - An agency head may exempt from release under subsection (a) specific information, that would -

''(1) constitute an unwarranted invasion of personal privacy;

''(2) reveal the identity of a confidential human source, or reveal information about an intelligence source or method when the unauthorized disclosure of that source or method would damage the national security interests of the United States;

''(3) reveal information that would assist in the development

or use of weapons of mass destruction;

''(4) reveal information that would impair United States cryptologic systems or activities;

''(5) reveal information that would impair the application of state-of-the-art technology within a United States weapon system;

''(6) reveal United States military war plans that remain in effect;

''(7) reveal information that would impair relations between the United States and a foreign government, or undermine ongoing diplomatic activities of the United States;

''(8) reveal information that would impair the current ability of United States Government officials to protect the President, Vice President, and other officials for whom protection services are authorized in the interest of national security;

''(9) reveal information that would impair current national security emergency preparedness plans; or

''(10) violate a treaty or other international agreement.

''(c) Applications of Exemptions. -

''(1) In general. - In applying the exemptions provided in paragraphs (2) through (10) of subsection (b), there shall be a presumption that the public interest will be served by disclosure and release of the records of the Japanese Imperial Government. The exemption may be asserted only when the head of the agency

that maintains the records determines that disclosure and release would be harmful to a specific interest identified in the exemption. An agency head who makes such a determination shall promptly report it to the committees of Congress with appropriate jurisdiction, including the Committee on the Judiciary and the Select Committee on Intelligence of the Senate and the Committee on Government Reform and the Permanent Select Committee on Intelligence of the House of Representatives.

''(2) Application of title 5. - A determination by an agency head to apply an exemption provided in paragraphs (2) through (9) of subsection (b) shall be subject to the same standard of review that applies in the case of records withheld under section 552(b)(1) of title 5, United States Code.

''(d) Records Related to Investigations or Prosecutions. - This section shall not apply to records -

''(1) related to or supporting any active or inactive investigation, inquiry, or prosecution by the Office of Special Investigations of the Department of Justice; or

''(2) solely in the possession, custody, or control of the Office of Special Investigations.

''SEC. 804. EXPEDITED PROCESSING OF REQUESTS FOR JAPANESE IMPERIAL GOVERNMENT RECORDS.

''For purposes of expedited processing under section 552(a)(6)(E) of title 5, United States Code, any person who was persecuted in the manner described in section 802(a)(3) and who requests a Japanese Imperial Government record shall be deemed to have a compelling need for such record.

''SEC. 805. EFFECTIVE DATE.

''The provisions of this title shall take effect on the date that is 90 days after the date of the enactment of this Act (Dec. 27, 2000).''

NAZI WAR CRIMES DISCLOSURE

Pub. L. 105-246, Oct. 8, 1998, 112 Stat. 1859, as amended by Pub. L. 106-567, Sec. 802(b)(2), Dec. 27, 2000, 114 Stat. 2865, provided that:

''SECTION 1. SHORT TITLE.

''This Act may be cited as the 'Nazi War Crimes Disclosure Act'.

''SEC. 2. ESTABLISHMENT OF NAZI WAR CRIMINAL RECORDS INTERAGENCY WORKING GROUP.

''(a) Definitions. - In this section the term -

''(1) 'agency' has the meaning given such term under section 551 of title 5, United States Code;

''(2) 'Interagency Group' means the Nazi War Criminal Records Interagency Working Group (redesignated Nazi War Crimes and

Japanese Imperial Government Records Interagency Working Group,

see section 802(b)(1) of Pub. L. 106-567, set out above)

established under subsection (b);

''(3) 'Nazi war criminal records' has the meaning given such

term under section 3 of this Act; and

''(4) 'record' means a Nazi war criminal record.

''(b) Establishment of Interagency Group. -

''(1) In general. - Not later than 60 days after the date of

enactment of this Act (Oct. 8, 1998), the President shall

establish the Nazi War Criminal Records Interagency Working

Group, which shall remain in existence for 3 years after the date

the Interagency Group is established.

''(2) Membership. - The President shall appoint to the

Interagency Group individuals whom the President determines will

most completely and effectively carry out the functions of the

Interagency Group within the time limitations provided in this

section, including the Director of the Holocaust Museum, the

Historian of the Department of State, the Archivist of the United

States, the head of any other agency the President considers

appropriate, and no more than 4 other persons who shall be

members of the public, of whom 3 shall be persons appointed under

the provisions of this Act in effect on October 8, 1998..(sic)

The head of an agency appointed by the President may designate an

appropriate officer to serve on the Interagency Group in lieu of the head of such agency.

''(3) Initial meeting. - Not later than 90 days after the date of enactment of this Act, the Interagency Group shall hold an initial meeting and begin the functions required under this section.

''(c) Functions. - Not later than 1 year after the date of enactment of this Act (Oct. 8, 1998), the Interagency Group shall, to the greatest extent possible consistent with section 3 of this Act -

''(1) locate, identify, inventory, recommend for declassification, and make available to the public at the National Archives and Records Administration, all classified Nazi war criminal records of the United States;

''(2) coordinate with agencies and take such actions as necessary to expedite the release of such records to the public; and

''(3) submit a report to Congress, including the Committee on the Judiciary of the Senate and the Committee on Government Reform and Oversight (now Committee on Government Reform) of the House of Representatives, describing all such records, the disposition of such records, and the activities of the

Interagency Group and agencies under this section.

''(d) Funding. - There are authorized to be appropriated such sums as may be necessary to carry out the provisions of this Act.

''SEC. 3. REQUIREMENT OF DISCLOSURE OF RECORDS REGARDING PERSONS WHO COMMITTED NAZI WAR CRIMES.

''(a) Nazi War Criminal Records. - For purposes of this Act, the term 'Nazi war criminal records' means classified records or portions of records that -

''(1) pertain to any person with respect to whom the United States Government, in its sole discretion, has grounds to believe ordered, incited, assisted, or otherwise participated in the persecution of any person because of race, religion, national origin, or political opinion, during the period beginning on March 23, 1933, and ending on May 8, 1945, under the direction of, or in association with -

''(A) the Nazi government of Germany;

''(B) any government in any area occupied by the military forces of the Nazi government of Germany;

''(C) any government established with the assistance or cooperation of the Nazi government of Germany; or

''(D) any government which was an ally of the Nazi government of Germany; or

''(2) pertain to any transaction as to which the United States Government, in its sole discretion, has grounds to believe -

''(A) involved assets taken from persecuted persons during the period beginning on March 23, 1933, and ending on May 8, 1945, by, under the direction of, on behalf of, or under authority granted by the Nazi government of Germany or any nation then allied with that government; and

''(B) such transaction was completed without the assent of the owners of those assets or their heirs or assigns or other legitimate representatives.

''(b) Release of Records. -

''(1) In general. - Subject to paragraphs (2), (3), and (4), the Nazi War Criminal Records Interagency Working Group shall release in their entirety Nazi war criminal records that are described in subsection (a).

''(2) Exception for privacy, etc. - An agency head may exempt from release under paragraph (1) specific information, that would -

''(A) constitute a clearly unwarranted invasion of personal privacy;

''(B) reveal the identity of a confidential human source, or reveal information about the application of an intelligence source or method, or reveal the identity of a human

intelligence source when the unauthorized disclosure of that source would clearly and demonstrably damage the national security interests of the United States;

''(C) reveal information that would assist in the development or use of weapons of mass destruction;

''(D) reveal information that would impair United States cryptologic systems or activities;

''(E) reveal information that would impair the application of state-of-the-art technology within a United States weapon system;

''(F) reveal actual United States military war plans that remain in effect;

''(G) reveal information that would seriously and demonstrably impair relations between the United States and a foreign government, or seriously and demonstrably undermine ongoing diplomatic activities of the United States;

''(H) reveal information that would clearly and demonstrably impair the current ability of United States Government officials to protect the President, Vice President, and other officials for whom protection services, in the interest of national security, are authorized;

''(I) reveal information that would seriously and

demonstrably impair current national security emergency preparedness plans; or

''(J) violate a treaty or international agreement.

''(3) Application of exemptions. -

''(A) In general. - In applying the exemptions listed in subparagraphs (B) through (J) of paragraph (2), there shall be a presumption that the public interest in the release of Nazi war criminal records will be served by disclosure and release of the records. Assertion of such exemption may only be made when the agency head determines that disclosure and release would be harmful to a specific interest identified in the exemption. An agency head who makes such a determination shall promptly report it to the committees of Congress with appropriate jurisdiction, including the Committee on the Judiciary of the Senate and the Committee on Government Reform and Oversight (now Committee on Government Reform) of the House of Representatives. The exemptions set forth in paragraph (2) shall constitute the only authority pursuant to which an agency head may exempt records otherwise subject to release under paragraph (1).

''(B) Application of title 5. - A determination by an agency head to apply an exemption listed in subparagraphs (3) through

(I) of paragraph (2) shall be subject to the same standard of review that applies in the case of records withheld under section 552(b)(1) of title 5, United States Code.

''(4) Limitation on application. - This subsection shall not apply to records -

''(A) related to or supporting any active or inactive investigation, inquiry, or prosecution by the Office of Special Investigations of the Department of Justice; or

''(B) solely in the possession, custody, or control of that office.

''(c) Inapplicability of National Security Act of 1947 Exemption. - Section 701(a) of the National Security Act of 1947 (50 U.S.C. 431((a))) shall not apply to any operational file, or any portion of any operational file, that constitutes a Nazi war criminal record under section 3 of this Act.

''SEC. 4. EXPEDITED PROCESSING OF FOIA REQUESTS FOR NAZI WAR CRIMINAL RECORDS.

''(a) Expedited Processing. - For purposes of expedited processing under section 552(a)(6)(E) of title 5, United States Code, any requester of a Nazi war criminal record shall be deemed to have a compelling need for such record.

''(b) Requester. - For purposes of this section, the term 'requester' means any person who was persecuted in the manner

described under section 3(a)(1) of this Act who requests a Nazi war criminal record.

''SEC. 5. EFFECTIVE DATE.

''This Act and the amendments made by this Act shall take effect on the date that is 90 days after the date of enactment of this Act (Oct. 8, 1998).''

CONGRESSIONAL STATEMENT OF FINDINGS AND PURPOSE; PUBLIC ACCESS TO INFORMATION IN ELECTRONIC FORMAT

Section 2 of Pub. L. 104-231 provided that:

''(a) Findings. - The Congress finds that -

''(1) the purpose of section 552 of title 5, United States Code, popularly known as the Freedom of Information Act, is to require agencies of the Federal Government to make certain agency information available for public inspection and copying and to establish and enable enforcement of the right of any person to obtain access to the records of such agencies, subject to statutory exemptions, for any public or private purpose;

''(2) since the enactment of the Freedom of Information Act in 1966, and the amendments enacted in 1974 and 1986, the Freedom of Information Act has been a valuable means through which any person can learn how the Federal Government operates;

''(3) the Freedom of Information Act has led to the disclosure

of waste, fraud, abuse, and wrongdoing in the Federal Government;

''(4) the Freedom of Information Act has led to the identification of unsafe consumer products, harmful drugs, and serious health hazards;

''(5) Government agencies increasingly use computers to conduct agency business and to store publicly valuable agency records and information; and

''(6) Government agencies should use new technology to enhance public access to agency records and information.

''(b) Purposes. - The purposes of this Act (see Short Title of 1996 Amendment note above) are to -

''(1) foster democracy by ensuring public access to agency records and information;

''(2) improve public access to agency records and information;

''(3) ensure agency compliance with statutory time limits; and

''(4) maximize the usefulness of agency records and information collected, maintained, used, retained, and disseminated by the Federal Government.''

FREEDOM OF INFORMATION ACT EXEMPTION FOR CERTAIN OPEN SKIES TREATY DATA

Pub. L. 103-236, title V, Sec. 533, Apr. 30, 1994, 108 Stat. 480, provided that:

''(a) In General. - Data with respect to a foreign country collected by sensors during observation flights conducted in connection with the Treaty on Open Skies, including flights conducted prior to entry into force of the treaty, shall be exempt from disclosure under the Freedom of Information Act -

''(1) if the country has not disclosed the data to the public; and

''(2) if the country has not, acting through the Open Skies Consultative Commission or any other diplomatic channel, authorized the United States to disclose the data to the public.

''(b) Statutory Construction. - This section constitutes a specific exemption within the meaning of section 552(b)(3) of title 5, United States Code.

''(c) Definitions. - For the purposes of this section -

''(1) the term 'Freedom of Information Act' means the provisions of section 552 of title 5, United States Code;

''(2) the term 'Open Skies Consultative Commission' means the commission established pursuant to Article X of the Treaty on Open Skies; and

''(3) the term 'Treaty on Open Skies' means the Treaty on Open Skies, signed at Helsinki on March 24, 1992.''

-EXEC-

CLASSIFIED NATIONAL SECURITY INFORMATION

For provisions relating to a response to a request for information under this section when the fact of its existence or nonexistence is itself classified or when it was originally classified by another agency, see Ex. Ord. No. 12958, Sec. 3.7, Apr. 17, 1995, 60 F.R. 19835, set out as a note under section 435 of Title 50, War and National Defense.

EXECUTIVE ORDER NO. 12174

Ex. Ord. No. 12174, Nov. 30, 1979, 44 F.R. 69609, which related to minimizing Federal paperwork, was revoked by Ex. Ord. No. 12291, Feb. 17, 1981, 46 F.R. 13193, formerly set out as a note under section 601 of this title.

EX. ORD. NO. 12600. PREDISCLOSURE NOTIFICATION PROCEDURES FOR CONFIDENTIAL COMMERCIAL INFORMATION

Ex. Ord. No. 12600, June 23, 1987, 52 F.R. 23781, provided:

By the authority vested in me as President by the Constitution and statutes of the United States of America, and in order to provide predisclosure notification procedures under the Freedom of Information Act (5 U.S.C. 552) concerning confidential commercial information, and to make existing agency notification provisions more uniform, it is hereby ordered as follows:

Section 1. The head of each Executive department and agency subject to the Freedom of Information Act (5 U.S.C. 552) shall, to

the extent permitted by law, establish procedures to notify submitters of records containing confidential commercial information as described in section 3 of this Order, when those records are requested under the Freedom of Information Act (FOIA), 5 U.S.C. 552, as amended, if after reviewing the request, the responsive records, and any appeal by the requester, the department or agency determines that it may be required to disclose the records. Such notice requires that an agency use good-faith efforts to advise submitters of confidential commercial information of the procedures established under this Order. Further, where notification of a voluminous number of submitters is required, such notification may be accomplished by posting or publishing the notice in a place reasonably calculated to accomplish notification.

Sec. 2. For purposes of this Order, the following definitions apply:

(a) ''Confidential commercial information'' means records provided to the government by a submitter that arguably contain material exempt from release under Exemption 4 of the Freedom of Information Act, 5 U.S.C. 552(b)(4), because disclosure could reasonably be expected to cause substantial competitive harm.

(b) ''Submitter'' means any person or entity who provides confidential commercial information to the government. The term

''submitter'' includes, but is not limited to, corporations, state governments, and foreign governments.

Sec. 3. (a) For confidential commercial information submitted prior to January 1, 1988, the head of each Executive department or agency shall, to the extent permitted by law, provide a submitter with notice pursuant to section 1 whenever:

(i) the records are less than 10 years old and the information has been designated by the submitter as confidential commercial information; or

(ii) the department or agency has reason to believe that disclosure of the information could reasonably be expected to cause substantial competitive harm.

(b) For confidential commercial information submitted on or after January 1, 1988, the head of each Executive department or agency shall, to the extent permitted by law, establish procedures to permit submitters of confidential commercial information to designate, at the time the information is submitted to the Federal government or a reasonable time thereafter, any information the disclosure of which the submitter claims could reasonably be expected to cause substantial competitive harm. Such agency procedures may provide for the expiration, after a specified period of time or changes in circumstances, of designations of competitive harm made by submitters. Additionally, such procedures may permit

the agency to designate specific classes of information that will be treated by the agency as if the information had been so designated by the submitter. The head of each Executive department or agency shall, to the extent permitted by law, provide the submitter notice in accordance with section 1 of this Order whenever the department or agency determines that it may be required to disclose records:

(i) designated pursuant to this subsection; or

(ii) the disclosure of which the department or agency has reason to believe could reasonably be expected to cause substantial competitive harm.

Sec. 4. When notification is made pursuant to section 1, each agency's procedures shall, to the extent permitted by law, afford the submitter a reasonable period of time in which the submitter or its designee may object to the disclosure of any specified portion of the information and to state all grounds upon which disclosure is opposed.

Sec. 5. Each agency shall give careful consideration to all such specified grounds for nondisclosure prior to making an administrative determination of the issue. In all instances when the agency determines to disclose the requested records, its procedures shall provide that the agency give the submitter a

written statement briefly explaining why the submitter's objections are not sustained. Such statement shall, to the extent permitted by law, be provided a reasonable number of days prior to a specified disclosure date.

Sec. 6. Whenever a FOIA requester brings suit seeking to compel disclosure of confidential commercial information, each agency's procedures shall require that the submitter be promptly notified.

Sec. 7. The designation and notification procedures required by this Order shall be established by regulations, after notice and public comment. If similar procedures or regulations already exist, they should be reviewed for conformity and revised where necessary. Existing procedures or regulations need not be modified if they are in compliance with this Order.

Sec. 8. The notice requirements of this Order need not be followed if:

(a) The agency determines that the information should not be disclosed;

(b) The information has been published or has been officially made available to the public;

(c) Disclosure of the information is required by law (other than 5 U.S.C. 552);

(d) The disclosure is required by an agency rule that (1) was

adopted pursuant to notice and public comment, (2) specifies narrow classes of records submitted to the agency that are to be released under the Freedom of Information Act (5 U.S.C. 552), and (3) provides in exceptional circumstances for notice when the submitter provides written justification, at the time the information is submitted or a reasonable time thereafter, that disclosure of the information could reasonably be expected to cause substantial competitive harm;

(e) The information requested is not designated by the submitter as exempt from disclosure in accordance with agency regulations promulgated pursuant to section 7, when the submitter had an opportunity to do so at the time of submission of the information or a reasonable time thereafter, unless the agency has substantial reason to believe that disclosure of the information would result in competitive harm; or

(f) The designation made by the submitter in accordance with agency regulations promulgated pursuant to section 7 appears obviously frivolous; except that, in such case, the agency must provide the submitter with written notice of any final administrative disclosure determination within a reasonable number of days prior to the specified disclosure date.

Sec. 9. Whenever an agency notifies a submitter that it may be required to disclose information pursuant to section 1 of this

Order, the agency shall also notify the requester that notice and an opportunity to comment are being provided the submitter. Whenever an agency notifies a submitter of a final decision pursuant to section 5 of this Order, the agency shall also notify the requester.

Sec. 10. This Order is intended only to improve the internal management of the Federal government, and is not intended to create any right or benefit, substantive or procedural, enforceable at law by a party against the United States, its agencies, its officers, or any person. Ronald Reagan.

EX. ORD. NO. 13110. NAZI WAR CRIMES AND JAPANESE IMPERIAL GOVERNMENT RECORDS INTERAGENCY WORKING GROUP

Ex. Ord. No. 13110, Jan. 11, 1999, 64 F.R. 2419, provided:

By the authority vested in me as President by the Constitution and the laws of the United States of America, including the Nazi War Crimes Disclosure Act (Public Law 105-246) (the ''Act'') (5 U.S.C. 552 note), it is hereby ordered as follows:

Section 1. Establishment of Working Group. There is hereby established the Nazi War Criminal Records Interagency Working Group (now Nazi War Crimes and Japanese Imperial Government Records Interagency Working Group) (Working Group). The function of the Group shall be to locate, inventory, recommend for

declassification, and make available to the public at the National Archives and Records Administration all classified Nazi war criminal records of the United States, subject to certain designated exceptions as provided in the Act. The Working Group shall coordinate with agencies and take such actions as necessary to expedite the release of such records to the public.

Sec. 2. Schedule. The Working Group should complete its work to the greatest extent possible and report to the Congress within 1 year.

Sec. 3. Membership. (a) The Working Group shall be composed of the following members:

(1) Archivist of the United States (who shall serve as Chair of the Working Group);

(2) Secretary of Defense;

(3) Attorney General;

(4) Director of Central Intelligence;

(5) Director of the Federal Bureau of Investigation;

(6) Director of the United States Holocaust Memorial Museum;

(7) Historian of the Department of State; and

(8) Three other persons appointed by the President.

(b) The Senior Director for Records and Access Management of the National Security Council will serve as the liaison to and attend

the meetings of the Working Group. Members of the Working Group who are full-time Federal officials may serve on the Working Group through designees.

Sec. 4. Administration. (a) To the extent permitted by law and subject to the availability of appropriations, the National Archives and Records Administration shall provide the Working Group with funding, administrative services, facilities, staff, and other support services necessary for the performance of the functions of the Working Group.

(b) The Working Group shall terminate 3 years from the date of this Executive order. William J. Clinton.

-SECREF-

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 551, 552a, 552b, 566, 574, 1216, 7133 of this title; title 2 sections 472, 501, 502; title 7 sections 12, 450i, 499f, 608d, 948, 1314g, 1314i, 1508, 1636, 1637b, 1642, 2279b, 5651, 5662, 5906, 7035; title 8 section 1182; title 10 sections 128, 130b, 1034, 1102, 1506, 2304, 2305, 2306a, 2328, 2371; title 12 sections 1786, 1818, 1828, 1831o, 4611; title 14 section 645; title 15 sections 18a, 57b-2, 78m, 78o-5, 78q, 78w, 78x, 78dd-1, 78dd-2, 79z-5c, 80a-30, 80b-10a, 278n, 719d, 773, 796, 1314, 1335a, 2055, 2217, 2613, 3364, 3710a, 4019, 4104, 4107, 4305, 4403, 4606, 4912, 5104, 5308, 7006; title 16 sections

973j, 1402, 4304, 5937; title 18 sections 207, 208, 1838; title 19 sections 1333, 1431, 1509, 1625, 1677f, 2418, 3315; title 20 sections 1078, 1087-2, 6512; title 21 sections 360c, 360j, 379, 379f, 830, 1904, 1908; title 22 sections 2200a, 3902, 4355, 4415, 4604, 4607, 4833, 5841, 6713, 6744; title 25 sections 450c, 450k, 1951, 2716; title 26 sections 6103, 6110, 7611, 7803; title 28 sections 594, 1657; title 29 sections 1310, 1343, 2635; title 30 section 1604; title 31 sections 716, 1352, 3729, 3733, 5319; title 33 sections 524, 941, 1513; title 35 sections 202, 209; title 38 sections 501, 502, 7451; title 39 sections 410, 3016; title 41 sections 253, 253b, 254b, 423, 706; title 42 sections 263b, 300v-2, 300aa-25, 405, 1306, 1320c-9, 2167, 2168, 2454, 2996d, 3027, 4332, 5916, 5919, 6272-6274, 7135, 7412, 8103, 9122, 9208, 9660, 10704, 13385; title 44 sections 2201, 2204, 2206, 3501, 3504, 3506; title 46 sections 4309, 6305, 7702, 9303; title 46 App. section 1705; title 49 sections 105, 706, 10706, 10709, 11162, 14123; title 50 sections 403-5b, 431; title 50 App. sections 463, 2158, 2159, 2170, 2406, 2411.

THE IMPORTANCE OF ACCESS TO PRESIDENTIAL RECORDS: THE VIEWS OF HISTORIANS

THURSDAY, APRIL 11, 2002

HOUSE OF REPRESENTATIVES,
COMMITTEE ON GOVERNMENT REFORM,
Washington, DC.

The committee met, pursuant to notice, at 2:03 p.m., in room 2154, Rayburn House Office Building, Hon. Stephen Horn (acting chairman of the committee) presiding.

Present: Representatives Gilman, Morella, Horn, Ose, Waxman, Maloney, Norton, Kucinich, Tierney, Schakowsky, Watson, and Lynch.

Staff present: James C. Wilson, chief counsel; Robert A. Briggs, chief clerk; Robin Butler, office manager; Elizabeth Frigola, communications director; Joshua E. Gillespie, deputy chief clerk; Nicholis Mutton, assistant to chief counsel; Corinne Zaccagnini, systems administrator; Phil Barnett, minority chief counsel; Karen Lightfoot, minority senior policy advisor; David McMillen, minority professional staff member; Ellen Rayner, minority chief clerk; Jean Gosa, minority assistant clerk; and Earley Green, minority assistant clerk.

Mr. HORN. A quorum being present, the Committee on Government Reform will come to order. I ask unanimous consent that all Members and witnesses' written and opening statements be included in the record. Without objection, so ordered.

I ask unanimous consent that all articles, exhibits and extraneous or tabular material referred to be in the record. Without objection, so ordered. I ask unanimous consent that a binder of exhibits for this hearing be included in our record. Without objection, so ordered.

Chairman Burton unfortunately is unable to be here and asked that I chair this important hearing, and I am reading now a statement of Chairman Dan Burton, April 11, 2002. The Chairman says,

I regret that I'm unable to be present for this very important hearing. Unfortunately, there is a serious illness in my family, and I'm unable to be in Washington. As you are aware, I have strong feelings about archived Presidential records and the ability of the American people to obtain access to these valuable resources. It is my belief that Executive Order 13233 is not appropriate. The President is doing a great job, and he has my unconditional support. Unfortunately, he got some bad advice on this issue. This is not the first time I have said this. Last month we were finally given access to documents that President Bush had claimed were subject to executive privilege. Those documents relate to law enforcement corruption in New England and goes back to 1960's and that has resulted in $2 billion of civil litigation. It was right for Congress to fight that fight, and I'm grateful that we were

finally able to reach an accommodation. It is my hope that Congress will show similar diligence when it comes to correcting the excesses of Executive Order 13233. I urge my colleagues, Republicans and Democrats, to support the legislation introduced this afternoon by Representative Horn. I particularly want to thank Representative Horn for chairing today's hearing and for his and his staff's hard work on this issue.

From the chairman of the Committee on Government Reform, Dan Burton.

Today's hearing involves public access to the records of our former Presidents. The Presidential Records Act of—are you speaking for the—well, I am going to wait until the ranking member is here. Do you want to—the ranking member today is the usual one, which is the ranking member from California, Mr. Waxman. And I will finish this one paragraph and then you have got a lot.

Today's hearing involves public access to the records of our former Presidents. The Presidential Records Act of 1978 declared for the first time that the official records of former Presidents belong to the American people. The act gave the Archivist of the United States custody of those records and imposed on the Archivist "an affirmative duty to make such records available to the public as rapidly and completely as possible, consistent with the provisions of this act."

Now I am delighted to yield 5 minutes or whatever he needs to the gentleman from California, Mr. Waxman, the ranking member.

[The prepared statement of Hon. Stephen Horn follows:]

DAN BURTON, INDIANA,
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Congress of the United States

House of Representatives

COMMITTEE ON GOVERNMENT REFORM

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BERNARD SANDERS, VERMONT,
INDEPENDENT

Opening Statement
Representative Steve Horn, R-CA
April 11, 2002

A quorum being present, the Committee on Government Reform will come to order. Chairman Burton is unable to be here today and has asked that I chair this important hearing.

Today's hearing involves public access to the records of our former Presidents. The Presidential Records Act of 1978 declared for the first time that the official records of former Presidents belong to the American people. The act gave the Archivist of the United States custody of those records and imposed on the Archivist "an affirmative duty to make such records available to the public as rapidly and completely as possible consistent with the provisions of this act."

The records of former President Reagan are the first to become subject to the Presidential Records Act. Near the end of his administration, President Reagan issued an Executive Order that established a process for former and incumbent Presidents to review records before they are released to the public under the act. The purpose of the review was to permit a former or incumbent President to claim executive privilege in the event he felt that a particular record should not be made public. Basically, the Reagan Executive Order provided for the release of records unless the former or incumbent President claimed executive privilege within 30 days after being notified by the Archivist of the proposed release of those records.

On November 1, 2001, President Bush replaced the Reagan Order with a new Order—Executive Order 13233. This new Order creates a much more restrictive process. For example, it gives both the former and incumbent President veto power over the release of records. It also provides an open-ended review process that permits either the former or incumbent President to prevent the release of records indefinitely--even without claiming executive privilege. Finally, the new Order requires the Archivist to automatically honor any claim of executive privilege by a former President, regardless of merit.

Last November, the Subcommittee on Government Efficiency, Financial Management and Intergovernmental Relations, which I chair, held a hearing on the implementation of the Presidential Records Act. Witnesses at our hearing raised serious policy and legal concerns over Executive Order 13233. Subsequent to the hearing, many historians, archivists, and others wrote to me to express similar concerns.

Based on those concerns, I drafted a bill to rescind Executive Order 13233 and replace it with a statutory process for the review of records for possible executive privilege claims. My bill preserves the

constitutional right of a former or incumbent President to claim Executive privilege. However, unlike the Executive Order, it does so in a way that I believe is fully consistent with the letter and spirit of the Presidential Records Act.

I am introducing my bill today. I am pleased and honored that a number of Members have joined me as original co-sponsors of the bill. They include Chairman Burton, Ranking Member Waxman, and Ms. Schakowsky, the Ranking Member of my subcommittee. I believe that the bill represents a reasonable and fair solution to the problems created by the Executive Order 13233. I hope that the committee will consider the bill in the near future.

At today's hearing, we will receive testimony from noted historians on the importance of access to presidential records and the impact of Executive Order 13233. I welcome today's witnesses and look forward your testimony. I would particularly appreciate any thoughts you might have on our bill.

Mr. WAXMAN. Thank you very much, Mr. Chairman. I want to commend you for holding today's hearing, and I want to thank this distinguished panel of witnesses for appearing at the hearing today.

What is at stake is extraordinarily important: the public's right to know how its government operates. Unfortunately, the Bush administration is undermining the public's right to know and Congress's responsibility to oversee the administration. Vice President Cheney chaired a taskforce that developed the administration's energy policy. One year ago next week, Representative Dingell and I asked the General Accounting Office, the nonpartisan watchdog agency for the Congress, to find out who attended those taskforce meetings, who were the professional staff, who did the taskforce members meet with, and what costs were incurred in the process. The Vice President's office has refused to comply with that request, forcing the Comptroller General to go to court for the first time in the history of this country.

Also 1 year ago, the Secretary of Commerce refused to release corrected census counts, claiming they were deliberative documents. As a result, I and 15 of my colleagues from this committee were forced to go to court. The court granted summary judgment in our favor on January 18, 2002, and ordered Secretary Evans to turn over the adjusted census data. Despite the court order, the administration continues to resist releasing this information.

In October 2001, Attorney General Ashcroft issued guidance to agencies on implementing the Freedom of Information Act. The thrust of that guidance was when you have discretion, use it to withhold documents. You can be assured the Department of Justice will defend your decisions, wrote the Attorney General. The list goes on and on. One particularly objectionable aspect of this secrecy campaign is the Bush Executive order restricting access to Presidential records, which is the subject of this hearing. In this Executive order, the President tries to turn the law upside down, making it more difficult to get access to Presidential records. The first victims of this attack are the historians who pour through thousands of pages of documents to piece together the story about what happened within past administrations. Our witnesses today can each speak to how important these records are and were to their work.

Ultimately, however, the real victims are the American people who are denied their right to an open government. There is a bipartisan consensus that the President's Executive order was a serious mistake, and I am very pleased that I will be joining with subcommittee Chairman Horn, subcommittee Ranking Member Schakowsky, and full committee Chairman Burton in introducing the Presidential Records Act Amendments of 2002. This legislation will nullify the President's Executive order and codify in statute procedures based on the Reagan Executive order that are designed to expedite the release of Presidential records. And I look forward to the testimony today, and I hope that my colleagues on this committee will join Representatives Horn, Schakowsky, Burton and me in supporting our important open government legislation. Thank you.

[The prepared statement of Hon. Henry A. Waxman follows:]

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BERNARD SANDERS, VERMONT
INDEPENDENT

Statement of the Honorable Henry A. Waxman
Hearing on
Secrecy and the Bush Administration

April 11, 2002

Mr. Chairman, I want to commend you for holding today's hearing. And I want to thank the distinguished witnesses for appearing here today. What's at stake is extraordinarily important: the public's right to know how its government operates.

Unfortunately, the Bush Administration is undermining the public's right to know and Congress' responsibility to oversee the Administration.

Vice President Cheney chaired a task force to develop the administration's energy policy. One year ago next week, Rep. Dingell and I asked GAO to find out who attended the task force meetings, who were the professional staff, who did the task force members meet with, and what costs were incurred in the process. The Vice President's office has refused to comply with that request, forcing the Comptroller General to go to court.

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In October 2001, Attorney General Ashcroft issued guidance to agencies on implementing the Freedom of Information Act. The thrust of that guidance was when you have discretion, use it to withhold documents. "[Y]ou can be assured the Department of Justice will defend your decisions," wrote the Attorney General.

The list goes on and on.

One particularly objectionable aspect of this secrecy campaign is the Bush executive order restricting access to presidential records, which is the subject of this hearing. In this executive order, the President tries to turn the law upside down, making it more difficult to get access to presidential records.

-over-

The first victims of this attack are the historians who pour through thousands of pages of documents to piece together the story of what happened within past administrations. Our witnesses today can each speak to how important these records are to their work. Ultimately, however, the real victims are the American people, who are denied their right to an open government.

There is a bipartisan consensus that the President's executive order was a serious mistake. I am very pleased that I will be joining with subcommittee chairman Horn, subcommittee ranking member Schakowsky, and full committee chairman Burton in introducing the Presidential Records Act Amendments of 2002. This legislation will nullify the President's executive order and codify in statute procedures based on the Reagan executive order that are designed to expedite the release of presidential records.

I look forward to the testimony today, and I hope that my colleagues on the Committee will join Reps. Horn, Schakowsky, Burton, and me in supporting our important open-government legislation.

Mr. HORN. I thank the gentleman, and now the gentlewoman from New York, Mrs. Maloney.

Mrs. MALONEY. Thank you very much. I feel very strongly about this. It really, really flies in the face of everything we are doing. Currently right now I am in a markup of the Financial Services Committee, which is attempting to address the abuses in the Enron scandal, and one of the prime focuses is disclosure, information, transparency, and what are we doing here but reversing this. Presidential papers and other documents should not be kept secret, and elected officials have to remember we are public servants. We are elected to serve, and our work belongs to the people of this country who either voted for us or did not vote for us. And I feel that this is so important that we see a bipartisan leadership coming together with my good friend subcommittee chairman, Mr. Horn, who has championed many good causes, Chairman Burton, we have had many disagreements with him, with the Ranking Member Waxman and other members of the committee, but he joins us, along with Ranking Member Schakowsky, with legislation to nullify or dissolve this ill-conceived Presidential Order 13233. And I am extremely proud to be a co-sponsor of it.

I would like to say that the leading opinion molders in this country agree, the Los Angeles Times, on this action. On November 1st they called it "an attack on the principle of open government." They called it "the dark Oval Office." The Washington Post called it a "flawed approach on records." The USA Today in their editorial called it "self-serving secrecy, Bush seeks to thwart release of the administration papers." And the New York Times called it "cheating history."

So I would like to request that all of these editorials in support of the public's right to know, that it be placed in the record.

And I——

Mr. HORN. Without objection.

[The information referred to follows:]

Los Angeles Times

TUESDAY, NOVEMBER 6, 2001

A Dark Oval Office

A five-page executive order signed by President Bush on Thursday would nudge the nation's highest office back toward democracy's dark ages, when history could effectively be kept from the public. The decree permits an incumbent president to veto the release of a former president's papers even if the former president has agreed to make them public. It rolls back historians' and journalists' timely access to historical documents, giving even members of a former president's family veto power over the release of material.

Rep. Stephen Horn (R-Long Beach) will chair a meeting of a governmental reform subcommittee today to look into Bush's move, and with luck someone will begin the process of reversing the order.

Since 1974, when Congress put President Nixon's papers and records under federal custody to avert the possibility he might destroy them, the trend has been toward greater openness. In 1978, the Presidential Records Act made such papers federal property and put them under the control of the archivist of the United States once a president leaves office. The law held that papers could be withheld no longer than 12 years after the end of a presidency. This was supposed to deter the kind of secrecy and dirty tricks that characterized the Nixon White House.

This didn't shed light into every dark presidential corner, as evidenced by such matters as the Iran-Contra scandal during the Reagan administration. Now the Bush White House views as anathema the prospect of 68,000 pages from that era being made available, and skeptics are left to wonder whether this reluctance has any relation to the fact that so many current staffers also worked for President Reagan.

The order was drafted by White House counsel Alberto R. Gonzales, who said it "simply implemented an orderly process" for dealing with past presidential records. In fact it would allow a former president—or members of his family if he is deceased—to withhold documents indefinitely. A sitting president could do the same. Any records deemed to be state secrets, "deliberative process" materials, confidential communications or attorney-client communications would require a historian or reporter to demonstrate a "specific need" for them to be released.

> Presidential papers and other documents should not be kept secret.

This is a recipe for inaction and endless legal wrangling. The administration knows that court cases challenging any restrictions it imposes could be long and cumbersome. It also knows that a sitting president can already exclude material that poses national security risks—allowing George W. Bush, for example, to lock away sensitive information about how Ronald Reagan or the first President Bush handled affairs in Afghanistan. But this decree is not about protecting troops or homeland security. Rather, the administration's sweeping refusal to release any documents from the Reagan era suggests a secrecy fetish.

Critics are right to challenge Bush's decision. The Cold War is not a model to which the United States should be returning. The more the public knows about how government business is conducted, the stronger a democracy becomes. This attempt to gut the 1978 Presidential Papers Act is an attack on the principle of open government.

The Washington Post

Friday, November 9, 2001

A Flawed Approach on Records

PRESIDENT BUSH has issued a new executive order revamping the process by which the White House handles public requests for the records of past presidents. Under law, many presidential records remain secret for 12 years after a president leaves office. Then they become available upon request, subject to national security and other concerns—and to whatever privilege claims the former and current presidents assert. The 12-year time period has now lapsed for President Reagan, so the White House needed to figure out how to handle pending requests from historians for tens of thousands of documents. Mr. Bush's order, unfortunately, strikes the wrong balance. By forcing the current administration to defer to past presidents' wishes on secrecy, it could serve to encumber public access to important historical material in which the interests of presidential confidentiality are no longer compelling.

The problem has its origins in a Supreme Court ruling that executive privilege is not the sole province of the current president. Former presidents can assert it too with respect to material that reveals their confidential communications while in office. The logic of executive privilege is that presidents will not talk candidly to aides if their privacy cannot be ensured; and a new president, especially if a political opponent, may not be a reliable guardian of his predecessor's legitimate secrets. The trouble is that ex-presidents may face fewer political costs than incumbents for making excessive claims of privilege.

Under the prior rules, the sitting president was under no obligation to back an ex-president's privilege claims—and where the two disagreed, the burden was on the former president to go to court and stop the disclosure. Under Mr. Bush's new order, the president and the former president will each get a chance to review documents before they are disclosed, and disclosure will go forward only if *both* agree. If either disapproves, the person requesting disclosure must then go to court. Mr. Bush has, in addition, committed the prestige of the current administration to supporting a predecessor's assertion in court in nearly all circumstances. His order would even show the same deference to dead or incapacitated ex-presidents whose representatives objected to disclosure.

The heavy presumption, 12 years after a president leaves office, should be that unclassified papers will not stay under wraps. Mr. Bush is entitled to support whatever privilege assertions by his predecessors he deems appropriate. But he ought to render an independent judgment, not back them automatically.

USA TODAY

Monday, November 12, 2001

Self-serving secrecy

Our view:

Bush seeks to thwart release of Reagan-administration papers.

In wartime, there is little more vital to government than its ability to work in secret. Secrecy can save lives, both at home and on the battlefield.

But when that need is used as an excuse to avoid political embarrassment — as President Bush did recently in thwarting the release of old presidential records — public trust is lost.

Hiding behind a bogus claim of expanding openness, Bush issued new rules that will greatly complicate the Presidential Records Act, a post-Watergate law intended to ensure the release of administration records 12 years after a president leaves office — in this case, those of the Reagan administration.

Under the law, Reagan documents were due for public release this year. Instead, Bush chose to stack the deck against disclosure, abolishing rules the Reagan administration itself wrote and replacing them with new roadblocks that:

- Allow a designated representative of a dead or incapacitated president the right to assert executive privilege in the president's name.
- Strip the Archivist of the United States' right to overrule former presidents' executive-privilege claims.
- Triple the time former presidents have to review document requests to 90 days and give the current president an indefinite period to review those decisions.

Both Bush and his staff pretend they're increasing access to the documents.

In introducing the rules, White House spokesman Ari Fleischer said that under existing law and procedures a former president has the right to withhold any documents for any reason. "But thanks to the executive order ... more information will be forthcoming," he said.

That's true only if you pretend that the 1978 law isn't already in effect, implemented through Reagan's executive order.

Administration opponents and critics of government secrecy believe Bush may be attempting to shield members of his administration who also served under Reagan, including Colin Powell and Gale Norton, from embarrassing revelations.

Whatever the motive, Bush's move is part of a larger administration pattern of obstructing the public's right to know how government works. For months Bush has fought congressional efforts to reveal the role of industry lobbyists in writing his energy plan. Bush's attorney general wrote a memo last month promising to back government agencies in court when they exploit legal loopholes to fight Freedom of Information Act requests.

Today the Bush administration enjoys broad public support. Each time the administration abuses secrecy as a convenient dodge rather than a last resort, it puts that support at risk.

The New York Times

THURSDAY, NOVEMBER 15, 2001

Cheating History

The records a president amasses during his tenure do not become his personal property when he leaves office. As the Presidential Records Act of 1978 makes clear, this treasure trove of historical material belongs to the American people. Unfortunately, neither that law, nor the public's right to be informed about the workings of its government, dissuaded President Bush from signing an executive order earlier this month creating new barriers to obtaining a former president's papers.

At immediate issue are 68,000 pages of records from the Reagan years. The records were eligible to be made public last January. The White House has repeatedly postponed their release on the grounds that it needed time to develop new procedures for handling requests because Mr. Reagan is the first former president whose papers are subject to the 1978 act. Now comes Mr. Bush's executive order, which raises the threat of a new era of needless secrecy regarding presidential papers.

The Presidential Records Act, enacted in the aftermath of the Watergate scandals, was designed to make sure that the papers and tapes of future presidents could not be permanently sequestered from public view. While the act grants access to some papers five years after a president leaves office, former presidents may withhold sensitive records, including those revealing advice given them by aides, for up to 12 years. Mr. Bush's rules establish a more cumbersome process. When a request is made, both the sitting president and the president whose papers have been requested can review the documents before they are released — with no time limit on that review. If either objects to releasing the records, the person requesting the documents must then bring a court action.

Alberto Gonzales, the White House counsel who drafted the five-page executive order, says it "simply implemented an orderly process" to deal with requests for records of former presidents once the 12-year period has passed. That is disingenuous. The Bush order essentially ditches the law's presumption of public access in favor of a process that grants either an incumbent president or a former president the right to withhold the former president's papers from the public. Nor is this, as some in the White House have suggested, a matter of protecting national security. Classified presidential documents are already exempt from public disclosure.

Critics have suggested that Mr. Bush is mainly interested in withholding documents that might be embarrassing not only to his father, George Bush, who was Mr. Reagan's vice president, but also to other administration officials who also served Mr. Reagan. Motives aside, historians as well as lawmakers on both sides of the aisle have expressed concern that the inevitable result of the order will be to deprive scholars and even 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. Since Mr. Bush is unlikely to rescind his own order, Congress must pass a law doing so.

Mrs. MALONEY. Thank you, Mr. Chairman. And it is often quoted that Supreme Court Justice Louis Brandeis said, and it is as correct today when he said it many years ago, "sunshine is the best disinfectant," and there is a public right to know. And as the people's representatives, we must never forget this fundamental right.

I believe that Ranking Member Waxman outlined some outrageous examples of—even with a court order to release the information on the census that the current administration is thwarting that. This is information that the taxpayers pay for that they should have, and I regret that I am in a banking committee Financial Services Committee markup on really basically this same point, transparency, the openness of information. I support this legislation, and I appreciate very much the leadership moving this hearing forward. Thank you.

[The prepared statement of Hon. Carolyn B. Maloney follows:]

STATEMENT OF CONGRESSWOMAN CAROLYN B. MALONEY

Committee on Government Reform
Full Committee Hearing

"The Importance of Access to Presidential Records: The Views of Historians"

April 11, 2002

Mr. Chairman and Ranking Member, thank you holding this hearing today.

I applaud the Government Reform Committee's work to ensure that the public has access to governmental documents and I am very troubled by the current administration's utter disinterest in ensuring this access.

President George W. Bush's action on November 1, 2001, was, as the LA Times noted, "an attack on the principle of open government." (11/6/01). I look forward to the testimony of today's distinguished witnesses. I am keenly interested in their interpretation of the President's Directive and what implications it will have on the timely release of presidential records.

Because of the bipartisan leadership shown by Chairman Burton, Ranking Member Waxman, Subcommittee Chairman Horn, and Ranking Member Schakowsky, legislation to nullify or dissolve Presidential Order 13,233 has been crafted. I am proud to join as a cosponsor of this good government bill.

He is often quoted, but Supreme Court Justice Louis Brandeis is as correct today as he was years ago: "sunshine is the best disinfectant." There is a public right-to-know and as the people's representatives we must never forget this fundamental right.

Thank you, Mr. Chairman.

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Mr. HORN. I am shocked that you would go for financial matters rather than morality. So—but I——

Mrs. MALONEY. We are trying to put morality into financial matters. We are putting morality into financial matters and really the theme is disclosure, disclosure, disclosure, transparency. And then to move and try to block records that belong to the people that were created with their tax dollars, I find absolutely outrageous. And in fact I think we should have two or three more hearings on it. Thank you. Bye bye.

Mr. HORN. Do you want to do them this afternoon?

OK. I will now yield to the gentleman from Massachusetts, Mr. Tierney.

Mr. TIERNEY. Thanks, Mr. Chairman. Thanks for having this hearing, highlighting an area that we all think is extremely important. Thank you to all the witnesses for listening through all these opening statements before we hear from you, and I will say up front that I also have to leave, not to go to the Financial Committee, but to deal with a hearing before the Ways and Means Committee on welfare reform and I do not want to try to equate or rank one above the other. It is just that I have to be there. But what you said and what you provided in your written remarks are certainly helpful and useful, and I thank you for that and you can trust that they will be reviewed and taken to heart. We have got a serious problem with this administration, as I think you have heard from a number of people on both sides of the aisle, with this proclivity toward secrecy, toward keeping things under wraps, toward not sharing with the American public or even Congress information and documents that ought to be made available and that would be very useful for the democratic process if they were made available. This morning members of this committee in fact received a so-called briefing from Homeland Security Director Tom Ridge, but unfortunately this briefing was somewhat less than that. It was also held behind closed doors when it should have been held in full public view. The committee was not seeking classified information from Governor Ridge, and there really was no reason why he could not have subjected himself to the congressional questioning and to the public light when we have such a serious issue as homeland security. Because of his vast responsibility on operational, budgetary and planning functions, it should have been a formal hearing. Yet the administration, as in other matters, has stonewalled efforts to achieve that goal.

We should not necessarily be surprised, I guess, that the White House is taking these actions. For more than a year, Members of Congress and public interest groups have struggled to obtain from this White House documents related to its energy taskforce and I think Mr. Waxman went into that in some detail of how it took a lawsuit just to get a small amount of documentation that should have been provided and there is much more that should be released. They will confirm the worst fears of environmentalists, that when they were preparing the energy plans, the White House listened almost exclusively to energy groups and industry heavyweights and largely ignored the concerns of the environmental community. So it is no surprise, I guess, that the administration sought to hide their decisionmaking process, but at the

same time, it has shown the administration's unwillingness to publicly disclose other important information, including meetings between administration officials and Enron executives. And in a memo to executive branch officials, the Attorney General stated his support for the rejection of Freedom of Information requests, and that is something I think is extraordinary and, before his statement, unheard of.

Even more egregiously in some sense is the administration's invocation of executive privilege over Justice Department documents that this committee sought for its efforts to uncover why several men were sent to prison in Massachusetts for more than 30 years when Federal law enforcement officials knew of their innocence. It is an absolute disgrace that the administration has claimed executive privilege and kept from the public light documents that would shed information on how we might make sure that something like that never happens again.

When last November the signing of the Executive Order 13233 was completed, the administration served notice that it would work hard to maintain secrecy over its White House documents, not only of this White House but for past Presidents, and it is surprising that this President would be even more concerned about past Presidents' documentation than they appear to be, but it is simply wrong for him to assert authority over those documents if it is being done for political reasons. So I am pleased that you all have come here today to share your perspective on this and your wealth of information and knowledge. I think you can certainly speak to the importance of access to Presidential records. This is just one area that I join my colleagues in hoping the administration will reverse its course and allow the public access to information to which it is entitled. I want to thank you all for being here. Again I apologize for my early exit, but I want you to really understand that what you provide here today is useful and helpful and very much appreciated. Thank you.

Mr. HORN. I thank the gentleman. Does the delegate from the District of Columbia want to file a statement as read or——

Ms. NORTON. I would like to make a few remarks, Mr. Chairman.

Mr. HORN. OK. It will be about 3 or 4 minutes, if we could. We need to get to the——

Ms. NORTON. Well, indeed I apologize that I am going to make a few remarks because of the importance of this hearing, but I have another hearing simultaneously here and in the Senate. But I had to stop by this hearing to say first I am pleased to be a cosponsor of your bill, Mr. Chairman, to amend the Presidential Records Act and to commend you for having this panel come to testify today. Perhaps all of us are students of history. My two degrees in history I think have been perhaps more important to me than my law degree. It is with some understanding of history that we should approach our daily tasks here, and we do not always get to do that, to have that understanding of history. Of course, we turn to those who look deeply into the record. We are here talking not about current history but about the—current matters, but about the kind of understanding of the past that should inform any responsible legislature. It is time that these matters were clarified as they can be clarified only through legislation. I think we will be

all the wiser when we hear today's testimony. I apologize to today's witnesses for whom I have the most profound respect. I assure them that I will be looking closely at their testimony. Thank you, Mr. Chairman.

Mr. HORN. I thank the gentlewoman. I want to give a few more paragraphs, and then we will get to the Members looking at us and the very distinguished—oh, do you want to make a statement?

Ms. SCHAKOWSKY. I would like to.

Mr. HORN. Yes. Great.

Ms. SCHAKOWSKY. Thank you, Mr. Chairman. I appreciate it. Last November, President Bush tried to subvert the intent of Congress when it passed the Presidential Records Act. Today we begin the process of undoing that subversion. I am pleased that we have worked together to produce the bipartisan bill that addresses public access to Presidential records. The Presidential Records Act was passed by Congress in 1978 to assure that Presidential records created at the expense of the public became available to the public 12 years after the President left office. This law was designed to inhibit the kind of secrecy and dirty tricks that characterized the Nixon re-election campaign. If officials know their acts will become a matter of public record in the future, Congress reasoned, they will alter their behavior today. If officials know their acts will become a matter of public record in the future, President Bush reasons, they will not speak honestly. I find that formulation troubling. What is it about the advice the President's advisers are putting forward that they do not want the public to know? Did the President and his advisers have conversations about Enron that would damage his reputation if they became public? Have his advisers told the President that his tax cut benefits the wealthy while endangering the Social Security Trust Fund? Are the President's advisers telling him that they have developed an energy policy that will fatten the wallets of his oil buddies in Texas? If so, I can understand why they would want to keep their advice secret.

However, if the President's advisers are giving him their honest opinion about what is best for the country, I do not understand why they would want to hide. The opinion of the President's advisers is generally well known. The Bush Executive order permits an incumbent President to block the release of papers from a former administration, even if that President has asked the papers be released.

The Bush Executive order allows a former President to claim executive privilege to block the release of documents without any independent review of the legitimacy of that claim. The order even allows a former President's family to make this claim after the President's death. The Bush Executive order is not about protecting state secrets or homeland security. Those concerns are already addressed in the law. Rather, this Executive order allows the Bush administration to lock away documents that would reveal how Presidents Reagan and George H.W. Bush handled affairs in Afghanistan. This Executive order can be used to make sure the rest of the Iran contra story is never told. The more the public knows about how its government works, the stronger the government and the safer our democracy. This attempt to undo the Presidential Records Act is one more act by this administration to close the cur-

tain between the government and the public, an act Congress cannot allow to continue. Thank you.

Mr. HORN. I am going to set the stage of this. The records of former President Reagan are the first to become subject to the Presidential Records Act. Near the end of his administration, President Reagan issued an Executive order that established a process for former and incumbent Presidents to review records before they are released to the public under the act. The purpose of this review was to permit a former or incumbent President to claim executive privilege in the event he felt that a particular record should not be made public. Basically, the Reagan Executive order provided for the release of records unless the former or incumbent President claimed executive privilege within 30 days after being notified by the Archivist of the United States of the proposed release of those records.

On November 1, 2001, President Bush replaced the Reagan order with a new order, Executive Order 13233. This new order creates a much more restrictive process. For example, it gives both the former and incumbent President veto power over the release of records. It also provides an open-ended review process that permits either the former or incumbent President to prevent the release of records indefinitely, even without claiming executive privilege.

Finally, the new order requires the Archivist to automatically honor any claim of executive privilege by a former President regardless of merit. Last November the Subcommittee on Government Efficiency, Financial Management and Intergovernmental Relations, which I chair, held a hearing on the implementation of the Presidential Records Act. Witnesses at our hearing raised serious policy and legal concerns over the Executive Order 13233. Since the hearing, many historians, archivists and others have written to me expressing similar concerns. Based on those concerns, I have drafted that bill that would replace Executive Order 13233 with a statutory process for reviewing records for possible claims of executive privilege. My bill preserves the constitutional right of a former or incumbent President to claim an executive privilege.

However, unlike the Executive order, it does so in a way that I believe is fully consistent with the letter and the spirit of the Presidential Records Act. I am introducing my bill today. I am pleased that a number of members have joined me as original co-sponsors of the bill, including Chairman Burton and Ranking Committee Member Mr. Waxman and subcommittee member, the ranking member, Ms. Schakowsky. I believe that this bill represents a reasonable and fair solution to the problems created by the Executive Order 13233. I hope that the committee will consider the bill in the near future.

At today's hearing, we will receive testimony from noted historians on the importance of access to Presidential records and the impact of Executive Order 13233. I welcome today's witnesses and look forward to their testimony.

Gentlemen, the way this committee functions, both the full committee and the subcommittee are oversight committees, and therefore we ask all witnesses to take the oath, and if you and anybody that supports you, will stand and put your right hands up.

[Witnesses sworn.]

Mr. HORN. OK. The clerk will note that all 4 affirmed.

And we will begin now as the agenda has with Robert Dallek, the very distinguished author of the 1960's and the 1970's and the 1980's, the author of Lone Star Rising: Lyndon Johnson and His Times, 1908–1960; Franklin D. Roosevelt, An American Foreign Policy, 1932–1945; Hail to the Chief: The Making and Unmaking of American Presidents. And Mr. Dallek, I believe, is still at UCLA.

Mr. DALLEK. No.

Mr. HORN. You are not. OK. You mean you do not like our sunshine in California?

Mr. DALLEK. No. I retired and——

Mr. HORN. Oh, you did?

Mr. DALLEK. And seized one of these packages. I've been teaching at Boston University.

Mr. HORN. Go ahead.

Mr. DALLEK. Well, Mr. Chairman, if you don't object, I would like to defer to my colleague, Professor Stanley Kutler, and let him lead off, because, sir, he has been a driving force through the years in working to open Presidential materials, and he was at the center of the struggle to open the Richard Nixon tapes. And as perhaps just a symbolic expression of deference, I'd like to ask him to speak first.

Mr. HORN. Stanley Kutler is professor at the University of Wisconsin Law School, author of Abuse of Power: The New Nixon Tapes, and The Wars of Watergate.

STATEMENT OF STANLEY KUTLER, PROFESSOR, UNIVERSITY OF WISCONSIN LAW SCHOOL

Mr. KUTLER. Thank you. Thank you, Bob. I'm still younger, though. But I just want to—you have the formal testimony, and let me just make a few remarks here. The 1978 Presidential Records Act is one of those rare exceptional moments in American legislative history when we get the compromise of competing ideas that seems to work very, very well. There were those who said, as of 1978, that Presidential papers, all papers of public officials, belong to the man or the woman, and they were theirs to deal with and dispose of as they saw fit. There were those who argued that, no, these are public records generated by public funds, and therefore the public should have access to them at some date certain.

There were some who wanted immediate release, too. Between the advocates on the two extremes, we sort of found a middle of this compromise of 12 years, of waiting till a President has left office for 12 years and then we would have access to the papers.

12 years seemed to be reasonable and fair, and as I said, the idea seems to have been relatively settled. But now suddenly in 2001, the President's counselors have said no. One has been quoted as saying that, well, 12 years was not enough, and I asked at one point, well, 15 years, 20 years, 50, 100 years? And I had no answer, because I think any is too many in this man's mind.

So it seems to me that we're now at a special moment in terms of whether or not we're going to retain this kind of openness at a reasonable time.

I'm a member of both the law and the history faculties, and I have taught constitutional and legal history for many more years

than I care to remember. I am delighted that in this action today, what we're here for, is that Congress seems to wish to assert itself in matters of legislative prerogatives. The most sophisticated course in constitutional law to elementary courses in public school civics, the lesson is that Congress enacts laws. The Presidents' execute them. I am suggesting in my formal testimony that President Bush has a special personal interest in closing Presidential papers, an action that has nothing whatsoever to do with national security. It is hardly a secret at this point that the Executive order had been in the making since January 21, 2001, long before September 11th. President Bush's attempt has resulted also, I think, in the most luxuriant interpretation of executive privilege I have ever encountered. Fair-minded and prominent people have fought over the parameters, the extent of executive privilege. They will continue to do so, to be sure. But we now have extended these parameters in an extraordinary way. The Presidents' heirs and designees can exert executive privilege from generation unto generation, it seems. And if that is not enough, the order conveniently extends to Vice Presidents, past and present.

My understanding is that executive privilege lies with the incumbent officeholder and does not follow him into retirement or to the grave and beyond.

The effect of this Presidential order, quite simply, is to overturn an act of Congress, an act that followed all the procedures as dictated by the Constitution. The act—the effect of the Executive order has been to—its effect has been to nullify the 1978 law and has brought us together here today in what I think is strictly a nonpartisan issue.

[The prepared statement of Mr. Kutler follows:]

BUSH'S SECRECY FETISH

Stanley I. Kutler

The United States was attacked in a stunning suicidal assault on September 11, 2001. We have retaliated and apparently destroyed a regime that harbored terrorists, and the hunt goes on for other sponsors and perpetrators of terrorism. Eventually, they will be eliminated or neutralized, and the republic will stand.

But what republic? We pledge allegiance to a flag and "to the republic for which it stands," but is it now a different republic? As calmer moments inevitably return, we will question whether the assault on the World Trade Center and the Pentagon justifies the suspension of some constitutional principles and laws. Make no mistake: the threat from without has resulted in extraordinary government measures. The Department of Justice has arrested and detained people for lengthy periods of time, usually under the cover of secrecy. Attorney General John Ashcroft presided over naming the Department's building after Robert F. Kennedy, with whom he seeks to identify. Perhaps this symbolizes the Bush Administration's gesture toward bi-partisanship. But World War I Attorney General A. Mitchell Palmer, notorious for the round-up of political undesirables, might offer a better model. And conveniently, he, too, was a Democrat.

The Bush Administration has turned to history to justify the extraordinary measures it has proposed. During the Civil War, military courts operated in some border areas to try civilians. Following Abraham Lincoln's assassination, a military tribunal convicted eight conspirators, some on questionable evidence, and executed four. In World War II, a military tribunal tried eight Nazi saboteurs, and sentenced six to death. The plot had been betrayed to the FBI by one of the saboteurs. J. Edgar Hoover unsuccessfully had recommended the death penalty for the renegade saboteur; nevertheless, he received a medal for "uncovering" the plot. Earlier President

Franklin D. Roosevelt ordered the incarceration of more than 110,000 Japanese-Americans, citizens and aliens alike. No mass evacuations or deportations have occurred in our present crisis, although the Immigration and Naturalization Service has detained a wide array of various ethnics, including Arabs, Israelis, Afghans, Sikhs, and Indians.

The Bush Administration has consistently shown itself partial to official secrecy. Some actions might be justified on emergency grounds. But not all. President Bush clearly has acted in behalf of other matters on his agenda, using the needs of the present situation as an excuse.

On November 1, President George W. Bush issued Executive Order 13233 that effectively undermines the Presidential Records Act of 1978, and he has done so in the name "national security." If his action stands, Bush will substantially shut down historical research of recent presidents. With this order, we would have no studies of recent events such as we have for the Vietnam War, using Lyndon Johnson and Richard Nixon's records to reveal their own doubts about the war, including its origins and attempts to make peace. We would not have any insight into Nixon's thinking and the role of his advisors in discussing and promoting various Supreme Court candidacies. We would have understood little of the origins and changes in Nixon's monetary policies or his manipulation of environmental legislation. Our history would have been be poorer; and certainly, present and future leaders would be less aware of past mistakes and errors.

The executive order constitutes nothing less than a wholesale emasculation of the Presidential Records Acts of 1978. That law was passed in the wake of Watergate and Richard Nixon's audacious attempt to retain, seal, and then destroy his presidential records. Later revelations of his archives confirmed the widespread suspicions of his criminal behavior and abuses of power. Congress properly recognized that a free nation would benefit and profit from a frank and full

disclosure of its historical records.

The 1978 law marked a conscious departure from traditional practice which allowed Presidents to leave office and retain their records. In 1974, Assistant Attorney General Antonin Scalia, prepared a memo for President Gerald Ford, arguing that the practice represented established "law" when, in fact, it was only custom. The new 1978 act provided that the National Archives house and maintain control over a former president's papers. Still, the law allowed those presidents a twelve year period of exclusive access to the papers, giving them a window for a personal bonanza. Writing memoirs has provided gainful employment for ex-presidents since Herbert Hoover. William J. Clinton's $9 million contract is good for his pocket; rest easy, the publisher will not be hurt one penny.

The Presidential Records Act established an orderly release of papers twelve years after the President left office. Ronald Reagan, the first president for whom the law applies, had a first installment of nearly 68,000 pages of his records ready for release in January 2001. The National Archives had sorted, filed, and vetted those papers for "national security" considerations. Reagan's papers, not incidentally, contain Vice President George H. W. Bush's records, whose own presidential papers are scheduled for opening in January 2005. Maybe.

Executive Order 13233 began to take shape as soon as the Bush II Administration took power. The archives had published its intention to release the Reagan materials, as required by law. But Alberto Gonzalez, the White House legal counsel, immediately requested a postponement to review "constitutional and legal questions." He received a 90-day delay and two subsequent ones from John Carlin, the Director of the National Archives, anxious to ensure "everyone's comfort level" -- and retain his position. Since 1978, through twelve years of Republican Administrations and eleven of Democratic ones, these presumably important and pressing "constitutional and

legal" questions had never surfaced. Strange indeed that the Executive Order should emerge when the nation was on a war footing, readily justifying the familiar and ever-dubious blanket of "national security." September 11 made it safe to circumvent standing law and close presidential records. We know Ronald Reagan will neither object nor agree; the decision apparently is George W. Bush's alone. Whatever "secrets" Reagan may have had are safe; more important, perhaps, Reagan's Vice President can rest easy.

Let us be perfectly clear: Bush's action has nothing whatsoever to do with protecting the nation. It has everything to with protecting our exclusive club of ex- and future ex-presidents. Most immediately, he is also covering for Reagan's Vice President as his order incredibly extends executive privilege to that officer, as well. Who knows? Perhaps we might learn something about that Vice President's role in Iran-contra, a role for which he famously denied any knowledge. President Bush, of course, will ultimately become a member of the club and undoubtedly, he is anxious to make certain that his record will be sanitized. In any event, extending executive privilege for one who was not the chief executive (at least in that period) is quite a leap. Speculation is rampant that Bush also is eager to protect Reagan aides who now are prominent in his Administration. They include current Secretary of State Colin Powell, OMB Director Mitch Daniels, Jr., and Chief of Staff Andrew Card. The Los Angeles Times had it right, calling the order a "secrecy fetish."

Executive Order 13233 provides presidential papers may be released only if the former and sitting president agree. This amounts to a concurrent veto. White House Press Secretary Ari Fleischer insisted the new order was innocuous and merely "implemented" existing law. The details, of course, showed otherwise, but when pressed, he retreated, leaving the "matter for the lawyers." He contended that the order provided a "safety valve" for a current administration

because former presidents, out of office for twelve years, might not realize the national security implications. Acting Assistant Attorney General M. Edward Whelan III deadpanned that the executive order was "not designed and it does not in any respect override any provisions" of the 1978 law. He, too, insisted that it merely provided procedures and filled gaps to implement the Presidential Records Act. The next day, President Bush, now in line with his cue cards, noted that his order provided "a process that I think will enable historians to do their jobs."

The 1978 act specifically mandated the release of a President's "confidential and private communications" with his advisors. Presumably, a legal counsel is an advisor, and the law did not provide for withholding an "attorney-client" or "attorney work product" materials. But the new executive order simply sets aside the act's provisions. The 1978 law recognized various exemptions contained in the 1965 Freedom of Information Act. Now, these have been expanded by executive fiat and we have a state secrets privilege; communications with advisors' privilege; attorney-client privilege; and attorney work product privilege. We are back to 1973 when one of Nixon's lawyers arrogantly said: "It is for the President alone to say what is covered by executive privilege."

Brett M. Kavanaugh, a Gonzalez staffer who apparently drafted the order, said that a 1987 Reagan executive order, which attempted much less restraint, offered "no defense whatsoever to the opinions of a former president." Bush's order, of course, now gives former presidents, their families, and former vice presidents a right to prevent the release of papers. Once again, a Watergate score has been settled. A few years ago, Mr. Kavanaugh worked with Kenneth Starr, and eagerly argued that President William J. Clinton had no right to retain documents, no executive privilege, and must yield to every demand made by the Office of Independent Counsel. Bush's action drips with irony.

The House Subcommittee on Government Efficiency and Intergovernmental Affairs of the House Committee on Government Reform held a brief hearing on the Executive Order on November 6, 1901. Somewhat gingerly, Chairman Stephen Horn (R-CA) thought that "the new order appears to create a more elaborate process" for releasing documents. "It also gives the former and incumbent presidents veto power over the release of the records." Administration spokesmen (Gonzalez did not appear) simply stonewalled and repeated the mantra of clearing away constitutional problems. No Democrats showed up for the hearing, but the other committee member, an ardent Reagan booster, Doug Ose (R-CA), appeared and strongly called for the administration to reconsider its order. An unabashed admirer of Ronald Reagan, Ose seems to believe releasing the Reagan Papers can only enhance his reputation. Horn belatedly offered his support.

Scott L. Nelson, a member of the Public Citizen Litigation Group, offered the most significant testimony. Nelson has a special familiarity with presidential records. He spent fifteen years in private practice representing Richard Nixon, and later his executors, on matters relating to access to Nixon's materials. He represented Nixon against Public Citizen and myself in our successful suit to liberate the Nixon tapes. Now, Nelson has defected and eloquently argues for public access.

Nelson testified that the Executive Order "is fundamentally flawed, both constitutionally, and as a matter of policy." He flatly stated that the new directive imposed substantive standards "that displace and subvert" the 1978 law's provisions for public access. Nelson noted that the Bush order requires the Archivist to withhold materials if a former president asserts executive privilege, and even if the incumbent president disagrees. In Nixon v. Administrator of General Services (1977), the Supreme Court held that former presidents retained a limited right to

executive privilege, but the Court certainly did not imply that incumbent executive branch officials must honor such claims.

The 1978 law assumed and provided a right of access; Bush's order stands that right on its head. The burden now is on the researcher who must show a "demonstrable, specific need." In short, researchers maintain a very expensive right to litigate. In 1988, the Circuit Court for the District of Columbia gave short shrift to such judicial protection. The judges emphatically rejected a Reagan order directing the Archives to accept any claims advanced by former President Nixon to block release of his presidential materials. Reagan appointee Lawrence Silberman's opinion rejected Reagan's contention that the Archivist might legally and independently support a former president as long as he could be challenged in court. Silberman excoriated the Administration: "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 . . . is in truth to delegate to the Judiciary the Executive Branch's responsibility." The Bush order is no different, for it requires the Archivist to honor the former president's claims even when the incumbent disagrees with them. Such a course constitutes nothing less than the incumbent's abdication of his obligation of fidelity to the law. When the inevitable challenge to Bush's order appears on his doorstep, as is likely, one hopes Judge Silberman will remain consistent in his faith to the law.

Speaking of lawsuits, Bush's order provides no end to back scratching for that fellowship of ex-presidents. His order provides that if the incumbent and former president agree to block release, the President and his Department of Justice will defend the assertion of privilege, thus saving the former president potentially significant legal fees. Richard Nixon wrote endless volumes of memoirs to support his lawyer habit.

Make no mistake: the Bush order breaks much new ground. Allowing a former president's family or personal representative to assert privilege is novel and bizarre. This involves the delegation of some personal right and brazenly enlarges the constitutional privilege. That privilege is asserted on behalf of the office, now no longer his. The shadowy doctrine of executive privilege has been elevated to a personal right, extending a lifetime, and even beyond.

The order bestows a luxuriant privilege upon former presidents. Incumbents decide and judge the nature of national security, not former presidents. If the incumbent sees no national security issue at stake, why allow a former president, ever anxious to preserve and enhance his reputation, to make that determination?

This matter is not closed. Slowly, congressmen are beginning to understand the stakes. Dan Burton (R-IN) reportedly is "exercised" by the Bush order and he preparing for a more elaborate hearing by the full House Committee on Government Reform, which he chairs. He apparently understands that this is not a partisan issue. Surely, he must be tolling the days of the twelve years remaining before Bill Clinton's papers are scheduled for release. That prospect must tantalize Burton.

White House Counsel Gonzalez thus far has refused to say when or whether Reagan's papers would be released. There is no time limit on how long a former or incumbent president can seal his papers. This is not about process; it is very much about substantive results. We know the following: the papers have been cleared for national security and personal exemptions; President Reagan unfortunately cannot deal with these matters, and there is no indication that Nancy Reagan cares; it follows, then, that this Administration, will establish new precedents and proscribe any releases. Heads we win; tails you lose.

Early in the game, and long before September 11, a Gonzalez aide thought that "maybe twelve

years is too short a time." Congress might act boldly and promptly to override this order and assert its legislative prerogatives. Or it might change the existing law. But what is the proper amount of time? Twenty years? Thirty? A hundred? Or is any too many?

Stanley I. Kutler is the author of The Wars of Watergate.

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Mr. HORN. We thank you for that statement, or are you complete?

Mr. KUTLER. No. I'm complete.

Mr. HORN. We will now go back to Richard Reeves, the author of "President Nixon: Alone in the White House and President Kennedy, A Profile of Power."

STATEMENT OF RICHARD REEVES, AUTHOR OF "PRESIDENT NIXON: ALONE IN THE WHITE HOUSE" AND "PRESIDENT KENNEDY: PROFILE IN POWER"

Mr. REEVES. Thank you. It's a privilege to be here. It's a privilege to be an American citizen.

In the Declaration of Independence, the fourth complaint against the King of England and why we should break away reads, "his call together legislative bodies at places unusual, uncomfortable and distant from the depository of the public records for the sole purpose of fatiguing them into compliance with his measures."

That was Thomas Jefferson in 1776. There have been since that time first a closing and then an opening, somewhat by accident, I think, of the public's right to know. On November 1st when the President signed Executive Order 13233, I sent him copies of my books on President Kennedy and President Nixon saying that I thought they might be worth a lot of money some day as an artifact, because if this law stands, books like this will never be written again. The classification system and—that has gone on over the years has touched the comic. I always thought that the best classification I saw to keep from historians and then from the public was a copy of Evergreen Magazine in the Kennedy Library with an inscription from Brendan Behan. The Evergreen, for those of us who remember, was considered something of a dirty book at the time, and apparently it was classified to keep it away. For 25 years, the U.S. Government said it would not be in the interest of the people to read these words: To my lantsman John Kennedy, best, Brendan Behan. For 25 years that was classified and kept.

This is James Madison writing in 1822: "A popular government without popular information or the means of acquiring it is but a prologue to a farce or a tragedy, or perhaps both. Knowledge will forever govern ignorance, and a people who mean to be their own Governors must arm themselves with the power which knowledge gives."

Now, not everyone agreed with that, including Presidents. President Lincoln's papers, for instance, did not become public until 1949. To someone like me, and I think other people at this table, the Presidential papers in fact are self-protecting. First, the Presidents and their governments have the right, the power to exclude most anything on the grounds of national security, on executive privilege or personal privacy, and in fact there are too many papers. 44 million papers in the Nixon archives, 50 million in the Reagan archives, where I now work in Simi Valley, CA. So that it takes a great deal of time and then a great deal of interviews and study to determine which papers you should look for. I think historians, and I'm a journalist, really, a reporter, understand the reason that some papers have to be kept secret for political embarrassment and such, and also Presidential papers are a commodity.

They are extremely valuable, and they can be sold. They can be used for various reasons.

It is my opinion that our government works on a system of deferred compensation. Yes, the pay is not very good to be in the government, but you get the money later. I'm told President Clinton made more than $15 million last year. That was almost as much as George Stephanopoulos made.

So the documents as private property are very valuable to a President. Three of us here, particularly Dr. Kutler, have worked on the Nixon papers, and without seeing most of those papers, I think it is hard to understand even now what happened during the Nixon administration. By that I don't mean the scandals of Watergate, as much as I mean a systematic attempt to skirt the checks and balances of the U.S. Constitution. General Charles DeGaulle of France was a great role model for President Nixon. He governed more or less by edict, but most of us here are old enough to realize that President Nixon's two great accomplishments, the opening to China which changed the politics, geopolitics of the world, and the—taking the United States off the gold standard. He really was the godfather of globalization in some ways. What we tend to forget, and what historians have had to try to find out, is that both of those world-changing edicts from a President of the United States had never been considered in public in this country. The Congress was not considered. The people were not considered. The press were not considered. Only four men, Nixon and Kissinger, in the case of China, and Nixon and John Connolly in the case of the new economics of the time knew. We learned of this when the President appeared on television and announced it as a fete accompli. It is only through searching the records that you can realize what it is that happened and what was actually so different about that President. And no matter what archival system is used, the families and the former aides will try to protect their reputation, which is what you would expect of them, and you would expect of us to try to bring that into more objective light. They were greatly influenced, the American Presidents of our generation, by Winston Churchill, who once said, "my task, my goal is to make the history and then write it before anyone else does."

That is one of the reasons Richard Nixon was keeping tapes. There is no doubt also that the world is changing, and that we have to take into account what will happen. Globalization brought great benefits, I think, to the economy of the world, certainly to the economy of the United States. It also, as we learned to our regret, made terror global, and it also is in the process of making law international—more international than Americans generally like to see. I don't think that President Bush wants to sit in The Hague 20 years from now explaining why he signed a certain paper involving certain people in the Middle East, and I think that is something the Congress should consider in terms of why this move is being made so strongly right now by the White House and to evaluate those arguments within a new context.

Luckily for us, history has been changed by the greatest—the great historian of the 20th century is the Xerox machine. It is now pretty hard to hide records unless you go to great efforts, and these are the great efforts that we are seeing. I love what I do, and I

know that the people I'm lucky enough to sit here with people who love their work. I mean, it is—going through the archives is like sloshing through the mud of a mine, and every once in a while stumbling on a diamond, every once in a while finding out, for instance, that John Kennedy knew of the Berlin Wall plans before the wall was built, and he thought it would prevent a war. The communists had their problem, which was their best and brightest fleeing. We had our problems, that we had only 15,000 soldiers in Berlin, and we could not defend either Berlin, Germany or Europe without using nuclear weapons. And President Kennedy did not want to use nuclear weapons. The wall, Check Point Charlie and all that solved that. President Kennedy emphasized in both public and private that as long as occupation rights were honored, the fact that American officers could drive through East Berlin, the United States had no objection to what the East Germans or the Russians did on their side of the border. That was not understood at the time, because had Kennedy gotten up and announced that, I suspect there would have been an attempt to impeach him. But, in fact, it is what prevented a war, and as he said privately, better a wall than a war. No one knew that, and that is the job, I think, of historians to try to find out what that meant.

There are many ways now to avoid it, and it involves not only this act. It involves a system that Dr. Kissinger set up basically to hide his papers in the Library of Congress, and since I'm doing a book now on President Reagan using his papers, I would—I'll close with just a note that our—a friendly note I received from the Library of Congress when I applied to look at the papers of Alexander Haig, who was, after all, the Secretary of State of the United States during that period. And once, or so he said, even ran the government. This is what you get under the kind of legislation—or the kind of process that the Bush administration has put in. I'll end with this:

"Dear Mr. Reeves, we have been notified that your request for permission to consult Alexander Haig's papers have been denied. Please let me know if we can be of any further assistance. Thank you."

Mr. HORN. Could you tell me who signed that letter?

Mr. REEVES. It was signed by John Haynes who is the Chief of the Documentary Section of the Library of Congress.

Mr. HORN. Did you try the Librarian of Congress?

Mr. REEVES. I haven't gone there. I was giving the Library of Congress a lecture that year. I didn't bring it up. The fact of the matter, he's going to say the same thing, because Kissinger and Haig figured out a way to hide their papers, not only from you and from us, but from the National Archives.

Mr. HORN. Well, an endowed chair has been in the Congressional library of Mr. Kissinger's.

Mr. REEVES. They don't let us see that.

Mr. HORN. We now have our last presenter——

Mr. REEVES. We have forgotten our first presenter.

Mr. DALLEK. I only deferred for the moment.

Mr. HORN. OK. Bob.

STATEMENT OF ROBERT DALLAK, AUTHOR OF "LONE STAR RISING: LYNDON JOHNSON AND HIS TIMES, 1908–1960," "FRANKLIN D. ROOSEVELT AND AMERICAN FOREIGN POLICY, 1932–1945," "HAIL TO THE CHIEF: THE MAKING AND UNMAKING OF AMERICAN PRESIDENTS"

Mr. DALLEK. Thank you. Thank you, Mr. Chairman, for inviting me to testify at this hearing about your proposed legislation, nullifying President Bush's Executive Order 13233, revising procedures for release of Presidential documents established under the Presidential Records Act of 1978. As I understand matters, the Executive order would give a sitting President, as well as past Presidents and their heirs the power to withhold Presidential documents for as long as they believe necessary. This control of historical papers would also extend to Vice Presidents.

I read President Bush's Executive order as essentially nullifying earlier legislation, making Presidential papers public rather than private property, and that of course has been a long struggle for historians to assure that these papers should be in the possession, so to speak, the ownership of the public rather than the Presidents themselves.

If Mr. Bush's order is left standing, I believe it will return us to the era when Presidents owned and controlled access to the documentary record generated during their administrations. The committee's amendment to the Presidential Records Act would eliminate this return to a state of affairs the Congress ended in the 1970's. My work over the last 30 years in five Presidential libraries, FDR, Truman, Eisenhower, Kennedy and Johnson, for books on Presidents Roosevelt, Kennedy and Johnson, leaves me unconvinced that President Bush's Executive order, as the administration alleges, will contribute to a more orderly release of Presidential documents, particularly greater assurance against breaches of national security and of privacy rights to the country. The President's directive will make the study and understanding of recent Presidential history more difficult. It will undermine Justice Felix Frankfurter's definition of government, "as the government which accepts in the fullest sense responsibility to explain itself."

Attorney General Ashcroft has asserted that the Executive order was essential for protecting, "national security, enhancing the effectiveness of our law enforcement agencies, protecting sensitive business information and, not least, preserving personal privacy."

I find the Attorney General's statement unconvincing. The 1978 Presidential Records Act makes ample provision for the protection of both national security and personal privacy. More to the point, in my 30 years of work in Presidential libraries, I have never heard of a breach of national security by premature release of Presidential documents, nor do I know of any notable violation of personal privacy by an unauthorized release of documents in the holdings of the libraries. Indeed, next year will be 40 years since the death of President Kennedy, and in the coming week, I'm completing a biography of President Kennedy. I'm going to have access to President Kennedy's medical records. I'll be the first biographer or historian to gain access to these materials. I shouldn't be the only one. This should have been available a long time ago so that we

could have known a great deal more about President Kennedy's medical history, but better late than never, as they say.

I will leave it to others with greater expertise than I have to comment on the claims of executive privilege asserted by the President as an additional basis for his order of November 1st. I can say, however, that to the best of my knowledge, it is unprecedented to claim that Presidents maintain executive privilege after they have left office, nor will I speculate on what exactly motivated President Bush's Executive order, except to say that it is hard to believe that either national security or personal privacy are genuine central considerations. I would like to focus instead on the importance of opening Presidential records to journalists and historians in a timely fashion. No one interested in the country's well being favors inappropriate release of Presidential materials. Some matters relating to national security and personal privacy should remain secret for the proper functioning of our government. As my colleague Arthur Schlesinger, Jr., said in a letter to this committee last November "a measure of secrecy is certainly essential to executive operations. But secrecy should be rigidly reserved for specific categories—weapons technology and deployment, diplomatic negotiations, intelligence methods and sources, personnel investigations, tax returns, personal data given the government on the presumption that it would be kept confidential. Secrecy, Schlesinger adds, carried too far becomes a means by which the executive branch dissembles its purposes, buries its mistakes, manipulates its citizens, escapes its accountability and maximizes its power."

Holding back Presidential documents impoverishes our understanding of recent history and handicaps a President wrestling with difficult contemporary policy questions. The more Presidents have known about past White House performance, the better they have been at making wise policy judgments. President Franklin Roosevelt's close knowledge of President Wilson's missteps at the end of World War I were of considerable help to him in leading the country into and through the Second World War. Lyndon Johnson's effectiveness in passing so much Great Society legislation in 1965 and 1966 partly rested on direct observation of how Roosevelt had managed relations with Congress. President Truman's problems on the Korean War following the move across the 38th parallel into North Korea was one element in persuading George Bush not to invade Iraq in 1991. Every President uses history in deciding current actions. The principal victim of President Bush's directive will be himself and the country. The study and publication of our Presidential history is no luxury or form of public entertainment. It is a vital element in assuring the best governance of our democracy. No one, no one has a monopoly on truth or wisdom in the making of public policy, nor can historians or history offer a fool-proof blueprint on sensible causes of action. But it is a useful guide in helping an administration make decisions about domestic and foreign affairs. The more we know about our past, the better we will be able to chart a sensible future. Your amendment to the Presidential Records Act will serve the Nation. Thank you for listening to my remarks. I'll be happy to answer any questions if they could in any way be helpful to your additional deliberations.

[The prepared statement of Mr. Dallak follows:]

Dr. Robert Dallek

Testimony before House Committee on Government Reform

April 11, 2002

Thank you, Mr. Chairman, for inviting me to testify at this hearing about your proposed legislation nullifying President Bush's Executive Order 13223 revising procedures for release of presidential documents established under the Presidential Records Act of 1978.

As I understand matters, the Executive Order would give a sitting president as well as past presidents and their heirs the power to withhold presidential documents for as long as they believed necessary. This control of historical papers would also extend to vice presidents. I read President Bush's Executive Order as essentially nullifying earlier legislation making presidential papers public rather than private property. If Mr. Bush's Order is left standing, I believe it will return us to the era when presidents owned and controlled access to the documentary record generated during their administrations. The committee's amendment to the Presidential Records Act would eliminate this return to a state of affairs the Congress ended in the 1970s.

My work over the last 30 years in five presidential libraries-FDR, Truman, Eisenhower, Kennedy, and Johnson-for books on presidents Roosevelt, Kennedy, and Johnson leaves me unconvinced that President Bush's Executive Order, as the administration alleges, will contribute to a more orderly release of presidential documents, particularly greater assurance against breaches of national security and of privacy rights. To the contrary, the President's directive will make the study and understanding of recent

presidential history more difficult. It will undermine Justice Felix Frankfurter's definition of democratic government "as the government which accepts in the fullest sense responsibility to explain itself."

Attorney General Ashcroft has asserted that the Executive Order was essential for protecting "national security, enhancing the effectiveness of our law enforcement agencies, protecting sensitive business information and, not least, preserving personal privacy."

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I will leave it to others with greater expertise than I have to comment on the claims of executive privilege asserted by the President as an additional basis for his Order of November 1. I can say, however, that, to the best of my knowledge, it is unprecedented to claim that presidents maintain executive privilege after they have left office. Nor will I speculate on what exactly motivated President Bush's Executive Order, except to say that it is hard to believe that either national security or personal privacy are genuine central considerations.

I would like to focus instead on the importance of opening presidential records to journalists and historians in a timely fashion. No one interested in the country's well-being favors inappropriate release of presidential materials. Some matters relating to

national security and personal privacy should remain secret for the proper functioning of our government. As my colleague Arthur Schlesinger, Jr. said in a letter to this committee last November, "A measure of secrecy is certainly essential to executive operations. But secrecy should be rigidly reserved for specific categories - weapons technology and deployment, diplomatic negotiations, intelligence methods and sources, personnel investigations, tax returns, personal data given the government on the presumption that it would be kept confidential. Secrecy, carried too far, becomes a means by which the executive branch dissembles its purposes, buries its mistakes, manipulates its citizens, escapes its accountability an! d maximizes its power."

Holding back presidential documents impoverishes our understanding of recent history and handicaps a president wrestling with difficult contemporary policy questions. The more presidents have known about past White House performance, the better they have been at making wise policy judgments. President Franklin Roosevelt's close knowledge of President Woodrow Wilson's missteps at the end of World War I were of considerable help to him in leading the country into and through the Second World War. Lyndon Johnson's effectiveness in passing so much Great Society legislation in 1965 and 1966 partly rested on direct observation of how Roosevelt had managed relations with Congress. President Truman's problems in the Korean war following the move across the 38th parallel into North Korea was one element in persuading George Bush not to invade Iraq in 1991.

Every president uses history in deciding current actions. The principal victim of President Bush's directive will be himself and the country. The study and publication of our presidential history is no luxury or form of public entertainment. It is a vital element

in assuring the best governance of our democracy. No one has a monopoly on truth or wisdom in the making of public policy. Nor can historians or history offer a foolproof blue print on sensible courses of action. But it is a useful guide in helping an administration make decisions about domestic and foreign affairs. The more we know about our past the better we will be able to chart a sensible future. Your amendment to the PRA will serve the nation.

Thank you for listening to my remarks. I will be happy to answer any questions that could in any way be helpful to your deliberations.

Robert Dallek

Washington, D.C., April 11, 2002

Mr. HORN. We thank you for that presentation. Our last presenter, and we need to get to her because, we are going to be called to the floor soon for votes. I want to make sure Ms. Hoff has a chance to get her presentation in. You are certainly welcome to sort of give a from-the-heart speech rather than all of the, you know, single things, because we do not have the time for it, frankly. But please give us a summary of your statement.

So Joan Hoff is director of Contemporary History Institute at Ohio University, former president of the Organization of American Historians, former editor of the Presidential Studies Quarterly, author of "Nixon Reconsidered: The Nixon Presidency." We are glad to have you here.

STATEMENT OF JOAN HOFF, DIRECTOR, CONTEMPORARY HISTORY INSTITUTE, OHIO UNIVERSITY, FORMER PRESIDENT, ORGANIZATION OF AMERICAN HISTORIANS, FORMER EDITOR, PRESIDENTIAL STUDIES QUARTERLY, AUTHOR OF "NIXON RECONSIDERED: THE NIXON PRESIDENCY"

Ms. HOFF. Thank you, Mr. Chairman, for the opportunity to testify. In the capacity that I held as head of some of these national organizations, I've long been concerned with access to Presidential papers. I've worked in all of the Presidential libraries, except for the Reagan library, and published primarily on Presidents Herbert Hoover and Richard Nixon. To a degree, I kind of claim a monopoly on unpopular Republican Quaker Presidents of whom we have had two. Anyway, today I want to simply reiterate what some of my colleagues have said, but also to place the Presidential Records Act of 1978 into historical perspective. It is one of the most important pieces of reform legislation passed in the aftermath of Watergate. Historians generally concur that Watergate was about holding top government officials accountable to people in a democratic system. The issue of government accountability is inextricably linked to access to information. Watergate aroused the historical profession, other scholars, and journalists to this important linkage. But that linkage remains fragile and needs to be constantly guarded.

The 1978 Presidential Records Act provides this protection, primarily, as you've heard, because it terminates private ownership of Presidential papers and made those papers property of the Federal Government. But in November, President Bush with his Executive order, I think, stepped backward with respect to holding government officials accountable. The very issue that was at the heart of Watergate.

Moreover, this Executive order would appear in at least my reading of it to be incompatible with the 1978 statute by allowing a former or incumbent President to assert a laundry list of privileges beyond those recognized in the 1978 law. It also places undue financial burden on academic researchers, a point that hasn't been raised here today, in particular, to the degree that these researchers would have to retain counsel and sue for restrictive documents without knowing what was in them. I don't think there is any point in second-guessing why the Bush administration issued its Executive order, because that would bog us down in political speculation, but I think the simple fact, in my opinion, is that like the War

Powers Act, Presidents in general are suspicious of the Presidential Records Act and of the Freedom of Information Act.

Hence, each President since Nixon has devised slightly different ways for protecting secrecy, either through officially claiming executive privilege or calling it something else, such as Presidential or constitutional privilege.

But President Bush, I think, has gone beyond all of these previous attempts by Presidents to operate in secret with this Executive order. If vigorously enforced, it would constitute an executive rewriting of two congressional statutes, the Presidential Records Act and the Freedom of Information Act.

We talk about people's right to know. But more often than not, it is Congress that has to protect that right when the public isn't paying attention and demanding it. That is why we are all here today, to consider Congressman Horn's proposed legislation.

I have outlined on page 3 of my official report the segments of the Executive order that disturb me. But I want to reiterate one of them in particular that I have already mentioned. In contrast to the 1978 Act, the burden of judicial proof is shifted to the researcher by this Executive order who, at his or her expense, must show a demonstrated specific need when requesting restricted records.

Research is already too expensive and time-consuming for most academics, especially graduate students. And this provision would simply discourage many of them from working on Presidential papers. In general, it seems to me that in contrast to the PRA, which mandates that the Archivist of the United States shall have an affirmative duty to make such records available to the public as rapidly and as completely as possible, that this Executive order, in order to carry it out, the Archivist of the United States would be put in the untenable position of having to violate the 1978 Act.

Congressman Horn's bill rectifies most of my specific concerns. However, I still believe that it gives incumbent Presidents too much unlimited authority over the release of papers of former Presidents. The need for government accountability and access to information in our democracy hasn't changed, but the public doesn't always think it is important. We are in one of these times of public indifference because of September 11th. The Bush administration is taking advantage of the legitimate public fear about national security to take steps to keep its activities secret, especially its decisionmaking activities, and has extended that secrecy in this Executive order to the policy formulating processes of previous administrations.

In doing so, I think the President and his aides and the Attorney General, at least in their public statements, have set a dangerous tone and are sending the wrong message to Government employees and to the American public. That message is frightening in its simplicity: Secrecy is more important than openness in government.

Presidential tone is often more important than direct Presidential action and less easy to contain. In this case it is creating an atmosphere of hostility and suspicion that can permeate the minds of government officials and dull public awareness about the dangers of secrecy in a democracy such as ours.

Last, I think it has been abundantly evident since Nixon that any administration which arrogantly asserts executive privilege to prevent public access to decisionmaking processes or to dodge accountability does not ingratiate itself with members of the media or scholars who usually become all of the more determined to ferret out government secrets.

The general historical rule of thumb is that Presidents' reputations do not usually suffer as more of their papers are opened. Closed papers do not protect Presidents in the long-run, however tempting it may be to restrict them in the short-run. Thank you, Mr. Chairman.

[The prepared statement of Ms. Hoff follows:]

Testimony of
Joan Hoff
to the
House Committee on Government Reform
April 11, 2002

Good afternoon, Mr. Chairman and members of the committee. Thank you for inviting me to testify before you this afternoon.
My name is Joan Hoff. I was the Executive Director of the Organization of American Historians in the 1980s. In the 1990s, I was President and CEO of the Center for the Study of the Presidency in New York City and Director of the Contemporary History Institute at Ohio University. Currently, I am the Distinguished Professor of Research at Montana State University. I have conducted research in all the presidential libraries except for Reagan's, and published many articles and 2 books on Presidents Herbert Hoover and Richard Nixon. I have previously testified before House and Senate committees on presidential historical sites, in defense of the Freedom of Information Act, and in support of separating the National Archives and Records Administration (NARA) from the General Services Administration (GSA). I also testified in *Taylor and Griffin v. United States* –the case which determined the monetary value of Nixon's presidential materials.

Today, I am representing the views of the historical profession about the independent archival status of presidential papers as I have observed and defended them over the last two decades.

Given my extensive research in Nixon's papers and tapes and the administrative positions I have held in national historical organizations, I have long been personally and professionally concerned with access to presidential papers. For example, I closely followed for over twenty years the litigious attempts by President Nixon and later his estate to prevent the implementation of certain sections of the 1974 Presidential Recordings and Materials Preservation Act (PRMPA), specifically to block the release of his secret tape recordings. Since before and after the passage of the 1978 Presidential Records Act (PRA), I have also observed the attempts by various presidents to extend executive privilege over their papers and the testimony of government officials either by arranging private agreements with the National Archives or with Executive Directives or with Executive Orders, as President Reagan did with an Executive Order 12356 in 1982 and, again, with his Executive Order 12667 in 1989, and as President Clinton did with his Executive Order in 1994.

The 1978 Presidential Records Act represents one of the most important pieces of reform legislation passed in the aftermath of Watergate. Historians generally concur that Watergate was about holding top government officials accountable to the people in a democratic system. The issue of government accountability is inextricably linked to access to information. Watergate roused the historical profession, other scholars, and journalists to this important linkage, but that linkage remains fragile and needs to be constantly guarded. The 1978 PRA provides this

protection primarily because it terminated private ownership of presidential papers by making them the property of the federal government from the moment of their creation. It specifically authorizes public access, regardless of whether a former or incumbent president agrees. Granted, past and present presidents have certain enumerated privileges that are set forth in the Freedom of Information Act (FOIA), as amended in 1974. Moreover, under exceptional circumstances, a president can assert a constitutionally based privilege subject to review by the Archivist of the United States or by the courts. When, on November 1; 2001, President Bush signed E.O.13233 it represented a step backward with respect to holding government officials accountable–the very issue that was at the heart of Watergate.

Moreover, this Executive Order would appear to be incompatible with the 1978 statute by allowing a former or incumbent president to assert a laundry list of privileges beyond those recognized in that law. It also places undue financial burden on academic researchers, in particular, to the degree that they would have to retain counsel and sue for restricted documents without knowing what was in them.

There is no point second guessing why the Bush administration issued this Executive Order because that would bog us down in the abyss of endless political speculation. The simple fact is that like War Powers Act, presidents in general don't like the PRA or the FOIA. Unlike the War Powers Act, however, to date they have found it slightly harder to avoid complying with the PRA and the FOIA, than when ordering military incursions without keeping Congress fully informed in violation of the spirit of the War Powers Act.

Hence, each president since Nixon has devised slightly different ways for protecting secrecy either through officially claiming executive privilege or calling it something else such as presidential or constitutional privilege. In his testimony on November 6 before the subcommittee on Government Efficiency, Financial Management and Intergovernmental Relations of this committee, Professor Mark J. Rozell explained in detail how each President from Ford through Clinton tried to exert executive privilege to protect government secrets. But President Bush has gone beyond all these previous attempts by Presidents to operate in secret with his E.O. 13233. If vigorously enforced it would constitute an executive rewriting of two congressional statutes: the PRA and the FOIA.

We talk about the people's right to know, but more often than not it is Congress that has to protect that right when the public isn't paying attention and demanding it. This is why we are all here today and that is why Congressman Horn has proposed the "Presidential Records Act Amendments of 2002" to nullify E.O. 13233 entitled, "Further Implementation of the Presidential Records Act."

The segments of E.O. 13233 that particularly disturb me as a presidential historian are these:

> 1) in contrast to the PRA, the burden of judicial proof is shifted to the researcher who, at his or her expense, must show a "demonstrated specific need" for the restricted records. Research is already too expensive and time consuming for most academics, especially graduate students, and this provision would simply discourage many from working in presidential papers;
> 2) in contrast to the PRA, the power of executive privilege is extended to the vice president;
> 3) in contrast to the PRA, incumbent presidents have an unlimited amount of time to review any presidential materials that are subject to access and "absent compelling circumstances," to concur with the privilege decisions of former presidents and support them "in any forum in which the privilege claim is challenged," meaning funding litigation by former presidents and thus "tilt[ing] the scale in favor of secrecy;"
> 4) in contrast to the PRA, which mandates that the Archivist of United States "shall have an affirmative duty to make such records available to the public as rapidly and completely as possible consistent with the provisions of this Act," President Bush's E.O. puts the Archivist in the untenable position of having to violate the PRA not only when he postpones releasing certain documents when a presidential library has approved their release, as in the recent case of the Reagan papers, but also even when the incumbent president finds "compelling circumstances" to disagree with the former president's ground of privilege. In both instances, the Archivist is being asked to violate his constitutional duty to execute the 1978 law faithfully.

Congressman Horn's bill rectifies most of my specific concerns as I have outlined them above and, most importantly, abrogates some of the other questionable legal aspects of E.O.13233 as delineated by Attorney Scott L. Nelson in his testimony before the subcommittee on Government Efficiency, Financial Management and Intergovernmental Relations of this committee on November 6, 2002. However, I still believe that it gives incumbent presidents too much authority over the release of papers of former presidents.

The need for government accountability and access to information in our democracy has not changed, but the public doesn't always think it is important. We are in one of those times of public indifference because of September 11. The Bush administration is taking advantage of public fear about national security to take steps to keep its activities secret, especially its decision-making activities, and has extended that secrecy to the policy formulation processes of previous administrations.

Contrary to the claims of members of the Bush administration, privacy and national security are

currently adequately protected by both the 1978 PRA, the Freedom of Information Act, and by

previous presidential executive orders. Back in April 2001, the President said that he had stopped e-mailing personal messages to his daughters. His aides later cited this statement as one of the reasons for Bush's Executive Order. Likewise, they have asserted arguments about not being able to obtain open and honest advice unless such advice remains secret indefinitely, and that incumbent presidents are the best judges of what should be withheld in the name of national security from the papers of their predecessors. Such comments appear to be part of a general predisposition on the part of the Bush administration to withhold rather than release information.

Secrecy with respect to access to information was a concern of this administration before September 11, as demonstrated when it postponed three times the release of 68,000 documents in the Reagan Library from January 2001 to March 2002. Then, there are Attorney General Ashcroft's memoranda of for September 28 and October 12. The first threatened disciplinary action against career lawyers to talked to "outside entities" and "internal legal deliberations" with respect to civil rights enforcement. The second encouraged all government agencies to resist FOIA requests by seeking out any and all good legal reasons (the exact phrase was "sound legal basis") "for withholding as much information as possible. None of these actions has anything to do with protecting national security; instead, they represent a pretext for protecting decision-making from public scrutiny and a denial of the public's right to know.

The President and his aides and the Attorney General have set a dangerous tone and are sending the wrong message to government officials and to the American public. That message is frightening in its simplicity: *secrecy is more important than openness in government.* Presidential tone is often more important than direct presidential action and less easy to contain. In this case, it is creating an atmosphere of hostility and suspicion that can permeate the minds of government officials and dull public awareness about the dangers of secrecy to a democracy such as ours. This is especially true in time of war when state protected secrets are on the rise, anyway.

Lastly, it has been abundantly evident since Nixon that any administration which arrogantly asserts executive privilege to prevent pubic access to decision-making processes or to dodge accountability does not ingratiate itself with members of the media or scholars who usually become all the more determined to ferret out government secrets. The general historical rule of thumb is that presidents' reputations do not usually suffer as more of their papers are opened. Closed papers do not protect presidents in the long run, however tempting it may be to restrict them in the short run.

That concludes my formal statement, Mr. Chairman, and I would be happy to answer any questions at the appropriate time.

Mr. HORN. We thank you for that very helpful practical bit. And that goes to the other historians. If you take a look at the measure we are putting in today, that is simply one step. And if you have some more ideas, let us know. We would appreciate it.

We are now going into the question period, and I am going to start yielding myself 5 minutes, and then the ranking member. We have a number of people we will simply alternate between both parties. I was very interested in the—I am going to just ask a few fast questions because time is going. And I would like to know how many of you know if the First World War papers are still locked up? Why? Do we know why?

Mr. KUTLER. It is like the First World War buildings the buildings that were on Constitution Avenue for years dated from the First World War that were called temporary. No one knew why they were still there.

Mr. HORN. My mother worked there in the Navy.

Mr. KUTLER. I know this about the First World War papers. I don't know why anyone would be interested in trench warfare right now.

Mr. HORN. Well, I will pass to another one. Now, as we drive in from Dulles every Saturday we hear the Johnson tapes brought from the Johnson papers, and I take it somebody is in with the people that run the Johnson Library. And—because apparently nobody else can get them. And now they will release them. But it seems to me, Dr. Dallek, certainly, when you were writing on Lyndon Johnson, you wish you had those tapes.

Mr. DALLEK. Well, I had a handful of them. But, in fact, President Johnson directed that they should be closed for 50 years after his death, which meant that they would not be open until 2023.

In her wisdom, Mrs. Johnson and the head of the Johnson Library, Harry Middleton, agreed that they would open them sooner. And, indeed, as Joan Hoff said, in essence, Johnson's reputation had nowhere to go but up. And by opening these papers, I think it served his reputation. And who can listen to them now, which I sometimes do, without a certain amount of amusement. And you are educated by them. But there are still many of these tapes that are closed. Indeed, at the John Kennedy Library, which——

Mr. HORN. Well, let's stick with LBJ for a while. Do you know what type, generically, of phone calls that are not being released?

Mr. DALLEK. Well, they claim that what is held back are these materials which would jeopardize national security or violate personal privacy rights. Now, of course, I can never tell what in fact they have held back, whether it meets sensible judgments on national security and personal privacy rights.

Over my career, I have been mystified at times when I have seen papers that were released later, and I wondered why was this a national security consideration? It just mystified me. So these are the two criteria that they are using.

Mr. HORN. Well, Dr. Kearns, I believe, has written on Johnson; isn't that correct? And then you have written on it. Mr. Caro has two volumes out in his very fine effort there. He has got the third one now on Johnson as majority leader, and that is coming out in a week or so.

Mr. DALLEK. Yes.

Mr. HORN. So I don't know who else is out there wanting it. But it just seems to me that it ought to be open to everybody.

Mr. REEVES. Well, it was a piece of either historical or journalistic entrepreneurship that got to these papers. Basically, one of our distinguished colleagues, Michael Beschloss, charmed, with the help of Simon Schuster, my publisher, Ms. Johnson into releasing them by a certain date.

This goes on in all libraries. But one of the ways it was done is that Michael had access to them for months, so that it was released to everybody on the same day, but he had a book finished that day and everybody else was knocking on the front door.

I think all of us have been in situations, particularly at the Kennedy Library, where there are researchers and then researchers, friends considered, Mrs. Kearns, Mrs. Goodwin, considered a friend and Arthur Schlesinger, considered a friend, see different things.

I don't know how other people feel about it. I would prefer a system where it truly was an equal starting line. But, so far, that has not happened.

Mr. HORN. I have just one question and then I will turn it over to Mr. Waxman. Are you aware of any instance in which the release of Presidential records has created a personal hardship or otherwise resulted in public harm?

Mr. DALLEK. Well, I remarked on that in my statement. I know of no instance.

Ms. HOFF. And there have been a number of surveys done of former officials of the government who, when interviewed, and asked whether they felt inhibited in giving the President advice because of the Presidential Records Act, all of them said no. And most of them said they couldn't even remember what were in the memos that were currently being restricted in any given time period. So that the people who work for the Government don't seem to think after the fact that this was an inhibiting factor.

Mr. KUTLER. Any number of incidents—it is not necessarily the President that comes to mind immediately here, but with materials that were released under Freedom of Information that have helped the individual enormously.

For example, I was the first person to receive the Justice Department records on the woman you know as Tokyo Rose, Ms. Toguri. Ms. Toguri, the government knew that the perjury had been suborned in her case. The government knew that this was—the prosecution resulted from the relentless persecution by Walter Winchell and other reporters, that General McArthur's staff, the FBI had declined prosecution for 4 years.

Now that all finally came out in all of these materials. I think Tokyo Rose got her pardon from President Ford in 1977. But clearly what she has now is a pardon before the bar of history because she was no more guilty of treason than you or I were.

Mr. REEVES. The victim recently within the last couple of weeks has been, and I think in the course of justice, Dr. Kissinger, that is, that the release of the transcripts of the conversations between the Americans and the Chinese that led to the 1972 summit revealed something about the elegance and cleverness of Dr. Kissinger as a historian. That is in his description, he said Taiwan was not a major issue in these talks.

It was mentioned briefly at the beginning. There was only a single mention, that is it. The papers revealed—it happened that I have had favoritism and had these papers before.

The papers revealed that was exactly true, if you follow it word for word. The first thing said was—by the Americans, by Dr. Kissinger, look, Taiwan is yours. Do whatever you want with it. With that, Chairman Lai said, OK, let's have a summit. But that was the single mention which made it so unimportant.

And for the first time last week, Dr. Kissinger finally had to say, well, perhaps there were things in his memoirs that he could have studied a bit closer to get a little bit closer to what happened. A clever man.

Mr. HORN. Thank you. I now yield to the gentleman from California, Mr. Waxman.

Mr. WAXMAN. Thank you very much, Mr. Chairman. I want to thank all of you for your testimony. I think it has been excellent. And I have been admirers of all four of you in your work.

It is interesting when you look at this issue. There really are two losers. There is clearly the public's loss of information to which they have a right. And the other loser is the President himself or herself.

Now we should understand this is all happening at this moment with this President, and it only affects the Reagan administration, and President Bush's father, who was the Vice President at the time.

So the Executive order is to try to keep the information about former President Bush, when he was Vice President, from being public, and also any records that will happen—any records that would happen to come due to be released for the Reagan, Bush, Clinton and Bush administrations as time may go on.

Now, Ms. Hoff, you said one of the dangers to the public is dulling our senses about secrecy. Now could you elaborate on that?

Ms. HOFF. Well, as I didn't say it in my opening remarks, but it is in my formal remarks, that especially in time of war, government secrets tend to increase incrementally, anyway. And I think what has happened since September 11th, and then in conjunction with this Executive order, is that national security has become a kind of mantra of the administration. The public is being led to believe that everything can be protected or kept secret in the name of national security. And that, I think, does have a kind of dulling effect on public opinion and the public sense of what it needs to know in time of war.

For example, if we had known about the terms of the secret negotiations that Henry Kissinger was carrying on with the North Vietnamese before 1973, even 6 months or a year before 1973, I think you would have found that these terms would have shown what historians later showed after they were able to get to some of these records, that the terms were no better than what the Nixon administration inherited in 1969 from the Johnson administration.

Mr. WAXMAN. Well, let me turn to Mr. Reeves. You are pointing out the dulling of senses about secrecy, particularly at this time in our history where we have a war on terrorism. But, Mr. Reeves, you talked about the balance of power, the checks and balances

that are envisioned in our Constitution. How is that affected by this move toward secrecy?

Mr. REEVES. Well, by withholding—that is not so much in records. You can do it in retrospect. If there are records, the incident I spoke of with Nixon, and there are others, are basically the Congress not having any issue—any true information on——

Mr. WAXMAN. Well, the President wants to keep information secret either about the past or the present, and is doing it, it seems to me, for purposes of enhancing his power. And he is enhancing his power at the present time if the Vice President of the United States doesn't have to reveal who he met with in the energy taskforce. We have other examples where there is not the transparency in the way decisions are made, the Congress is kept in the dark and the public is kept from knowing what is happening. It really keeps a check on the ability of a President. Let me put it this way.

It keeps the checks and balances from operating, because a President starts getting more power because he can operate without the Congress and the public saying, no, wait, you may be going too far.

Mr. REEVES. Right. Well, that was the effect in these two cases, and I am sure has been in others. And if we believe in democracy, we essentially believe that the more people who are involved in a national decision, the better decision that will be. Presidents routinely, I think, try to subvert that idea. They think they know better.

Mr. WAXMAN. Well, I suppose whenever you have power, you want more power. I would submit that a President becomes the victim not only of the ways you all pointed out in your testimony, by this secrecy of these records, but I think the President becomes a victim, because when a President gets too much power—when anybody gets too much power, as power corrupts, and absolute power corrupts absolutely—the President doesn't have the usual checks on him that will help make decisions properly. I thought it was an excellent point that you made that if a President doesn't know history in making decisions at the present, he can repeat the mistakes or fail to learn from previous mistakes. And I would submit that it becomes a disservice to the President in making decisions not to have the advantage of information from the past and also to have too much power without the usual checks the democracy would bring on that power.

I notice my time is up. But you have all made an excellent presentation, and I think a compelling reason why we ought to pass the legislation to prevent this President from taking the law that said the public has a right to these Presidential papers and turning it on its head and trying to deny the public and his history the benefit of these papers. Thank you very much.

Mr. HORN. I thank the gentleman. And we now yield for questions, the distinguished member on this committee, Mr. Gilman, the gentleman from New York.

Mr. GILMAN. Thank you, Mr. Chairman. I certainly want to welcome our panelists today and thank them for their very astute analysis of where we are on Presidential Executive orders. As you probably are aware, this committee has been trying to get some in-

formation on the criminal background and the FBI association with Mafia cases in the Boston area.

Let me ask, would the executive privilege apply to anything before the Reagan administration? And could it be utilized as a basis for restricting our access to information prior to the Reagan administration?

Mr. REEVES. My reading of the law, I am not a lawyer, is that it would not.

Mr. DALLEK. You know, Mr. Gilman, executive privilege goes way back in our history. And Presidents had or claimed executive privilege in relation to their principal aides, but it was only in the 1950's that we first began to have this broader approach to the whole idea of executive privilege. And claims were made that any kind of document that was generated in the executive branch could come under this rubric of executive privilege.

But I do not know of a single instance in which executive privilege applies to past Presidents, to historical records. My understanding is that executive privilege, so to speak, expires with the President's term. Now my colleague, Professor Kutler, I think knows more about this than I do. But that is my impression of executive privilege.

Mr. KUTLER. We just never recognized, as far as I know, I know of no legal precedents that have recognized executive privilege lingering 1 day beyond a President's terms of office. You asked before if any particular President before Reagan would declare that. Well, the only President, I hope I am right here, that is alive before Reagan right now is Jimmy Carter. Am I missing somebody? Oh, Ford. That is right. Sorry.

Well, they are the only Presidents who are alive before Reagan. Now, and I don't see either one of them as ever having exerted executive privilege from the day they left office. I wouldn't expect them to begin that now. I mean, that is what is so extraordinary about this order, the way this seems to perpetuate this beyond the President's terms of office into his retirement, and then upon his heirs and designees. That is extraordinary, it seems to me. And, incidentally, to former Vice Presidents.

Mr. GILMAN. In your opinion, if this were tested in the court, do you think it would survive?

Mr. KUTLER. I don't think so. But certainly there are members of the District D.C. Court of Appeals who have very strong conservative credentials who have ruled precisely against this kind of thing in the past. I am thinking of Justice Silverman who has spoken out on this in the past. And I just can't see this surviving a challenge. But it seems to me that it is right here in Congress to assert its proper legislative prerogatives on this matter and reassert what was stated here in 1978.

I mean, ideally, as a student of these things, that is what I would really like to see and that it stay out of court.

Mr. GILMAN. Well, let me ask the panel. Should Executive Order 13233 be rescinded?

Ms. HOFF. Yes. Definitely.

Mr. REEVES. It would be unanimous at this table.

Mr. GILMAN. Unanimous on this issue.

Mr. KUTLER. I think you would be hard-pressed to find any serious historian who would want to sustain it. I know of no one.

Mr. GILMAN. One other thought. Should the act be amended to provide a statutory process for consideration of potential executive privilege claims?

Ms. HOFF. You mean beyond the 1978 act?

Mr. GILMAN. Yes.

Mr. HORN. Well, as I remember the *Nixon* v. *Administrator of General Services,* the Supreme Court held that a former President can claim executive privilege. And we are going to put that in, without objection, into the hearing record, and put the whole case in so everybody can look and see that.

[The information referred to follows:]

97 S.Ct. 2777
53 L.Ed.2d 867, 2 Media L. Rep. 2025
(Cite as: 433 U.S. 425, 97 S.Ct. 2777)

Supreme Court of the United States

Richard M. NIXON, Appellant,
v.
ADMINISTRATOR OF GENERAL SERVICES et al.

No. 75-1605.

Argued April 20, 1977.
Decided June 28, 1977.

Former president brought action challenging constitutionality of the Presidential Recordings and Materials Preservation Act. A three-judge court for the District of Columbia, 408 F.Supp. 321, upheld the Act and former president appealed. The Supreme Court, Mr. Justice Brennan, held that: (1) the Act did not violate principle of separation of powers; (2) did not work an impermissible intrusion on the doctrine of presidential privilege; (3) did not impermissibly infringe on former president's privacy interests; (4) did not infringe on former president's First Amendment right of association, and (5) did not constitute a bill of attainder.

Affirmed.

Mr. Justice White concurred in part and concurred in the judgment and filed an opinion.

Mr. Justice Stevens concurred and filed an opinion.

Mr. Justice Blackmun concurred in part and concurred in the judgment in part and filed an opinion.

Mr. Justice Powell concurred in part and concurred in the judgment in part and filed an opinion.

Mr. Chief Justice Burger dissented and filed an opinion.

Mr. Justice Rehnquist dissented and filed an opinion.

West Headnotes

[1] Records ⚷13
326k13

Since no regulation pursuant to the Presidential Recordings and Materials Preservation Act had become effective, court, when presented with challenge to disposition of presidential documents pursuant to the Act, could only consider the injury to former president's constitutionally protected interests allegedly worked by the taking of his materials into custody for screening by government archivists. Presidential Recordings and Materials Preservation Act, § 101 et seq., 44 U.S.C.A. § 2107 note.

[2] United States ⚷28
393k28
(Formerly 410k216(1), 410k216)

Former president, as well as an incumbent president, may assert the presidential privilege of confidentiality.

[3] Constitutional Law ⚷58
92k58

[3] Records ⚷2
326k2

Presidential Recordings and Materials Preservation Act's regulation of the disposition of presidential materials within the executive branch does not constitute a violation of the principle of separation of powers. Presidential Recordings and Materials Preservation Act, § 101 et seq., 44 U.S.C.A. § 2107 note.

[4] Constitutional Law ⚷58
92k58

[4] Records ⚷2
326k2

Since the executive branch became a party to the regulations of the Presidential Recordings and Materials Preservation Act when the president signed the Act into law and when the incumbent administration urged affirmance of trial court judgment upholding the constitutionality of the Act and since the function of control of the presidential materials remained in the person of the Administrator of the General Services Administration and government archivists, the Act does not violate principle of separation of powers. Presidential Recordings and Materials Preservation Act, § 101, 44 U.S.C.A. § 2107 note.

[5] Constitutional Law ⚷58
92k58

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In determining whether legislation disrupts the proper balance between the coordinate branches of government by infringing on powers of the executive branch, proper inquiry focuses on the extent to which it prevents the executive branch from accomplishing its constitutionally assigned function; only where the potential for disruption is present must the court determine whether the impact is justified by an overriding need to promote objectives within the constitutional authority of Congress.

[6] Records ⚷13
326k13

Requirement that Administrator of the General Services Administration, when determining disposition of presidential papers pursuant to the Presidential Recordings and Materials Preservation Act, recognize the need to protect any party's opportunity to assert any legal or constitutionally based right or privilege and also recognize an obligation to return purely private materials to the former president guards against disclosures barred by any defenses or privileges available to the former president or the executive branch. Presidential Recordings and Materials Preservation Act, § 104(a)(5, 7), 44 U.S.C.A. § 2107 note.

[7] Records ⚷13
326k13

Presidential Recordings and Materials Preservation Act requires meaningful notice to former president of archival decisions which might bring into play his rights to assert legally or constitutionally based rights or privileges. Presidential Recordings and Materials Preservation Act, § 104(a)(5), 44 U.S.C.A. § 2107 note.

[8] Constitutional Law ⚷58
92k58
(Formerly 326k13)

[8] Records ⚷2
326k2

Regulation and mandatory disclosure of documents in possession of the executive branch is not invalid as an invasion of the autonomy of that branch.

[9] United States ⚷28
393k28
(Formerly 410k216(1), 410k216)

Privilege of confidentiality which exists with respect to presidential communications is derived from the supremacy of the executive branch within its assigned areas of constitutional responsibility.

[10] United States ⚷28
393k28
(Formerly 410k216(1), 410k216)

Former president may legitimately assert the presidential privilege only as to those materials whose contents fall within the scope of the privilege.

[11] Records ⚷2
326k2

Absolute barrier to all outside disclosure of papers of former president which might be subject to claim of presidential privilege was not constitutionally necessary so that Presidential Recordings and Materials Preservation Act was not facially invalid on theory that it did not provide protection for materials subject to the presidential privilege. Presidential Recordings and Materials Preservation Act, § 104, 44 U.S.C.A. § 2107 note.

[12] Records ⚷2
326k2

Mere screening by government archivists of papers and recordings of former president would not impermissibly interfere with candid communication of views by presidential advisors so that provisions of the Presidential Recordings and Materials Preservation Act calling for such screening did not impermissibly intrude on the presidential privilege. Presidential Recordings and Materials Preservation Act, § 101 et seq., 44 U.S.C.A. § 2107 note.

[13] Records ⚷2
326k2

Objectives of establishing regular procedures to deal with preservation of presidential materials for legitimate historical and government purposes, restoring public confidence in the political process by preserving materials of one former president to facilitate a source for full airing of events leading to his resignation, and understanding how those political processes had in fact operated in order to gauge the necessity for remedial legislation provided adequate justification for the limited intrusion into presidential privilege resulting from the provisions of the Presidential Recordings and Materials Preservation

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Act. Presidential Recordings and Materials Preservation Act, § 101 et seq., 44 U.S.C.A. § 2107 note.

[14] Constitutional Law ⚷82(7)
92k82(7)

[14] Records ⚷2
326k2

Presidential Recordings and Materials Preservation Act does not unconstitutionally invade former president's right of privacy. Presidential Recordings and Materials Preservation Act, § 101 et seq., 44 U.S.C.A. § 2107 note; U.S.C.A.Const. Amend. 1.

[15] Searches and Seizures ⚷13.1
349k13.1
(Formerly 349k13, 349k7(5))

Provisions of the Presidential Recordings and Materials Preservation Act for custody and screening of materials of former president do not amount to a general search. Presidential Recordings and Materials Preservation Act, § 101 et seq., 44 U.S.C.A. § 2107 note; U.S.C.A.Const. Amend. 4.

[16] Constitutional Law ⚷91
92k91

[16] Records ⚷2
326k2

Presidential Recordings and Materials Preservation Act did not significantly interfere with or chill former president's First Amendment right of association merely because the former president had served as head of his national political party and had spent a substantial portion of his working time on partisan political matters and the records arising from those activities were not segregated from the great mass of materials being placed in the custody of the Administrator of the General Services Administration. Presidential Recordings and Materials Preservation Act, § 101 et seq., 44 U.S.C.A. § 2107 note; U.S.C.A.Const. Amend. 1.

[17] Constitutional Law ⚷82.5
92k82.5

Constitutional prohibition against bills of attainder was not intended to serve as a variant of the equal protection clause to invalidate every act of Congress or of the states which legislatively burdens some persons or groups but not all other plausible individuals; clause does not limit Congress to the choice of legislating for the universe or legislating only benefits or not legislating at all. U.S.C.A.Const. art. 1, § 9, cl. 3; Amend. 14.

[18] Constitutional Law ⚷82.5
92k82.5

Fact that an Act refers specifically to one person by name does not automatically offend the bill of attainder clause. U.S.C.A.Const. art. 1, § 9, cl. 3.

[19] Constitutional Law ⚷82.5
92k82.5

[19] Records ⚷2
326k2

Since, at the time of the passage of the Presidential Recordings and Materials Preservation Act, only the materials of one former president demanded immediate attention as the papers of all other former presidents since 1928 were already housed in functioning presidential libraries and since the former president in question had entered into a depository agreement which called for destruction of certain materials, the former president in question constituted a legitimate class of one and the Act was not an unconstitutional bill of attainder. U.S.C.A.Const. art. 1, § 9, cl. 3; Presidential Recordings and Materials Preservation Act, § 101 et seq., 44 U.S.C.A. § 2107 note.

[20] Constitutional Law ⚷82.5
92k82.5

Forbidden legislative punishment is not involved merely because an Act imposes burdensome consequences; question is whether the Act imposes punishment within the meaning of the prohibition against bills of attainder. U.S.C.A.Const. art. 1, § 9, cl. 3.

[21] Constitutional Law ⚷82.5
92k82.5

Court will look beyond mere historical experience and, in determining whether an Act imposes punishment in violation of the bill of attainder clause, will analyze whether the legislation under challenge, viewed in terms of the type and severity of the burdens imposed, can reasonably be said to further nonpunitive legislative purposes; where such

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legitimate legislative purposes do not appear, it is reasonable to conclude that the punishment of individuals disadvantaged by the enactment was the purpose of the decision makers. U.S.C.A.Const. art. 1, § 9, cl. 3.

[22] Constitutional Law ⚷82.5
92k82.5

[22] Records ⚷2
326k2

Presidential Recordings and Materials Preservation Act was not adopted for punitive purposes and thus does not constitute a bill of attainder. U.S.C.A.Const. art. 1, § 9, cl. 3; Presidential Recordings and Materials Preservation Act, § 101 et seq., 44 U.S.C.A. § 2107 note.

[23] Constitutional Law ⚷70.1(3)
92k70.1(3)

Supreme Court is not free to invalidate acts of Congress based upon inferences which the court may be asked to draw from its personalized reading of the contemporary scene or recent history.

****2780** Syllabus [FN*]

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Timber & Lumber Co., 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

***425** After appellant had resigned as President of the United States, he executed a depository agreement with the Administrator of General Services that provided for the storage near appellant's California home of Presidential materials (an estimated 42 million pages of documents and 880 tape recordings) accumulated during appellant's ****2781** terms of office. Under this agreement, neither appellant nor the General Services Administration (GSA) could gain access to the materials without the other's consent. Appellant was not to withdraw any original writing for three years, although he could make and withdraw copies. After the initial three-year period he could withdraw any of the materials except tape recordings. With respect to the tape recordings, appellant agreed not to withdraw the originals for five years and to make reproductions only by mutual agreement. Following this five-year period the Administrator would destory such tapes as appellant directed, and all of the tapes were to be destroyed at appellant's death or after the expiration of 10 years, whichever occurred first. Shortly after the public announcement of this agreement, a bill was introduced in Congress designed to abrogate it, and about three months later this bill was enacted as the Presidential Recordings and Materials Preservation Act (Act) and was signed into law by President Ford. The Act directs the Administrator of GSA to take custody of appellant's Presidential materials and have them screened by Government archivists in order to return to appellant those personal and private in nature and to preserve those having historical value and to make the materials available for use in judicial proceedings subject to 'any rights, defenses or privileges which the Federal Government or any person may invoke.' The Administrator is also directed to promulgate regulations to govern eventual public access to some of the materials. These regulations must take into account seven guidelines specified by s 104(a) of the Act, including, inter alia, the need to protect any person's opportunity to assert any legally or constitutionally based right or privilege and the need to return to appellant or his family materials that are personal and private in nature. No such publicaccess regulations have yet become effective. The day after the ***426** Act was signed into law, appellant filed an action in District Court challenging the Act's constitutionality on the grounds, inter alia, that on its face it violates (1) the principle of separation of powers; (2) the Presidential privilege; (3) appellant's privacy interests; (4) his First Amendment associational rights; and (5) the Bill of Attainder Clause, and seeking declaratory and injunctive relief against enforcement of the Act. Concluding that since no public-access regulations had yet taken effect it could consider only the injury to appellant's constitutionally protected interests allegedly caused by the taking of the Presidential materials into custody and their screening by Government archivists, the District Court held that appellant's constitutional challenges were without merit and dismissed the complaint. Held:

1. The Act does not on its face violate the principle of separation of powers. Pp. 2789-2791.

(a) The Act's regulation of the Executive Branch's function in the control of the disposition of Presidential materials does not in itself violate such principle, since the Executive Branch became a party to the Act's regulation when President Ford signed the Act into law and President Carter's administration, acting through the Solicitor General, urged affirmance of the District Court's judgment. Moreover, the

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function remains in the Executive Branch in the person of the GSA Administrator and the Government archivists, employees of that branch. P. 27899

(b) The separate powers were not intended to operate with absolute independence, but in determining whether the Act violates the separation-of- powers principle the proper inquiry requires analysis of the extent to which the Act prevents the Executive Branch from accomplishing its constitutionally assigned functions, and only where the potential for disruption is present must it then be determined whether that impact is justified by an overriding need to promote objectives within Congress' constitutional authority. Pp. 2789-2790.

(c) There is nothing in the Act rendering it unduly disruptive of the Executive Branch, since that branch remains in full control of the Presidential materials, the Act being facially designed to ensure that **2782 the materials can be released only when release is not barred by privileges inhering in that branch. Pp. 2790-2791.

2. Neither does the Act on its face violate the Presidential privilege of confidentiality. Pp. 2791-2796.

(a) In view of the specific directions to the GSA Administrator in s 104(a) of the Act to take into account, in determining public access to the materials, 'the need to protect any party's opportunity to assert any constitutionally based right or privilege,' and the need to return to *427 appellant his purely private materials, there is no reason to believe that the restrictions on public access ultimately established by regulation will not be adequate to preserve executive confidentiality. Pp. 2793-2794.

(b) The mere screening of the materials by Government archivists, who have previously performed the identical task for other former Presidents without any suggestion that such activity in any way interfered with executive confidentiality, will not impermissibly interfere with candid communication of views by Presidential advisers and will be no more of an intrusion into Presidential confidentiality than the in camera inspection by the District Court approved in United States v. Nixon, 418 U.S. 683, 94 S.Ct. 3090, 41 L.Ed.2d 1039. Pp. 2794-2795.

(c) Given the safeguards built into the Act to prevent disclosure of materials that implicate Presidential confidentiality, the requirement that appellant's personal and private materials be returned to him, and the minimal nature of the intrusion into the confidentiality of the Presidency resulting from the archivists' viewing such materials in the course of their screening process, the claims of Presidential privilege must yield to the important congressional purposes of preserving appellant's Presidential materials and maintaining access to them for lawful governmental and historical purposes. Pp. 2794-2796.

3. The Act does not unconstitutionally invade appellant's right of privacy. While he has a legitimate expectation of privacy in his personal communications, the constitutionality of the Act must be viewed in the context of the limited intrusion of the screening process, of appellant's status as a public figure, his lack of expectation of privacy in the overwhelming majority of the materials (he having conceded that he saw no more than 200,000 items), and the virtual impossibility of segregating the apparently small quantity of private materials without comprehensive screening. When this is combined with the Act's sensitivity to appellant's legitimate privacy interests, the unblemished record of the archivists for discretion, and the likelihood that the public-access regulations to be promulgated will further moot appellant's fears that his materials will be reviewed by 'a host of persons,' it is apparent that appellant's privacy claim has no merit. Pp. 2796-2801.

4. The Act does not significantly interfere with or chill appellant's First Amendment associational rights. His First Amendment claim is clearly outweighed by the compelling governmental interests promoted by the Act in preserving the materials. Since archival screening is the least restrictive means of identifying the materials to be returned to appellant, the burden of that screening is the measure of the First Amendment claim, and any such burden is speculative in light of the Act's provisions protecting appellant from improper public disclosures *428 and guaranteeing him full judicial review before any public access is permitted. Pp. 2801-2803.

5. The Act does not violate the Bill of Attainder Clause. Pp. 2803-2811.

(a) However expansive is the prohibition against bills of attainder, it was not intended to serve as a variant of the Equal Protection Clause, invalidating every Act. by Congress or the States that burdens some persons or groups but not all other plausible individuals. While the Bill of Attainder Clause serves

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as an important bulwark against tyranny, it does not do so by limiting Congress to the choice of legislating for the universe, or legislating only benefits, or not legislating at all. Pp. 2803-2804.

(b) The Act's specificity in referring to appellant by name does not automatically **2783 offend the Bill of Attainder Clause. Since at the time of the Act's passage Congress was only concerned with the preservation of appellant's materials, the papers of former Presidents already being housed in libraries, appellant constituted a legitimate class of one, and this alone can justify Congress' decision to proceed with dispatch with respect to his materials while accepting the status of his predecessors' papers and ordering in the Public Documents Act the further consideration of generalized standards to govern his successors. P. 2805.

(c) Congress, by lodging appellant's materials in the GSA's custody pending their screening by Government archivists and the promulgation of further regulations, did not 'inflict punishment' within the historical meaning of bills of attainder. Pp. 2805-2806.

(d) Evaluated in terms of Congress' asserted proper purposes of the Act to preserve the availability of judicial evidence and historically relevant materials, the Act is one of nonpunitive legislative policymaking, and there is no evidence in the legislative history or in the provisions of the Act showing a congressional intent to punish appellant. Pp. 2806-2811.

D.C., 408 F.Supp. 321, affirmed.

Herbert J. Miller, Jr., and Nathan Lewin, Washington, D.C., *429 for appellant.

Sol. Gen. Wade H. McCree, Jr., Detroit, Mich., and Robert E. Herzstein, Washington, D.C., for appellees.

Mr. Justice BRENNAN delivered the opinion of the Court.

Title I of Pub.L. 93-526, 88 Stat. 1695, note following 44 U.S.C. s 2107 (1970 ed., Supp. V), the Presidential Recordings and Materials Preservation Act (hereafter Act), directs the Administrator of General Services, official of the Executive Branch, to take custody of the Presidential papers and tape recordings of appellant, former President Richard M. Nixon, and promulgate regulations that (1) provide for the orderly processing and screening by Executive Branch archivists of such materials for the purpose of returning to appellant those that are personal and private in nature, and (2) determine the terms and conditions upon which public access may eventually be had to those materials that are retained. The question for decision is whether Title I is unconstitutional on its face as a violation of (1) the separation of powers; (2) Presidential privilege doctrines; (3) appellant's privacy interests; (4) appellant's First Amendment associational rights; or (5) the Bill of Attainder Clause.

On December 19, 1974, four months after appellant resigned as President of the United States, his successor, President Gerald R. Ford, signed Pub.L. 93-526 into law. The next *430 day, December 20, 1974, appellant filed this action in the District Court for the District of Columbia, which under s 105(a) of the Act has exclusive jurisdiction to entertain complaints challenging the Act's legal or constitutional validity, or that of any regulation promulgated by the Administrator. Appellant's complaint challenged the Act's constitutionality on a number of grounds and sought declaratory and injunctive relief against its enforcement. A three-judge District Court was convened pursuant to 28 U.S.C. ss 2282, 2284. [FN1] Because regulations required by s 104 of the Act governing public access to the materials were not yet effective, the District Court held that questions going to the possibility of future public release under regulations yet to be published were not ripe for review. It found that there was 'no need and no justification for this court now to reach constitutional claims directed at the regulations . . . the promulgation of (which) might eliminate, limit, or cast (the constitutional claims) in a different light.' **2784 408 F.Supp. 321, 336 (1976). Accordingly, the District Court limited review 'to consideration of the propriety of injunctive relief against the alleged facial unconstitutionality of the statute,' id., at 335, and held that the challenges to the facial constitutionality of the Act were without merit. It therefore dismissed the complaint. Id., at 374-375. We noted probable jurisdiction, 429 U.S. 976, 97 S.Ct. 483, 50 L.Ed.2d 583 (1976). We affirm.

FN1. For proceedings prior to convention of the three-judge court, see Nixon v. Richey, 168 U.S.App.D.C. 169, 513 F.2d 427, on reconsideration 168 U.S.App.D.C. 172, 513 F.2d 430 (1975). See also Nixon v. Sampson, 389 F.Supp. 107 (DE 1975).

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I
The Background

The materials at issue consist of some 42 million pages of documents and some 880 tape recordings of conversations. Upon his resignation, appellant directed Government archivists to pack and ship the materials to him in California. This ***431** shipment was delayed when the Watergate Special Prosecutor advised President Ford of his continuing need for the materials. At the same time, President Ford requested that the Attorney General give his opinion respecting ownership of the materials. The Attorney General advised that the historical practice of former Presidents and the absence of any governing statute to the contrary supported ownership in the appellant, with a possible limited exception. [FN2] 43 Op.Atty. Gen. No. 1 (1974), App. 220-230. The Attorney General's opinion emphasized, however:

FN2. No opinion was given respecting ownership of certain permanent files retained by the Chief Executive Clerk of the White House from administration to administration. The Attorney General was unable definitively to determine their status on the basis of then-available information. 43 Op.Atty. Gen. No. 1 (1974), App. 228.

'Historically, there has been consistent acknowledgement that Presidential materials are peculiarly affected by a public interest which may justify subjecting the absolute ownership rights of the ex-President to certain limitations directly related to the character of the documents as records of government activity.' Id., at 226.

On September 8, 1974, after issuance of the Attorney General's opinion, the Administrator of General Services, Arthur F. Sampson, announced that he had signed a depository agreement with appellant under the authority of 44 U.S.C. s 2107. 10 Weekly Comp. of Pres.Doc. 1104 (1974). We shall also refer to the agreement as the Nixon-Sampson agreement. See Nixon v. Sampson, 389 F.Supp. 107, 160-162 (DC 1975) (App. A). The agreement recited that appellant retained 'all legal and equitable title to the Materials, including all literary property rights,' and that the materials accordingly were to be 'deposited temporarily' near appellant's California home in an 'existing facility belonging to the United States.' Id., at 160. The agreement stated further that appellant's purpose was 'to donate' the materials to the United States 'with appropriate ***432** restrictions.' Ibid. It was provided that all of the materials 'shall be placed within secure storage areas to which access can be gained only by use of two keys,' one in appellant's possession and the other in the possession of the Archivist of the United States or members of his staff. With exceptions not material here, appellant agreed 'not to withdraw from deposit any originals of the materials' for a period of three years, but reserved the right to 'make reproductions' and to authorize other persons to have access on conditions prescribed by him. After three years, appellant might exercise the 'right to withdraw from deposit without formality any or all of the Materials . . . and to retain . . . (them) for any purpose . . .' determined by him. Id., at 161.

The Nixon-Sampson agreement treated the tape recordings separately. They were donated to the United States 'effective September 1, 1979,' and meanwhile 'shall remain on depost.' It was provided however that '(s)ubsequent to September 1, 1979 the Administrator shall destory such tapes as (Mr. Nixon) may direct' and in any event the tapes 'shall be destroyed at the time of (his) death or on September 1, 1984, whichever event shall first occur.' Ibid. Otherwise the tapes were not to be withdrawn, ****2785** and reproduction would be made only by 'mutual agreement.' Id., at 162. Access until September 1, 1979, was expressly reserved to appellant, except as he might authorize access by others on terms prescribed by him.

Public announcement of the agreement was followed 10 day later, September 18, by the introduction of S. 4016 by 13 Senators in the United States Senate. The bill, which became Pub.L. 93-526 and was designed, inter alia, to abrogate the Nixon-Sampson agreement, passed the Senate on October 4, 1974. It was awaiting action in the House of Representatives when on October 17, 1974, appellant filed suit in the District Court seeking specific enforcement of the Nixon-Sampson agreement. That action was consolidated with other suits seeking access to Presidential materials pursuant ***433** to the Freedom of Information Act, 5 U.S.C. s 552 (1970 ed. and Supp. V), and also seeking injunctive relief against enforcement of the agreement. Nixon v. Sampson, supra. [FN3] The House passed its version of the Senate bill on December 3, 1974. The final version of S. 4016 was passed on December 9, 1974, and President Ford signed it into law on December 19.

FN3. The Court of Appeals for the District of Columbia Circuit stayed any order effectuating the decision in Nixon v. Sampson pending decision of the three-judge court whether under s 105(a) the

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instant case was to 'have priority on the docket of (the District) court over other cases,' Nixon v. Richey, 168 U.S.App.D.C., at 173, 177, 188-190, 513 F.2d, at 431, 435, 446-448. The three-judge court was of the view that 'the central purpose of Congress, in relation to all pending litigation, is to have an early and prior determination of the Act's constitutionality' and therefore did not request dissolution of the stay until entry of judgment. 408 F.Supp., at 333-334, n. 10.

II
The Act

Public Law 93-526 has two Titles. Title I, the challenged Presidential Recordings and Materials Preservation Act, consists of ss 101 through 106. Title II, the Public Documents Act, amends Chapter 33 of Title 44, United States Code, to add ss 3315 through 3324 thereto, and establish the National Study Commission on Records and Documents of Federal Officials.

Section 101(a) of Title I directs that the Administrator of General Services, notwithstanding any other law or agreement or understanding (e. g., the Nixon-Sampson agreement), 'shall receive, obtain, or retain, complete possession and control of all original tape recordings of conversations which were recorded or caused to be recorded by any officer or employee of the Federal Government and which

'(1) involve former President Richard M. Nixon or other individuals who, at the time of the conversation, were employed by the Federal Government;

***434** '(2) were recorded in the White House or in the office of the President in the Executive Office Buildings located in Washington, District of Columbia; Camp David, Maryland; Key Biscayne, Florida; or San Clemente, California; and

'(3) were recorded during the period beginning January 20, 1969, and ending August 9, 1974.'

Section 101(b) provides that notwithstanding any such agreement or understanding, the Administrator also 'shall receive, retain, or make reasonable efforts to obtain, complete possession and control of all papers, documents, memorandums, transcripts, and other objects and materials which constitute the Presidential historical materials (as defined by 44 U.S.C. s 210) of Richard M. Nixon, covering the period beginning January 20, 1969, and ending August 9, 1974.'

Section 102(a) prohibits destruction of the tapes or materials except as may be provided by law, and s 102(b) makes them available (giving priority of access to the Office of the Watergate Special Prosecutor) in response to court subpoena or other legal process, or for use in judicial proceedings. This was made subject, however, 'to any rights, defenses, or privileges which the Federal Government or any person may invoke . . ..' ****2786** Section 102(c) affords appellant, or any person designated by him in writing, access to the recordings and materials for any purpose consistent with the Act 'subsequent and subject to the regulations' issued by the Administrator under s 103. See n. 46, infra. Section 102(d) provides for access according to s 103 regulations by any agency or department in the Executive Branch for lawful Government use. Section 103 requires custody of the tape recordings and materials to be maintained in Washington except as may otherwise be necessary to carry out the Act, and directs that the Administrator promulgate regulations necessary to assure their protection from loss or destruction and to prevent access to them by unauthorized persons.

***435** Section 104, in pertinent part, directs the Administrator to promulgate regulations governing public access to the tape recordings and materials. Section 104(a) requires submission of proposed regulations to each House of Congress, the regulations to take effect under s 104(b)(1) at the end of 90 legislative days unless either the House or the Senate adopts a resolution disapproving them. The regulations must take into account seven factors specified in s 104(a), namely:

'(1) the need to provide the public with the full truth, at the earliest reasonable date, of the abuses of governmental power popularly identified under the generic term 'Watergate';

'(2) the need to make such recordings and materials available for use in judicial proceedings;

'(3) the need to prevent general access, except in accordance with appropriate procedures established for use in judicial proceedings to information relating to the Nation's security;

'(4) the need to protect every individual's right to a fair and impartial trial;

'(5) the need to protect any party's opportunity to assert any legally or constitutionally based right or privilege which would prevent or otherwise limit access to such recordings and materials;

'(6) the need to provide public access to those materials which have general historical significance, and which are not likely to be related to the need described in paragraph (1); and

'(7) the need to give to Richard M. Nixon, or his heirs, for his sole custody and use, tape recordings

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and other materials which are not likely to be related to the need described in paragraph (1) and are not otherwise of general historical significance.'

Section 105(a) vests the District Court for the District of Columbia with exclusive jurisdiction not only to hear *436 constitutional challenges to the Act, but also to hear challenges to the validity of any regulation, and to decide actions involving questions of title, ownership, custody, possession, or control of any tape or materials, or involving payment of any award of just compensation required by s 105(c) when a decision of that court holds that any individual has been deprived by the Act of private property without just compensation. Section 105(b) is a severability provision providing that any decision invalidating a provision of the Act or a regulation shall not affect the validity or enforcement of any other provision or regulation. Section 106 authorizes appropriation of such sums as may be necessary to carry out the provisions of the Title.

III
The Scope of the Inquiry

The District Court correctly focused on the Act's requirement that the Administrator of General Services administer the tape recordings and materials placed in his custody only under regulations promulgated by him providing for the orderly processing of such materials for the purpose of returning to appellant such of them as are personal and private in nature, and of determining the terms and conditions upon which public access may eventually be had to those remaining in the Government's possession. The District Court also noted that in designing the regulations, the Administrator **2787 must consider the need to protect the constitutional rights of appellant and other individuals against infringement by the processing itself or, ultimately, by public access to the materials retained. 408 F.Supp., at 334-340. This construction is plainly required by the wording of ss 103 and 104. [FN4]

FN4. This interpretation has abundant support in the legislative history of the Act. Senator Javits, one of the sponsors of S. 4016, stated: '(The criteria of s 104(a)) endeavor to protect due process for individuals who may be named in the papers as well as any privilege which may be involved in the papers, and of course the necessary access of the former President himself.

'In short, the argument that the bill authorizes absolute unrestricted public access does not stand up in the face of the criteria and the requirement for the regulations which we have inserted in the bill today.' 120 Cong.Rec. 33860 (1974).

Senator Nelson, the bill's draftsman, agreed that the primary purpose to provide for the American people a historical record of the Watergate events 'should not override all regard for rights of the individual to privacy and a fair trial.' Id., at 33851. Senator Ervin, also a sponsor and floor manager of the bill, stated:

'Nobody's right is affected by this bill, because it provides, as far as privacy is concerned, that the regulations of the Administrator shall take into account . . . (the) opportunity to assert any legally or constitutionally based right which would prevent or otherwise limit access to the tape recordings and other materials.' Id., at 33969.

See also id., at 33960 (remarks of Sen. Ervin); id., at 37902-37903 (remarks of Rep. Brademas).

*437 Regulations implementing ss 102 and 103, which did not require submission to Congress, and which regulate access and screening by Government archivists, have been promulgated, 41 CFR s 105-63 (1976). Public-access regulations that must be submitted to Congress under s 104(a) have not, however, become effective. The initial set proposed by the Administrator was disapproved pursuant to s 104(b)(1) by Senate Resolution. S.Res. 244, 94th Cong., 1st Sess. (1975); 121 Cong.Rec. 28609-28614 (1975). The Senate also disapproved seven provisions of a proposed second set, although that set had been withdrawn. S.Res. 428, 94th Cong., 2d Sess. (1976); 122 Cong.Rec. 10159-10160 (1976). The House disapproved six provisions of a third set. H.R.Res. 1505, 94th Cong., 2d Sess. (1976). The Administrator is of the view that regulations cannot become effective except as a package and consequently is preparing a fourth set for submission to Congress. Brief for Federal Appellees 8-9, n. 4.

[1] *438 The District Court therefore concluded that as no regulations under s 104 had yet taken effect, and as such regulations once effective were explicitly made subject to judicial review under s 105, the court could consider only the injury to appellant's constitutionally protected interests allegedly worked by the taking of his Presidential materials into custody for screening by Government archivists. 408 F.Supp., at 339-340. Judge McGowan, writing for the District Court, quoted the following from Watson v. Buck, 313 U.S. 387, 402, 61 S.Ct. 962, 967, 85 L.Ed. 1416 (1941):

'No one can foresee the varying applications of these separate provisions which conceivably might

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be made. A law which is constitutional as applied in one manner may still contravene the Constitution as applied in another. Since all contingencies of attempted enforcement cannot be envisioned in advance of those applications, courts have in the main found it wiser to delay passing upon the constitutionality of all the separate phases of a comprehensive statute until faced with cases involving particular provisions as specifically applied to persons who claim to be injured. Passing upon the possible significance of the manifold provisions of a broad statute in advance of efforts to apply the separate provisions is analogous to rendering an advisory opinion upon a statute or a declaratory judgment upon a hypothetical case.' 408 F.Supp., at 336.

Only this Term we applied this principle in an analogous situation in declining to adjudicate the constitutionality of regulations of the Administrator of the Environmental Protection Agency that were in process of **2788 revision, stating: 'For (the Court) to review regulations not yet promulgated, the final form of which has been only hinted at, would be wholly novel.' EPA v. Brown, 431 U.S. 99, 104, 97 S.Ct. 1635, 1637, 52 L.Ed.2d 166 (1977). See also Thorpe v. Housing Authority, 393 U.S. 268, 283-284, 89 S.Ct. 518, 526-527, 21 L.Ed.2d 474 (1969); Rosenberg v. Fleuti, 374 U.S. 449, 451, 83 S.Ct. 1804, 1806, 10 L.Ed.2d 1000 (1963); United States v. Raines, 362 U.S. 17, 20-22, 80 S.Ct. 519, 522-523, 4 L.Ed.2d 524 (1960); Harmon v. Brucker, 355 *439 U.S. 579, 78 S.Ct. 433, 2 L.Ed.2d 503 (1958). We too, therefore, limit our consideration of the merits of appellant's several constitutional claims to those addressing the facial validity of the provisions of the Act requiring the Administrator to take the recordings and materials into the Government's custody subject to screening by Government archivists.

The constitutional questions to be decided are, of course, of considerable importance. They touch the relationship between two of the three coordinate branches of the Federal Government, the Executive and the Legislative, and the relationship of appellant to his Government. They arise in a context unique in the history of the Presidency and present issues that this Court has had no occasion heretofore to address. Judge McGowan, speaking for the District Court, comprehensively canvassed all the claims, and in a thorough opinion, concluded that none had merit. Our independent examination of the issues brings us to the same conclusion, although our analysis differs somewhat on some questions.

IV

Claims Concerning the Autonomy of the Executive Branch

[2] The Act was the product of joint action by the Congress and President Ford, who signed the bill into law. It is therefore urged by intervenor- appellees that, in this circumstance, the case does not truly present a controversy concerning the separation of powers, or a controversy concerning the Presidential privilege of confidentiality, because, it is argued, such claims may be asserted only by incumbents who are presently responsible to the American people for their action. We reject the argument that only an incumbent President may assert such claims and hold that appellant, as a former President, may also be heard to assert them. We further hold, however, that neither has separation-of-powers claim nor his claim of breach of constitutional privilege has merit.

Appellant argues broadly that the Act encroaches upon the *440 Presidential prerogative to control internal operations of the Presidential office and therefore offends the autonomy of the Executive Branch. The argument is divided into separate but interrelated parts.

First, appellant contends that Congress is without power to delegate to a subordinate officer of the Executive Branch the decision whether to disclose Presidential materials and to prescribe the terms that govern any disclosure. To do so, appellant contends, constitutes, without more, an impermissible interference by the Legislative Branch into matters inherently the business solely of the Executive Branch.

Second, appellant contends, somewhat more narrowly, that by authorizing the Administrator to take custody of all Presidential materials in a 'broad, undifferentiated' manner, and authorizing future publication except where a privilege is affirmatively established, the Act offends the presumptive confidentiality of Presidential communications recognized in United States v. Nixon, 418 U.S. 683, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974). He argues that the District Court erred in two respects in rejecting this contention. Initially, he contends that the District Court erred in distinguishing incumbent from former Presidents in evaluating appellant's claim of confidentiality. Appellant asserts that, unlike the very specific privilege protecting against disclosure of state secrets and sensitive information concerning military

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or diplomatic matters, which appellant concedes may be asserted only by an incumbent President, a more generalized Presidential privilege survives the termination of the President-adviser**2789 relationship much as the attorneyclient privilege survives the relationship that creates it. Appellant further argues that the District Court erred in applying a balancing test to his claim of Presidential privilege and in concluding that, notwithstanding the fact that some of the materials might legitimately be included within a claim of Presidential confidentiality, substantial public interests outweighed and justified the limited *441 inroads on Presidential confidentiality necessitated by the Act's provision for Government custody and screening of the materials. Finally, appellant contends that the Act's authorization of the process of screening the materials itself violates the privilege and will chill the future exercise of constitutionally protected executive functions, thereby impairing the ability of future Presidents to obtain the candid advice necessary to the conduct of their constitutionally imposed duties.

A
Separation of Powers

[3][4] We reject at the outset appellant's argument that the Act's regulation of the disposition of Presidential materials within the Executive Branch constitutes, without more, a violation of the principle of separation of powers. Neither President Ford nor President Carter supports this claim. The Executive Branch became a party to the Act's regulation when President Ford signed the Act into law, and the administration of President Carter, acting through the Solicitor General, vigorously supports affirmance of the District Court's judgment sustaining its constitutionality. Moreover, the control over the materials remains in the Executive Branch. The Administrator of General Services, who must promulgate and administer the regulations that are the keystone of the statutory scheme, is himself an official of the Executive Branch, appointed by the President. The career archivists appointed to do the initial screening for the purpose of selecting out and returning to appellant his private and personal papers similarly are Executive Branch employees.

Appellant's argument is in any event based on an interpretation of the separation-of-powers doctrine inconsistent with the origins of that doctrine, recent decisions of the Court, and the contemporary realities of our political system. True, it has been said that 'each of the three general departments of government (must remain) entirely free from the control or *442 coercive influence, direct or indirect, of either of the others . . .,' Humphrey's Executor v. United States, 295 U.S. 602, 629, 55 S.Ct. 869, 874, 79 L.Ed. 1611 (1935), and that '(t)he sound application of a principle that makes one master in his own house precludes him from imposing his control in the house of another who is master there.' Id., at 630, 55 S.Ct., at 874. See also O'Donoghue v. United States, 289 U.S. 516, 53 S.Ct. 740, 77 L.Ed. 1356 (1933); Springer v. Government of the Philippine Islands, 277 U.S. 189, 201, 48 S.Ct. 480, 482, 72 L.Ed. 845 (1928).

[5] But the more pragmatic, flexible approach of Madison in the Federalists Papers and later of Mr. Justice Story [FN5] was expressly **2790 affirmed by this Court only three years ago in United States v. Nixon, supra. There the same broad argument concerning the separation of powers was made by appellant in the context of opposition to a subpoena duces tecum of the Watergate Special Prosecutor for certain Presidential tapes and documents of value to a pending criminal investigation. Although acknowledging that each branch of the Government has the duty initially to interpret the Constitution for itself, and that its interpretation of its powers is due *443 great respect from the other branches, 418 U.S., at 703, 94 S.Ct., at 3105, the Court squarely rejected the argument that the Constitution contemplates a complete division of authority between the three branches. Rather, the unanimous Court essentially embraced Mr. Justice Jackson's view, expressed in his concurrence in Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635, 72 S.Ct. 863, 870, 96 L.Ed. 1153 (1952).

FN5. Madison in The Federalist No. 47, reviewing the origin of the separation-of-powers doctrine, remarked that Montesquieu, the 'oracle' always consulted on the subject,

'did not mean that these departments ought to have no partial agency in, or no controul over the acts of each other. His meaning, as his own words import . . . can amount to no more than this, that where the whole power of one department is exercised by the same hands which possess the whole power of another department, the fundamental principles of a free constitution, are subverted.' The Federalist No. 47, pp. 325-326 (J. Cooke ed. 1961) (emphasis in original).

Similarly, Mr. Justice Story wrote:

'(W)hen we speak of a separation of the three great departments of government, and maintain that that separation is indispensable to public liberty, we are to understand this maxim in a limited sense. It is not

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meant to affirm that they must be kept wholly and entirely separate and distinct, and have no common link of connection or dependence, the one upon the other, in the slightest degree.' 1 J. Story, Commentaries on the Constitution s 525 (M. Bigelow, 5th ed. 1905).

'In designing the structure of our Government and dividing and allocating the sovereign power among three coequal branches, the Framers of the Constitution sought to provide a comprehensive system, but the separate powers were not intended to operate with absolute independence.' 418 U.S., at 707, 94 S.Ct., at 3107 (emphasis supplied).

Like the District Court, we therefore find that appellant's argument rests upon an 'archaic view of the separation of powers as requiring three airtight departments of government,' 408 F.Supp., at 342. [FN6] Rather, in determining whether the Act disrupts the proper balance between the coordinate branches, the proper inquiry focuses on the extent to which it prevents the Executive Branch from accomplishing its constitutionally assigned functions. United States v. Nixon, 418 U.S., at 711-712, 94 S.Ct., at 3109. Only where the potential for disruption is present must we then determine whether that impact is justified by an overriding need to promote objectives within the constitutional authority of Congress. Ibid.

FN6. See also, e. g., 1 K. Davis, Administrative Law Treatise s 1.09 (1958); G. Gunther, Cases and Materials on Constitutional Law 400 (9th ed. 1975); L. Jaffe, Judicial Control of Administrative Action 28-30 (1965); Cox, Executive Privilege, 122 U.Pa.L.Rev. 1383, 1387-1391 (1974); Ratner, Executive Privilege, Self Incrimination, and the Separation of Powers Illusion, 22 UCLA Rev. 92-93 (1974).

[6][7] It is therefore highly relevant that the Act provides for custody of the materials in officials of the Executive Branch and that employees of that branch have access to the materials only 'for lawful Government use, subject to the (Administrator'***444** s) regulations.' s 102(d); 41 CFR ss 105-63.205, 105-63.206, and 105-63.302 (1976). For it is clearly less intrusive to place custody and screening of the materials within the Executive Branch itself than to have Congress or some outside agency perform the screening function. While the materials may also be made available for use in judicial proceedings, this provision is expressly qualified by any rights, defense, or privileges that any person may invoke including, of course, a valid claim of executive privilege. United States v. Nixon, supra. Similarly, although some of the materials may eventually be made available for public access, the Act expressly recognizes the need both 'to protect any party's opportunity to assert any legally or constitutionally based right or privilege,' s 104(a)(5), and to return purely private materials to appellant, s 104(a)(7). These provisions plainly guard against disclosures barred by any defenses or privileges available to appellant or the Executive Branch. [FN7] And appellant himself ****2791** concedes that the Act 'does not make the presidential materials available to the Congress except insofar as Congressmen are members of the public and entitled to access when the public has it.' Brief for Appellant 119. The Executive Branch remains in full control of the Presidential materials, and the Act facially is designed to ensure that the materials can be released only when release is not barred by some applicable privilege inherent in that branch.

FN7. The District Court correctly interpreted the Act to require meaningful notice to appellant of archival decisions that might bring into play rights secured by s 104(a)(5). 408 F.Supp., at 340 n. 23. Such notice is required by the Administrator's regulations, 41 CFR s 105- 63.205 (1976), which provide: 'The Administrator of General Services or his designated agent will provide former President Nixon or his designated attorney or agent prior notice of, and allow him to be present during, each authorized access.'

[8] Thus, whatever are the future possibilities for constitutional ***445** conflict in the promulgation of regulations respecting public access to particular documents, nothing contained in the Act renders it unduly disruptive of the Executive Branch and, therefore, unconstitutional on its face. And, of course, there is abundant statutory precedent for the regulation and mandatory disclosure of documents in the possession of the Executive Branch. See, e. g., the Freedom of Information Act, 5 U.S.C. s 552 (1970 ed. and Supp. V); the Privacy Act of 1974, 5 U.S.C. s 552(a) (1970 ed., Supp. V); the Government in the Sunshine Act, 5 U.S.C. s 552b (1976 ed.); the Federal Records Act, 44 U.S.C. s 2101 et seq.; and a variety of other statutes, e. g., 13 U.S.C. ss 8-9 (census data); 26 U.S.C. s 6103 (tax returns). Such regulation of material generated in the Executive Branch has never been considered invalid as an invasion of its autonomy. Cf. Environmental Protection Agency v. Mink, 410 U.S. 73, 83, 93 S.Ct. 827, 834, 35 L.Ed.2d 119 (1973); FAA Administrator v. Robertson, 422 U.S. 255, 95 S.Ct. 2140, 45 L.Ed.2d 164 (1975). [FN8] Similar

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congressional power ***446** to regulate Executive Branch documents exists in this instance, a power that is augmented by the important interests that the Act seeks to attain. See infra, at 2794- 2796.

FN8. We see no reason to engage in the debate whether appellant has legal title to the materials. See Brief for Appellant 90. Such an inquiry is irrelevant for present purposes because s 105(c) assures appellant of just compensation if his economic interests are invaded, and, even if legal title is his, the materials are not thereby immune from regulation. It has been accepted at least since Mr. Justice Story's opinion in Folsom v. Marsh, 9 Fed.Cas. No. 4,901 pp. 342, 347 (CC Mass.1841), that regardless of where legal title lies, 'from the nature of the public service, or the character of documents, embracing historical, military, or diplomatic information, it may be the right, and even the duty, of the government, to give them publicity, even against the will of the writers.' Appellant's suggestion that the Folsom principle does not go beyond materials concerning national security and current Government business is negated by Mr. Justice Story's emphasis that it also extended to materials 'embracing historical . . . information.' Ibid. (Emphasis added.) Significantly, no such limitation was suggested in the Attorney General's opinion to President Ford. Although indicating a view that the materials belonged to appellant, the opinion acknowledged that 'Presidential materials' without qualification 'are peculiarly affected by a public interest' which may justify subjecting 'the absolute ownership rights' to certain 'limitations directly related to the character of the documents as records of government activity.' 43 Op.Atty.Gen. No. 1 (1974), App. 220-230. On the other hand, even if legal title rests in the Government, appellant is not thereby foreclosed from asserting under s 105(a) a claim for return of private materials retained by the Administrator in contravention of appellant's rights and privileges as specified in s 104(a)(5).

B
Presidential Privilege

[9] Having concluded that the separation-of-powers principle is not necessarily violated by the Administrator's taking custody of and screening appellant's papers, we next consider appellant's more narrowly defined claim that the Presidential privilege shields these records from archival scrutiny. We start with what was established in United States v. Nixon, supra that the privilege is a qualified one. [FN9] Appellant had ****2792** argued in that case that in camera inspection by the District Court of Presidential documents and materials subpoenaed by the Special Prosecutor would itself violate the privilege without regard to whether the documents were protected from public disclosure. The Court disagreed, stating that 'neither the doctrine of separation of powers, nor the need for confidentiality of highlevel communications, without more, can sustain an absolute, unqualified Presidential privilege . . ..' [FN10]***447** 418 U.S., at 706, 94 S.Ct., at 3106. The Court recognized that the privilege of confidentiality of Presidential communications derives from the supremacy of the Executive Branch within its assigned area of constitutional responsibilities, [FN11] but distinguished a President's 'broad, undifferentiated claim of public interest in the confidentiality of such (communications)' from the more particularized and less qualified privilege relating to the need 'to protect military, diplomatic, or sensitive national security secrets . . .' Ibid. The Court held that in the case of the general privilege of confidentiality of Presidential communications, its importance must be balanced against the inroads of the privilege upon the effective functioning of the Judicial Branch. This balance was struck against the claim of privilege in that case because the Court determined that the intrusion into the confidentiality of Presidential communications resulting from in camera inspection by the District Court, 'with all the protection that a district court will be obliged to provide,' would be minimal and therefore that the claim was outweighed by '(t)he impediment that an absolute, unqualified privilege would place in the way of the primary constitutional duty of the Judicial Branch . . ..' Id., at 706-707, 94 S.Ct., at 3107.

FN9. Like the District Court, we do not distinguish between the qualified 'executive' privilege recognized in United States v. Nixon and the 'presidential' privilege to which appellant refers, except to note that appellant does not argue that the privilege he claims extends beyond the privilege recognized in that case. See 408 F.Supp., at 343 n. 24.

FN10. United States v. Nixon recognized that there is a legitimate governmental interest in the confidentiality of communications between high Government officials, e. g., those who advise the President, and that '(h)uman experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process.' 418 U.S., at 705, 94 S.Ct., at 3106.

FN11. Indeed, the opinion noted, id., at 705 n. 15, 94 S.Ct., at 3106, that Government confidentiality

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has been a concern from the time of the Constitutional Convention in 1787, the meetings of which were conducted in private, 1 M. Farrand, The Records of the Federal Convention of 1787, pp. xi-xxv (1911), and the records of which were sealed for more than 30 years after the Convention. See 3 Stat. 475, 15th Cong., 1st Sess., Res. 8 (1818). See generally C. Warren, The Making of the Constitution 134-139 (1937).

Unlike United States v. Nixon, in which appellant asserted a claim of absolute Presidential privilege against inquiry by the coordinate Judicial Branch, this case initially involves appellant's assertion of a privilege against the very ***448** Executive Branch in whose name the privilege is invoked. The nonfederal appellees rely on this apparent anomaly to contend that only an incumbent President can assert the privilege of the Presidency. Acceptance of that proposition would, of course, end this inquiry. The contention draws on United States v. Reynolds, 345 U.S. 1, 7-8, 73 S.Ct. 528, 532, 97 L.Ed. 727 (1953), where it was said that the privilege 'belongs to the Government and must be asserted by it: it can neither be claimed nor waived by a private party.' The District Court believed that this statement was strong support for the contention, but found resolution of the issue unnecessary. 408 F.Supp., at 343-345. It sufficed, said the District Court, that the privilege, if available to a former President, was at least one that 'carries much less weight than a claim asserted by the incumbent himself.' Id., at 345.

It is true that only the incumbent is charged with performance of the executive duty under the Constitution. And an incumbent may be inhibited in disclosing confidences of a predecessor when he believes that the effect may be to discourage candid presentation of views by his contemporary ****2793** advisers. Moreover, to the extent that the privilege serves as a shield for executive officials against burdensome requests for information which might interfere with the proper performance of their duties, see United States v. Nixon, 418 U.S., at 714, 94 S.Ct., at 3110; cf. Eastland v. United States Servicemen's Fund, 421 U.S. 491, 501-503, 95 S.Ct. 1813, 1820- 1821, 44 L.Ed.2d 324 (1975); Dombrowski v. Eastland, 387 U.S. 82, 84-85, 87 S.Ct. 1425, 1427, 18 L.Ed.2d 577 (1967) (per curiam), a former President is in less need of it than an incumbent. In addition, there are obvious political checks against an incumbent's abuse of the privilege.

Nevertheless, we think that the Solicitor General states the sounder view, and we adopt it:

'This Court held in United States v. Nixon . . . that the privilege is necessary to provide the confidentiality required for the President's conduct of office. Unless he ***449** can give his advisers some assurance of confidentiality, a President could not expect to receive the full and frank submissions of facts and opinions upon which effective discharge of his duties depends. The confidentiality necessary to this exchange cannot be measured by the few months or years between the submission of the information and the end of the President's tenure; the privilege is not for the benefit of the President as an individual, but for the benefit of the Republic. Therefore the privilege survives the individual President's tenure.' Brief for Federal Appellees 33.

At the same time, however, the fact that neither President Ford nor President Carter supports appellant's claim detracts from the weight of his contention that the Act impermissibly intrudes into the executive function and the needs of the Executive Branch. This necessarily follows, for it must be presumed that the incumbent President is vitally concerned with and in the best position to assess the present and future needs of the Executive Branch, and to support invocation of the privilege accordingly.

[10] The appellant may legitimately assert the Presidential privilege, of course, only as to those materials whose contents fall within the scope of the privilege recognized in United States v. Nixon, supra. In that case the Court held that the privilege is limited to communications 'in performance of (a President's) responsibilities,' 418 U.S., at 711, 94 S.Ct., at 3109, 'of his office,' id., at 713, and made 'in the process of shaping policies and making decisions,' id., at 708, 94 S.Ct., at 3107. Of the estimated 42 million pages of documents and 880 tape recordings whose custody is at stake, the District Court concluded that the appellant's claim of Presidential privilege could apply at most to the 200,000 items with which the appellant was personally familiar.

The appellant bases his claim of Presidential privilege in this case on the assertion that the potential disclosure of ***450** communications given to the appellant in confidence would adversely affect the ability of future Presidents to obtain the candid advice necessary for effective decisionmaking. We are called upon to adjudicate that claim, however, only with respect to the process by which the materials will be screened and catalogued by professional archivists. For any eventual public access will be governed by the guidelines of s 104, which direct the Administrator

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to take into account 'the need to protect any party's opportunity to assert any . . . constitutionally based right or privilege,' s 104(a)(5), and the need to return purely private materials to the appellant, s 104(a)(7).

[11] In view of these specific directions, there is no reason to believe that the restriction on public access ultimately established by regulation will not be adequate to preserve executive confidentiality. An absolute barrier to all outside disclosure is not practically or constitutionally necessary. As the careful research by the District Court clearly demonstrates, there has never been an expectation that the confidences of the Executive Office are absolute and unyielding. All former Presidents from President Hoover to President Johnson have deposited **2794 their papers in Presidential libraries (an example appellant has said he intended to follow) for governmental preservation and eventual disclosure. [FN12] The *451 screening processes for sorting materials for lodgment in these libraries also involved comprehensive review by archivists, often involving materials upon which access restrictions ultimately have been imposed. 408 F.Supp., at 347. The expectation of the confidentiality of executive communications thus has always been limited and subject to erosion over time after an administration leaves office.

FN12. The District Court found that in the Hoover Library there are no restrictions on Presidential papers, although some restrictions exist with respect to personal and private materials, and in the Roosevelt Library, less than 0.5% of the materials is restricted. There is no evidence in the record as to the percentage of materials currently under restriction in the Truman or Eisenhower Libraries, but in the Kennedy Library, 85% of the materials has been processed, and of the processed materials, only 0.6% is under donor (as distinguished from security-related) restriction. In the Johnson Library, review of nonclassified materials is virtually complete, and more than 99% of all nonsecurity classified materials is unrestricted. In each of the Presidential libraries, provision has been made for the removal of the restrictions with the passage of time. 408 F.Supp., at 346 n. 31.

[12] We are thus left with the bare claim that the mere screening of the materials by the archivists will impermissibly interfere with candid communication of views by Presidential advisers. [FN13] We agree with the District Court that, thus framed, the question is readily resolved. The screening constitutes a very limited intrusion by personnel in the Executive Branch sensitive to executive concerns. These very personnel have performed the identical task in each of the Presidential *452 libraries without any suggestion that such activity has in any way interfered with executive confidentiality. Indeed, in light of this consistent historical practice, past and present executive officials must be well aware of the possibility that, at some time in the future, their communications may be reviewed on a confidential basis by professional archivists. Appellant has suggested no reason why review under the instant Act, rather than the Presidential Libraries Act, is significantly more likely to impair confidentiality, nor has he called into question the District Court's finding that the archivists' 'record for discretion in handling confidential material is unblemished.' 408 F.Supp., at 347.

FN13. Aside from the public access eventually to be provided under s 104, the Act mandates two other access routes to the materials. First, under s 102(b), access is available in accordance with lawful process served upon the Administrator. As we have noted, see n. 7, supra, the appellant is to be advised prior to any access to the materials, and he is thereafter free to review the specific materials at issue, see s 102(c); 41 CFR s 105-63.301 (1976), in order to determine whether to assert any rights, privileges, or defenses. Section 102(b) expressly conditions ultimate access by way of lawful process upon the right of appellant to invoke any rights, defenses, or privileges.
Second, s 102(d) of the Act states: 'Any agency or department in the executive branch of the Federal Government shall at all times have access to the tape recordings and other materials . . . for lawful Government use . . ..' The District Court eschewed a board reading of that section as permitting wholesale access by any executive official for any conceivable executive purpose. Instead, it construed s 102(d) in light of Congress' presumed intent that the Act operate within constitutional bounds an intent manifested throughout the statute, see 408 F.Supp., at 337 n. 15. The District Court thus interpreted s 102(d), and in particular the phrase 'lawful use,' as requiring that once appellant is notified of requested access by an executive official, see n. 7, supra, he be allowed to assert any constitutional right or privilege that in his view would bar access. See 408 F.Supp., at 338 n. 18. We agree with that interpretation.

[13] Moreover, adequate justifications are shown for this limited intrusion into executive confidentiality comparable to those held to justify in in camera inspection of the District Court sustained in United States v. Nixon, supra. Congress' purposes in enacting the Act are exhaustively treated in the opinion of the District Court. **2795 The legislative

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history of the Act clearly reveals that, among other purposes, Congress acted to establish regular procedures to deal with the perceived need to preserve the materials for legitimate historical and governmental purposes. [FN14] An incumbent President should not be dependent on happenstance or the whim of a prior President when he seeks access to records of past decisions that define or channel current decisions that define or channel current governmental obligations. [FN15] Nor should the American people's ability to reconstruct ***453** and come to terms which their history be truncated by an analysis of Presidential privilege that focuses only on the needs of the present. [FN16] Congress can legitimately act to rectify the hit-or-miss approach that has characterized past attempts to protect these substantial interests by entrusting the materials to expert handling by trusted and disinterested professionals.

FN14. From its exhaustive survey of the legislative history, the District Court concluded that the public interests served by the Act could be merged undre 'the rubric of preservation of an accurate and complete historical record.' Id., at 348-349.

FN15. S.Rep. No. 93-1181, pp. 3-5 (1974); H.R.Rep. No. 93-1507, p. 3 (1974); 120 Cong.Rec. 37904 (remarks of Rep. Abzug.) See also s 102(d) of the Act.
Presidents in the past have had to apply to the Presidential libraries of their predecessors for permissionial libraries of their predecessors ernmental actions relating to current governmental problems. See 408 F.Supp., at 351-352. Although it appears that most such requests have been granted, Congress could legitimately conclude that the situation was unstable and ripe for change. It is clear from the face of the Act that making the materials available for the ongoing conduct of presidential policy was at least one of the objectives of the Act. See s 102(d).

FN16. S.Rep. No. 93-1181, pp. 1, 3 (1974); H.R.Rep. No. 93-1507, pp. 2-3, 8 (1974); Hearing on GSA Regulations Implementing Presidential Recordings and Materials Preservation Act before the Senate Committee on Government Operations, 94th Cong., 1st Sess., 256 (1975); 120 Cong.Rec. 31549-31550 (1974) (remarks of Sen. Nelson); Id., at 33850-33851; Id., at 33863 (remarks of Sen. Ervin); id., at 33874-33875 (remarks of Sen. Huddleston); id., at 33875-33876 (remarks of Sen. Ribicoff); Id., at 33876 (remarks of Sen. Muskie); id., at 33964-33965 (remarks of Sen. Nelson); id., at 37900-37901 (remarks of Rep. Brademas). See also ss 101(b)(1), 104(a)(7) of the Act.

Other substantial public interests that led Congress to seek to preserve appellant's materials were the desire to restore public confidence in our political processes by preserving the materials as a source for facilitating a full airing of the events leading to appellant's resignation, and Congress' need to understand how those political processes had in fact operated in order to guage the necessity for remedial legislation. Thus by preserving these materials, the Act may be thought to aid the legislative process and thus to be within the scope of Congress' broad investigative power, see, e. g., Eastland v. United States Servicemen's Fund, 421 U.S. 491, 95 S.Ct. 1813, 44 L.Ed.2d 324 (1975). And, of course, the Congress repeatedly referred to the importance of the materials to the Judiciary in the event that they shed light upon issues in civil or criminal litigation, a social ***454** interest that cannot be doubted. See United States v. Nixon, supra [FN17]

FN17. As to these several objectives of the legislature, see S.Rep. No. 93-1181, &&. 1, 3-4, 6 (1974); H.R.Rep. No. 93-1507, pp. 2-3, 8 (1974); 120 Cong.Rec. 31549-31550 (1974) remarks of Sen. Nelson); id., at 33849-33851; Id., at 37900-37901 (remarks of Rep. Brademas); id., at 37905 (remarks of Rep. McKinney). See also ss 102(b), 104(a) of the Act.

In light of these objectives, the scheme adopted by Congress for preservation of the appellant's Presidential materials cannot be said to be overbroad. It is true that among the voluminous materials to be screened by archivists are some materials that bear no relationship to any of these objectives (and whose prompt return to appellant is therefore mandated by s 104(a)(7)). But these materials are commingled with other materials whose preservation the Act requires, for the appellant, like his predecessors, made no systematic attempt to segregate official, personal, and private materials. 408 F.Supp., at 355. Even individual documents and tapes often intermingle communications****2796** relating to governmental duties, and of great interest to historians or future policymakers, with private and confidential communications. Ibid.

Thus, as in the Presidential libraries, the intermingled state of the materials requires the comprehensive review and classification contemplated by the Act if Congress' important objectives are to be furthered. In the course of that process, the archivists will be required to view the small fraction of the materials that implicate Presidential confidentiality, as well as

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personal and private materials to be returned to appellant. But given the safeguards built into the Act to prevent disclosure of such materials and the minimal nature of the intrusion into the confidentiality of the Presidency, we believe that the claims of Presidential privilege clearly must yield to the important congressional purposes of preserving the materials and maintaining access to them for lawful governmental and historical purposes.

***455** In short, we conclude that the screening process contemplated by the Act will not constitute a more severe intrusion into Presidential confidentiality than the in camera inspection by the District Court approved in United States v. Nixon, 418 U.S., at 706, 94 S.Ct., at 3106. We must, of course, presume that the Administrator and the career archivists concerned will carry out the duties assigned to them by the Act. Thus, there is no basis for appellant's claim that the Act 'reverses' the presumption in favor of confidentiality of Presidential papers recognized in United States v. Nixon. Appellant's right to assert the privilege is specifically preserved by the Act. The guideline provisions on their face are as broad as the privilege itself. If the broadly written protections of the Act should nevertheless prove inadequate to safeguard appellant's rights or to prevent usurpation of executive powers, there will be time enough to consider that problem in a specific factual context. For the present, we hold, in agreement with the District Court, that the Act on its face does not violate the Presidential privilege.

V
Privacy

Appellant concedes that when he entered public life he voluntarily surrendered the privacy secured by law for those who elect not to place themselves in the public sportlight. See, e. g., New York Times Co. v. Sullivan, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964). He argues, however, that he was not thereby stripped of all legal protection of his privacy, and contends that the Act violates fundamental rights of expression and privacy guaranteed to him by the First, Fourth, and Fifth Amendments. [FN18]

FN18. Insofar as appellant argues a privacy claim based upon the First Amendment, see Part VI, infra. In joining this part of the opinion, Mr. Justice STEWART adherest to his views on privacy as expressed in his concurring opinion in Whalen v. Roe, 429 U.S. 5898 607, 97 S.Ct. 869, 880, 51 L.Ed.2d 64 (1977).

[14] ***456** The District Court treated appellant's argument as addressed only to the process by which the screening of the materials will be performed. 'Since any claim by (appellant) that his privacy will be invaded by public access to private materials must be considered premature when it must actually be directed to the regulations once they become effective, we need not consider how the materials will be treated after they are reviewed.' 408 F.Supp., at 358. Although denominating the privacy claim '(t)he most troublesome challenge that plaintiff raises . . .,' id., at 357, the District Court concluded that the claim was without merit. The court reasoned that the proportion of the 42 million pages of documents and 880 tape recordings implicating appellant's privacy interests was quite small since the great bulk of the materials related to appellant's conduct of his duties as President, and were therefore materials to which great public interest attached. The touchstone of the legality of the archival processing, in the District Court's view, was its reasonableness. Balancing the public interest ****2797** in preserving the materials touching appellant's performance of his official duties against the invasion of the appellant's privacy that archival screening necessarily entails, the District Court concluded that the Act was not unreasonable and hence not facially unconstitutional:

> 'Here, we have a processing scheme without which national interests of overriding importance cannot be served . . ..' Id., at 364.

Thus, the Act 'is a reasonable response to the difficult problem caused by the mingling of personal and private documents and conversations in the midst of a vastly greater number of nonprivate documents and materials related to government objectives. The processing contemplated by the Act at least as narrowed by carefully tailored regulations represents the least intrusive manner in which to provide an adequate level of promotion of government interests of overriding ***457** importance.' Id., at 367. We agree with the District Court that the Act does not unconstitutionally invade appellant's right of privacy.

One element of privacy has been characterized as 'the individual interest in avoiding disclosure of personal matters . . ..' Whalen v. Roe, 429 U.S. 589, 599, 97 S.Ct. 869, 876, 51 L.Ed.2d 64 (1977). We may agree with appellant that, at least when Government intervention is at stake, public officials, including the President, are not wholly without constitutionally protected privacy rights in matters of personal life unrelated to any acts done by them in

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their public capacity. Presidents who have established Presidential libraries have usually withheld matters concerned with family or personal finances, or have deposited such materials with restrictions on their screening. 408 F.Supp., at 360. [FN19] We may assume with the District ***458** Court, for the purposes of this case, that this pattern of de facto Presidential control and congressional acquiescence gives rise to appellant's legitimate expectation of privacy in such materials. Katz v. United States, 389 U.S. 347, 351-353, 88 S.Ct. 507, 511-512, 19 L.Ed.2d 576 (1967). [FN20] This expectation is independent of the question of ownership of the materials, an issue we do not reach. See n. 8, supra. But the merit of appellant's claim of invasion of his privacy cannot be considered in the abstract; rather, the claim must be considered in light of the specific ****2798** provisions of the Act, and any intrusion must be weighed against the public interest in subjecting the Presidential materials of appellant's administration to archival screening. Camara v. Municipal Court, 387 U.S. 523, 534-539, 87 S.Ct. 1727, 1733-1736, 18 L.Ed.2d 930 (1967); Terry v. Ohio, 392 U.S. 1, 21, 88 S.Ct. 1868, 1879, 20 L.Ed.2d 889 (1968). [FN21] Under this test, the privacy interest asserted by appellant is weaker than that found wanting in the recent decision of Whalen v. Roe, supra. Emphasizing the precautions utilized by New York State to prevent the unwarranted disclosure of private medical information retained in a state computer bank system, Whalen rejected a constitutional objection to New York's program on privacy grounds. Not only does the Act challenged here mandate regulations similarly aimed at preventing undue dissemination of private materials but, unlike Whalen, the Government will not even retain long-term control over ***459** such private information; rather, purely private papers and recordings will be returned to appellant under s 104(a)(7) of the Act.

FN19. The District Court, 408 F.Supp., at 360 n. 54, surveyed evidence in the record respecting depository restrictions for all Presidents since President Hoover. It is unclear whether President Hoover actually excluded any of his personal and private materials from the scope of his gift, although his offer to deposit materials in a Presidential library reserved the right to do so. President Franklin D. Roosevelt also indicated his intention to select certain materials from his papers to be retained by his family. Because of his death, this function was performed by designated individuals and by his secretary. Again the record is unclear as to how many materials were removed. A number of personal documents deemed to be personal family correspondence were turned over to the Roosevelt family library in 1948, later returned to the official library in 1954-1955, and have been on loan to the family since then. It is unclear to what extent these materials were reviewed by the library personnel.

President Truman withheld from deposit the personal file maintained in the White House by his personal secretary. This file was deposited with the library upon his death in 1974, although the terms of his will excluded a small number of items determined by the executors of his will to pertain to personal or business affairs of the Truman family. President Eisenhower's offer to deposit his Presidential materials excluded materials determined by him or his representative to be personal or private. President Kennedy's materials deposited with GSA did not include certain materials relating to his private affairs, and some recordings of meetings involving President Kennedy, although physically stored in the Kennedy Library, have not yet been turned over to the library or reviewed by Government archivists. President Johnson's offer to deposit materials excluded items which he determined to be of special or private interest pertaining to personal or family affairs.

FN20. Even if prior Presidents had declined to assert their privacy interests in such materials, their failure to do so would not necessarily bind appellant, for privacy interests are not solely dependent for their constitutional protection upon established practice of governmental toleration.

FN21. We agree with the District Court that the Fourth Amendment's warrant requirement is not involved. 408 F.Supp., at 361-362.

The overwhelming bulk of the 42 million pages of documents and the 880 tape recordings pertain, not to appellant's private communications, but to the official conduct of his Presidency. Most of the 42 million pages were prepared and seen by others and were widely circulated within the Government. Appellant concedes that he saw no more than 200,000 items, and we do not understand him to suggest that his privacy calam extends to items he never saw. See United States v. Miller, 425 U.S. 435, 96 S.Ct. 1619, 48 L.Ed.2d 71 (1976). Further, it is logical to assume that the tape recordings made in the Presidential offices primarily relate to the conduct and business of the Presidency. And, of course, appellant cannot assert any privacy claim as to the documents and tape recordings that he has already disclosed to the public. United States v. Dionisio, 410 U.S. 1, 14, 93 S.Ct. 764, 771, 35 L.Ed.2d 67 (1973); Katz v. United States, supra, 389 U.S., at 351, 88 S.Ct., at 511. Therefore, appellant's privacy claim embracing, for

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example, 'extremely private communications between him and, among others, his wife, his daughters, his physician, lawyer, and clergyman, and his close friends, as well as personal diary dictablets and his wife's personal files,' 408 F.Supp., at 359, relates only to a very small fraction of the massive volume of official materials with which they are presently commingled. [FN22]

FN22. Some materials are still in appellant's possession, as the Administrator has not yet attempted to act on his authority under s 101(b)(1) to take custody of them. See Brief for Federal Appellees 4 n. 1. Moreover, the Solicitor General conceded at oral argument that there are certain purely private materials which 'should be returned to (appellant) once . . . identified.' Tr. of Oral Arg. 58-59. The District Court enjoined the Government from 'processing, disclosing, inspecting, transferring, or otherwise disposing of any materials . . . which might fall within the coverage of . . . the . . . Act . . . .' 408 F.Supp., at 375. As the District Court's stay is no longer in effect, the Government should now promptly disclaim may interest in materials conceded to be appellant's purely private communications and deliver them to him.

***460** The fact that appellant may assert his privacy claim as to only a small fraction of the materials of his Presidency is plainly relevant in judging the reasonableness of the screening process contemplated by the Act, but this of course does not, without more, require rejection of his privacy argument. Id., at 359. Although the Act requires that the regulations promulgated by the Administrator under s 104(a) take into account appellant's legally and constitutionally based rights and privileges, presumably including his privacy rights, s 104(a)(5), and also take into account the need to return to appellant his private materials, s 104(a)(7), [FN23] ****2799** the identity and separation of these purely private matters can be achieved, as all parties concede, only by screening all of the materials.

FN23. The Solicitor General implied at oral argument that the requirement of the guidelines directing the Administrator to consider the need to return to appellant 'for his sole custody and use . . . materials which are not (Watergate related) . . . and are not otherwise of general historical significance,' s 104(a)(7), is further qualified by the requirement under ss 102(b) and 104(a)(5), that the regulations promulgated by the Administrator take into account the need to protect appellant's rights, defenses, or privileges. Tr. of Oral Arg. 37-38.

Appellant contends that the Act therefore is tantamount to a general warrant authorizing search and seizure of all of his Presidential 'papers and effects.' Such 'blanket authority,' appellant contends, is precisely the kind of abuse that the Fourth Amendment was intended to prevent, for "the real evil aimed at by the Fourth Amendment is the search itself, that invasion of a man's privacy which consists (in) rummaging about among his effects to secure evidence against him." Brief for Appellant 148, quoting United States v. Poller, 43 F.2d 911, 914 (C.A.2 1930). Thus, his brief continues, at 150-151:

'(Appellant's) most private thoughts and communications, both written and spoken, will be exposed to and reviewed by a host of persons whom he does not know and ***461** did not select, and in whom he has no reason to place his confidence. This group will decide what is personal, to be returned to (him), and what is historical, to be opened for public review.' [FN24]

FN24. Appellant argues that screening under the Act contrasts with the screening procedures followed by earlier Presidents who, 'in donating materials to Presidential libraries, have been able . . . to participate in the selection of persons who would review the materials for classification purposes.' Brief for Appellant 151 n. 68. We are unable to say that the record substantiates this assertion. The record is most complete with respect to President Johnson, who appears to have recommended the individual who was later selected as Director of the Johnson Library, but seems not to have played any role in the selection of the archivists actually performing the day-to-day processing. 408 F.Supp., at 365 n. 60. Moreover, we agree with the District Court that it is difficult to see how professional archivists performing a screening task under proper standards would be meaningfully affected in the performance of their duties by loyalty to individuals or institutions. Ibid.

Appellant principally relies on Stanford v. Texas, 379 U.S. 476, 85 S.Ct. 506, 13 L.Ed.2d 431 (1965), but that reliance is misplaced. Stanford invalidated a search aimed at obtaining evidence that an individual had violated a 'sweeping and many-faceted law which, among other things, outlaws the Communist Party and creates various individual criminal offenses, each punishable by imprisonment for up to 20 years.' Id., at 477, 85 S.Ct., at 507. The search warrant authorized a search of his private home for books, records, and other materials concerning illegal Communist activities. After spending more than four hours in Stanford's house, police officers seized half of his books which included works by Sartre, Marx,

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Pope John XXIII, Mr. Justice Hugo Black, Theodore Draper, and Earl Browder, as well as private documents including a marriage certificate, insurance policies, household bills and receipts, and personal correspondence. $2Id., at 479-480, 85 S.Ct., at 508-509. $2Stanford held this to be an unconstitutional general search.

[15] The District Court concluded that the Act's provisions for ***462** custody and screening could not be analogized to a general search and that Stanford, therefore, did not require the Act's invalidation. 408 F.Supp., at 366-367, n. 63. We agree. Only a few documents among the vast quantity of materials seized in Stanford were even remotely related to any legitimate government interest. This case presents precisely the opposite situation: the vast proportion of appellant's Presidential materials are official documents or records in which appellant concedes the public has a recognized interest. Moreover, the Act provides procedures and orders the promulgation of regulations expressly for the purpose of minimizing the intrusion into appellant's private and personal materials. Finally, the search in Stanford was an intrusion into an individual's ****2800** home to search and seize personal papers in furtherance of a criminal investigation and designed for exposure in a criminal trial. In contrast, any intrusion by archivists into appellant's private papers and effects is undertaken with the sole purpose of separating private materials to be returned to appellant from nonprivate materials to be retained and preserved by the Government as a record of appellant's Presidency.

Moreover, the screening will be undertaken by Government archivists with, as the District Court noted, 'an unblemished record for discretion,' 408 F.Supp., at 365. That review can hardly differ materially from that contemplated by appellant's intention to establish a Presidential library, for Presidents who have established such libraries have found that screening by professional archivists was essential. Although the District Court recognized that this contemplation of archival review would not defeat appellant's expectation of privacy, the court held that it does indicate that 'in the special situation of documents accumulated by a President during his tenure and reviewed by professional government personnel, pursuant to a process employed by past Presidents, any intrusion into privacy interests is less substantial than it might appear at first.' Ibid. (citation omitted).

***463** The District Court analogized the screening process contemplated by the Act to electronic surveillance conducted pursuant to Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. ss 2510 et seq. 408 F.Supp., at 363. We think the analogy is apt. There are obvious similarities between the two procedures. Both involve the problem of separating intermingled communications, (1) some of which are expected to be related to legitimate Government objectives, (2) some of which are not, and (3) for which there is no means to segregate the one from the other except by reviewing them all. Thus the screening process under the Act, like electronic surveillance, requires some intrusion into private communications unconnected with any legitimate governmental objectives. Yet this fact has not been thought to render surveillance under the Omnibus Act Unconstitutional. Cf., e. g., United States v. Donovan, 429 U.S. 413, 97 S.Ct. 658, 50 L.Ed.2d 652 (1977); Berger v. New York, 388 U.S. 41, 87 S.Ct. 1873, 18 L.Ed.2d 1040 (1967). See also 408 F.Supp., at 363-364.

Appellant argues that this analogy is inappropriate because the electronic surveillance procedure was carefully designed to meet the constitutional requirements enumerated in Berger v. New York, supra, including (1) prior judicial authorization, (2) specification of particular offenses said to justify the intrusion, (3) specification 'with particularity' of the conversations sought to be seized, (4) minimization of the duration of the wiretap, (5) termination once the conversation sought is seized, and (6) a showing of exigent circumstances justifying use of the wiretap procedure. Brief for Appellant 157. Although the parallel is far from perfect, we agree with the District Court that many considerations supporting the constitutionality of the Omnibus Act also argue for the constitutionality of this Act's materials screening process. For example, the Omnibus Act permits electronic surveillance only to investigate designated crimes that are serious in nature, 18 U.S.C. s 2516, and only when normal investigative techniques have failed or are likely to do so, s 2518(3)(c). Similarly, ***464** the archival review procedure involved here is designed to serve important national interests asserted by Congress, and the unavailability of less restrictive means necessarily follows from the commingling of the documents. [FN25] Similarly, ****2801** just as the Omnibus Act expressly requires that interception of nonrelevant communications be minimized, s 2518(5), the Act's screening process is designed to minimize any privacy intrusions, a goal that is further reinforced by regulations which must take those interests into account. [FN26] The fact that apparently

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only a minute portion of the materials implicates appellant's privacy interests [FN27] also negates any conclusion that ***465** the screening process is an unreasonable solution to the problem of separating commingled communications.

FN25. Appellant argues that, unlike electronic surveillance, where success depends upon the subject's ignorance of its existence, appellant could have been allowed to separate his personal from official materials. But Congress enacted the Act in part to displace the Nixon-Sampson agreement that expressly provided for automatic destruction of the tape recordings in the event of appellant's death and that allowed appellant complete discretion in the destruction of materials after the initial three-year storage period.
Moreover, appellant's view of what constitutes official as distinguished from personal and private materials might differ from the view of Congress, the Executive Branch, or a reviewing court. Not only may the use of disinterested archivists lead to application of uniform standards in separating private from nonprivate communications, but the Act provides for judicial review of their determinations. This would not be the case as to appellant's determinations.

FN26. The District Court found, 408 F.Supp., at 364 n. 58, and we agree, that it is irrelevant that Title III, unlike this Act, requires adherence to a detailed warrant requirement, 18 U.S.C. s 2518. That requirement is inapplicable to this Act, since we deal not with standards governing a generalized right to search by law enforcement officials or other Government personnel but with a particularized legislative judgment, supplemented by judicial review, similar to condemnation under the power of eminent domain, that certain materials are of value to the public.

FN27. The fact that the overwhelming majority of the materials is relevant to Congress' lawful objectives is in contrast to the experience under the Omnibus Crime Control Act. A recent report on surveillance conducted under the Omnibus Act indicates that for the calendar year 1976 more than one-half of all wire intercepts authorized by judicial order yielded only nonincriminating communications. Administrative Office of the U. S. Courts, Report on Applications for Orders Authorizing or Approving the Interception of Wire or Oral Communications, Jan. 1, 1976, to Dec. 31, 1976, p. XII (Table 4).

In sum, appellant has a legitimate expectation of privacy in his personal communications. But the constitutionality of the Act must be viewed in the context of the limited intrusion of the screening process, of appellant's status as a public figure, of his lack of any expectation of privacy in the overwhelming majority of the materials, of the important public interest in preservation of the materials, and of the virtual impossibility of segregating the small quantity of private materials without comprehensive screening. When this is combined with the Act's sensitivity to appellant's legitimate privacy interests, see s 104(a)(7), the unblemished record of the archivists for discretion, and the likelihood that the regulations to be promulgated by the Administrator will further moot appellant's fears that his materials will be reviewed by 'a host of persons,' [FN28] Brief for Appellant 150, we are compelled to agree with the District Court that appellant's privacy claim is without merit.

FN28. Throughout this litigation appellant has claimed that his privacy will necessarily be unconstitutionally invaded because the screening requires a staff of 'over one hundred archivists, accompanied by lawyers, technicians and secretaries (who) will have a right to review word-by-word five and one-half years of a man's life . . ..' Tr. of Oral Arg. 16. The size of the staff is, of course, necessarily a function of the enormous quantity of materials involved. But clearly not all engaged in the screening will examine each document. The Administrator initially proposed that only one archivist examine most documents. See 408 F.Supp., at 365 n. 59.

VI
First Amendment

[16] During his Presidency appellant served also as head of his national political party and spent a substantial portion of ***466** his working time on partisan political matters. Records arising from his political activities, like his private and personal records, are not segregated from the great mass of materials. He argues that the Act's archival screening process therefore necessarily entails invasion of his constitutionally protected rights of associational privacy and political speech. As summarized by the District Court: 'It is alleged that the Act invades the private formulation of political thought ****2802** critical to free speech and association, imposing sanctions upon past expressive activity, and more significantly, limiting that of the future because individuals who learn the substance of certain private communications by (appellant) especially those critical of themselves will refuse to associate with him. The Act is furthermore said to chill (his) expression because he will be 'saddled' with prior positions communicated in

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private, leaving him unable to take inconsistent positions in the future.' 408 F.Supp., at 367-368.

The District Court, viewing these arguments as in essence a claim that disclosure of the materials violated appellant's associational privacy, and therefore as not significantly different in structure from appellant's privacy claim, again treated the arguments as limited to the constitutionality of the Act's screening process. Id., at 368. As was true with respect to the more general privacy challenge, only a fraction of the materials can be said to raise a First Amendment claim. Nevertheless, the District Court acknowledged that appellant would 'appear . . . to have a legitimate expectation that he would have an opportunity to remove some of the sensitive political documents before any government screening took place.' Ibid. The District Court concluded, however, that there was no reason to believe that the mandated regulations when promulgated would not adequately protect against public access to materials implicating appellant's privacy in political association, and that 'any burden arising solely from review by professional and discreet archivists is not significant.' The court therefore held that the Act does not significantly ***467** interfere with or chill appellant's First Amendment rights. Id., at 369. We agree with the District Court's conclusion.

It is, of course, true that involvement in partisan polities is closely protected by the First Amendment, Buckley v. Valeo, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed. 659 (1976), and that 'compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by First Amendment.' Id., at 64, 96 S.Ct., at 656. But a compelling public need that cannot be met in a less restrictive way will override those interests, Kusper v. Pontikes, 414 U.S. 51, 58-59, 94 S.Ct. 303, 308, 38 L.Ed.2d 260 (1973); United States v. O'Brien, 391 U.S. 367, 376-377, 88 S.Ct. 1673, 1678-1679, 20 L.Ed.2d 672 (1968); Shelton v. Tucker, 364 U.S. 479, 488, 81 S.Ct. 247, 252, 5 L.Ed.2d 231 (1960), 'particularly when the 'free functioning of our national institutions' is involved.' Buckley v. Valeo, supra, 424 U.S., at 66, 96 S.Ct., at 657. Since no less restrictive way than archival screening has been suggested as a means for identification of materials to be returned to appellant, the burden of that screening is presently the measure of his First Amendment claim. Id., at 84, 96 S.Ct., at 665. The extent of any such burden, however, is speculative in light of the Act's terms protecting appellant from improper public disclosures and guaranteeing him full judicial review before any public access is permitted. ss 104(a)(5), 104(a)(7), 105(a). [FN29] As the District Court concluded, the First Amendment ***468** claim is clearly outweighed by the important governmental interests promoted by the Act.

FN29. Appellant argues that Shuttlesworth v. Birmingham, 394 U.S. 147, 150-151, 89 S.Ct. 935, 938, 22 L.Ed.2d 162 (1969); Cox v. Louisiana, 379 U.S. 536, 85 S.Ct. 453, 13 L.Ed.2d 471 (1965); Staub v. Baxley, 355 U.S, 313, 319-321, 78 S.Ct. 277, 280-281, 2 L.Ed.2d 302 (1958); Thomas v. Collins, 323 U.S. 516, 538-541, 65 S.Ct. 315, 326-327, 89 L.Ed. 430 (1945); and Lovell v. griffin, 303 U.S. 444, 452-453, 58 S.Ct. 666, 669, 82 L.Ed. 949 (1938), support his contention that '(a) statute which vests such broad authority (with respect to First Amendment rights) is unconstitutional on its face, and the party subjected to it may treat it as a nullity even if its actual implementation would not harm him.' Brief for Appellant 169. The argument is without merit. Those cases involved regulations that permitted public officials in their arbitrary discretion to impose prior restraints on expressional or associational activities. In contrast, the Act is concerned only with materials that record past activities and with a screening process guided by longstanding archival screening standards.

****2803** For the same reasons, we find no merit in appellant's argument that the Act's scheme for custody and archival screening of the materials 'necessarily inhibits (the) freedom of political activity (of future Presidents) and thereby reduces the 'quantity and diversity' of the political speech and association that the Nation will be receiving from its leaders.' Brief for Appellant 168. It is significant, moreover, that this concern has not deterred President Ford from signing the Act into law, or President Carter from urging this Court's affirmance of the judgment of the District Court.

VII
Bill of Attainder Clause
A

Finally, we address appellant's argument that the Act constitutes a bill of attainder proscribed by Art. I, s 9, of the Constitution. [FN30] His argument is that Congress acted on the premise that he had engaged in "misconduct," was an "unreliable custodian" of his own documents, and generally was deserving of a 'legislative judgment of blameworthiness,' Brief for Appellant 132-133. Thus, he argues, the Act is pervaded with the key features of a bill of attainder: a law that legislatively determines guilt and inflicts

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punishment upon an identifiable individual without provision of the protections of a judicial trial. See United States v. Brown, 381 ***469** U.S. 437, 445, 447, 85 S.Ct. 1707, 1713, 1714, 14 L.Ed.2d 484 (1965); United States v. Lovett, 328 U.S. 303, 315-316, 66 S.Ct. 1073, 1078-1079, 90 L.Ed. 1252 (1946); Ex parte Garland, 4 Wall. 333, 377, 18 L.Ed. 366 (1867); Cummings v. Missouri, 4 Wall. 277, 323, 18 L.Ed. 356 (1867).

FN30. Article I, s 9, applicable to Congress, provides that '(n)o Bill of Attainder or ex post facto Law shall be passed,' and Art. 1, s 10, applicable to the States, provides that '(n)o State shall . . . pass any Bill of Attainder, ex post facto Law . . ..' The linking of bills of attainder and ex post facto laws is explained by the fact that a legislative denunciation and condemnation of an individual often acted to impose retroactive punishment. See Z. Chafee, Jr., Three Human Rights in the Constitution of 1787, pp. 92-93 (1956).

Appellant's argument relies almost entirely upon United States v. Brown, supra, the Court's most recent decision addressing the scope of the Bill of Attainder Clause. It is instructive, therefore, to sketch the broad outline of that case. Brown invalidated s 504 of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. s 504, that made it a crime for a Communist Party member to serve as an officer of a labor union. After detailing the infamous history of bills of attainder, the Court found that the Bill of Attainder Clause was an important ingredient of the doctrine of 'separation of powers,' one of the organizing principles of our system of government. 381 U.S., at 442-443, 85 S.Ct., at 1711-1712. Just as Art. III confines the Judiciary to the task of adjudicating concrete 'cases or controversies,' so too the Bill of Attainder Clause was found to 'reflect . . . the Framers' belief that the Legislative Branch is not so well suited as politically independent judges and juries to the task of ruling upon the blameworthiness of, and levying appropriate punishment upon, specific persons.' 381 U.S., at 445, 85 S.Ct., at 1713. Brown thus held that s 504 worked a bill of attainder by focusing upon easily identifiable members of a class members of the Communist Party and imposing on them the sanction of mandatory forfeiture of a job or office, long deemed to be punishment with the contemplation of the Bill of Attainder Clause. See, e. g., United States v. Lovett, supra, 328 U.S., at 316, 66 S.Ct. at 1079; Cummings v. Missouri, supra, 4 Wall., at 320.

Brown, Lovett, and earlier cases unquestionably gave broad and generous meaning to the constitutional protection against bills of attainder. But appellant's proposed reading is far broader still. In essence, he argues that Brown establishes that the Constitution is offended whenever a law imposes undesired consequences on an indvidual or on a class ***470** that is not defined at a proper level of generality. The Act in question ****2804** therefore is faulted for singling out appellant, as opposed to all other Presidents or members of the Government, for disfavored treatment.

[17] Appellant's characterization of the meaning of a bill of attainder obviously proves far too much. By arguing that an individual or defined group is attainted whenever he or it is compelled to bear burdens which the individual or group dislikes, appellant removes the anchor that ties the bill of attainder guarantee to realistic conceptions of classification and punishment. His view would cripple the very process of legislating, for any individual or group that is made the subject of adverse legislation can complain that the lawmakers could and should have defined the relevant affected class at a greater level of generality. [FN31] Furthermore, every person or group made subject to legislation which he or it finds burdensome may subjectively feel, and can complain, that he or it is being subjected to unwarranted punishment. United States v. Lovett, supra, 328 U.S., at 324, 66 S.Ct., at 1083 (Frankfurther, J., concurring). [FN32] ***471** However expansive the prohibition against bills of attainder, it surely was not intended to serve as a variant of the equal protection doctrine, [FN33] invalidating every Act of Congress or the States that legislatively burdens some persons or groups but not all other plausible individuals. [FN34] In short, while the Bill of Attainder Clause serves as an important 'bulwark against tyranny.' United States v. Brown, 381 U.S., at 443, 85 S.Ct., at 1712, it does not do so by limiting ****2805** Congress to the choice of legislating for the universe, or legislating only benefits, or not legislating at all.

FN31. In this case, for example, appellant faults the Act for taking custody of his papers but not those of other Presidents. Brief for Appellant 130. But even a congressional definition of the class consisting of all Presidents would have been vulnerable to the claim of being overly specific, since the definition might more generally include all members of the Executive Branch, or all members of the Government, or all in possession of Presidential papers, or all in possession of Government papers. This does not dispose of appellant's contention that the Act focuses upon him with the requisite degree of specificity for a bill of

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attainder, see infra, at 2805, but it demonstrates that simple reference to the breadth of the Act's focus cannot be determinative of the reach of the Bill of Attainder Clause as a limitation upon legislative action that disadvantages a person or group. See, e. g., United States v. Brown, 381 U.S. 437, 474-475, 85 S.Ct. 1707, 1728, 14 L.Ed.2d 484 (1965) (White, J., dissenting); n. 34, infra.

FN32. 'The fact that harm is inflicted by governmental authority does not make it punishment. Figuratively speaking all discomforting action may be deemed punishment because it deprives of what otherwise would be enjoyed. But there may be reasons other than punitive for such deprivation.'

FN33. We observe that appellant originally argued that 'for similar reasons' the Act violates both the Bill of Attainder Clause and equal protection of the laws. Jurisdictional Statement 27-28. He has since abandoned reliance upon the equal protection argument, apparently recognizing that mere underinclusiveness is not fatal to the validity of a law under the equal protection component of the Fifth Amendment, New Orleans v. Dukes, 427 U.S. 297, 96 S.Ct. 2513, 49 L.Ed.2d 511 (1976); Katzenbach v. Morgan, 384 U.S. 641, 657, 86 S.Ct. 1717, 1727, 16 L.Ed.2d 828 (1966), even if the law disadvantages an individual or identifiable members of a group, see, e. g., Williamson v. Lee Optical Co., 348 U.S. 483, 75 S.Ct. 461, 99 L.Ed. 563 (1955) (opticians); Daniel v. Family Ins. Co., 336 U.S. 220, 69 S.Ct. 550, 93 L.Ed. 632 (1949) (insurance agents). 'For similar reasons' the mere specificity of law does not call into play the Bill of Attainder Clause. Cf. Comment, The Supreme Court's Bill of Attainder Doctrine: A Need for Clarification, 54 Calif.L.Rev. 212, 234-236 (1966); but see Comment, The Bounds of Legislative Specification: A Suggested Approach to the Bill of Attainder Clause, 72 Yale L.J. 330 (1962).

FN34. Brown recognized this by making clear that conflict-of-interest laws, which inevitably prohibit conduct on the part of designated individuals or classes of individuals, do not contravene the bill of attainder guarantee. Brown specifically noted the validity of s 32 of the Banking Act of 1933, 12 U.S.C. s 78, which disqualified identifiable members of a group officers and employees of underwriting organizations from serving as officers of Federal Reserve Banks, 381 U.S., at 453, 85 S.Ct., at 1717. Other valid federal conflict-of-interest statutes which also single out identifiable members of groups to bear burdens or disqualifications are collected, Id., at 467-468, n. 2, 85 S.Ct., at 1724-1725 (White, J., dissenting). See also Regional Rail Reorganization Act Cases, 419 U.S. 102, 95 S.Ct. 335, 42 L.Ed.2d 320 (1974) (upholding transfer of rail properties of eight railroad companies to Government- organized corporation).

[18][19] Thus, in the present case, the Act's specificity the fact that ***472** it refers to appellant by name does not automatically offend the Bill of Attainder Clause. Indeed, viewed in context, the focus of the enactment can be fairly and rationally understood. It is true that Title I deals exclusively with appellant's papers. But Title II casts a wider net by establishing a special commission to study and recommend appropriate legislation regarding the preservation of the records of future Presidents and all other federal officials. In this light, Congress' action to preserve only appellant's records is easily explained by the fact that at the time of the Act's passage, only his materials demanded immediate attention. The Presidential papers of all former Presidents from Hoover to Johnson were already housed in functioning Presidential libraries. Congress had reason for concern solely with the preservation of appellant's materials, for he alone had entered into a depository agreement, the Nixon-Sampson agreement, which by its terms called for the destruction of certain of the materials. Indeed, as the federal appellees argue, 'appellant's depository agreement . . . created an imminent danger that the tape recordings would be destroyed if appellant, who had contracted phlebitis, were to die.' Brief for Federal Appellees 41. In short, appellant constituted a legitimate class of one, and this provides a basis for Congress' decision to proceed with dispatch with respect to his materials while accepting the status of his predecessors' papers and ordering the further consideration of generalized standards to govern his successors.

[20] Moreover, even if the specificity element were deemed to be satisfied here, the Bill of Attainder Clause would not automatically be implicated. Forbidden legislative punishment is not involved merely because the Act imposes burdensome consequences. Rather, we must inquire further whether Congress, by lodging appellant's materials in the custody of the General Services Administration pending their screening by Government archivists and the promulgation of further regulations, 'inflict(ed) punishment' within the constitutional ***473** proscription against bills of attainder. United States v. Lovett, 328 U.S., at 315, 66 S.Ct., at 1078; see also United States v. Brown, supra, 381 U.S., at 456-460, 85 S.Ct., at 1718-1721; Cummings v. Missouri, 4 Wall., at 320.

B

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The infamous history of bills of attainder is a useful starting point in the inquiry whether the Act fairly can be characterized as a form of punishment leveled against appellant. For the substantial experience of both England and the United States with such abuses of parliamentary and legislative power offers a ready checklist of deprivations and disabilities so disproportionately severe and so inappropriate to nonpunitive ends that they unquestionably have been held to fall within the proscription of Art. I, s 9. A statutory enactment that imposes any of those sanctions on named or identifiable individuals would be immediately constitutionally suspect.

In England a bill of attainder originally connoted a parliamentary Act sentencing a named individual or identifiable members of a group to death. [FN35] Article I, s 9, however, ****2806** also ***474** proscribes enactments originally characterized as bills of pains and penalties, that is, legislative Acts inflicting punishment other than execution. United States v. Lovett, supra, 328 U.S., at 323-324, 66 S.Ct., at 1082-1083 (Frankfurter, J., concurring); Cummings v. Missouri, supra, 4 Wall. at 323; Z. Chafee, Jr., Three Human Rights in the Constitution of 1787, p. 97 (1956). Generally addressed to persons considered disloyal to the Crown or State, 'pains and penalties' historically consisted of a wide array of punishments: commonly included were imprisonment, [FN36] banishment, [FN37] and the punitive confiscation of property by the sovereign. [FN38] Our country's own experience with bills of attainder resulted in the addition of another sanction to the list of impermissible legislative punishments: a legislative enactment barring designated individuals or groups from participation in specified employments or vocations, a mode of punishment commonly employed against those legislatively branded as disloyal. See, e. g., Cummings v. Missouri, supra (barring ***475** clergymen from ministry in the absence of subscribing to a loyalty oath); United States v. Lovett, supra (barring named individuals from Government employment); United States v. Brown, supra (barring Communist Party members from offices in labor unions).

FN35. See, for example, the 1685 attainder of James, Duke of Monmouth, for high treason: 'WHEREAS James duke of Monmouth has in an hostile manner invaded this kingdom and is now in open rebellion, levying war against the king, contrary to the duty of his allegiance; Be by and with the advice and consent of the lords spiritual and temporal, and commons in this parliament assembled, and by the authority of the same, That the said James duke of Monmouth stand and be convicted and attainted of high treason, and that he suffer pains of death, and incur all forfeitures as a traitor convicted and attainted of high treason.' 1 Jac. 2, c. 2 (1685) (emphasis omitted).
The attainder of death was usually accompanied by a forfeiture of the condemned person's property to the King and the corruption of his blood, whereby his heirs were denied the right to inherit his estate. Blackstone traced the practice of 'corruption of blood' to the Norman conquest. He considered the practice an 'oppressive mark of feudal tenure' and hoped that it 'may in process of time be abolished by act of parliament.' 4 W. Blackstone Commentaries* 388. The Framers of the United States Constitution responded to this recommendation. Art. III, s 3.

FN36. See, e. g., 10 & 11 Will. 3, c. 13 (1701): 'An Act for continuing the Imprisonment of Counter and others, for the late horrid Conspiracy to assassinate the Person of his sacred Majesty.'

FN37. See, e. g., Cooper v. Telfair, 4 Dall. 14, 1 L.Ed. 721 (1800) ("all and every the persons, named and included in the said act (declaring persons guilty of treason) are banished from the said state (Georgia)"); 2 R. Wooddeson, A Systematical View of the Laws of England 638-639 (1792) (banishment of Lord Clarendon and the Bishop Atterbury). See Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168, n. 23, 83 S.Ct. 554, 567, 9 L.Ed.2d 644 (1963).

FN38. Following the Revolutionary War, States often seized the property of alleged Tory sympathizers. See, e. g., James's Claim, 1 Dall. 47, 1 L.Ed. 31 (1780) ('John Parrock was attainted of High Treason, and his estate seized and advertised for sale'); Respublica v. Gordon, 1 Dall. 233, 1 L. Ed. 115 (1788) ('attainted of treason for adhering to the king of Great Britain, in consequence of which his estate was confiscated to the use of the commonwealth . . .').

Needless to say, appellant cannot claim to have suffered any of these forbidden deprivations at the hands of the Congress. While it is true that Congress ordered the General Services Administration to retain control over records that appellant claims as his property, [FN39] s 105 of the Act makes provision for an award by the District Court of 'just compensation.' This undercuts even a colorable contention that the Government has punitively confiscated appellant's property, for the 'owner (thereby) is to be put in the same position monetarily as he would have occupied if his property has not been taken.' United States v. Reynolds, 397 U.S. 14, 16, 90 S.Ct. 803, 805, 25

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L.Ed.2d 12 (1970); accord, United States v. Miller, 317 U.S. 369, 373, 63 S.Ct. 276, 279, 87 L.Ed. 336 (1943). Thus, no feature of the challenged Act falls within the historical meaning of legislative punishment.

FN39. In fact, it remains unsettled whether the materials in question are the property of appellant or of the Government. See n. 8, supra.

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[21] But our inquiry is not ended by the determination that the Act imposes no punishment traditionally judged to be prohibited by the Bill of Attainder Clause. Our treatment of the scope of the Clause has never precluded the possibility that new burdens and deprivations might be legislatively fashioned that are inconsistent with the bill of attainder guarantee. The Court, therefore, often has looked beyond mere historical experience and has applied a functional test of the existence of punishment, analyzing whether the law under **2807 challenge, viewed in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitive *476 legislative purposes. [FN40] Cummings v. Missouri, 4 Wall., at 319-320; Hawker v. New York, 170 U.S. 189, 193-194, 18 S.Ct. 573, 575, 42 L.Ed. 1002 (1898); Dent v. West Virginia, 129 U.S. 114, 128, 9 S.Ct. 231, 235, 32 L.Ed. 623 (1889); Trop v. Dulles, 356 U.S. 86, 96-97, 78 S.Ct. 590, 595-596, 2 L.Ed.2d 630 (1958) (plurality opinion); Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-169, 83 S.Ct. 554, 567-568, 9 L.Ed.2d 644 (1963). Where such legitimate legislative purposes do not appear, it is reasonable to conclude that punishment of individuals disadvantaged by the enactment was the purpose of the decisionmakers.

FN40. In determining whether punitive or nonpunitive objectives underlie a law, United States v. Brown established that punishment is not restricted purely to retribution for past events, but may include inflicting deprivations on some blameworthy or tainted individual in order to prevent his future misconduct. 381 U.S., at 458-459, 85 S.Ct., at 1720. This view is consistent with the traditional purposes of criminal punishment, which also include a preventive aspect. See, e. g., H. Packer, The Limits of the Criminal Sanction 48 61 (1968). In Brown the element of punishment was found in the fact that 'the purpose of the statute before us is to purge the governing boards of labor unions of those whom Congress regards as guilty of subversive acts and associations and therefore unfit to fill (union) positions . . ..' 381 U.S., at 460, 85 S.Ct., at (72). Thus, Brown left undisturbed the requirement that one who complains of being attainted must establish that the legislature's action constituted punishment and not merely the legitimate regulation of conduct. Indeed, just three Terms later, United States v. O'Brien, 391 U.S. 367, 383 n. 30, 88 S.Ct. 1673, 1682, 20 L.Ed.2d 672 (1968), which, like Brown, was also written by Mr. Chief Justice Warren, reconfirmed the need to examine the purposes served by a purported bill of attainder in determining whether it in fact represents a punitive law.

[22] Application of the functional approach to this case leads to rejection of appellant's argument that the Act rests upon a congressional determination of his blameworthiness and a desire to punish him. For, as noted previously, see supra, at 2794-2796, legitimate justifications for passage of the Act are readily apparent. First, in the face of the Nixon-Sampson agreement which expressly contemplated the destruction of some of appellant's materials, Congress stressed the need to preserve '(i)nformation included in the materials of former President Nixon (that) is needed to complete the prosecutions *477 of Watergate-related crimes.' H.R.Rep. No. 93-1507, p. 2 (1974). Second, again referring to the Nixon-Sampson agreement, Congress expressed its desire to safeguard the 'public interest in gaining appropriate access to materials of the Nixon Presidency which are of general historical significance. The information in these materials will be of great value to the political health and vitality of the United States.' Ibid. [FN41] Indeed, these same objectives are stated in the text of the Act itself, s 104(a), note following 44 U.S.C. s 2107 (1970 ed., Supp. V), where Congress instructs the General Services Administration to promulgate regulations that further these ends and at the same time protect the constitutional and legal rights of any individual adversely affected by the Administrator's retention of appellant's materials.

FN41. The Senate pointed to these same objectives in nullifying the Nixon-Sampson agreement: '(1) To begin with, prosecutors, defendants, and the courts probably would be deprived of crucial evidence bearing on the defendants' innocence or guilt of the Watergate crimes for which they stand accused. (2) Moreover, the American people would be denied full access to all facts about the Watergate affair, and the efforts of Congress, the executive branch, and others to take measures to prevent a recurence of the Watergate affair may be inhibited.' S.Rep. No. 93-1181, p. 4 (1974).

Evaluated in terms of these asserted purposes, the law plainly must be held to be an act of nonpunitive

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legislative policymaking. Legislation designed to guarantee the availability of evidence for use at criminal trials is a fair exercise of Congress' responsibility **2808 to the 'due process of law in the fair administration of criminal justice,' United States v. Nixon, 418 U.S., at 713, 94 S.Ct., at 3110, and to the functioning of our adversary legal system which depends upon the availability of relevant evidence in carrying out its commitments both to fair play and to the discovery of truth within the bounds set by law. Branzburg v. Hayes, 408 U.S. 665, 688, 92 S.Ct. 2646, 2660, 33 L.Ed.2d 626 (1972); Blackmer v. United States, 284 U.S. 421, 438, 52 S.Ct. 252, 76 L.Ed. 375 (1932); Blair v. United States, 250 U.S. 273, 281, 39 S.Ct. 468, 471, 63 L.Ed. 979 (1919). Similarly, Congress' interest *478 in and expansive authority to act in preservation of monuments and records of historical value to our national heritage are fully established. United States v. Gettysburg Electric R. Co., 160 U.S. 16 S.Ct. 427, 40 L.Ed. 576 (1896); Roe v. Kansas, 278 U.S. 191, 49 S.Ct. 160, 73 L.Ed. 259 (1929). [FN42] A legislature thus acts responsibly in seeking to accomplish either of these objectives. Neither supports an implication of a legislative policy designed to inflict punishment on an individual.

FN42. These cases upheld exercises of the power of eminent domain in preserving historical monuments and like facilities for public use. The power of eminent domain, however, is not restricted to tangible property or realty but extends both to intangibles and to personal effects as involved here. See Cincinnati v. Louisville & Nashville R. Co., 223 U.S. 390, 400, 32 S.Ct. 267, 268, 56 L.Ed. 481 (1912); Porter v. United States, 473 F.2d 1329 (CA5 1973).

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A third recognized test of punishment is strictly a motivational one: inquiring whether the legislative record evinces a congressional intent to punish. See, e. g., United States v. Lovett, 328 U.S., at 308-314, 314, 66 S.Ct., at 1075-1078; Kennedy v. Mendoza-Martinez, supra, 372 U.S., at 169- 170, 83 S.Ct., at 568. The District Court unequivocally found: 'There is no evidence presented to us, nor is there any to be found in the legislative record, to indicate that Congress' design was to impose a penalty upon Mr. Nixon . . . as punishment for alleged past wrongdoings. . . . The legislative history leads to only one conclusion, namely, that the Act before us is regulatory and not punitive in character.' 408 F.Supp., at 373 (emphasis omitted). We find no cogent reason for disagreeing with this conclusion.

First, both Senate and House Committee Reports, in formally explaining their reasons for urging passage of the Act, expressed no interest in punishing or penalizing appellant. Rather, the Reports justified the Act by reference to objectives that fairly and properly lie within Congress' legislative competence: preserving the availability of judicial evidence and *479 of historically relevant materials. Supra, at 2807-2808. More specifically, it seems clear that the actions of both Houses of Congress were predominantly precipitated by a resolve to undo the recently negotiated Nixon-Sampson agreement, the terms of which departed from the practice of former Presidents in that they expressly contemplated the destruction of certain Presidential materials. [FN43] Along these lines, H.R.Rep. No. 93-1507, supra, at 2, stated: 'Despite the overriding public interest in preserving these materials . . . (the) Administrator of General Services entered into an agreement . . . which, if implemented, could seriously limit access to these records and . . . result in the destruction of a substantial portion of them.' See also S.Rep. No. 93-1181, p. 4 (1974). The relevant Committee Reports thus cast no aspersions on appellant's personal conduct and contain no condemnation of his behavior as meriting the infliction of punishment. Rather, they focus almost exclusively on the meaning and effect of an agreement recently announced by the General Services Administration which most Members of Congress perceived to be inconsistent with the public interest.

FN43. Particularly troublesome was the provision of the agreement requiring the automatic destruction of tape recordings upon appellant's death.

**2809 Nor do the floor debates on the measure suggest that Congress was intent on encroaching on the judicial function of punishing an individual for blameworthy offenses. When one of the opponents of the legislation, mischaracterizing the safeguards embodied in the bill, [FN44] stated that it is 'one which partakes of the characteristics of a bill of attainder . . .,' 120 *480 Cong.Rec. 33872 (1974) (Sen.Hruska), a key sponsor of the measure responded by expressly denying any intention of determining appellant's blameworthiness or imposing punitive sanctions:

FN44. In condemning the enactment as a bill of attainder, Senator Hruska argued that the bill seizes appellant's papers and distributes them to litigants

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without affording appellant the opportunity judicially 'to assert a defense or privilege to the production of the papers.' 120 Cong.Rec. 33871 (1974). In fact, the Act expressly recognizes appellant's right to present all such defenses and privileges through an expedited judicial proceeding. See infra, at 2810.

'This bill does not contain a word to the effect that Mr. Nixon is guilty of any violation of the law. It does not inflict any punishment on him. So it has no more relation to a bill of attainder . . . than my style of pulchritude is to be compared to that of the Queen of Sheba.' Id., at 33959-33960 (Sen. Ervin).

In this respect, the Act stands in marked contrast to that invalidated in United States v. Lovett, 328 U.S., at 312, 66 S.Ct., at 1077, where a House Report expressly characterized individuals as 'subversive . . . and . . . unfit . . . to continue in Government employment.' H.R.Rep. No. 448, 78th Cong., 1st Sess., 6 (1943). We, of course, do not suggest that such a formal legislative announcement of moral blameworthiness or punishment is necessary to an unlawful bill of attainder. United States v. Lovett, supra, at 316, 66 S.Ct. at 1079. But the decided absence from the legislative history of any congressional sentiments expressive of this purpose is probative of nonpunitive intentions and largely undercuts a major concern that prompted the bill of attainder prohibition: the fear that the legislature, in seeking to pander to an inflamed popular constituency, will find it expedient openly to assume the mantle of judge or, worse still, lynch mob. Cf. Z. Chafee, supra, at 161. [FN45] No such legislative overeaching is involved here.

FN45. The Court in United States v. Brown, 381 U.S., at 444, 85 S.Ct., at 1712, referred to Alexander ander Hamilton's concern that legislatures might cater to the 'momentary passions' of a "free people, in times of heat and violence . . .." In this case, it is obvious that the supporters of this Act steadfastly avoided inflaming or appealing to any 'passions' in the community. Indeed, rather than seek expediently to impose punishment and to circumvent the courts. Congress expressly provided for access to the Judiciary for resolution of any constitutional and legal rights appellant might assert. S.Rep. No. 93 1181, pp. 2 6 (1974).

***481** We also agree with the District Court that 'specific aspects of the Act . . . just do not square with the claim that the Act was a punitive measure.' 408 F.Supp., at 373. Whereas appellant complains that the Act has for some two years deprived him of control over the materials in question, Brief for Appellant 140, the Congress placed the materials under the auspices of the General Services Administration, s 101, note following 44 U.S.C. s 2107 (1970 ed., Supp. V), the same agency designated in the Nixon-Sampson agreement as depository of the documents for a minimum three-year period, App. 40. Whereas appellant complains that the Act deprives him of 'ready access' to the materials, Brief for Appellant 140, the Act provides that 'Richard M. Nixon, or any person whom he may designate in writing, shall at all times have access to the tape recordings and other materials . . .,' s 102(c). [FN46] The District Court correctly construed this as safeguarding appellant's right to inspect, copy, and use the materials in issue, 408 F.Supp., at 375, paralleling the ****2810** right to 'make reproductions' contained in the Nixon-Sampson agreement, App. 40. And even if we assume that there is merit in appellant's complaint that his property has been confiscated. Brief for Appellant 140, the Act expressly provides for the payment of just compensation under s 105(c); see supra, at 2806.

FN46. Regulations guaranteeing appellant's unrestricted access to the materials have been promulgated by the Administrator and have not been challenged. See 41 CFR ss 105-63.3 (1976).

Other features of the Act further belie any punitive interpretation. In promulgating regulations under the Act, the General Services Administration is expressly directed by Congress to protect appellant's or 'any party's opportunity to assert any legally or constitutionally based right or privilege . . ..' s 104(a)(5). More importantly, the Act preserves for appellant all of the protections that inhere in a judicial proceeding, for s 105(a) not only assures district ***482** court jurisdiction and judicial review over all his legal claims, but commands that any such challenge asserted by appellant 'shall have priority on the docket of such court over other cases.' A leading sponsor of the bill emphasized that this expedited treatment is expressly designed 'to protect Mr. Nixon's property or other legal rights . . ..' 120 Cong.Rec. 33854 (1974) (Sen. Ervin). Finally, the Congress has ordered the General Services Administration to establish regulations that recognize 'the need to give to Richard M. Nixon, or his heirs, for his sole custody and use, tape recordings and other materials which are not likely to be related to' the articulated objectives of the Act, s 104(a)(7). While appellant obviously is not set at ease by these precautions and safeguards, they confirm the soundness of the opinion

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given the Senate by the law division of the Congressional Research Service: '(B)ecause the proposed bill does not impose criminal penalties or other punishment, it would not appear to violate the Bill of Attainder Clause.' 120 Cong.Rec. 33853 (1974). [FN47]

FN47. In brief, legislative history of the Act offers a paradigm of a Congress aware of constitutional constraints on its power and carefully seeking to act within those limitations. See generally Brest, The Conscientious Legislator's Guide to Constitutional Interpretation, 27 Stan.L.Rev. 585 (1975).

One final consideration should be mentioned in light of the unique posture of this controversy. In determining whether a legislature sought to inflict punishment on an individual, it is often useful to inquire into the existence of less burdensome alternatives by which that legislature (here Congress) could have achieved its legitimate nonpunitive objectives. Today, in framing his challenge to the Act, appellant contends that such an alternative was readily available:

'If Congress had provided that the Attorney General or the Administrator of General Services could institute a civil suit in an appropriate federal court to enjoin disposition . . . ***483** of presidential historical materials . . . by any person who could be shown to be an 'unreliable custodian' or who had 'engaged in misconduct' or who 'would violate a criminal prohibition,' the statute would have left to judicial determination, after a fair proceeding, the factual allegations regarding Mr. Nixon's blameworthiness.' Brief for Appellant 137.

We have no doubt that Congress might have selected this course. It very will may be, however, that Congress chose not to do so on the view that a full-fledged judicial inquiry into appellant's conduct and reliability would be no less punitive and intrusive than the solution actually adopted. For Congress doubtless was well aware that just three months earlier, appellant had resisted efforts to subject himself and his records to the scrutiny of the Judicial Branch, United States v. Nixon, 418 U.S. 683, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974), a position apparently maintained to this day. [FN48] A rational and fairminded Congress, ****2811** therefore, might well have decided that the carefully tailored law that it enacted would be less objectionable to appellant than the alternative that he today appears to endorse. To be sure, if the record were unambiguously to demonstrate that the Act represents the infliction of legislative punishment, the fact that the judicial alternative poses its own difficulties would be of no constitutional significance. But the record suggests the contrary, and the unique choice that Congress faced buttresses our conclusion that the Act cannot fairly be read to inflict legislative punishment as forbidden by the Constitution.

FN48. For example, in his deposition taken in this case, appellant refused to answer questions pertaining to the accuracy and reliability of his prior public statements as President concerning the contents of the tape recordings and other materials in issue. He invoked a claim of privilege and asserted that the questions were irrelevant to the judicial inquiry. See, e. g., App. 586-590.

[23] We, of course, are not blind to appellant's plea that we ***484** recognize the social and political realities of 1974. It was a period of political turbulence unprecedented in our history. But this Court is not free to invalidate Acts of Congress based upon inferences that we may be asked to draw from our personalized reading of the contemporary scene or recent history. In judging the constitutionality of the Act, we may only look to its terms, to the intent expressed by Members of Congress who voted its passage, and to the existence or nonexistence of legitimate explanations for its apparent effect. We are persuaded that none of these factors is suggestive that the Act is a punitive bill of attainder, or otherwise facially unconstitutional. The judgment of the District Court is

Affirmed.

Mr. Justice WHITE, concurring in part and concurring in the judgment.

I concur in the judgment and, except for Part VII, in the Court's opinion. With respect to the bill of attainder issue, I concur in the result reached in Part VII; the statute does not impose 'punishment' and is not, therefore, a bill of attainder. See United States v. Brown, 381 U.S. 437, 462, 85 S.Ct. 1707, 1722, 14 L.Ed.2d 484 (1965) (White, J., dissenting). I also append the following observations with respect to one of the many issues in this case.

It is conceded by all concerned that a very small portion of the vast collection of Presidential materials now in possession of the Administrator consists of purely private materials, such as diaries, recordings of family conversations, private correspondence

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'personal property of any kind not involving the actual transaction of government business.' Tr. of Oral Arg. 55. It is also conceded by the federal and other appellees that these private materials, once identified, must be returned to Mr. Nixon. Id., at 38-40, 57-59. The Court now declares that 'the Government (without awaiting a court order) should now promptly disclaim any interest in materials conceded to be appellant's purely private communications and deliver them to him.' Ante, at 2798 n. 22. I agree that the separation and return of these materials should proceed without delay. Furthermore, even if under the Act this process can occur only after the issuance of regulations under s 104 that are subject to congressional approval, surely regulations covering this narrow subject matter need not take long to effectuate.

Also, s 104(a)(7) suggests that the private materials to be returned to Mr. Nixon are limited to those that 'are not otherwise of general historical significance.' But, as I see it, the validity of the Act would be questionable if mere historical significance sufficed to withhold purely private letters or diaries; and in view of the other provisions of the Act, particularly s 104(a) (5), it need not be so construed. Purely private materials, whether or not of historical interest, are to be delivered to Mr. Nixon. The federal and other appellees conceded as much at oral argument. [FN*]

FN* 'QUESTION: Well now, suppose Mr. Nixon has prepared a diary every day and put down what, exactly what he did, and let's suppose that someone thought that was a purely personal account. Now, I can just imagine that someone might think that it nevertheless is of general historical significance.

'MR. McCREE: May I refer the Court to need No. 5? 'The need to protect any party's opportunity to assert any legally or constitutionally based right or privilege which would prevent or otherwise limit access to such recordings and materials.'

'And I submit that this Act affords Richard M. Nixon the opportunity to assert the contention that this diary of his is personal and has not the kind of historical significance that will permit his deprivation; and that would then have to be adjudicated in a court.

'QUESTION: Well, do

'MR. McCREE: And ultimately this Court will answer that question.

'QUESTION: Well, how do you so you would agree; then, that 104 must be construed must be construed to sooner or later return to Mr. Nixon what we might call purely private papers?

'MR. McCREE: Indeed I do.

'QUESTION: Can you imagine any diary thinking of Mr. Truman's diary, which it is reported, was a result of being dictated every evening, after the day's work can you conceive of any such material that would not be of general historical interest?

'MR. McCREE: I must concede, being acquainted with some historians, that it's difficult to conceive of anything that might not be of historical interest. But

'(Laughter.)

'QUESTION: Yes. Archivists and historians, Like journalists.

'MR. McCREE: Indeed they are.

'QUESTION: think that everything is.

'(Laughter.)

'MR. McCREE: But this legislation recognizes that a claim of privacy, a claim of privilege must be protected, and if the regulations are insufficient to do that, again a court will have an opportunity to address itself to a particular item such as the diary before it can be turned over.

'And for that reason, we suggest that the attack at this time is premature because the statute, in recognizing the right of privacy, is facially adequate. And the attack that was made the day after it became effective brought to this Court a marvelous opportunity to speculate about what might happen, but the regulations haven't even been promulgated and acquiesced in so that they have become effective.' Tr. of Oral Arg. 38-40.

'(Mr. HERZSTEIN, for the private appellees:)

'But there's just no question about the return of personal diaries, Dictabelts, so long as they are not the materials involved in the transaction of government business. 'Now, the statute, I agree, could have been drafted a little more clearly, but we think there are several points which make it quite clear that his personal materials are to be returned to him.

'One is the fact that statute refers to the presidential historical materials of Richard Nixon, not to the person(al) or private materials.

'The second is that, as Judge McCree mentioned, criterion 7 calls for a return of materials to him, and if you read those two in conjunction with the legislative history, there are statements on the Floor of the Senate, on the Floor of the House, and in the Committee Reports, indicating the expectation that Nixon's personal records would be returned to him.

'QUESTION: Could you give us a capsule summary of the difference between what you have just referred to as Nixon's personal records, which will be returned, and the matter which will not be returned?

'MR. HERZSTEIN: Well, yes. Certainly any personal letters, among his family or friends, certainly a diary made at the end of the day, as it were, after the event

'QUESTION: Even though the Dictabelt was paid for out of White House appropriations?

'MR. HERZSTEIN: That's right. That doesn't bother us. I think it's incidental now. But we do have

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a different view on the tapes, which actually recorded the transaction of government business by government employees on government time and so on. The normal tapes that we've heard so much about.

'The Dictabelts, Mr. Nixon has said, are his personal diary. Instead of writing it down, in other words, he dictated it at the end of the day. And we think that's

'QUESTION: I want to be sure about the concession, because this certainly is of historical interest.

'MR. HERZSTEIN: That's right, it is, but we do not feel it's covered by the statute. We have acknowledged that from the start.

'QUESTION: Is this concession shared by the Solicitor General, do you think?

'MR. HERZSTEIN: We believe it is.

'QUESTION: What about that?

'MR. McCREE: About the fact that the paper belongs to the government and so forth, we don't believe that makes a document a government documen(t). We certainly agree with that.

'Beyond that, if the Court please

'QUESTION: What about the Dictabelts representing his daily diary?

'MR. McCREE: I would think that's a personal matter that would be should be returned to him once it was identified.

'QUESTION: Well, is there any problem about, right this very minute, of picking those up and giving them back to Mr. Nixon?

'MR. McCREE: I know of no problem. Whether it would have to await the adoption of the regulation, which has been stymied by Mr. Nixon's lawsuit, which has been delayed for three years,

'QUESTION: How has that stymied the issuance of regulations, Mr. Solicitor General?

'MR McCREE: One of the dispositions of the district court was to stay the effectiveness of regulations. Now, I think it held up principally the regulations for public access. The other regulations are not part of this record, and I cannot speak to the Court with any knowledge about them.' Id., at 57-59.

**2813 Similarly, although the Court relies to some extent on the statutory recognition of the constitutional right to compensation in the event it is determined that the Government has confiscated Mr. Nixon's property, I would question whether a mere historical interest in purely private communications would be a sufficient predicate for taking them for public use. Historical considerations are normally sufficient grounds for condemning property, United States v. Gettysburg Electric R. Co., 160 U.S. 668, 16 S.Ct. 427, 40 L.Ed. 576 (1896); Roe v. Kansas, 278 U.S. 191, 49 S.Ct. 160, 73 L.Ed. 259 (1929); but whatever may be true of the great bulk of the materials in the event they are declared to be Mr. Nixon's property, I doubt that the Government is entitled to his purely private communications merely because it wants to preserve them and offers compensation.

Mr. Justice STEVENS, concurring.

The statute before the Court does not apply to all Presidents or former Presidents. It singles out one, by name, for special treatment. Unlike all other former Presidents in our history, he is denied custody of his own Presidential papers; he is subjected to the burden of prolonged litigation over the administration of the statute; and his most private papers and conversations are to be scrutinized by Government archivists. The statute implicitly condemns him as an unreliable custodian of his papers. Legislation which subjects a named individual to this humiliating treatment must raise serious questions under the Bill of Attainder Clause.

Bills of attainder were typically directed at once powerful leaders of government. By special legislative Acts, Parliament deprived one statesman after another of his reputation, his property, and his potential for future leadership. The motivation for such bills was as much political as it was punitive and often the victims were those who had been the most relentless in attacking their political enemies at the height of ***485** their own power. [FN1] In light of this history, legislation like that before us must be scrutinized with great care.

FN1. At the debate on the impeachment of the Earl of Danby, the Earl of Carnarvon recounted this history:

'My Lords, I understand but little of Latin, but a good deal of English, and not a little of the English history, from which I have learnt the mischiefs of such kind of prosecutions as these, and the ill fate of the prosecutors. I shall go no farther back than the latter end of Queen Elizabeth's reign: At which time the Earl of Essex was run down by Sir Walter Raleigh, and your Lordship very well know what became of Sir Walter Raleigh. My Lord Bacon, he ran down Sir Walter Raleigh, and your Lordships know what became of my Lord Bacon. The Duke of Buckingham, he ran down my Lord Bacon, and your Lordships know what happened to the Duke of Buckingham. Sir Thomas Wentworth, afterwards Earl of Strafford, ran down the Duke of Buckingham, and you all know what became of him. Sir Harry Vane, he ran down the Earl of Strafford, and your Lordships know what became of Sir Harry Vane. Chancellor Hyde, he ran down Sir Harry

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Vane, and your Lordships know what became of the Chancellor. Sir Thomas Osborne, now Earl of Danby, ran down Chancellor Hyde; but what will become of the Earl of Danby, your Lordships best can tell. But let me see that man that dare run the Earl of Danby down, and we shall soon see what will become of him.' (Footnote omitted.) As quoted in Z. Chafee, Jr., Three Human Rights in the Constitution of 1787, p. 127 (1956).

Our cases 'stand for the proposition that legislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial are bills of attainder prohibited by the Constitution.' United States v. Lovett, 328 U.S. 303, 315-316, 66 S.Ct. 1073, 1079, 90 L.Ed. 1252. The concept of punishment involves not only the character of the deprivation, but also the manner in which that deprivation is imposed. It has been held permissible for Congress to deprive Communist deportees, as a group, of their social security benefits, ****2814** Flemming v. Nestor, 363 U.S. 603, 80 S.Ct. 1367, 4 L.Ed.2d 1435, but it would surely be a bill of attainder for Congress to deprive a single, named individual of the same benefit. Cf. id., at 614, 80 S.Ct., at 1374. The very ***486** specificity of the statute would mark it as punishment, for there is rarely any valid reason for such narrow legislation; and normally the Constitution requires Congress to proceed by general rulemaking rather than by deciding individual cases. United States v. Brown, 381 U.S. 437, 442-446, 85 S.Ct. 1707, 1711-1713, 14 L.Ed.2d 484.

Like the Court, however, I am persuaded that 'appellant constituted a legitimate class of one . . . .' Ante, at 2805. The opinion of the Court leaves unmentioned the two facts which I consider decisive in this regard. Appellant resigned his office under unique circumstances and accepted a pardon [FN2] for any offenses committed while in office. By so doing, he placed himself in a different class from all other Presidents. Cf. Orloff v. Willougby, 345 U.S. 83, 90-91, 73 S.Ct. 534, 538-539, 97 L.Ed. 842. Even though unmentioned, it would be unrealistic to assume that historic facts of this consequence did not affect the legislative decision. [FN3]

FN2. See Burdick v. United States, 236 U.S. 79, 94, 35 S.Ct. 267, 270, 59 L.Ed. 476.

FN3. Cf. Calder v. Bull, 3 Dall. 386, 390, 1 L.Ed. 648:
'That Charles 1st. king of England, was beheaded; that Oliver Cromwell was Protecter of England; that Louis 16th, late King of France, was guillotined; are all facts, that have happened; but it would be nonsense to suppose, that the States were prohibited from making any law after either of these events, and with reference thereto.'

Since these facts provide a legitimate justification for the specificity of the statute, they also avoid the conclusion that this otherwise nonpunitive statute is made punitive by its specificity. If I did not consider it appropriate to take judicial notice of those facts, I would be unwilling to uphold the power of Congress to enact special legislation directed only at one former President at a time when his popularity was at its nadir. For even when it deals with Presidents or former Presidents, the legislative focus should be upon 'the calling' rather than 'the person.' Cf. Cummings v. Missouri, 4 Wall. 277, 320, 18 L.Ed. 356. In short, in my view, this case will not be a precedent for future legislation which relates, not to the Office of President, but just to one of its occupants.

***487** Without imputing a similar reservation to the Court, I join its opinion with the qualification that these unmentioned facts have had a critical influence on my vote to affirm.

***491** Mr. Justice BLACKMUN, concurring in part and concurring in the judgment.

My posture in this case is essentially that of Mr. Justice POWELL, post, p. 2815. I refrain from joining his opinion, however, because I fall somewhat short of sharing his view, post, at 2818-2820, that the incumbent President's submission, made through the Solicitor General, that the Act serves rather than hinders the Chief Executive's Art. II functions, is dispositive of the separation-of-powers issue. I would be willing to agree that it is significant and that it is entitled to serious consideration, but I am not convinced that it is dispositive. The fact that President Ford signed the Act does not mean that he necessarily approved of its every detail. Political realities often guide a President to a decision not to veto.

One must remind oneself that our Nation's history reveals a number of instances where Presidential transition has not been particularly friendly or easy. On occasion it has been openly hostile. It is my hope and anticipation as it obviously is of the others who have written in this case that this Act, concerned as it is with what the Court describes, ante, at 2805, as 'a

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legitimate class of one,' will not become a model for the disposition of the papers of each President who leaves office at a time when **2815 his successor or the Congress is not of his political persuasion.

I agree fully with my Brother POWELL when he observes, post, at 2820, that the 'difficult constitutional questions lie ahead' for resolution in the future. Reserving judgment on *492 those issues for a more appropriate time certainly not now I, too, join the judgment of the Court and agree with much of its opinion. I specifically join Part VII of the Court's opinion.

Mr. Justice POWELL, concurring in part and concurring in the judgment.

I join the judgment of the Court and all but Parts IV and V of its opinion. For substantially the reasons stated by the Court, I agree that the Presidential Recordings and Materials Preservation Act (Act) on its face does not violate appellant's rights under the First, Fourth, and Fifth Amendments and the Bill of Attainder Clause. [FN1] For reasons quite different from those stated by the Court, I also would hold that the Act is consistent on its face with the principle of separation of powers.

FN1. Although I agree with much of Parts IV and V, I am unable to join those parts of the Court's opinion because of my uncertainty as to the reach of its extended discussion of the competing constitutional interests implicated by the Act.

I

The Court begins its analysis of the issues by limiting its inquiry to those constitutional claims that are addressed to 'the facial validity of the provisions of the Act requiring the Administrator to take the recordings and materials into the Government's custody subject to screening by Government archivists.' Ante, at 2788. I agree that the inquiry must be limited in this manner, but I would add two qualifications that in my view further restrict the reach of today's decision.

First, Title I of Pub.L. 93-526 (the Act) does not purport to be a generalized provision addressed to the complex problem of disposition of the accumulated papers of Presidents or other federal officers. Unlike Title II of Pub.L. 93-526 (The Public Documents Act), which authorizes a study of that problem, *493 Title I is addressed specifically and narrowly to the need to preserve the papers of former President Nixon after his resignation under threat of impeachment. It is legislation, as the Court properly observes, directed against 'a legitimate class of one.' Ante, at 2805.

President Nixon resigned on August 9, 1974. Less than two weeks earlier, the House Judiciary Committee had voted to recommend his impeachment, H.R.Rep.No. 93-1305, pp. 10-11 (1974), including among the charges of impeachable offenses allegations that the President had obstructed investigation of the Watergate break-in and had engaged in other unlawful activities during his administration. Id., at 1-4. One month after President Nixon's resignation, on September 8, 1974, President Ford granted him a general pardon for all offenses against the United States that he might have committed in his term of office.

On the same day, the Nixon-Sampson agreement was made public. The agreement provided for the materials to be deposited temporarily with the General Services Administration in a California facility, but gave the former President the right to withdraw or direct the destruction of any materials after an initial period of three years or, in the case of tape recordings, five years. During this initial period access would be limited to President Nixon and persons authorized by him, subject only to legal process ordering materials to be produced. Upon President Nixon's death, the tapes were to be destroyed immediately. 10 Weekly Comp. of Pres. Doc. 1104-1105 (1974).

Those who drafted and sponsored Title I in Congress uniformly viewed its provisions as emergency legislation, necessitated by the extraordinary events that led to the resignation and pardon and to the former President's arrangement for the disposition of his papers. Senator Nelson, for example, referred to the bill as 'an emergency measure' **2816 whose principalpurpose *494 was to assure 'protective custody' of the materials. 120 Cong.Rec. 33848, 33850-33851 (1974).

> '(T)here is an urgency in the situation now before us. Under the existing agreement between the GSA and Mr. Nixon, if Mr. Nixon died tomorrow, those tapes if I read the agreement correctly are to be destroyed immediately; it is also possible that the Nixon papers could be destroyed by 1977. This would be a catastroph(e) from an historical standpoint.' Id., at 33857.

Senator Ervin similarly remarked:

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'This bill really deals with an emergency situation, because some of these documents are needed in the courts and by the general public in order that they might know the full story of what is known collectively as the Watergate affair.' Id., at 33855.

Efforts to apply the legislation more generally to all Presidents or to other federal officers were resisted on the Senate floor. Thus, speaking again of the unique needs created by the Nixon-Sampson agreement and the Watergate scandals, Senator Javits stressed that 'we seek to deal in this particular legislation, only with this particular set of papers of this particular ex-President.' Id., at 33860. See generally S.Rep.No.93-1181 (1974).

It is essential in addressing the constitutional issues before us not to lose sight of the limited justification for and objectives of this legislation. The extraordinary events that led to the resignation and pardon, and the agreement providing that the record of those events might be destroyed by President Nixon, created an impetus for congressional action that may without overstatement be termed unique. I therefore do not share my Brother REHNQUIST's foreboding that this Act 'will daily stand as a veritable sword of Damocles over every succeeding President and his advisers.' Post, at 2841: If the study authorized by Title II should lead to ***495** more general legislation, there will be time enough to consider its validity if a proper case comes before us.

My second reservation follows from the first. Because Congress acted in what it perceived to be an emergency, it concentrated on the immediate problem of establishing governmental custody for the purpose of safeguarding the materials. It deliberately left to the rulemaking process, and to subsequent judicial review, the difficult and sensitive task of reconciling the long-range interests of President Nixon, his advisors, the three branches of Government, and the American public, once custody was established. As the District Court observed:

'The Act in terms merely directs GSA to take custody of the materials that fall within the scope of section 101, and to promulgate regulations after taking into consideration the seven factors listed in section 104(a). Those factors provide broad latitude to the Administrator in establishing the processes and standards under which the materials will be reviewed and public access to them afforded. . . .' 408 F.Supp. 321, 335 (1976) (footnote omitted).

In view of the latitude that the Act gives to GSA in framing regulations, I agree with the District Court that the question to be resolved in this case is a narrow one: 'Is the regulatory scheme enacted by Congress unconstitutional without reference to the content of any conceivable set of regulations falling within the scope of the Administrator's authority under section 104(a)?' Id., at 334-335.

No regulations have yet taken effect under s 104(a). Ante, at 2787. In these circumstances, I believe it is appropriate to address appellant's constitutional claims, as did the District Court, with an eye toward the kind of regulations and screening practices that would be consistent with the Act and yet that would afford protection to the important ***496** constitutional interests asserted. Section 104(a)(5) of the Act directs the Administrator to take into account

'the need to protect any party's opportunity to assert any legally or constitutionally based right or privilege which would ****2817** prevent or otherwise limit access to such recordings and materials.'

The District Court observed that in considering this factor, the Administrator might well provide for meaningful participation by appellant in the screening process and in the selection of the archivists who would review the materials. The court also observed that procedures might be adopted that would minimize any intrusion into private materials and that would permit appellant an opportunity to obtain administrative and judicial review of all proposed classifications of the materials. 408 F.Supp., at 339-340. [FN2] Finally, ***497** the court noted that substantive restrictions on access might be adopted, consistent with traditional restrictions placed on access to Presidential papers, and that such restrictions could forbid public disclosure of any confidential communications between appellant and his advisors 'for a fixed period of years, or until the death of Mr. Nixon and others participating in or the subject of communications.' Id., at 338. [FN3]

FN2. By way of illustration, the District Court observed that the following archival practices might be adopted to limit invasion of appellant's constitutionally protected interests:

'1. A practice of requiring archivists to make the minimal intrusion necessary to classify material. Identification by signature, the file within which material is found, general nature (as with diaries, or dictabelts serving the same function), a cursory glance at the contents, or other means could significantly limit infringement of plaintiff's interests without undermining the effectiveness of screening by governmental personnel. Participation by Mr.

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Nixon in preliminary identification of material that might be processed without word-by-word review would facilitate such a procedure.

'2. A practice of giving Mr. Nixon some voice in the designation of the personnel who will review the materials, perhaps by selecting from a body archivists approved by the government.

'3. A practice of giving Mr. Nixon notice of all proposed classifications of materials and an opportunity to obtain administrative and judicial review of them, on constitutional or other grounds, before they are effectuated.' 408 F.Supp., at 339-340 (footnotes omitted).

I agree with the views expressed by Mr. Justice WHITE, ante, at 2811- 2814, on the need to return private materials to appellant.

FN3. The District Court noted the existence of: 'a basic set of donor-imposed access restrictions that was first formulated by Herbert Hoover (and) followed by Presidents Eisenhower, Kennedy, and Johnson. Under this scheme the following materials would be restricted:

'1) materials that are security-classified; '2) materials whose disclosure would be prejudicial to foreign affairs;

'3) materials containing statements made by or to a President in confidence;

'4) materials relating to the President's family, personal, or business affairs or to such affairs of individuals corresponding with the President;

'5) materials containing statements about individuals that might be used to embarrass or harass them or members of their families;

'6) such other materials as the President or his representative might designate as appropriate for restriction.

'President Franklin Roosevelt imposed restrictions very similar to numbers 1, 2, 4, and 5, and in addition restricted (a) investigative reports on individuals, (b) applications and recommendations for positions, and (c) documents containing derogatory remarks about an individual. President Truman's restrictions were like those of Hoover, Eisenhower, Kennedy, and Johnson, except that he made no provision, like number 6 above, for restriction merely at his own instance.' 408 F.Supp., at 338-339 n. 19 (citations omitted).

I have no doubt that procedural safeguards and substantive restrictions such as these are within the authority of the Administrator to adopt under the board mandate of s 104(a). While there can be no positive assurance that such protections will in fact be afforded, we nonetheless may assume, in reviewing the facial validity of the Act that all constitutional and legal rights will be given full protection. Indeed, that assumption is the basis on which I join today's judgment ***498** upholding the facial validity of the Act. As the Court makes clear in its opinion, the Act plainly requires the Administrator, in designing the regulations, to 'consider the need to protect the constitutional rights of appellant and other individuals against infringement by the processing itself or, ultimately, by public access to the materials retained.' Ante, at 2787.

****2818** II

I agree that the Act cannot be held unconstitutional on its face as a violation of the principle of separation of powers or of the Presidential privilege that dervies from that principle. This is not a case in which the Legislative Branch has exceeded its enumerated powers by assuming a function reserved to the Executive under Art. II. E. g., Buckley v. Valeo, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976); Myers v. United States, 272 U.S. 52, 47 S.Ct. 21, 71 L.Ed. 160 (1926). The question of governmental power in this case is whether the Act, by mandating seizure and eventual public access to the papers of the Nixon Presidency, impermissibly interferes with the President's power to carry out his Art. II obligations. In concluding that the Act is not facially invalid on this ground, I consider it dispositive in the circumstances of this case that the incumbent President has represented to this Court, through the Solicitor General, that the Act serves rather than hinders the Art. II functions of the Chief Executive.

I would begin by asking whether, putting to one side other limiting provisions of the Constitution, Congress has acted beyond the scope of its enumerated powers. Cf. Reid v. Covert, 354 U.S. 1, 70, 77 S.Ct. 1222, 1258, 1 L.Ed.2d 1148 (1957) (Harlan, J., concurring). Apart from the legislative concerns mentioned by the Court, ante, at 2807-2808, I believe that Congress unquestionably has acted within the ambit of its broad authority to investigate, to inform the public, and, ultimately, to legislate against suspected corruption and abuse of power in the Executive Branch.

***499** This Court has recognized inherent power in Congress to pass appropriate legislation to 'preserve the departments and institutions of the general government from impairment or destruction, whether threatened by force or by corruption.' Burroughs v. United States, 290 U.S. 534, 545, 54 S.Ct. 287, 290, 78 L.Ed. 484 (1934). Congress has the power, for example, to restrict the political activities of civil servants, e. g., CSC v. Letter Carriers, 413 U.S.

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548, 93 S.Ct. 2880, 37 L.Ed.2d 796 (1973); to punish bribery and conflicts of interest, e. g., Burton v. United States, 202 U.S. 344, 26 S.Ct. 688, 50 L.Ed. 1057 (1906); to punish obstructions of lawful governmental functions, Haas v. Henkel, 216 U.S. 462, 30 S.Ct. 249, 54 L.Ed. 569 (1910); and with important exceptions to make executive documents available to the public, EPA v. Mink, 410 U.S. 73, 93 S.Ct. 827, 35 L.Ed.2d 119 (1973). The Court also has recognized that in aid of such legislation Congress has a broad power 'to inquire into and publicize corruption, maladministration or inefficiency in agencies of the Government.' Watkins v. United States, 354 U.S. 178, 200 n. 33, 77 S.Ct. 1173, 1185 n. 33, 1 L.Ed.2d 1273 (1957). See also Buckley v. Valeo, supra, 424 U.S., at 137-138, 96 S.Ct., at 690-691; Eastland v. United States Servicemen's Fund, 421 U.S. 491, 95 S.Ct. 1813, 44 L.Ed.2d 324 (1975).

The legislation before us rationally serves these investigative and informative powers. Congress legitimately could conclude that the Nixon-Sampson agreement, following the recommendation of impeachment and the resignation of President Nixon, might lead to destruction of those of the former President's papers that would be most likely to assure public understanding of the unprecedented events that led to the premature termination of the Nixon administration. Congress similarly could conclude that preservation of the papers was important to its own eventual understanding of whether that administration had been characterized by deficiencies susceptible of legislative correction. Providing for retention of the materials by the Administrator and for the selection of appropriate materials for eventual disclosure to the public was a rational means of serving these legitimate congressional objectives.

***500** Congress still might be said to have exceeded its enumerated powers, however, if the Act could be viewed as an assumption by the Legislative Branch of functions reserved exclusively to the Executive by Art. II. In Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 72 S.Ct. 863, 96 L.Ed. 1153 (1952), for example, the Court buttressed ****2819** its conclusion that the President had acted beyond his power under Art. II by characterizing his seizure of the steel mills as an exercise of a 'legislative' function reserved exclusively to Congress by Art. I. 343 U.S., at 588-589, 72 S.Ct., at 867. And last Term we reaffirmed the fundamental principle that the appointment of executive officers is an 'Executive' function that Congress is without power to vest in itself. Buckley v. Valeo, supra, 424 U.S., at 124-141, 96 S.Ct., at 684-693. But the Act before us presumptively avoids these difficulties by entrusting the task of ensuring that its provisions are faithfully executed to an officer of the Executive Branch. [FN4]

FN4. The validity of the provision of s 104(b) for possible disapproval of the Administrator's regulations by either House of Congress is not before us at this time. See 408 F.Supp., at 338 n. 17; Brief for Federal Appellees 26, and n. 11.

I therefore conclude that the Act cannot be held invalid on the ground that Congress has exceeded its affirmative grant of power under the Constitution. But it is further argued that Congress nonetheless has contravened the limitations on legislative power implicitly imposed by the creation of a coequal Executive Branch in Art. II. It is said that by opening-up the operations of a past administration to eventual public scrutiny, the Act impairs the ability of present and future Presidents to obtain unfettered information and candid advice and thereby limits executive power in contravention of Act. II and the principle of separation of powers. I see no material distinction between such an argument and the collateral claim that the Act violates the Presidential privilege in confidential communications.

In United States v. Nixon, 418 U.S. 683, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974) (Nixon I), ***501** we recognized a presumptive, yet qualified, privilege for confidential communications between the President and his advisors. Observing that 'those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process,' id., at 705, 94 S.Ct., at 3106, we recognized that a President's generalized interest in confidentiality is 'constitutionally based' to the extent that it relates to 'the effective discharge of a President's powers.' Id., at 711, 94 S.Ct., at 3109. We held nonetheless that '(t)he generalized assertion of privilege must yield to the demonstrated, specified need for evidence in a pending criminal trial.' Id., at 713, 94 S.Ct., at 3110.

Appellant understandably relies on Nixon I. Comparing the narrow scope of the judicial subpoenas considered there with the comprehensive reach of this Act encompassing all of the communications of his administration appellant argues that there is no 'demonstrated, specific need' here that can outweigh the extraordinary intrusion worked by this legislation.

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On the ground that the result will be to destroy 'the effective discharge of the President's powers,' appellant urges that the Act be held unconstitutional on its face.

These arguments undoubtedly have considerable force, but I do not think they can support a decision invalidating this Act on its face. Section 1 of Art. II vests all of the executive power in the sitting President and limits his term of office to four years. It is his sole responsibility to 'take Care that the Laws be faithfully executed.' Art. II, s 3. Here, as previously noted, President Carter has represented to this Court through the Solicitor General that the Act is consistent with 'the effective discharge of the President's powers':

> 'Far from constituting a breach of executive autonomy, the Act . . . is an appropriate means of ensuring that the Executive Branch will have access to the materials necessary to the performance of its duties.' Brief for Federal Appellees 29.

***502** This representation is similar to one made earlier on behalf of President Ford, who signed the Act. Motion of Federal Appellees to Affirm 15. I would hold that these representations must be given precedence ****2820** over appellant's claim of Presidential privilege. Since the incumbent President views this Act as furthering rather than hindering effective execution of the laws, I do not believe it is within the province of this Court to hold otherwise.

This is not to say that a former President lacks standing to assert a claim of Presidential privilege. I agree with the Court that the former President may raise such a claim, whether before a court or a congressional committee. In some circumstances the intervention of the incumbent President will be impractical or his views unknown, and in such a case I assume that the former President's views on the effective operation of the Executive Branch would be entitled to the greatest deference. It is uncontroverted, I believe, that the privilege in confidential Presidential communications survives a change in administrations. I would only hold that in the circumstances here presented the incumbent, having made clear in the appropriate forum his opposition to the former President's claim, alone can speak for the Executive Branch. [FN5]

> FN5. There is at least some risk that political, and even personal, antagonisms could motivate Congress and the President to join in a legislative seizure and public exposure of a former President's papers without due regard to the long-range implications of such action for the Art. II functions of the Chief Executive. Even if such legislation did not violate the principle of separation of powers, it might well infringe individual liberties protected by the Bill of Attainder Clause or the Bill of Rights. But this is not the case before us. In passing this legislation, Congress acted to further legitimate objectives in circumstances that were wholly unique in the history of our country. The legislation was approved by President Ford, personally chosen by President Nixon as his successor, and is now also supported by President Carter. In view of the circumstances leading to its passage and the protection it provides for "any . . . constitutionally based right or privilege," supra, at 2816, this Act on its face does not violate the personal constitutional rights asserted by appellant.

***503** I am not unmindful that '(i)t is emphatically the province and duty of the judicial department to say what the law is.' Marbury v. Madison, 1 Cranch 137, 177, 2 L.Ed. 60 (1803). As we reiterated in Nixon I:

> "Deciding whether a matter has in any measure been committed by the Constitution to another branch of government . . . is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution." 418 U.S., at 704, 94 S.Ct., at 3105-3106, quoting Baker v. Carr, 369 U.S. 186, 211, 82 S.Ct. 691, 706, 7 L.Ed.2d 663 (1962).

My position is simply that a decision to waive the privileges inhering in the Office of the President with respect to an otherwise valid Act of Congress is the President's alone to make under the Constitution. [FN6]

> FN6. Cf. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635- 637, 72 S.Ct. 863, 870-871, 96 L.Ed. 1153 (1952) (Jackson, J., concurring): 'When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. In these circumstances, and in these only, may he be said (for what it may be worth) to personify the federal sovereignty. If his act is held unconstitutional under these circumstances, it usually means that the Federal Government as an undivided whole lacks power. . . .' (Footnote omitted.) See also Williams v. Suffolk Insurance Co., 13 Pet. 415, 420, 10 L.Ed. 226 (1839):
>
> '(T)his Court ha(s) laid down the rule, that the action of the political branches of the government in a matter that belongs to them, is conclusive.'

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III

The difficult constitutional questions lie ahead. The President no doubt will see to it that the interests in confidentiality so forcefully urged by THE CHIEF JUSTICE and Mr. Justice REHNQUIST in their dissenting opinions are taken into account in the final regulations that are promulgated under ***504** s 104(a). While the incumbent President has supported the constitutionality of the Act as it is written, there is no indication ****2821** that he will oppose appellant's assertions of Presidential privilege as they relate to the rules that will govern the screening process and the timing of disclosure, and particularly the restrictions that may be placed on certain documents and recordings. I emphasize that the validity of such assertions of Presidential privilege is not properly before us at this time.

Similarly, difficult and important questions concerning individual rights remain to be resolved. At stake are not only the rights of appellant but also those of other individuals whose First, Fourth, and Fifth Amendment interests may be implicated by disclosure of communications as to which a legitimate expectation of privacy existed. I agree with the Court that even in the councils of Government an individual 'has a legitimate expectation of privacy in his personal communications,' ante, at 2801, and also that compelled disclosure of an individual's political associations, in and out of Government, can be justified only by 'a compelling public need that cannot be met in a less restrictive way,' ante, at 2802. Today's decision is limited to the facial validity of the Act's provisions for retention and screening of the materials. The Court's discussion of the interests served by those provisions should not foreclose in any way the search that must yet undertaken for means of assuring eventual access to important historical records without infringing individual rights protected by the First, Fourth, and Fifth Amendments.

Mr. Chief Justice BURGER, dissenting.

In my view, the Court's holding is a grave repudiation of nearly 200 years of judicial precedent and historical practice. That repudiation arises out of an Act of Congress passed in the aftermath of a great national crisis which culminated in the resignation of a President. The Act (Title I of Pub.L. 93- 526) violates firmly established constitutional principles in several respects.

***505** I find it very disturbing that fundamental principles of constitutional law are subordinated to what seem the needs of a particular situation. That moments of great national distress give rise to passions reminds us why the three branches of Government were created as separate and coequal, each intended as a check, in turn, on possible excesses by one or both of the others. The Court, however, has now joined a Congress, in haste to 'do something,' and has invaded historic, fundamental principles of the separate powers of coequal branches of Government. To 'punish' one person, Congress and now the Court tears into the fabric of our constitutional framework.

Any case in this Court calling upon principles of separation of powers, rights of privacy, and the prohibitions against bills of attainder, whether urged by a former President or any citizen is inevitably a major constitutional holding. Mr. Justice Holmes, speaking of the tendency of 'great cases like hard cases (to make) bad law,' went on to observe the dangers inherent when 'some accident of immediate overwhelming interest . . . appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend.' Northern Securities Co. v. United States, 193 U.S. 197, at 400-401, 24 S.Ct. 436, at 468, 48 L.Ed. 679 (1904) (dissenting opinion).

Well-settled principles of law are bent today by the Court under that kind of 'hydraulic pressure.'

I
Separation of Powers

Appellant urges that Title I is an unconstitutional intrusion by Congress into the internal workings of the Office of the President, in violation of the constitutional principles of separation of powers. Three reasons support that conclusion. ***506** The well-established principles of separation of powers, as developed in the decisions of this Court, are violated if Congress compels or coerces the President, in matters relating to the ****2822** operation and conduct of his office. [FN1] Next, the Act is an exercise of executive not legislative power by the Legislative Branch. Finally, Title I works a sweeping modification of the constitutional privilege and historical practice of confidentiality of every Chief Executive since 1789.

FN1. Later, I will discuss the importance of the

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legislation's applicability to only one ex-President.

A

As a threshold matter, we should first establish the standard of constitutional review by which Title I is to be judged. In the usual case, of course, legislation challenged in this Court benefits from a presumption of constitutionality. To survive judicial scrutiny a statutory enactment need only have a reasonable relationship to the promotion of an objective which the Constitution does not independently forbid, unless the legislation trenches on fundamental constitutional rights.

But where challenged legislation implicates fundamental constitutional guarantees, a far more demanding scrutiny is required. For example, this Court has held that the presumption of constitutionality does not apply with equal force where the very legitimacy of the composition of representative institutions is at stake. Reynolds v. Sims, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964). Similarly, the presumption of constitutionality is lessened when the Court reviews legislation endangering fundamental constitutional rights, such as freedom of speech, or denying persons governmental rights or benefits because of race. Legislation touching substantially on these areas comes here bearing a heavy burden which its proponents must carry.

Long ago, this Court found the ordinary presumption of constitutionality inappropriate in measuring legislation directly impinging on the basic tripartite structure of our Government. ***507** In Kilbourn v. Thompson, 103 U.S. 168, 192, 26 L.Ed. 377 (1880), Mr. Justice Miller observed for the Court that encroachments by Congress posed the greatest threat to the continued independence of the other branches. [FN2] Accordingly, he cautioned that the exercise of power by one branch directly affecting the potential independence of another 'should be watched with vigilance, and when called in question before any other tribunal . . . should receive the most careful scrutiny.' Ibid. (Emphasis supplied.) See also Buckley v. Valeo, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976).

FN2. In this, Mr. Justice Miller was but expressing the earlier opinion of Madison, who declared in The Federalist No. 48, p. 334 (J. Cooke ed. 1961).
'The legislative department derives a superiority in our governments from other circumstances. Its constitutional powers being at once more extensive and less susceptible of precise limits, it can with the greater facility, mask under complicated and indirect measures, the encroachments which it makes on the coordinate departments.'

Our role in reviewing legislation which touches on the fundamental structure of our Government is therefore akin to that which obtains when reviewing reviewing legislation touching on other fundamental constitutional guarantees. Because separation of powers is the base framework of our governmental system and the means by which all our liberties depend, Title I can be upheld only if it is necessary to secure some overriding governmental objective, and if there is no reasonable alternative which will trench less heavily on separation-of-powers principles.

B

Separation of powers is in no sense a formalism. It is the characteristic that distinguished our system from all others conceived up to the time of our Constitution. With federalism, separation of powers is 'one of the two great structural principles of the American constitutional system . . . .' E. Corwin, The President 9 (1957). See also Griswold v. Connecticut, 381 U.S. 479, 501, 85 S.Ct. 1678, 1690-1691, 14 L.Ed.2d 510 (1965) (Harlan, J., concurring in judgment).

***508 **2823** In pursuit of that principle, executive power was vested in the President; no other offices in the Executive Branch, other than the Presidency and Vice Presidency, were mandated by the Constitution. Only two Executive Branch offices, therefore, are creatures of the Constitution; all other departments and agencies, from the State Department to the General Services Administration, are creatures of the Congress and owe their very existence to the Legislative Branch. [FN3]

FN3. Statutes relating to departments or agencies created by Congress frequently are phrased in mandatory terms. For example, in the 1949 legislation creating the General Services Administration, Congress provided as follows:
'The Administrator is authorized and directed to coordinate and provide for the . . . efficient purchase, lease and maintenance of . . . equipment by Federal agencies.' 40 U.S.C. s 759(a).
Even with respect to international relations, Congress has affirmatively imposed certain requirements on the Secretary of State:
'The Secretary of State shall furnish to the Public

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Printer a correct copy of every treaty between the United States and any foreign government . . ..' 22 U.S.C. s 2660.

The Presidency, in contrast, stands on a very different footing. Unlike the vast array of departments which the President oversees, the Presidency is in no sense a creature of the Legislature. The President's powers originate not from statute, but from the constitutional command to 'take Care that the Laws be faithfully executed . . ..' These independent, constitutional origins of the Presidency have an important bearing on determining the appropriate extent of congressional power over the Chief-Executive or his records and workpapers. For, although the branches of Government are obviously not divided into 'watertight compartments,' Springer v. Philippine Islands, 277 U.S. 189, 211, 48 S.Ct. 480, 485, 72 L.Ed. 845 (1928) (Holmes, J., dissenting), the office of the Presidency, as a constitutional equal of Congress, must as a general proposition be free from Congress' coercive powers. [FN4] This is not simply an abstract proposition ***509** of political philosophy; it is a fundamental prohibition plainly established by the decisions of this Court.

FN4. Cf. Mr. Justice WHITE's discussion in United States v. Brewster, 408 U.S. 501, 558, 92 S.Ct. 2531, 2560, 33 L.Ed.2d 507 (1972) (dissenting opinion), where he spoke of the 'evil' of 'executive control of legislative behavior . . ..' (Emphasis supplied.)

A unanimous Court, including Mr. Chief Justice Taft, Mr. Justice Holmes, and Mr. Justice Brandeis stated:

'The general rule is that neither department (of Government) may . . . control, direct or restrain the action of the other.' Massachusetts v. Mellon, 262 U.S. 447, 488, 43 S.Ct. 597, 601, 67 L.Ed. 1078 (1923).

Similarly, in O'Donoghue v. United States, 289 U.S. 516, 530, 53 S.Ct. 740, 743, 77 L.Ed. 1356 (1933), the Court emphasized the need for each branch of Government to be free from the coercive influence of the other branches:

'(E)ach department should be kept completely independent of the others independent not in the sense that they shall not cooperate to the common end of carrying into effect the purposes of the Constitution, but in the sense that the acts of each shall never be controlled by, or subjected, directly or indirectly, to, the coercive influence of either of the other departments.'

In Humphrey's Executor v. United States, 295 U.S. 602, 629-630, 55 S.Ct. 869, 874, 79 L.Ed. 1611 (1935), the Court again held:

'The fundamental necessity of maintaining each of the three general departments of government entirely free from the control or coercive influence, direct or indirect, of either of the others, has often been stressed and is hardly open to serious question. So much is implied in the very fact of the separation of the powers . . . .' (Emphasis supplied.)

****2824** Consistent with the principle of noncoercion, the unbroken practice since George Washington with respect to congressional demands for White House papers has been, in Mr. Chief Justice Taft's words, that 'while either house (of Congress) ***510** may request information, it cannot compel it . . ..' W. Taft, The Presidency 110 (1916). President Washington established the tradition by declining to produce papers requested by the House of Representatives relating to matters of foreign policy:

'To admit, then a right in the House of Representatives to demand and to have as a matter of course all the papers respecting a negotiation with a foreign power would be to establish a dangerous precedent.' 1 Messages and Papers of the Presidents 195 (J. Richardson Comp., 1899).

In noting the first President's practice, this Court stated in United States v. Curtiss-Wright Corp., 299 U.S. 304, 320, 57 S.Ct. 216, 221, 81 L.Ed. 255 (1936), that Washington's historic precedent was 'a refusal the wisdom of which was recognized by the House itself and has never since been doubted.' [FN5]

FN5. This Presidential prerogative has not been limited to foreign affairs, where, of course, secrecy and confidentiality may be of the utmost importance. See A. Bickel, The Morality of Consent 79 (1975); W. Taft, The Presidency 110 (1916).

Part of our constitutional fabric, then, from the beginning has been the President's freedom from control or coercion by Congress, including attempts to procure documents that, though clearly pertaining to matters of important governmental interests, belong and pertain to the President. This freedom from Congress' coercive influence, in the words of Humphrey's Executor, 'is implied in the very fact of the separation of the powers . . ..' 295 U.S., at 629-630, 55 S.Ct., at 874. Moreover, it is not

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constitutionally significant that Congress has not directed that the papers be turned over to it for examination or retention, rather than to GSA. Separation of powers is fully implicated simply by Congress' mandating what disposition is to be made of the papers of another branch.

This independence of the three branches of Government, including control over the papers of each, lies at the heart of ***511** this Court's broad holdings concerning the immunity of congressional papers from outside scrutiny. The Constitution, of course, expressly grants immunity to Members of Congress as to any 'Speech or Debate in either House . . .'; yet the Court has refused to confine that Clause literally 'to words spoken in debate.' Powell v. McCormack, 395 U.S. 486, 502, 89 S.Ct. 1944, 1954, 23 L.Ed.2d 491 (1969). Congressional papers, including congressional reports, have been held protected by the Clause in order "to prevent intimidation (of legislators) by the executive and accountability before a possibly hostile judiciary." Ibid. In a word, to preserve the constitutionally rooted independence of each branch of Government, each branch must be able to control its own papers.

Title I is an unprecedented departure from the constitutional tradition of noncompulsion. The statute commands the head of a legislatively created department to take and maintain custody of appellant's Presidential papers, including many purely personal papers wholly unrelated to any operations of the Government. Title I does not concern itself in any way with materials belonging to departments of the Executive Branch created and controlled by Congress.

The Court brushes aside the fundamental principle of noncompulsion, abandoning outright the careful, previously unchallenged holdings of this Court in Mellon, O'Donoghue's and Humphrey's Executor. In place of this firmly established doctrine, [FN6] the ****2825** Court substitutes, without analysis, an ill-defined ***512** 'pragmatic, flexible approach.' Ante, ate 2789. Recasting, for the immediate purposes of this case, our narrow holding in United States v. Nixon, 418 U.S. 683, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974), see infra, at 2826-2827, the Court distills separation-of-powers principles into a simplistic rule which requires a 'potential for disruption' or an 'unduly disruptive' intrusion, before a measure will be held to trench on Presidential powers. [FN7]

FN6. The Court's references to the historical understanding of separation-of-powers principles omit a crucial part of that history. Madison's statements in The Federalist No. 47 as to one department's exercising the 'whole power' of another department do not purport to be his total treatment of the subject. The Federalist No. 48, two days later, states the central theme of Madison's view:

'It is equally evident, that neither (department) ought to possess directly or indirectly, an overruling influence over the others in the administration of their respective powers.' The Federalist No. 48, p. 332 (J. Cooke ed. 1961). (Emphasis supplied.)

Indeed, Madison expressly warned at length in No. 48 of the inevitable dangers of 'encroachments' by the Legislative Branch upon the coordinate departments of Government.

But aside from the Court's highly selective discussion of the Framers' understanding, the Court cannot obscure the fact that this Court has never required, in order to show a separation-of-powers violation, that Congress usurped the whole of executive power. Any such requirement was rejected by the Court in Buckley v. Valeo, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976). There, we held that Congress could not constitutionally exercise the President's appointing powers, even though under that statute the President had the power to appoint one-fourth of the Federal Election Commission members, and even though the President had 'approved' the statute when he signed the bill into law.

FN7. Nowhere is the standard clarified in the majority's opinion. We are left to guess whether only a 'potential for disruption' is required or whether 'undue disruption,' whatever that may be, is required.

The Court's approach patently ignores Buckley v. Valeo, where, only one year ago, we unanimously found a separation-of-powers violation without any allegation, much less a showing, of 'undue disruption.' There, we held that Congress could not impinge, even to the modest extent of six appointments to the Federal Election Commission, on the appointing powers of the President. We reached this conclusion in the face of the fact that President Ford had signed the bill into law. [FN8]

FN8. The federal parties filed three briefs in Buckley. The main brief, styled the 'Brief for the Attorney General as Appellee and for the United States as Amicus Curiae,' explicitly stated that the method of appointment of four of the members of the Commission was unconstitutional. See pp. 6-7, 110-120. The Attorney General signed this portion of the brief as a party (see pp. 2, 103 n. 65). The Executive Branch therefore made it clear that, in its view, the statute was unconstitutional to the extent it

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reposed appointing powers in Congress. The second brief, styled the 'Brief for the Attorney General and the Federal Election Commission,' generally defended the Act but took no position concerning the method of appointing the Commission. See p. 1 n. 1. The third brief was filed by the Commission on its own behalf only; it defended the appointment procedures, but it was not joined by the Attorney General and did not express the view of the President or of any other portion of the Executive Branch.

***513** But even taking the 'undue disruption' test as postulated, the Court engages in a facile analysis, as Mr. Justice REHNQUIST so well demonstrates. We are told, under the Court's view, that no 'undue disruption' arises because GSA officials have taken custody of appellant's Presidential papers, and since, for the time being, only GSA and other Executive Branch officials will have access to them. Ante, at 2790.

This analysis is superficial in the extreme. Separation-of-powers principles are no less eroded simply because Congress goes through a 'minuet' of directing Executive Department employees, rather than the Secretary of the Senate or the Doorkeeper of the House, to possess and control Presidential papers. Whether there has been a violation of separation-of-powers principles depends, not on the identity of the custodians, but upon which branch has commanded the custodians to act. Here, Congress has given the command.

If separation-of-powers principles can be so easily evaded, then the constitutional separation is a sham.

Congress' power to regulate Executive Department documents, as contrasted with ****2826** Presidential papers, under such measures as the Freedom of Information Act, 5 U.S.C. s 552 (1970 ed. and Supp. V), does not bear on the question. No one challenges Congress' power to provide for access to records of the Executive Departments which Congress itself created. But the Freedom of Information Act, the Privacy Act of 1974, and similar measures never contemplated mandatory production of Presidential papers. What is instructive, by contrast, is the nonmandatory, noncoercive manner in which Congress has previously legislated with respect to Presidential papers, by providing for Presidential libraries at the option of every ***514** former President. Title I, however, breaches the nonmandatory tradition that has long been a vital incident of separation of powers.

C

The statute, therefore, violates separation-of-powers principles because it exercises a coercive influence by another branch over the Presidency. The legislation is also invalid on another ground pertaining to separation of powers; it is an attempt by Congress to exercise powers vested exclusively in the President the power to control files, records, and papers of the office, which are comparable to the internal workpapers of Members of the House and Senate.

The general principle as to this aspect of separation of powers was stated in Kilbourn v. Thompson:

'(E)ach (branch) shall by the law of its creation be limited to the exercise of the powers appropriate to its own department and no other.

'(A)s a general rule . . . the powers confided by the Constitution to one of these departments cannot be exercised by another.' 103 U.S., at 191.

Madison also expressed this:

'For this reason that Convention which passed the ordinance of government, laid its foundation on this basis, that the legislative, executive and judiciary departments should be separate and distinct, so that no person should exercise the powers of more than one of them at the same time.' The Federalist No. 48, p. 335 (J. Cooke ed. 1961) (quoting Jefferson).

In the 1975 Term, in the face of a holding by a Court of Appeals that the separation-of-powers challenge was meritless, we unanimously invalidated an attempt by Congress to exercise appointing powers constitutionally vested in the Chief Executive. Buckley v. Valeo, 424 U.S., at 109-143, 96 S.Ct., at 677-693.

***515** The Constitution does not speak of Presidential papers, just as it does not speak of workpapers of Members of Congress or of judges. [FN9] But there can be no room for doubt that, up to now, it has been the implied prerogative of the President as of Members of Congress and of judges to memorialize matters, establish filing systems, and provide unilaterally for disposition of his work papers. Control of Presidential papers is, obviously, a natural and necessary incident of the broad discretion vested in the President in order for him to discharge his duties. [FN10]

FN9. As to congressional papers, see supra, at 2824. Despite the Constitution's silence as to the papers of the Legislative Branch, this Court had no difficulty holding those papers to be protected from control by

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other branches. See also Mr. Justice Brennan's dissenting opinion in United States v. Brewster, 408 U.S. 501, 532-533, 92 S.Ct. 2531, 2547, 33 L.Ed.2d 507 (1972), where he quotes approvingly from Kilbourn v. Thompson, 103 U.S. 168, 26 L.Ed. 377 (1881), and Coffin v. Coffin, 4 Mass. 1 (1808). In both of those cases, written materials by legislators were deemed to be protected by legislative immunity from intrusion or seizure.

FN10. This discretion was exercised, as we have seen, by President Washington in the face of a congressional demand for production of his workpapers.
Obviously, official documents fall into an entirely different category and are not involved in this case.

To be sure, we recognized a narrowly limited exception to Presidential control of Presidential papers in United States v. Nixon, 418 U.S. 683, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974). But that case permits compulsory**2827 judicial intrusions only when a vital constitutional function, i. e., the conduct of criminal proceedings, would be impaired and when the President makes no more 'than a generalized claim of . . . public interest . . .,' id., at 707, 94 S.Ct., at 3107, in maintaining complete control of papers and in preserving confidentiality. That case, in short, was essentially a conflict between the Judicial Branch and the President, where the effective functioning of both branches demanded an accommodation and where the prosecutorial and judicial demands upon the President were very narrowly restricted with great ***516** specificity 'to a limited number of conversations . . ..' Moreover, the request for production there was limited to materials that might themselves contain evidence of criminal activity of persons then under investigation or indictment. Finally, the intrusion was carefully limited to an in camera examination, under strict limits, by a single United States District Judge. That case does not stand for the proposition that the Judiciary is at liberty to order all papers of a President into custody of United States Marshals. [FN11]

FN11. Appellees, of course, would view that sort of intrusion as an intra branch confrontation, since United States Marshals are officials of the Executive Branch, at least so long as the District Judge simply ordered the Marshals to take custody of and to review the documents without turning them over to the court. This is, of course, sheer sophistry.

United States v. Nixon, therefore, provides no authority for Congress' mandatory regulation of Presidential papers simply 'to promote the general Welfare' which, of course, is a generalized purpose. No showing has been made, nor could it, that Congress' functions will be impaired by the former President's being allowed to control his own Presidential papers. [FN12] Without any threat whatever to its own functions, Congress has by this statute, as in Buckley v. Valeo, exercised authority entrusted to the Executive Branch. [FN13]

FN12. Of course, United States v. Nixon pertained only to the setting of Judicial-Executive conflict. Nothing in our holding suggests that, even if Congress needed Presidential documents in connection with its legislative functions, the constitutional tradition of Presidential control over Presidential documents in the face of legislative demands could be abrogated. We expressly stated in Nixon that '(w)e are not here concerned with the balance between . . . the confidentiality interest and congressional demands for information . . ..' 418 U.S., at 712 n. 19, 94 S.Ct., at 3109.

FN13. In his concurring opinion, Mr. Justice POWELL concludes that Title I was addressed essentially to an 'emergency' situation in the wake of appellant's resignation. But his opinion does not present any analysis as to whether this particular legislation, not some other legislation, is necessary to achieve that end. Since Title I commands confiscation of all materials of an entire Presidential administration, Title I was simply not drafted to meet the specific emergency it purports to address. Besides omitting any discussion justifying the need for Title I, Mr. Justice POWELL's opinion relies entirely on the possibly limiting regulations to be promulgated at some future point by the GSA Administrator, which will protect 'all constitutional and legal rights . . ..' Ante, at 2817. This conclusion, of course, begs the precise question before us, which is whether the act of congressionally mandated seizure of all Presidential materials of one President violates the Constitution.

***517** D

Finally, in my view, the Act violates principles of separation of powers by intruding into the confidentiality of Presidential communications protected by the constitutionally based doctrine of Presidential privilege. A unanimous Court in United States v. Nixon could not have been clearer in holding that the privilege guaranteeing confidentiality of such communications derives from the Constitution, subject to compelled disclosure only in narrowly limited circumstances:

'A President and those who assist him must be free to explore alternatives in the process of shaping

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policies and making decisions and to do so in a way many would be unwilling to express except privately. These are the considerations justifying a presumptive privilege for Presidential communications. The privilege is fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution.' 418 U.S., at 708, 94 S.Ct., at 3107.

2828 President Lyndon Johnson expressed the historic view of Presidential confidentiality in even stronger terms in a letter to the GSA Administrator: '(S)ince the President . . . is the recipient of many confidences from others, and since the inviolability of such confidence is essential to the functioning of the constitutional office of the Presidency, it will be necessary to withhold from public scrutiny certain papers and ***518 classes of papers for varying periods of time. Therefore . . . I hereby reserve the right to restrict the use and availability of any materials . . . for such time as I in my sole discretion, may . . . specify . . ..' Hearing before a Subcommittee of the House Committee on Government Operations, on H.J.Res. 632, 89th Cong., 1st Sess., 17 (1965).

As a constitutionally based prerogative, Presidential privilege inures to the President himself; it is personal in the same sense as the privilege against compelled self-incrimination. Presidential privilege would therefore be largely illusory unless it could be interposed by the President against the countless thousands of persons in the Executive Branch, and most certainly if the executive officials are acting, as this statute contemplates, at the command of a different branch of Government. [FN14]

FN14. Civil service statutes aside, we know now that an executive official cannot replace all of his underlings on the basis of a patronage system. Thus, as a matter of constitutional law, a Chief Executive would not be at liberty to replace all Executive Branch officials with persons who, for political reasons, enjoy the President's trust and confidence. Elrod v. Burns, 427 U.S. 347, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976).

This statute requires that persons not designated or approved by the former President will review all Presidential papers. Even if the Government agents, in culling through the materials, follow the 'advisory' suggestions offered by the District Court, the fact remains that their function abrogates the Presidential privilege. Congress has, in essence, commanded them to review and catalog thousands of papers and recordings that are undoubtedly privileged. Given that fact, it is clear that the Presidential privilege of one occupant of that office will have been rendered a nullity. [FN15]

FN15. I cannot accept the argument pressed by appellees that review is rendered harmless by the fact that many of the documents may not be protected by Presidential privilege. How 'harmless' review justifies manifestly 'harmful' review escapes me.

***519** E

There remains another inquiry under the issue of separation of powers. Does the fact that the Act applies only to a former President, described as 'a legitimate class of one,' ante, at 2805, after he has left office, justify what would otherwise be unconstitutional if applicable to an incumbent President?

On the face of it, congressional regulation of the papers of a former President obviously will have less disruptive impact on the operations of an incumbent President than an effort at regulation or control over the same papers of an incumbent President. But this 'remoteness' does not eliminate the separation-of-powers defects. First, the principle that a President must be free from coercion should apply to a former President, so long as Congress is inquiring or acting with respect to operations of the Government while the former President was in office. [FN16]

FN16. President Truman, for one, objected to Congress' efforts to coerce him after he was no longer in office in connection with matters pertaining to his administration. See infra, at 2829-2830.

To the extent Congress is empowered to coerce a former President, every future President is at risk of denial of a large measure of the autonomy and independence contemplated by the Constitution and of the confidentiality attending it. Myers v. United States, 272 U.S. 52, 47 S.Ct. 21, 71 **2829 L.Ed. 160 (1926). Indeed, the President, if he is to have autonomy while in office, needs the assurance that Congress will not immediately be free to coerce him to open all his files and records and give an account of Presidential actions at the instant his successor is sworn in. [FN17] Absent the validity of the expectation of ***520** privacy of such papers (save for a subpoena under United States v. Nixon), future Presidents and those they consult will be well advised to take into account the possibility that their most

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confidential correspondence, workpapers, and diaries may well be open to congressionally mandated review, with no time limit, should some political issue give rise to an interbranch conflict.

FN17. It would be the height of impertinence, after all, to serve a legislative subpoena on an outgoing President as he is departing from the inauguration of his successor. So too, the people would rightly be offended, and more important, so would the Constitution, by a congressional resolution, designed to ensure the smooth functioning of the Executive Branch, requiring a former President, upon leaving office, to remain in Washington, D.C., in order to be available for consultations with his successor for a prescribed period of time.

The Need for Confidentiality

The consequences of this development on what a President expresses to others in writing and orally are incalculable; perhaps even more crucial is the inhibiting impact on those to whom the President turns for information and for counsel, whether they are officials in the Government, business or labor leaders, or foreign diplomats and statesmen. I have little doubt that Title I and the Court's opinion will be the subject of careful scrutiny and analysis in the foreign offices of other countries whose representatives speak to a President on matters they prefer not to put in writing, but which may be memorialized by a President or an aide. Similarly, Title I may well be a 'ghost' at future White House conferences, with conferees choosing their words more cautiously because of the enlarged prospect of compelled disclosure to others. A unanimous Court carefully took this into account in United States v. Nixon:

'The expectation of a President to the confidentiality of his conversations and correspondence, like the claim of confidentiality of judicial deliberations, for example, has all the values to which we accord deference for the privacy of all citizens and, added to those values, is the necessity for protection of the public interest in candid, objective, and even blunt or harsh opinions in Presidential decision-making.' 418 U.S., at 708, 94 S.Ct., at 3107.

***521** In this same vein, Mr. Justice POWELL argues that President Carter's representation to the Court through the Solicitor General that Title I enhances the efficiency of the Executive Branch is dispositive of appellant's separation-of-powers claim. This deference to the views of one administration, expressed approximately 100 days after its inception, as to the permanent structure of our Government is not supported by precedent and conflicts with 188 years of history. First, there is no principled basis for limiting this unique deference. If and when the one-House veto issue, for example, comes before us, are we to accept the opinion of the Department of Justice as to the effects of that legislative device on the Executive Branch's operations? Second, if Title I is thus efficacious, why did the President who signed this bill into law decide to establish a Presidential library in Ann Arbor, Mich., rather than turn all of his Presidential materials over to GSA for screening and retention in Washington, D.C., where the materials would be readily accessible to officials of the Executive Branch? And why, suddenly, is Congress' acquiescence in President Ford's actions consistent with the supposed foundation of Title I?

Third, as pointed out by Mr. Justice BLACKMUN, ante, at 2814: 'Political realities often guide a President to a decision not to veto' or, indeed, a decision not to challenge in court the actions of Congress. See n. 18, infra. Finally, it is perhaps not inappropriate to note that, on occasion, Presidents disagree with their predecessors ****2830** on issues of policy. Some have believed in 'Congressional Government'; others adhered to expansive notions of Presidential power. It is, I respectfully submit, a unique idea that this Court accept as controlling the representations of any administration on a constitutional question going to the permanent structure of Government.

Title I is also objectionable on separation-of-powers grounds, despite its applicability only to a former President, because compelling the disposition of all of a former President's papers ***522** is a legislative exercise of what have historically been regarded as executive powers. Presidential papers do not, after all, instantly lose their nature quadrennially at high noon on January 20. Moreover, under Title I it is now the Congress, not the incumbent President, [FN18] that has decided what to do with all the papers of one entire administration.

FN18. The fact that the President signs a bill into law, and thereafter defends it, without more, does not mean, of course, that the policy embodied in the legislation is that of the President, nor does it even mean that the President personally approves of the measure. When signing a bill into law, numerous Presidents have actually expressed disagreement with the legislation but felt constrained for a variety of reasons to permit the bill to become law. President Franklin D. Roosevelt repudiated the 'Lovett Rider' later struck down by this Court in United States v.

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Lovett, 328 U.S. 303, 325, 66 S.Ct. 1073, 1083, 90 L.Ed. 1252 (1946) (Frank-furter, J., concurring). President Ford did not request this legislation in order to assure the effective functioning of the Executive Branch.

Finally, the federal appellees concede that Presidential privilege, a vital incident of our separation-of-powers system, does not terminate instantly upon a President's departure from office. They candidly acknowledge that 'the privilege survives the individual President's tenure,' Brief for Federal Appellees 33, because of the vital public interests underlying the privilege. This principle, as all parties concede, finds explicit support in history; former President Truman in 1953 refused to provide information to the Congress on matters occurring during his administration, advising Congress:

'It must be obvious to you that if the doctrine of separation of powers and the independence of the Presidency is to have any validity at all, it must be equally applicable to a President after his term of office has expired when he is sought to be examined with respect to any acts occurring while he (was) President.' 120 Cong.Rec. 33419 (1974). (Emphasis supplied.) [FN19]

FN19. Since by definition the concern is with former Presidents, I see no distinction in Congress' seeking to compel the appearance and testimony of a former President and in, alternatively, seeking to compel the production of Presidential papers over the former President's objection.

***523** To ensure institutional integrity and confidentiality, Presidents and their advisers must have assurance, as do judges and Members of Congress, that their internal communications will not become subject to retroactive legislation mandating intrusions into matters as to which there was a well-founded expectation of privacy when the communications took place. Just as Mr. Truman rejected congressional efforts to inquire of him, after he left office, as to his activities while President, this Court has always assumed that the immunity conferred by the Speech or Debate Clause is available to a Member of Congress after he leaves office. United States v. Brewster, 408 U.S. 501, 92 S.Ct. 2531, 33 L.Ed.2d 507 (1972). It would therefore be illogical to conclude that the President loses all immunity from legislative coercion as to his Presidential papers from the moment he leaves office.

The Court correctly concedes that a former President retains the Presidential privilege after leaving office, ante, at 2792-2793; but it then concludes that several considerations cut against recognition of the privilege as to one former President. First, the Court places great emphasis on the fact that neither President Ford nor ****2831** President Carter 'supports appellant's claim . . ..' Ante, at 2793. The relevance of that fact is not immediately clear. The validity of one person's constitutional privilege does not depend on whether some other holder of the same privilege supports his claim. [FN20] The fact that an incumbent President has signed or supports a particular measure cannot defeat a former President's claim of privilege. If the Court is correct today, it was wrong one year ago in Buckley v. Valeo, when we unanimously held that Presidential approval of the Federal Election Campaign ***524** could not validate an unconstitutional invasion of Presidential appointing authority.

FN20. Clients asserting the attorney-client privilege have not, up to now, been foreclosed from interposing the privilege unless a similarly situated client is willing to support the particular claim.

Second, the Court suggests that many of the papers are unprivileged. Of the great volume of pages, appellant estimated that he saw only about 200,000 items while he was President. Several points are relevant in this regard. We do not know how many pages the 200,000 items represent; the critical factor is that all papers are presumptively privileged. Regardless of the number of pages, the fact remains that the 200,000 items that the President personally reviewed or prepared while in office obviously have greater historical value than the mass of routine papers coming to the White House. Mountains of Government reports tucked away in Presidential files will not likely engage the interest of archivists or historians, since most such reports are not historically important and are, in any event, available elsewhere. Rather, archivists and historians will want to find and preserve the materials that reflect the President's internal decisionmaking processes. Those are precisely the papers which will be subjected to the most intensive review and which have always been afforded absolute protection. The Court's analytically void invocation of sheer numbers cannot mask the fact that the targets of the review are privileged papers, diaries, and conversations.

I agree that, under United States v. Nixon, the Presidential privilege is qualified. From that premise, however, the Court leaps to the conclusion that future regulations governing public access to the materials are sufficient to protect that qualified privilege. The

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Act does indeed provide for a number of safeguards before the public at large obtains access to the materials. See s 104(a). But the Court cannot have it both ways. The opinion expressly recognizes again and again that public access is not now the issue. The constitutionality of a statute cannot rest on the presumed validity of regulations not yet issued; moreover, no regulations governing public access can remedy the statute's basic flaw of ***525** permitting Congress to seize the confidential papers of a President.

F

In concluding that Title I on its face violates the principle of separation of powers, I do not address the issue whether some circumstances might justify legislation for the disposition of Presidential papers without the President's consent. Here, nothing remotely like the particularized need we found in United States v. Nixon has been shown with respect to these Presidential papers. No one has suggested that Congress will find its own 'core' functioning impaired by lack of the impounded papers, as we expressly found the judicial function would be impaired by lack of the material subpoenaed in United States v. Nixon.

I leave to another day the question whether, under exigent circumstances, a narrowly defined congressional demand for Presidential materials might be justified. But Title I fails to satisfy either the required narrowness demanded by United States v. Nixon or the requirement that the coequal powers of the Presidency not be injured by congressional legislation.

****2832** II
Privacy

The discussion of separation of powers concerns, of course, the structure of government, not the rights of the sole individual ostensibly affected by this legislation. But Title I touches not only upon the independence of a coordinate branch of government, it also affects, in the most direct way, the basic rights of one named individual. The statute provides, as we have seen, for governmental custody over and review of all of the former President's written and recorded materials at the time he left office, including diary recordings and conversations in his private residences outside Washington, D. C. s 101(a) (2).

The District Court was deeply troubled by this admittedly ***526** unprecedented intrusion. Its opinion candidly acknowledged that the personal-privacy claim was the 'most troublesome' point raised by this unique statute. [FN21] In addition to communications and memoranda reflecting the President's confidential deliberations, the District Court admitted that the materials subject to GSA review included highly personal communications.

FN21. The District Court concluded its discussion of the privacy challenge as follows: 'We would be less than candid were we to state that we find it as easy to dispose of Mr. Nixon's privacy claims as his claim of presidential privilege.' 408 F.Supp., at 367.

'Among all of the papers and tape recordings falling within the Act, however, are some papers and materials containing extremely private communications between (Mr. Nixon) and, among others, his wife, his daughters, his physician, lawyer, and clergyman, and his close friends, as well as personal diary dictabelts and his wife's personal files . . . Segregating those that are private from those that are not private requires rather comprehensive screening, and archivists entrusted with that duty will be required to read or listen to private communications.' 408 F.Supp. 321, 359 (DC 1976).

A

Given this admitted intrusion, the legislation before us must be subjected to the most searching kind of judicial scrutiny. [FN22] Statutes that trench on fundamental liberties, like ***527** those affecting significantly the structure of our government, are not entitled to the same presumption of constitutionality we normally accord legislation. Moore v. City of East Cleveland, 431 U.S. 494, 499, 97 S.Ct. 1932, 1935, 52 L.Ed.2d 531 (1977). The burden of justification is reversed; the burden rests upon government, not on the individual whose liberties are affected, to justify the measure. Abood v. Detroit Board of Education, 431 U.S. 209, 263-264, 97 S.Ct. 1782, 1813-1814, 52 L.Ed.2d 261 (1977) (Powell, J., concurring in the judgment). We recently reaffirmed the standard or review in such cases as one of 'exacting scrutiny.'

FN22. Although the District Court expressly concluded that the former President had a 'legitimate expectation' that his Presidential materials would not be subject to 'comprehensive review by government personnel without his consent,' id., at 361, the Court nonetheless deemed the compulsory intrusion permissible given the constitutionality of the federal

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wiretap statute, 18 U.S.C. ss 2510-2520, which of course permits substantial governmental intrusions into the privacy of individuals. Not only is this analogy imperfect, as the District Court itself admitted, 408 F.Supp., at 364, but this analysis fails to apply the 'exacting scrutiny' called for by our decisions. Above all, the present statute fails to provide any of the stringent safeguards, including a warrant, mandated by Title III of the Omnibus Crime Control and Safe Streets Act of 1968. Indeed, the District Court flatly admitted as much. Ibid.

'We long have recognized that significant encroachments on First Amendment rights of the sort that compelled disclosure imposes cannot be justified by a mere showing of some legitimate governmental interest . . . (W)e have required that the subordinating interests of the State must survive exacting scrutiny.' Buckley v. Valeo, 424 U.S., at 64, 96 S.Ct., at 656.

**2833 B

Constitutional analysis must, of course, take fully into account the nature of the Government's interests underlying challenged legislation. Once those interests are identified, we must then focus on the nature of the individual interests affected by the statute. Id., at 96 S.Ct., at 632. Finally, we must decide whether the Government's interests are of sufficient weight to subordinate the individual's interests, and, if so, whether the Government has nonetheless employed unnecessarily broad means for achieving its purposes. Lamont v. Postmaster General, 381 U.S. 301, 310, 85 S.Ct. 1493, 1498, 14 L.Ed.2d 398 (1965) (Brennan, J., concurring).

Two governmental interests are asserted as the justification for this statute: to ensure the general efficiency of the Executive ***528** Branch's operations [FN23] and to preserve historically significant papers and tape recordings for posterity. [FN24] Both these purposes are legitimate and important. Yet, there was no serious suggestion by Congress that the operations of the Executive Branch would actually be impaired unless, contrary to nearly 200 years' past practice, all Presidential papers of the one named incumbent were required by law to be impounded in the sole control of Government agents. The statute on its face, moreover, does not purport to address a particularized need, such as the need to secure Presidential papers concerning the Middle East, the SALT talks, or problems in Panama. [FN25] Indeed, the congressionally perceived 'need' is a ***529** far more 'generalized need' than that rejected in United States v. Nixon by a unanimous Court.

FN23. Administrative efficiency is obviously a highly desirable goal. See, e.g., Dixon v. Love, 431 U.S. 105, 114, 97 S.Ct. 1723, 1728, 52 L.Ed.2d 172 (1977); Mathews v. Eldridge, 424 U.S. 319, 347-349, 96 S.Ct. 893, 909-910, 47 L.Ed.2d 18 (1976). However, I am constrained to recall that 'administrative efficiency' has not unformly been regarded as of 'overriding importance.' Indeed, claims of administrative efficiency have been swiftly dismissed at times as mere 'bald assertion(s).' Richardson v. Wright, 405 U.S. 208, 223, 92 S.Ct. 788, 796, 31 L.Ed.2d 151 (1972) (Brennan, J., dissenting). Numerous other opinions have held that individual interests, including the right to welfare payments, 'clearly outweigh' government interests in promoting 'administrative efficiency,' Goldberg v. Kelly, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970) (opinion of Brennan, J.). And, Mr. Justice Marshall in Shapiro v. Thompson, 294 U.S. 618, 634, 89 S.Ct. 1322, 1331, 22 L.Ed.2d 600 (1969), stated that when 'fundamental' rights are at stake, such as the 'right to travel,' government must demonstrate a 'compelling' interest, not merely a 'rational relationship between (the underlying statute) and (the) . . . admittedly permissible state objectives . . . .'

FN24. The initial interest in preserving the materials for judicial purposes has diminished substantially. Since the Special Prosecutor has disclaimed any further interest in the materials for purposes of possible criminal investigations, the only conceivably remaining judicial need is to preserve the materials for possible use in civil litigation between private parties. The admittedly important interests in the enforcement of the criminal law, recognized in United States v. Nixon, are no longer pressed by the Government.

FN25. If there were a particularized need, the statute suffers from greater overbreadth than others we have invalidated.

As to the interest in preserving historical materials, there is nothing whatever in our national experience to suggest that existing mechanisms, such as the 20-year-old Presidential Libraries Act, were insufficient to achieve that purpose. [FN26] In any event, the interest in preserving 'historical materials' cannot justify seizing, without notice or hearing, private papers preliminary to a line-by-line examination by Government agents.

FN26. At the time the Title I was passed, appellant had made tentative arrangements with the University of Southern California in Los Angeles for the

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establishment of a Presidential library, under the terms of the Presidential Libraries Act. App. 167-168. That has now ripened into a formal agreement so that in the event Title I is invalidated, appellant's historical materials will be housed in a facility on the USC campus under terms applicable to other Presidential libraries of past Presidents.

In contrast to Congress' purposes underlying the statute, this Act intrudes significantly on two areas of traditional privacy interests of Presidents. One embraces Presidential papers relating to his decisions, **2834 development of policies, appointments, and communications in his role as leader of a political party; the other encompasses purely private matters of family, property, investments, diaries, and intimate conversations. Both interests are of the highest order, with perhaps some primacy for family papers. [FN27] Cf. Moore v. City of East Cleveland, supra, 431 U.S., at 499, 97 S.Ct., at 1935- 1936.

FN27. The Court's refusal to afford constitutional protection to such commerciai matters as bank records, California Bankers Assn. v. Shultz, 416 U.S. 21, 94 S.Ct. 1494, 39 L.Ed.2d 812 (1974), or drug prescription records, Whalen v. Roe, 429 U.S. 589, 97 S.Ct. 869, 51 L.Ed.2d 64 (1977) only serves to emphasize the importance of truly private papers or communications, such as a personal diary or family correspondence. These private papers lie at the core of First and Fourth Amendment interests.

Title I thus touches directly on what Mr. Justice Powell once referred to as the 'intimate areas of an individual's personal affairs,' California Bankers Assn. v. Shultz, 416 U.S. *530 21, 78, 94 S.Ct. 1494, 1526, 39 L.Ed.2d 812 (1974) (concurring opinion). The papers in both of these areas family and political decisionmaking are of the most private nature, enjoying the highest status under our law. Mr. Justice Brennan recently put it this way: 'Personal letters constitute an integral aspect of a person's private enclave.' Fisher v. United States, 425 U.S. 391, 427, 96 S.Ct. 1569, 1588, 48 L.Ed.2d 39 (1976) (concurring in judgment). An individual's papers, he said, are 'an extension of his person.' Id., at 420, 96 S.Ct., at 1585. Mr. Justice Marshall made the same point: 'Diaries and personal letters that record only their author's personal thoughts lie at the heart of our sense of privacy.' Couch v. United States, 409 U.S. 322, 350, 93 S.Ct. 611, 626, 34 L.Ed.2d 548 (1973) (dissenting opinion). In discussing private papers, he referred even more emphatically to the 'deeply held belief on the part of the Members of this Court throughout its history that there are certain documents no person ought to be compelled to produce at the Government's request.' Fisher v. United States, supra, 425 U.S., at 431-432, 96 S.Ct., at 1591 (emphasis supplied) (concurring in judgment). This echoes Lord Camden's oft- quoted description of personal papers as a man's 'dearest property.' Boyd v. United States, 116 U.S. 616, 628, 6 S.Ct. 524, 531, 29 L.Ed. 746 (1886).

One point emerges clearly: The papers here involve the most fundamental First and Fourth Amendment interests. Since the Act asserts exclusive Government custody over all papers of a former President, the Fourth Amendment's prohibition against unreasonable searches and seizures is surely implicated. [FN28] Indeed, where papers or books are the subject *531 of a government intrusion, our cases uniformly hold that the Fourth Amendment prohibition against a general search requires that warrants contain descriptions reflecting 'the most scrupulous exactitude . . .,' Stanford v. Texas, 379 U.S. 476, 485, 85 S.Ct. 506, 511, 13 L.Ed.2d 431 (1965). Those cases proscribe general language in a warrant or a statute of 'indiscriminate sweep . . ..' Id., at 486, 85 S.Ct., at 512. Title I, commanding seizure followed by permanent control of all materials having 'historical or commemorative value,' evidences the 'indiscriminate sweep' we have long denounced. This 'broad broom' statute provides virtually no standard at all to guide the Government agents combing through the papers; the agents are left to roam at large through confidential materials, something to which no other President and no Member of Congress or of the Judicial Branch has been subjected.

FN28. The fact that GSA initially secured possession of the Presidential papers through the agreement with the former President does not change the fact that the agency was commanded by Congress to take exclusive custody of and retain all Presidential historical materials. Moreover, everyone admits that the Act contemplates a careful screening process by Government agents. The fact that the governmental intrusion is noncriminal in nature does not, of course, render the Fourth Amendment's prohibitions inapplicable. See South Dakota v. Opperman, 428 U.S. 364, 96 S.Ct. 3092, 49 L.Ed.2d 1000 (1976).

**2835 The Court, while recognizing that Government agents will necessarily be reviewing the most private kinds of communications covering a period of five and one-half years, tells us that Stanford is inapposite. Several reasons are given. The Court suggests that, unlike the instant case, the seizure in Stanford included vast quantities of materials

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unrelated to any legitimate government objective; in addition, the Stanford intrusion constituted an invasion of the home in connection with a criminal investigation. That last consideration relied on by the Court can be disposed of quickly, for by its terms, just as in Stanford, Title I commands seizure and review of papers from appellant's private residences within and outside Washington, D. C., s 101(a), for the purpose, among others, of criminal proceedings brought by the Special Prosecutor, s 102(b), and to make the materials available more broadly 'for use in judicial proceedings.' s 104(a)(2). Title I is not needed for this purpose, since a narrowly defined subpoena can accomplish those purposes under United States v. Nixon. Title I is in effect a 'legislative warrant' reminiscent of the odious general warrants of the colonial era.

***532** As to the Court's first consideration, its 'quantity' test is fallacious. The intrusion in Stanford was unlawful not because the State had an interest in only part of many items in Stanford's home, but rather because the warrant failed to describe the objects of seizure with the 'most scrupulous exactitude.' Stanford is not a 'numbers' test, the protection of which vanishes if unprotected materials outnumber protected materials; it is, rather, a test designed to ensure that protected materials are not seized at all. Title I on its face commands that protected materials be seized wherever found including the private residences mentioned reviewed, and returned only if the Government agents decide that certain protected materials lack historical significance. The Act plainly accomplishes exactly what Stanford expressly forbids.

In addition to Fourth Amendment considerations, highly important First Amendment interests pervade all Presidential papers, since they include expressions of privately held views about politics, diplomacy, or people of all walks of life, within and outside this country. Appellant's freedom of association is also implicated, since his recordings and papers will likely reveal much about his relationships with both individuals and organizations. In NAACP v. Alabama, 357 U.S. 449, 462, 78 S.Ct. 1163, 1171-1172, 2 L.Ed.2d 1488 (1958), the Court said:

> 'This Court has recognized the vital relationship between freedom to associate and privacy in one's associations.'

Accordingly, in passing on a statute compelling disclosure of political contributions, the Court, in Buckley v. Valeo, imposed the strict standard of 'exacting scrutiny' because of the significant impact on First Amendment rights.

The fact that the former President was an important national and world political figure obviously does not diminish the traditional privacy interest in his papers. Forced disclosure of private information, even to Government officials, is by no means sanctioned by this Court's decisions, except for ***533** the most compelling reasons. Cf. Whalen v. Roe, 429 U.S. 589, 97 S.Ct. 869, 51 L.Ed.2d 64 (1977). I do not think, for example, that this Court would readily sustain, as a condition to holding public office, a requirement that a candidate reveal publicly membership in every organization whether religious, social, or political. After all, our decision in NAACP v. Alabama, supra, was presumably intended to protect from compelled disclosure members of the organization who were actively involved in public affairs or who held public office in Alabama.

The Court's reliance on Whalen v. Roe, supra, in rejecting appellant's privacy claim is surprising. That case dealt with the State's undoubted police power to regulate dispensing of dangerous drugs, the very use or possession of which the State could forbid. 429 U.S., at 603, and 597 n. 20, 97 S.Ct., at 878 and 875 n. 20. Hence, we had no difficulty whatever in reaching a unanimous ****2836** holding that the public interest in regulating dangerous drugs outweighed any privacy interest in reporting to the State all prescriptions, those reports being made confidential by statute. No personal, private business, or political confidences were involved.

C

In short, a former President up to now has had essentially the same expectation of privacy with respect to his papers and records as every other person. This expectation is soundly based on two factors: first, under our constitutional traditions, Presidential papers have been, for more than 180 years, deemed by the Congress to belong to the President. Congress ratified this tradition by specific Acts: (a) congressional appropriations following authorization to purchase Presidential papers; (b) congressional enactment of a nonmandatory system of Presidential libraries; and (c) statutes permitting, until 1969, a charitable-contribution deduction for papers of Presidents donated to the United States or to nonprofit institutions.

***534** Second, in the absence of any legislation to the

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contrary, there was no reason whatever for a President to take time from his official duties to ensure that there was no 'commingling' of 'public' and 'private' papers. Indeed, the fact that the former President commingled Presidential and private family papers, absent any then-existing laws to the contrary, points strongly to the conclusion that he did in fact have an expectation of privacy with respect to both categories of papers.

On the basis of this Court's holdings, I cannot understand why the former President's privacy interests do not outweigh the generalized, undifferentiated goals sought to be achieved by Title I. Without a more carefully defined focus, these legislative goals do not represent 'paramount Government interests,' nor is this particular piece of legislation needed to achieve those goals, even if we assume, arguendo, that they are of a 'compelling' or 'overriding' nature. But even if other Members of the Court strike the balance differently, the Government has nonetheless failed to choose narrowly tailored means of carrying out its purposes so as not unnecessarily to invade important First and Fourth Amendment liberties. The Court demanded no less in Buckley v. Valeo, and nothing less will do here. Cf. Hynes v. Mayor of Borough of Oradell, 425 U.S. 610, 620, 96 S.Ct. 1755, 1760, 48 L.Ed.2d 243 (1976).

The federal appellees point to two factors as mitigating the effects of this admitted intrusion: first, in their view, most of the President's papers and conversations relate to the business of Government, rather than to personal, family, or political matters; second, it is said that the intrusion is limited as much as possible, since the review will be carried out by specially trained Government agents.

Even accepting the Government's interest in identifying and preserving governmentally related papers in order to preserve them for historical purposes, that interest cannot justify a seizure and search of all the papers taken here. ***535** Since compulsory review of personal and family papers and tape recordings is an admittedly improper invasion of privacy, no constitutional principle justifies an intrusion into indisputably protected areas in order to carry out the 'generalized' statutory objectives.

Second, the intrusion cannot be saved by the credentials, however impeccable, of the Government agents. The initial problem with this justification is that no one knows whether these agents are, as the federal appellees contend, uniformly discreet. Despite the lip service paid by the District Court and appellees to the record of archivists generally, there is nothing before us to justify the conclusion that each of the more than 100 persons who apparently will have access to, and will monitor and examine, the materials is indeed reliably discreet.

The Act, furthermore, provides GSA with no meaningful standards to minimize the extent of intrusions upon appellant's privacy. We are thus faced with precisely the same standardless discretion vested in governmental officials which this Court has ****2837** unhesitatingly struck down in other First Amendment areas. See, e.g., Hynes v. Mayor of Borough of Oradell, supra. In the absence of any meaningful statutory standards, which might help secure the privacy interests at stake, I question whether we can assume, as a matter of law, that Government agents will be able to formulate for themselves constitutionally valid standards of review in examining, segregating, and cataloging the papers of the former President.

Nor does the possibility that, had Title I not been passed, appellant would perhaps use Government specialists to help classify and catalog his papers eliminate the objections to this intrusion. Had appellant, like all his recent predecessors, been permitted to deposit his papers in a Presidential library, Government archivists would have been working directly under appellant's guidance and direction, not solely that of Congress or GSA. He, not Congress, would have established standards ***536** for preservation, to ensure that his privacy would be protected. Similarly, he would have been able to participate personally in the reviewing process and could thus assure that any governmental review of purely personal papers was minimized or entirely eliminated. He, not Congress, would have controlled the selection of which experts, if any, would have access to his papers. Finally, and most important, the 'intrusion' would have been consented to, eliminating any constitutional question. But the possibility of a consent intrusion cannot, under our law, justify a nonconsensual invasion. Actual consent is required, cf. Schneckloth v. Bustamonte, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973), not the mere possibility of consent under drastically different circumstances.

Finally, even if the Government agents are completely discreet, they are still Government officials charged with reviewing highly private papers

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and tape recordings. Unless we are to say that a police seizure and examination of private papers is justified by the 'impeccable' record of a discreet police officer, I have considerable difficulty understanding how a compulsory review of admittedly private papers, in which there is no conceivable Governmental interest, by Government agents is constitutionally permissible.

III
Bill of Attainder
A

Under Art. I, s 9, cl. 3, as construed and applied by this Court since the time of Mr. Chief Justice Marshall, Title I violates the Bill of Attainder Clause. In contrast to Title II of Pub.L. 93-526, the Public Documents Act, which establishes a National Study Commission to study questions concerning the preservation of records of all federal officials, Title I commands the Administrator to seize all tape recordings 'involv(ing) former President Richard M. Nixon' and all 'Presidential historical materials of Richard M. Nixon. . . .'

***537** ss 101(a)(1), (b)(1). By contrast with Title II, which is general legislation, Title I is special legislation singling out one individual as the target.

Although the prohibition against bills of attainder has been addressed only infrequently by this Court, it is now settled beyond dispute that a bill of attainder, within the meaning of Art. I, is by no means the same as a bill of attainder at common law. The definition departed from the common-law concept very early in our history, in a most fundamental way. At common law, the bill was a death sentence imposed by legislative Act. Anything less than death was not a bill of attainder, but was, rather, 'a bill of pains and penalties.' This restrictive definition was recognized tangentially in Marbury v. Madison, 1 Cranch 137, 179, 2 L.Ed. 60 (1803), [FN29] but the ****2838** Court soon thereafter rejected conclusively any notion that only a legislative death sentence or even incarceration imposed on named individuals fell within the prohibition. Mr. Chief Justice Marshall firmly settled the matter in 1810, holding that legislative punishment in the form of a deprivation of property was prohibited by the Bill of Attainder Clause:

FN29. 'The constitution declares that 'no bill of attainder or ex post facto law shall be passed.'
'If, however, such a bill should be passed and a person should be prosecuted under it, must the court condemn to death those victims whom the constitution endeavors to preserve?' Marbury v. Madison, 1 Cranch, at 179.

'A bill of attainder may affect the life of an individual, or may confiscate his property, or may do both.' Fletcher v. Peck, 6 Cranch 87, 138, 3 L.Ed. 162. (Emphasis supplied.)

The same point was made 17 years later in Ogden v. Saunders, 12 Wheat. 213, 286, 6 L.Ed. 606, where the Court stated:

'By classing bills of attainder, ex post facto laws, and laws impairing the obligation of contracts together, the ***538** general intent becomes very apparent; it is a general provision against arbitrary and tyrannical legislation over existing rights, whether of person or property.' (Emphasis supplied.)

More than 100 years ago this Court struck down statutes which had the effect of preventing defined categories of persons from practicing their professions. Cummings v. Missouri, 4 Wall. 277, 18 L.Ed. 356 (1867) (a priest); Ex parte Garland, 4 Wall. 333, 18 L.Ed. 366 (1867) (a lawyer). Those two cases established more broadly that 'punishment' for purposes of bills of attainder is not limited to criminal sanctions; rather, '(t)he deprivation of any rights, civil or political, previously enjoyed, may be punishment . . ..' Cummings, supra, at 320.

Mr. Chief Justice Warren pointed out that the Constitution, in prohibiting bills of attainder, did not envision 'a narrow, technical (and therefore soon to be outmoded) prohibition . . ..' United States v. Brown, 381 U.S. 437, 442, 85 S.Ct. 1707, 1711, 14 L.Ed.2d 484 (1965). To the contrary, the evil was a legislatively imposed deprivation of existing rights, including property rights, directed at named individuals. Mr. Justice Black, in United States v. Lovett, 328 U.S. 303, 315-316, 66 S.Ct. 1073, 1079, 90 L.Ed. 1252 (1946), stated:

'(The cases) stand for the proposition that legislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial are bills of attainder prohibited by the Constitution.' (Emphasis supplied.)

The only 'punishment' in Lovett, in fact, was the deprivation of Lovett's salary as a Government employee an indirect punishment for his 'bad'

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associations.

Under our cases, therefore, bills of attainder require two elements: first, a specific designation of persons or groups as subjects of the legislation, and, second, a Garland-Cummings-Lovett-Brown-type arbitrary deprivation, including deprivation ***539** of property rights, without notice, trial, or other hearing. [FN30] No one disputes that Title I suffers from the first infirmity, since it applies only to one former President. The issue that remains is whether there has been a legislatively mandated deprivation of an existing right.

FN30. Title I fails to provide any procedural due process safeguards, either before or after seizure of the Presidential materials. There is no provision whatever permitting appellant to be heard in the decisionmaking process by which GSA employees will determine, with no statutory standards to guide them, whether particular materials have 'general historical value.' No time restraints are placed upon GSA's decisionmaking process, even though this Court has consistently recognized that, when dealing with First Amendment interests, the timing of governmental decisionmaking is crucial. E. g., Freedman v. Maryland, 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965); Marcus v. Search Warrant, 367 U.S. 717, 81 S.Ct. 1708, 6 L.Ed.2d 1127 (1961). Under those holdings, any statute which separates an individual, against his will, from First Amendment protected materials must be strictly limited within a time frame. Title I, in contrast, places no limits with respect to GSA's retention of custody over appellant's papers; three years have already elapsed since seizure of the papers in question.

B

Since George Washington's Presidency, our constitutional tradition, without a single exception, has treated Presidential papers ****2839** as the President's personal property. This view has been congressionally and judicially ratified, both as to the ownership of Presidential papers, Folsom v. Marsh, 9 Fed.Cas. 342 (Mo. 4, 901) (CC Mass.1841) (Story, J., sitting as Circuit Justice), and, by the practice of Justices as to ownership of their judicial papers.

Congress itself has consistently legislated on this assumption. I have noted earlier that appropriation legislation has been enacted on various occasions providing for Congress' purchase of Presidential papers. See Hearing before a Special Subcommittee of the House Committee on Government Operations on H. J. Res. 330, 84th Cong., 1st Sess., 28 (1955). Those hearings led Congress to establish a nonmandatory system ***540** of Presidential libraries, again explicitly recognizing that Presidential papers were the personal property of the Chief Executive. In the floor debate on that measure, Congressman John Moss, a supporter of the legislation, stated: 'Finally, it should be remembered that Presidential papers belong to the President . . ..' 101 Cong.Rec.9935 (1955). Indeed, in 1955 in testimony pertaining to this proposed legislation, the Archivist of the United States confirmed:

> 'The papers of the Presidents have always been considered to be their personal property, both during their incumbency and afterward. This has the sanction of law and custom and has never been authoritatively challenged.' Hearing on H. J. Res. 330, supra, at 32.

Similarly, the GSA Administrator testified:

> 'As a matter of ordinary practice, the President has removed his papers from the White House at the end of his term. This has been in keeping with the tradition and the fact that the papers are the personal property of the retiring Presidents.' Id., at 14. (Emphasis supplied.)

In keeping with this background, it was not surprising that the Attorney General stated in an opinion in September 1974:

> 'To conclude that such materials are not the property of former President Nixon would be to reverse what has apparently been the almost unvaried understanding of all three branches of the Government since the beginning of the Republic, and to call into question the practices of our Presidents since the earliest times.' 43 Op.Atty.Gen. No. 1, pp. 1-2 (1974).

I see no escape, therefore, from the conclusion that, on the basis of more than 180 years' history, the appellant has been deprived of a property right enjoyed by all other Presidents ***541** after leaving office, namely, the control of his Presidential papers.

Even more starkly, Title I deprives only one former President of the right vested by statute in other former Presidents by the 1955 Act the right to have a Presidential library at a facility of his own choosing for the deposit of such Presidential papers as he unilaterally selects. Title I did not purport to repeal the Presidential Libraries Act; that statute remains in effect, available to present and future Presidents, and has already been availed of by former President Ford.

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The operative effect of Title I, therefore, is to exclude, by name, one former President and deprive him of what his predecessors and his successor have already been allowed. This invokes what Mr. Justice Black sain in Lovett, supra could not be constitutionally done:

> 'Those who wrote our Constitution well knew the danger inherent in special legislative acts which take away the life, liberty, or property of particular named persons because the legislature thinks them guilty of conduct which deserves punishment. They intended to safeguard the people of this country from punishment without trial by duly constituted courts.' 328 U.S., at 317, 66 S.Ct., at 1079-1080. (Emphasis supplied.)

But apart from Presidential papers generally, Title I on its face contemplates that even the former President's purely family and personal papers and tape recordings are likewise to be taken into custody for whatever period of time is required for review. Some items, such as the originals of tape recordings of the former President's conversations, ****2840** will never be returned to him under the Act.

I need not, and do not, inquire into the motives of Congress in imposing this deprivation on only one named person. Our cases plainly hold that retribution and vindictiveness are not requisite elements of a bill of attainder. The Court ***542** appears to overlook that Mr. Chief Justice Warren in United States v. Brown, supra, concluded that retributive motives on the part of Congress were irrelevant to bill-of-attainder analysis. To the contrary, he said flatly: 'It would be archaic to limit the definition of punishment to 'retribution." Indeed, he expressly noted that bills of attainder had historically been enacted for regulatory or preventive purposes:

> 'Historical considerations by no means compel restriction of the bill of attainder ban to instances of retribution. A number of English bills of attainder were enacted for preventive purposes that is, the legislature made a judgment, undoubtedly based largely on past acts and associations . . . that a given person or group was likely to cause trouble . . . and therefore inflicted deprivations upon that person or group in order to keep it from bringing about the feared event.' 381 U.S., at 458-459, 85 S.Ct., at 1720.

Under the long line of our decisions, therefore, the Court has the heavy burden of demonstrating that legislation which singles out one named individual for deprivation without any procedural safeguards of what had for nearly 200 years been treated by all three branches of Government as private property, can survive the prohibition of the Bill of Attainder Clause. In deciding this case, the Court provides the basis for a future Congress to enact yet another Title I, directed at some future former President, or a Member of the House or the Senate because the individual has incurred public disfavor and that of the Congress. Cf. Powell v. McCormack, 395 U.S. 486, 89 S.Ct. 1944, 23 L.Ed.2d 491 (1969). As in United States v. Brown, Title I, in contrast to Title II, does 'not set forth a generally applicable rule,' 381 U.S., at 450, 85 S.Ct., at 1715; it is beyond doubt special legislation doing precisely the evil against which the prohibitions of the 'bills of attainder, ex post facto laws, and laws impairing the obligation of contracts . . .' were aimed. Ogden v. Saunders, 12 Wheat., at 286.

***543** The concurring opinions make explicit what is implicit throughout the Court's opinion, i. e., (a) that Title I would be unconstitutional under separation-of-powers principles if it applied to any other President; (b) that the Court's holding rests on appellant's being a 'legitimate class of one,' ante, at 2805; and (c) that the Court's holding 'will not be a precedent.' Ante, p. 2814.

Nothing in our cases supports the analysis or Mr. Justice STEVENS, ibid., Under his view, appellant's resignation and subsequent acceptance of a pardon set him apart as a "legitimate class of one." The two events upon which he relies, however, are beside the point. Correct analysis under the Bill of Attainder Clause focuses solely upon the nature of the measure adopted by Congress, not upon the actions of the target of the legislation. Even if this approach were analytically sound, the two events singled out are relevant only to two possible theories: first, that appellant is culpably deserving of punishment by virtue of his resignation and pardon; or second, that appellant's actions were so unique as to justify legislation confiscating his Presidential materials but not those of any other President. The first point can be disposed of quickly, since the Bill of Attainder Clause was, of course, intended to prevent legislatively imposed deprivations of rights upon persons whom the Legislature thought to be culpably deserving of punishment.

The remaining question, then, is whether appellant's 'uniqueness' permits individualized legislation of the sort passed here. It does not. The point is not that Congress is powerless to act as to exigencies arising during or in the immediate aftermath of a particular

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administration; rather, the point is that Congress cannot punish a particular **2841 individual on account of his 'uniqueness.' If Congress had declared forfeited appellant's retirement pay to which he otherwise would be entitled, instead of confiscating his Presidential materials, it would not avoid the bill-of-attainder prohibition to say that appellant was guilty of unprecedented actions *544 setting him apart from his predecessors in office. In short, appellant's uniqueness does not justify serious deprivations of existing rights, including the statutory right abrogated by Title I to establish a Presidential library.

The novel arguments advanced in the several concurring opinions serve to emphasize how clearly Title I violates the Bill of Attainder Clause; Mr. Justice STEVENS although finding no violation of the Clause, admirably states the case which, for me, demonstrates the unconstitutionality of Title I:

> 'The statute before the Court does not apply to all Presidents or former Presidents. It singles out one, by name, for special treatment. Unlike all former Presidents in our history, he is denied custody of his own Presidential papers; he is subjected to the burden of prolonged litigation over the administration of the statute; and his most private papers and conversations are to be scrutinized by Government archivists. The statute implicitly condemns him as an unreliable custodian of his papers. Legislation which subjects a named individual to this humiliating treatment must raise serious questions under the Bill of Attainder Clause.' Ante, at 2813.

IV

The immediate consequences of the Court's holding may be discounted by some on the ground it is justified by the uniqueness of the circumstances in short, that the end justifies the means and that, after all, the Court's holding is really not to be regarded as precedent. Yet the reported decisions of this Court reflect other instances in which unique situations confronted the Judicial Branch for example, the alleged treason of one of Founding Fathers. United States v. Burr, 25 F.Cas. 187 (No. 14,694) (CC Va.1807). Burr may or may not have been blameless; Father Cummings and Lawyer Garland, in common with hundreds of thousands of others, may have been technically guilty of 'carrying on *545 rebellion' against the United States. But this Court did not weigh the culpability of Cummings, Garland, or of Lovett or Brown in according to each of them the full measure of the protection guaranteed by the literal language of the Constitution. For nearly 200 years this Court has not viewed either a 'class' or a 'class of one' as 'legitimate' under the Bill of Attainder Clause.

It may be, as three Justices intimate in their concurring opinions, that today's holding will be confined to this particular 'class of one'; if so, it may not do great harm to our constitutional jurisprudence but neither will it enhance the Court's credit in terms of adherence to stare decisis. Only with future analysis, in perspective, and free from the 'hydraulic pressure' Holmes spoke of, will we be able to render judgment on whether the Court has today enforced the Constitution or eroded it.

Mr. Justice REHNQUIST, dissenting.

Appellant resigned the Office of the Presidency nearly three years ago, and if the issue here were limited to the right of Congress to dispose of his particular Presidential papers, this case would not be of major constitutional significance. Unfortunately, however, today's decision countenances the power of any future Congress to seize the official papers of an outgoing President as he leaves the inaugural stand. In so doing, it poses a real threat to the ability of future Presidents to receive candid advice and to give candid instructions. This result, so at odds with our previous case law on the separation of powers, will daily stand as a veritable sword of Damocles over every succeeding President and his advisers. Believing as I do that the Act is a clear violation of the constitutional principle of separation of powers, I need not **2842 address the other issues considered by the Court. [FN1]

FN1. While the entire substance of this dissent is devoted to the constitutional principle of separation of powers, and not to the other issues that the Court addresses separately, it seems to me that the Court is too facile in separating appellant's 'privacy' claims from his 'separation of powers' claims, as if they were two separate and wholly unrelated attacks on the statute. The concept of 'privacy' can be a coat of many colors, and quite differing kinds of rights to 'privacy' have been recognized in the law. Property may be 'private,' in the sense that the Fifth Amendment prohibits the Government from seizing it without paying just compensation. A dictabelt tape or diary may be 'private' in that sense, but may also be 'private' in the sense that the Fourth Amendment would prohibit an unreasonable seizure of it even though in making such a seizure the Government agreed to pay for the fair value of the diary so as not to run afoul of the Eminent Domain Clause of the Fifth Amendment. Many states have recognized a common-law 'right of privacy' first publicized in the

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famous Warren and Brandeis article, The Right to Privacy, 4 Harv.L.Rev. 193 (1890). Privileges, such as the executive privilege embodied in the Constitution as a result of the separation of powers, United States v. Nixon, 418 U.S. 683, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974), and the attorney-client privilege, recognized under case and statutory law in most jurisdictions, protect still a different form of privacy. The invocation of such privileges has the effect of protecting the privacy of a communication made confidentially to the President or by a client to an attorney; the purpose of the privilege, in each case, is to assure free communication on the part of the confidant and of the client, respectively.

The Court states, ante, at 2798, that 'it is logical to assume that the tape recordings made in the Presidential offices primarily relate to the conduct and business of the Presidency.' Whatever the merits of this argument may be against a claim based on other types of privacy, it makes crystal clear that the Act is a serious intrusion upon the type of 'privacy' that is protected by the principle of executive privilege. The Court's complete separation of its discussion of the executive-privilege claim from the privacy claim thus enables it to take inconsistent positions in the different sections of its opinion.

The Court's position with respect to the appellant's individual privacy heightens my concern regarding the privacy interest served by executive privilege. In attempting to minimize the Act's impact upon appellant's privacy, the Court concludes that 'purely private papers and recordings will be returned to appellant under s 104(a)(7) of the Act.' Ibid. However, this conclusion raises more questions than answers. Under s 104(a)(7), the return of papers to the appellant is conditioned on their being 'not otherwise of general historical significance.' Given the expansive nature of this phrase, see Tr. of Oral Arg. 39, it is quite conceivable that virtually none of the papers will be returned, and the Court's representation is an empty gesture. See also s 104(a)(6). What is meant by 'purely private papers'? Is a personal letter to or from the President, but concerning the duties of the President considered 'private,' or is a document replete with personal communications, but containing some reference to the affairs of state, 'purely private'? The dictabelts of the President's personal recollections, dictated in diary form at the end of each day, are assumedly private, and are to be returned. See Tr. of Oral Arg. 59. But the dictabelt dictation is also recorded on the voice- activated White House taping system, and those tapes will be retained and reviewed. Hence, appellant's privacy interest will not be served by the return of the dictabelts, and the retention of the tapes will seriously erode Presidential communications, as discussed infra, at 2845-2848. By approaching these issues in compartmentalized fashion the Court obscures the fallacy of its result.

I fully subscribe to most of what is said respecting the separation of powers in the dissent of THE CHIEF JUSTICE. Indeed, it is because I so thoroughly agree with his observation that the Court's holding today is a 'grave repudiation of nearly 200 years of judicial precedent and historical practice' that I take this opportunity to write separately on the subject, thinking that its importance justifies such an opinion.

***546** My conclusion that the Act violates the principle of separation of powers is based upon three fundamental propositions. First, candid and open discourse among the President, his ***547** advisers, foreign heads of state and ambassadors, Members of Congress, and the others who deal with the White House on a sensitive basis is an absolute prerequisite to the effective discharge of the duties of that high office. Second, the effect of the Act, and of this Court's decision upholding its constitutionality, will undoubtedly restrain the necessary free flow of information to and from the present President and future Presidents. Third, any substantial intrusion upon the effective discharge of the duties of the President is ****2843** sufficient to violate the principle of separation of powers, and our prior cases do not permit the sustaining of an Act such as this by 'balancing' an intrusion of substantial magnitude against the interests assertedly fostered by the Act.

***548** With respect to the second point, it is of course true that the Act is directed solely at the papers of former President Nixon. [FN2] Although the terms of the Act, therefore, have no direct application to the present occupant or future occupants of the Office, the effect upon candid communication to and from these future Presidents depends, in the long run, not upon the limited nature of the present Act, but upon the precedential effect of today's decision. Unless the authority of Congress to seize the papers of this appellant is limited only to him in some principled way, future Presidents and their advisers will be wary of a similar Act directed at their papers out of pure political hostility.

FN2. I am not unmindful of the excesses of Watergate, and of the impetus it gave to this legislation. However, the Court's opinion does not set forth a principled distinction that would limit the constitutionality of an Act such as this to President Nixon's papers. Absent such a distinction:

'The emotional aspects of the case make it difficult to decide dispassionately, but do not qualify our obligation to apply the law with an eye to the future as well as with concern for the result in the particular

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case before us.' Brewer v. Williams, 430 U.S. 387, 415, 97 S.Ct. 1232, 1247, 51 L.Ed.2d 424 (1977) (Stevens, J., concurring).

We are dealing with a privilege, albeit a qualified one, that both the Court and the Solicitor General concede may be asserted by an ex-President. It is a privilege which has been relied upon by Chief Executives since the time of George Washington. See, e. g., the dissenting opinion of THE CHIEF JUSTICE, ante, at 2823-2824. Unfortunately, the Court's opinion upholding the constitutionality of this Act is obscure, to say the least, as to the circumstances that will justify Congress in seizing the papers of an ex- President. [FN3] A potpourri of reasons is advanced as to why the Act is not an unconstitutional ***549** infringement upon the principle of separation of powers, [FN4] but the weight to be attached to any of the factors is left wholly unclear.

FN3. Indeed, there is nothing in the Court's logic which would invalidate such an Act if it applied to an incumbent President during his term of office. It is of course not likely that an incumbent would sign such a measure, but a sufficiently determined Congress could pass it over his veto nonetheless.

FN4. In my view, the Court's decision itself, by not offering any principled basis for distinguishing appellant's case from that of any future President, has a present and future impact on the functioning of the Office of the Presidency. Hence the validity of the reasons asserted by the Court for upholding this particular Act is a subject which I find it unnecessary to address in detail. I feel bound to observe, however, that the Court, in emphasizing, e. g., ante, at 2790, the fact that the seized papers are to be lodged with the General Services Administration, an agency created by Congress but housed in the Executive Branch of the Government, relies upon a thin reed indeed.

Control and management of an agency such as the General Services Administration is shared between the incumbent President, by virtue of his authority to nominate its officials, and Congress, by virtue of its authority to enact substantive legislation defining the functions of the agency. But the physical placement of the seized Presidential papers with such an agency does not solve the separation-of-powers problem. The principle of separation of powers is infringed when, by Act of Congress, Presidential communications are impeded because the President no longer has exclusive control over the release of his confidential papers. The fact that this Act places physical custody in the hands of the General Services Administration, rather than a congressional committee, makes little difference so far as divestiture of Presidential control is concerned.

The Court speaks of the need to establish procedures to preserve Presidential materials, to allow a successor President access to the papers of the prior President, to grant the American public historical access, and to rectify the present 'hit-or-miss' approach by entrusting the materials to the expert handling of the archivists. Ante, at 2794-2795. These justifications are equally applicable to each and every future President, and other than one cryptic paragraph, ante, at 2795, the Court's treatment contains no suggestion that Congress might not permissibly ****2844** seize the papers of any outgoing future President. The unclear scope of today's opinion will cause future Presidents and their advisers to be uneasy over ***550** the confidentiality of their communications, thereby restraining those communications.

The position of my Brothers POWELL and BLACKMUN is that today's opinion will not result in an impediment to future Presidential communications since this case is 'unique' [FN5] appellant resigned in disgrace from the Presidency during events unique in the history of our Nation. Mr. Justice POWELL recognizes that this position is quite different from that of the Court. Ante, at 2815-2818. Unfortunately his concurring view that the authority of Congress is limited to the situation he describes does not itself change the expansive scope of the Court's opinion, and will serve as scant consolation to future Presidential advisers. For so long as the Court's opinion represents a threat to confidential communications, the concurrences of Mr. Justice POWELL and Mr. Justice BLACKMUN, I fear, are based on no more than wishful thinking.

FN5. My Brother STEVENS, ante, at 2814, seeks to attribute a similar uniqueness to the precedential value of this case, but his observations are directed to appellant's bill-of-attainder claim, rather than to the separation-of-powers claim.

Were the Court to advance a principled justification for affirming the judgment solely on the facts surrounding appellant's fall from office, the effect of its decision upon future Presidential communications would be far less serious. But the Court does not advance any such justification.

A

It would require far more of a discourse than could profitably be included in an opinion such as this to

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fully describe the pre-eminent position that the President of the United States occupies with respect to our Republic. Suffice it to to say that the President is made the sole repository of the executive powers of the United States, and the powers entrusted to him as well as the duties imposed upon him ***551** are awesome indeed. [FN6] Given the vast spectrum of the decisions ****2845** that confront him Domestic affairs, relationships with foreign powers, direction of the military as Commander in ***552** Chief it is by no means an overstatement to conclude that current, accurate, and absolutely candid information is essential to the proper performance of his office. Nor is it an overstatement to conclude that the President must be free to give frank and candid instructions to his subordinates. It cannot be denied that one of the principal determinants of the quality of the information furnished to the President will be the degree of trust placed in him by those who confide in him. The Court itself, ante, at 2793, cites approvingly the following language of the Solicitor General:

> "Unless he can give his advisers some assurance of confidentiality, a President could not expect to receive the full and frank submission of facts and opinions upon which effective discharge of his duties depends." See Brief for Federal Appellees 33.

The public papers of Dwight D. Eisenhower, who had the advantage of discharging executive responsibilities first as the Commander in Chief of the United States forces in Europe during the Second World War and then as President of the United States for two terms, attest to the critical importance of this trust in the President's discretion:

> 'And if any commander is going to get the free, unprejudiced opinions of his subordinates, he had better protect what they have to say to him on a confidential basis.' Public Papers of the Presidents of the United States: Dwight D. Eisenhower, 1955, p. 674 (1959).

The effect of a contrary course likewise impressed President Eisenhower:

> 'But when it comes to the conversations that take place ***553** between any responsible official and his advisers or exchange of little, mere slips of this or that, expressing personal opinions on the most confidential basis, those are not subject to investigation by anybody; and if they are, will wreck the Government.' Ibid. (Emphasis added.)

There simply can be no doubt that it is of the utmost importance for sensitive communications to the President to be viewed as confidential, and generally unreachable without the President's consent.

FN6. Article II empowers him 'by and with the Advice and Consent of the Senate' to make treaties, to appoint numerous other high officials of the Federal Government, to receive ambassadors and other public ministers, and to commission all the officers of the United States. That Article enjoins him to 'take Care that the Laws be faithfully executed,' and authorizes him to 'give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient.' It is difficult to imagine a public office whose occupant would be more dependent upon the confidentiality of the advice which he received, and the confidentiality of the instructions which he gave, for the successful execution of his duties. This is particularly true in the area of foreign affairs and international relations; in United States v. Curtiss-Wright Corp., 299 U.S. 304, 319, 57 S.Ct. 216, 220-221, 81 L.Ed. 255 (1936), this Court stated:

> 'Not only, as we have shown, is the federal power over external affairs in origin and essential character different from that over internal affairs, but participation in the exercise of the power is significantly limited. In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation. He makes treaties with the advice and consent of the Senate; but he alone negotiates. Into the field of negotiation the Senate cannot intrude; and Congress itself is powerless to invade it. As Marshall said in his great argument of March 7, 1800, in the House of Representatives, 'The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations.' Annals, 6th Cong., col. 613. The Senate Committee on Foreign Relations at a very early day in our history (February 15, 1816), reported to the Senate, among other things, as follows:
>
> "The President is the constitutional representative of the United States with regard to foreign nations. He manages our concerns with foreign nations and must necessarily be most competent to determine when, how, and upon what subjects negotiation may be urged with the greatest prospect of success. For his conduct he is responsible to the Constitution. The committee consider this responsibility the surest pledge for the faithful discharge of his duty. They think the interference of the Senate in the direction of foreign negotiations calculated to diminish that responsibility and thereby to impair the best security for the national safety. The nature of transactions with foreign nations, moreover, requires caution and unity of design, and their success frequently depends on secrecy and dispatch.' U.S. Senate, Reports, Committee on Foreign Relations, vol. 8, p. 24.'

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B

In order to fully understand the impact of this Act upon the confidential communications in the White House, it must be understood that the Act will affect not merely former President Nixon, but the present President and future Presidents. As discussed above, while this Act itself addresses only the papers of former President Nixon, today's decision upholding its constitutionality renders uncertain the constitutionality of future congressional action directed at any ex-President. Thus Presidential confidants will assume, correctly, that any records of communications to the President could be subject to 'appropriation' in much the same manner as the present Act seized the records of confidential communications to and from President Nixon. When advice is sought by future Presidents, no one will be unmindful of the fact that as a result of the uncertainty engendered by today's decision, all confidential communications of any ex-President could be subject to seizure over his objection, as he leaves the inaugural stand on January 20.

And Presidential communications will undoubtedly be impeded by the recognition that there is a substantial probability of public disclosure of material seized under this Act, which, by today's decision, is a constitutional blueprint for future Acts. First, the Act on its face requires that 100-odd Government archivists study and review Presidential papers, ***554** heretofore accessible only with the specific consent of the President. Second, the Act requires that ****2846** public access is to be granted by future regulations consistent with 'the need to provide public access to those materials which have general historical significance . . ..' s 104(a)(6). Either of these provisions is sufficient to detract markedly from the candor of communications to and from the President.

In brushing aside the fact that the archivists are empowered to review the papers, the Court concludes that the archivists will be discreet. Ante, at 2794. But there is no foundation for the Court's assumption that there will be no leaks. Any reviews that the archivists have made of Presidential papers in the past have been done only after authorization by the President, and after the President has had an opportunity to cull the most sensitive documents. It strikes me as extremely naive, and I daresay that this view will be shared by a large number of potential confidants of future Presidents, to suppose that each and every one of the archivists who might participate in a similar screening by virtue of a future Act would remain completely silent with respect to those portions of the Presidential papers which are extremely newsworthy. The Solicitor General, supporting the constitutionality of the Act, candidly conceded as much in oral argument:

> 'Question: . . . I now ask you a question that may sound frivolous, but do you think if a hundred people know anything of great interest in the City of Washington, it will remain a secret?
> '(Laughter.)
> 'Mr. McCree: 'MR. JUSTICE POWELL, I have heard that if two people have heard it, it will not.' Tr. of Oral Arg. 46.

It borders on the absurd for the Court to cite our recent decision in Whalen v. Roe, 429 U.S. 589, 97 S.Ct. 869, 51 L.Ed.2d 64 (1977), as a precedent for the proposition that Government officials will invariably ***555** honor provisions in a law dedicated to the preservation of privacy. It is quite doubtful, at least to my mind, that columnists or investigative reporters will be avidly searching for what doctor prescribed what drug for what patient in the State of New York, which was the information required to be furnished in Whalen v. Roe. But with respect to the advice received by a President, or the instructions given by him, on highly sensitive matters of great historical significance, the case is quite the opposite. Hence, at the minimum, today's decision upholding the constitutionality of this Act, mandating review by archivists, will engender the expectation that future confidential communications to the President may be subject to leaks or public disclosure without his consent.

In addition to this review by archivists, Presidential papers may now be seized and shown to the public if they are of 'general historical significance.' The Court attempts to avoid this problem with the wishful expectation that the regulations regarding public access, when promulgated, will be narrowly drawn. However, this assumes that a Presidential adviser will speak candidly based upon this same wishful assumption that the regulations, when ultimately issued and interpreted, will protect his confidences. But the current Act is over two and one-half years old and no binding regulations have yet been promulgated. And it is anyone's guess as to how long it will take before such ambiguous terms as 'historical significance' are definitively interpreted, and as to whether some future Administrator as yet unknown might issue a broader definition. Thus, the public access required by this Act will at the very least engender substantial uncertainty regarding whether future confidential communications will, in fact,

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remain confidential.

The critical factor in all of this is not that confidential material might be disclosed, since the President himself might choose to 'go public' with it. The critical factor is that the determination as to whether to disclose is wrested by the ***556** Act from the President. When one speaks in confidence to a President, he necessarily relies upon the President's discretion not to disclose the sensitive. The President similarly relies on the discretion of a subordinate when instructing him. Thus it is no answer to ****2847** suggest, as does the Court, ante, at 2793-2794, that the expectation of confidentiality has always been limited because Presidential papers have in the past been turned over to Presidential libraries or otherwise subsequently disclosed. In those cases, ultimate reliance was upon the discretion of the President to cull the sensitive ones before disclosure. But when, as is the case under this Act, the decision whether to disclose no longer resides in the President, communication will inevitably be restrained.

The Court, as does Mr. Justice POWELL, seeks to diminish the impact of this Act on the Office of the President by virtue of the fact that neither President Ford nor President Carter supports appellant's claim. Ante, at 2789, 2820 n. 5. It is quite true that President Ford signed the Act into law, and that the Solicitor General, representing President Carter, supports its constitutionality. While we must give due regard to the fact that these Presidents have not opposed the Act, we must also give due regard to the unusual political forces that have contributed to making this situation 'unique.' Ante, at 2816 (POWELL, J., concurring). Mr. Justice POWELL refers to the stance of the current Executive as 'dispositive,' ante, at 2817-2818, and the Court places great emphasis upon it. I think this analysis is mistaken.

The current occupant of the Presidency cannot by signing into law a bill passed by Congress waive the claim of a successor President that the Act violates the principle separation of powers. We so held in Myers v. United States, 272 U.S. 52, 47 S.Ct. 21, 71 L.Ed. 160 (1926). And only last Term we unanimously held in Buckley v. Valeo, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976), that persons with no connection with the Executive Branch of the Government may attack the constitutionality of a law signed by the President on the ***557** ground that it invaded authority reserved for the Executive Branch under the principle of separation of powers. This principle, perhaps the most fundamental in our constitutional framework, may not be signed away by the temporary incumbent of the office which it was designed to protect.

Mr. Justice POWELL'S view that the incumbent President must join the challenge of the ex-President places Presidential communications in limbo, since advisers, at the time of the communication, cannot know who the successor will be or what his stance will be regarding seizure by Congress of his predecessor's papers. Since the advisers cannot be sure that the President to whom they are communicating can protect their confidences, communication will be inhibited. Mr. Justice POWELL'S view, requiring an ex-President to depend upon his successor, blinks at political and historical reality. The tripartite system of Government established by the Constitution has on more than one occasion bred political hostility not merely between Congress and a lameduck President, but between the latter and his successor. To substantiate this view one need only recall the relationship at the time of the transfer to the reins of power from John Adams to Thomas Jefferson, from James Buchanan to Abraham Lincoln, from Herbert Hoover to Franklin Roosevelt, and from Harry Truman to Dwight Eisenhower. Thus, while the Court's decision is an invitation for a hostile Congress to legislate against an unpopular lameduck President, Mr. Justice POWELL'S position places the ultimate disposition of a challenge to such legislation in the hands of what history has shown may be a hostile incoming President. I cannot believe that the Constitution countenances this result. One may ascribe no such motives to Congress and the successor Presidents in this case, without nevertheless harboring a fear that they may play a part in some succeeding case.

The shadow that today's decision casts upon the daily operation of the Office of the President during his entire ***558** four-year term sharply differentiates it from our previous separation-of-powers decisions, which have dealt with much more specific and limited intrusions. These cases have focused upon unique aspects of the operation of a particular branch of Government, rather ****2848** than upon an intrusion, such as the present one, that permeates the entire decisionmaking process of the Office of the President. For example, in Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 72 S.Ct. 863, 96 L.Ed. 1153 (1952) (Steel Seizure Cases), this Court held that the President could not by Executive Order seize steel mills in order to prevent a work stoppage when Congress had provided other methods for dealing with such an eventuality. In Myers v. United States, supra,

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the Court struck down an 1876 statute which had attempted to restrict the President's power to remove postmasters without congressional approval. In Buckley v. Valeo, supra, the Court struck down Congress' attempt to vest the power to appoint members of the Federal Election Commission in persons other than the President.

To say that these cases dealt with discrete instances of governmental action is by no means to disparage their importance in the development of our constitutional law. But it does contrast them quite sharply with the issue involved in the present case. To uphold the Presidential Recordings and Materials Preservation Act is not simply to sustain or invalidate a particular instance of the exercise of governmental power by Congress or by the President; it has the much more far-reaching effect of significantly hampering the President, during his entire term of office, in his ability to gather the necessary information to perform the countless discrete acts which are the prerogative of his office under Art. II of the Constitution.

C

It thus appears to me indisputable that this Act is a significant intrusion into the operations of the Presidency. I do not think that this severe dampening of free communication ***559** to and from the President may be discounted by the Court's adoption of a novel 'balancing' test for determining whether it is constitutional. [FN7] I agree with the Court that the three branches of Government need not be airtight, ante, at 2790, and that the separate branches are not intended to operate ***560** with absolute independence. United States v. Nixon, 418 U.S. 683, 707, 94 S.Ct. 3090, 3107, 41 L.Ed.2d 1039 (1974). But I find no support in the Constitution or in our cases for the Court's ****2849** pronouncement that the operations of the Office of the President may be severely impeded by Congress simply because Congress had a good reason for doing so.

FN7. As a matter of original inquiry, it might plausibly be claimed that the concerns expressed by the Framers of the Constitution during their debates, and similar expressions found in the Federalist Papers, by no means require the conclusion that the Judicial Branch is the ultimate arbiter of whether one branch has transgressed upon powers constitutionally reserved to another. It could have been plausibly maintained that the Framers thought that the Constitution itself had armed each branch with sufficient political weapons to fend off intrusions by another which would violate the principle of separation of powers, and that therefore there was neither warrant nor necessity for judicial invalidation of such intrusion. But that is not the way the law has developed in this Court.

Marbury v. Madison, 1 Cranch 137, 2 L.Ed. 60 (1803), not only established the authority of this Court to hold an Act of Congress unconstitutional, but the particular constitutional question which it decided was essentially a 'separation of powers' issue: whether Congress was empowered under the Constitution to expand the original jurisdiction conferred upon this Court by Art. III of the Constitution.

Any argument that Marbury is limited to cases involving the powers of the Judicial Branch and that the Court had no power to intervene in any dispute relating to separation of powers between the other two branches has been rejected in Myers v. United States, 272 U.S. 52, 47 S.Ct. 21, 71 L.Ed. 160 (1926); Humphrey's Executor v. United States, 295 U.S. 602, 55 S.Ct. 869, 79 L.Ed. 1611 (1935); and Buckley v. Valeo, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976). In so doing, these cases are entirely consistent with the following language from United States v. Nixon:

'In the performance of assigned constitutional duties each branch of the Government must initially interpret the Constitution, and the interpretation of its powers by any branch is due great respect from the others. The President's counsel, as we have noted, reads the Constitution as providing an absolute privilege of confidentiality for all Presidential communications. Many decisions of this Court, however, have unequivocally reaffirmed the holding of Marbury v. Madison, 1 Cranch 137, 2 L.Ed. 60 (1803), that '(i)t is emphatically the province and duty of the judicial department to say what the law is.' Id., at 177.' Id., at 703, 94 S.Ct. at 3105.

Surely if ever there were a case for 'balancing.' and giving weight to the asserted 'national interest' to sustain governmental action, it was in the Steel Seizure Cases, supra. There the challenged Presidential Executive Order recited, without contradiction by its challengers, that 'American fighting men and fighting men of other nations of the United Nations are now engaged in deadly combat with the forces of aggression in Korea'; that 'the weapons and other materials needed by our armed forces and by those joined with us in the defense of the free world are produced to a great extent in this country, and steel is an indispensable component of substantially all of such weapons and materials'; and that a work stoppage in the steel industry 'would immediately jeopardize and imperil our national defense and the defense of those joined with us in resisting aggression, and would add to the continuing

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danger of our soldiers, sailors, and airmen engaged in combat in the field.' 343 U.S., at 590-591, 72 S.Ct., at 868 (App. to opinion). Although the 'legislative' actions by the President could have been quickly overridden by an Act of Congress, id., at 677, 72 S.Ct., at 933-934 (Vinson, C.J., dissenting), this Court struck down the Executive Order as violative of the separation-of-powers principle with nary a mention of the national interest to be fostered by what could have been characterized as a relatively minimal and temporary intrusion upon the role of Congress. The analysis was simple and straightforward: Congress had exclusive authority to legislate; the President's Executive Order was an exercise of legislative power that impinged upon that authority of Congress, and was therefore unconstitutional. Id., at 588-589, 72 S.Ct., at 867-868. See also Buckley v. Valeo. [FN8]

FN8. For the reasons set forth by THE CHIEF JUSTICE, ante, at 2825-2826, it is clear that the circumstances in United States v. Nixon, involving a narrow request for specified documents in connection with a criminal prosecution, provide no support for the Court's use of a balancing test in a case such as this where the seizure is a broad and undifferentiated intrusion into the daily operations of the Office of the President.

***561** I think that no only the Executive Branch of the Federal Government, but the Legislative and Judicial Branches as well, will come to regret this day when the Court has upheld an Act of Congress that trenches so significantly on the functioning of the Office of the President. I dissent.

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Ms. HOFF. But that decision also said that executive privilege erodes over time. And consequently it reaches a point of diminishing returns, according to that decision.

Mr. KUTLER. And there is nothing said in that opinion also that implies that an incumbent executive branch official must honor that claim. What is so extraordinary here is that, talking about putting things on its head, the present order that exists today provides that if there is any claim of executive privilege, that if upon a claim of executive privilege, anyone were to challenge that, such as a historian or a journalist or forth, that the President and the Department of Justice shall defend the claim. So, in other words, former Presidents don't have any expense of going to court.

Now we all know that Richard Nixon wrote book after book in order to maintain that lawyer habit. But now this is put on its head and the government of the United States will continue to defend former Presidents in the exertion of that privilege.

Ms. HOFF. Putting researchers then in the position of using their money to bring suit against a former President whose suit is being financed by the government.

Mr. REEVES. It is a tremendous disincentive to people who do this for a living, because it is very rare to find anybody who can afford a lawyer in the historic community to sell a house, much less take on the U.S. Government.

Mr. GILMAN. So, and what is your answer? Should the act be amended then to provide a statutory process for consideration of potential executive privilege claims?

Mr. REEVES. I can't answer that. It is a very large step, it seems to me.

Mr. KUTLER. Well, I would just prefer that the language in the current Executive order relating to the extension of executive privilege just be rendered null and void. That is all.

Ms. HOFF. Yes.

Mr. KUTLER. That would be the simplest way, it seems to me.

Ms. HOFF. And that the claim of an incumbent to block opening, for example, of the papers of a former President, should be very definitely limited, either to a time period or at least to review by the Archivist of the United States.

Mr. DALLEK. Under the statute or under this Executive order, as I understand it, a sitting President can override what a past President decides to do about opening his papers, and an incumbent President can say, yes, Mr. Reagan or Mr. Carter has said they can open these papers, but I am not going to permit that. And I find that mind-boggling.

Mr. KUTLER. What we have here is the concurrent veto, which we all know about in terms of 19th Century American history, that Calhoun proposed that if one section didn't like what the other section likes, it was null and void.

Well, President Carter, President Reagan, President George H.W. Bush can want to release something, but the incumbent can say, no, you can't. So, so much for control over one's own papers.

Ms. HOFF. That has actually happened in this last 14 months when the Reagan Library was prepared to open 68,000 Reagan documents which were no longer restricted under the 1978 act, and the Bush administration delayed that opening three times. And yet

when we saw what was opened, there was no national security. There might have been embarrassment in terms of some of the advice that the President was receiving about appointments, personnel matters. But embarrassment is not national security.

Ms. WATSON. Mr. Chairman, on this issue.

Mr. GILMAN. I want to thank our panelists for your analysis.

[The prepared statement of Hon. Benjamin A. Gilman follows:]

BENJAMIN A. GILMAN STATEMENT
ACCESS TO DELIBERATIVE DOCUMENTS HEARING
04-11-02

1

I WANT TO THANK OUR CHAIRMAN ~~BURTON~~ FOR HOLDING THIS HEARING AND FOR VIGOROUSLY PURSUING THIS MATTER WHICH WE SEEM TO UNANIMOUSLY AGREE HAS IMPORTANT CONSEQUENCES FOR FUTURE RELATIONS BETWEEN THE EXECUTIVE BRANCH AND THE LEGISLATIVE BRANCH OF OUR NATION'S GOVERNMENT. INDEED, THE BI-PARTISAN AGREEMENT ON THE ISSUE OF CONGRESSIONAL ACCESS TO DELIBERATIVE DOCUMENTS WHICH WE SAW AT OUR PREVIOUS HEARINGS SHOULD SERVE AS AN UNEQUIVOCAL SIGNAL TO THE ADMINISTRATION THAT THIS IS AN ISSUE WHICH THIS COMMITTEE TAKES QUITE SERIOUSLY.

AT THE HEART OF THE ISSUE IS CONGRESS'

(2)

CONSTITUTIONAL RESPONSIBILITY TO OVERSEE THE OPERATION OF OUR FEDERAL GOVERNMENT. THE ADMINISTRATION'S DECISION TO DENY CERTAIN REQUESTS FOR DELIBERATIVE DOCUMENTS BY THIS COMMITTEE PERTINENT TO THE FBI'S HANDLING OF THE BOSTON MAFIA CASE MAY BE CONSTRUED AS A DIRECT CHALLENGE TO THAT RESPONSIBILITY. THIS IS PARTICULARLY TROUBLING IN LIGHT OF THE SALVATI CASE WHICH IS ONE OF MOST EGREGIOUS MISCARRIAGES OF JUSTICE IN THE HISTORY OF OUR NATION.

WHILE THIS DOES NOT NECESSARILY SUGGEST THAT THE JUSTICE DEPARTMENT IS DELIBERATELY OR WILLFULLY COVERING UP PAST MISCONDUCT, IT IS DIFFICULT NOT TO INFER THAT SUCH A POLICY MAY BE EMPLOYED TO CONCEAL ACTUAL OR PERCEIVED

UNPROFESSIONAL BEHAVIOR AT THE DEPARTMENT. ACCORDINGLY, THIS COMMITTEE HAS STRONGLY ADVISED THE JUSTICE DEPARTMENT TO REVIEW AND REVISE THIS HIGHLY QUESTIONABLE POLICY SHIFT IN ORDER TO ACCOMMODATE THIS COMMITTEE'S RIGHT TO ACCESS .

I AM CERTAIN THAT THIS COMMITTEE WOULD BE WILLING TO WORK WITH THE ADMINISTRATION TO REACH A SATISFACTORY SOLUTION TO THIS PROBLEM IF IT DISPLAYS A MORE FLEXIBLE ATTITUDE ON THIS POINT. WELCOME THE COMMENTS FROM THE DISTINGUISHED HISTORIANS SEATED BEFORE THIS COMMITTEE TODAY AND I TRUST THEY WILL ILLUMINATE OUR POSITION WITH PERTINENT AND HISTORICAL CASES OF CONGRESSIONAL ACCESS TO PRESIDENTIAL DOCUMENTS .

Mr. HORN. The Q and A to the distinguished new Member of the House from California, Diane Watson.

Mr. GILMAN. Mr. Chairman, may I insert in the record an opening statement?

Mr. HORN. Yes. It will be put in at the beginning as if read.

Mr. GILMAN. Thank you.

Ms. WATSON. Mr. Chairman, as I understand, there is a bill ready to be introduced by Waxman, Burton——

Mr. HORN. Yes. It is my bill.

Ms. WATSON. I just wanted to know, would this solve the problem, and do you know of the bill, the chairman's bill, Mr. Horn? I think it gets to the points that you are raising. I would hope that you would elaborate on it, Mr. Chairman.

Mr. HORN. We have three or four Members that want to question, and we have a vote, so we are going to have to take a recess, if you can stay. And we will go vote, and when we end the recess, which will be about 15 minutes, to be over and back, and we will be chaired by Mr. Ose, the distinguished member of our committee and the chairman of Regulatory Affairs. We are in recess.

[Recess.]

Mr. OSE [presiding]. I am going to reconvene this meeting. I want to thank the witnesses for hanging with us. I apologize for the delay. I will claim the time, there being no other members.

First of all, for each of you, anybody who has any input on this, of the 68,000 documents withheld for over a year, all but 150 pages have now been released under the new order. Doesn't that sort of moot the criticism that you are registering on the new order? Mr. Kutler.

Mr. KUTLER. No, I don't think so. First of all, I assume you have seen the list of what was withheld? There is a list.

Mr. OSE. All right.

Mr. KUTLER. It is a very promising list, because it promises to reveal internal debates over appointments and so forth, which is really, you know, in our understanding of how you make appointments and so forth is very, very important. There are people, for example, Clarence Thomas, that are mentioned in this, that obviously there is concern about protecting him.

But I don't think it changes anything. I mean, it is clear that none of this is stated on the basis of national security. That was the first thing that struck me. It was all on the basis of confidential advice.

So, you know, I take it back for 1 second to the Nixon stuff. When the first great release occurred in April 1987, 150,000 pages were withheld, and we were given a list of everything that was withheld at the time. And it was the strangest thing. It was—I mean, there was things that—about Mrs.—President Nixon's remarks to the Davis Cup team, Mrs. Nixon's garden party and so forth, which is strange. Why withhold that? But then as you ran further down the list, there was, for example, H.R. Haldeman's file on the 1972 Presidential campaign.

Well, the 1972 Presidential campaign clearly involved the Watergate matter in some significant ways. But the whole file was withheld on the basis of personal political, so, you know, the material was—seemed to be very, very significant. And that seems so here.

So I don't think that moots the matter at all.

Mr. REEVES. You say it seems significant, the new material.

Well, I would say that I thought that it kind of was not mitigating because the material—not that I have seen every page of it, but I have seen a lot of pages of it, was not—was barely questionable to be withheld. The 150 pages that are still not let go are some sort of internal papers on judges, potential judges and whatnot. They undoubtedly have, if they are candid, they undoubtedly have some things which might be private. But the rest of the stuff doesn't seem to me to rise to any test of need to be reviewed because, in the first case, the President saw almost none of this. These are internal memos between people within the White House. So that it was—it may have evolved into advice to the President, but it isn't in these pages. The President is barely in these pages.

Mr. DALLEK. What I find troubling about it is that one is gratified that so much of the material has now been released and there are only some 150 pages that remain, but I think it is the principle that is at stake here. Are we going to have to fight and scrap every inch of the way in order to get materials open, and then 2 years, 3 years later the White House concedes, fine, we will open 90 percent of it? See, I mean, I think the shoe needs to be on the other foot.

Mr. OSE. It actually looks like 99.8 percent.

Mr. DALLEK. Right. But we had to battle to get this.

Ms. HOFF. These postponements can be important in terms of your own personal research and in terms of the issue involved. I think that should be taken into consideration, especially when the postponement turned out to have really no basis in reality with respect to either privacy or policy or national security.

Mr. OSE. Well, let me, if I might then, just kind of go backup the chain on this particular issue and ask the question: Was the Reagan Executive order adequate or sufficient to protect the claims of privilege by former Presidents?

Ms. HOFF. As a nonlawyer, my opinion of that was when he issued it at the very end of his second term, that it did perhaps open a kind of can of worms with respect to former Presidents making claims of executive privilege long after they are out of office. And since that wasn't challenged or, in this case, codified until now, I don't think I gave it much thought other than it seemed to me to open a door that perhaps would cause a former President long out of office to decide that somehow his papers—some papers reflected a need to be protected by a claim of national security when he might not be basically informed, well informed about what national security was 12 years later.

Mr. REEVES. Can I read you an example of what the point I hoped to make about whether this stuff was that sensitive at all. This is a 1987—this is one of the things that was just released. It is a 1987 memo to Howard Baker, who was then chief of staff, from Gary Bower. It was about, as we recall the stock market crash of 1987, that this is what they felt they had to review to see if it involved national security when it had been once passed already.

It is not sufficient for the President—this doesn't go to the President, it only goes to Baker. It is—and the President hasn't seen it, at least since his initials aren't on it. They usually are.

"It is not sufficient for the President to only say that this is not 1929 if the economy is good. I have attached President Hoover's statement after the October crash. You will note that it is exactly what Reagan said. We do not need to give the press and liberals another quote parallel to draw between then and now. The Democrats are on the floor now making the Hoover/Reagan connection. We must move quickly," underlined, "before the connection gets settled in the mind of the average citizen."

I would argue that doesn't fit any of the criteria for papers that should not be released.

Mr. OSE. That existed under the Reagan Executive order, or under the new order?

Mr. REEVES. Under the new.

Mr. OSE. Mr. Dallek, anything to offer?

Mr. DALLEK. No.

Ms. HOFF. It would also have been restricted under the 1978 act.

Mr. OSE. Right.

Mr. REEVES. Could have been. This piece could have been.

Ms. HOFF. No, I am saying that couldn't have been. If that act were applied evenhandedly, no, it couldn't have been.

Mr. OSE. Finally, if I might. This is my final question. That is, do you think a statutory procedure that directs how an incumbent President shall evoke executive privilege intrudes too much on Presidential prerogatives? In other words, if the Congress says you have to follow this process to invoke it, is that too much of an intrusion from the legislative branch into the legislative branch?

Mr. DALLEK. You mean on past?

Mr. OSE. On executive privilege claims.

Mr. DALLEK. About past Presidential materials, not current?

Mr. OSE. OK. Past. That is fine.

Mr. KUTLER. OK. To answer your question, no, I don't think so. I don't think that would be any intrusion whatsoever. Again, I think that this involves extending the executive privilege argument far beyond the confines of the incumbent administration whoever it is.

So I don't see why that is an—how in any way that is an intrusion upon the President's power, if the former President has no objection to it. Now, you can say, well, the former President may not know and may not appreciate the state of national security at this moment. I find that hard to believe, because I am assuming that past practice continues to this very day, where former Presidents are regularly briefed by the CIA and whoever does the briefing. I mean, that has been the practice for about the last 40 years. I think it goes back to when Eisenhower became President, and did this with Truman. And succeeding Presidents have done the same. So it seems to me unlikely that a former President would have no appreciation of what is a national security matter today.

Mr. REEVES. Was that responsive to your question? I mean, I understood the question differently and, in fact, would take a different side. That is, since executive privilege is often a contest between the executive and legislative branch, it would be an intrusion for the legislative branch to be able to set firm rules as to what——

Mr. OSE. But the executive could certainly veto any such legislation.

Mr. REEVES. Yes. No. I think it should be an ongoing negotiation which could include vetoes or anything else. But I don't think that the law or anybody else would be helped if the Congress had the power, if they could sustain the power to define what executive privilege is. If I understood the question.

Mr. KUTLER. Well, executive privilege is a doctrine that emerges by deduction. It is not out of the Constitution. It is not out of statute. It is not out of anything. It is something that comes up from time to time. And feelings toward it are governed by the exigencies of the moment.

Now if you were to do this in a statutory sense as you are proposing, I am sure that the President would, with your cooperation, your consent, continue to exert executive privilege in certain other matters. You are saying that this is one we find no constitutional, no statutory or logical authority for. That is all.

Ms. HOFF. As long as the legislation applies to Presidential papers, and as long as, if I am reading it correctly, it does specifically indicate that there will be a time limit on both the former Presidents' claims to privilege and the incumbent President's claim to this privilege, this can't go on indefinitely. That was, I think, a defect of the Reagan order, a flaw in the Reagan Executive order, that it did not place a time limit on these claims of either the privacy or national security with respect to former Presidents and Presidents.

The time limit, I think, is essential. And I don't think that would constitute an unnecessary congressional invasion of Presidential prerogative.

Mr. KUTLER. Which you do well in this legislation, the time limit. No. I think it is very reasonable, very fair.

Mr. DALLEK. As I understand it, the executive privilege is in the service of the effective functioning of the Presidency. And I think if you are trying to extend executive privilege to past Presidential materials, I don't see the logic of it. What I understand is that you want to defend national security against intrusion. You want to defend privacy rights against intrusion. But I am hard-pressed to understand why executive privilege claims would still operate in relation to past Presidential activity. That individual is no longer President of the United States. His functioning as President is no longer going to be—because I assume that you are talking about quite specific things. You are not talking about some general principle as to the functioning of the Presidency. But quite specific instances in which the President is eager to maintain control of information, of his communications between himself and particular aides.

And so I find extending executive privilege to past Presidential materials as something that I am not very sympathetic to or sympathetic to at all.

Mr. OSE. Do any of you have any comments or suggestions on our bill to amend the Presidential Records Act beyond what has already been covered in your testimony, both written and oral? Mr. Kutler.

Mr. KUTLER. Yes. I have one.

Mr. OSE. We are going to open the door for you here. Don't leave this room and say we didn't give you a chance.

Mr. KUTLER. One little one, Congressman. I am not quite clear that this is stated in the proposed bill. But one of the most disturbing things to me, because I have been through this, is the idea that the former President will be extended legal counsel by the Department of Justice. That is not a very level playing field.

Mr. OSE. In terms of financing the cost of any litigation?

Mr. KUTLER. Right. And that is new in this Executive order. That is new. That was proposed. And I would hope that would be removed or specifically opposed, however you want to do it. But I really think that there is a level playing field that is at stake in this.

Mr. OSE. All right. Anybody else?

Ms. HOFF. I thought the current legislation does that, though. Doesn't the proposed legislation?

Mr. OSE. The current Executive order extends the financial. I don't believe the Horn legislation includes the financing of defense. It is being whispered in my ear here ever so eloquently that the Horn legislation would, in effect, repeal the Executive order and thereby remove the financial protection.

Ms. HOFF. It would also then remove the necessity for the researcher to go to court to sue for these records. Yes.

Mr. KUTLER. Well, if the overturning of the order does that, then fine.

Mr. OSE. OK. Fine.

Ms. HOFF. These are the two key provisions, I think, with respect to the average researcher that—the reversal of the burden of proof simply would kill historical research for all intents and purposes because we normally as researchers don't have financial backing to bring suit.

Mr. OSE. All right. I think that concludes our hearing. I want to thank the witness for joining us today. I appreciate you all taking the time. It has been very informative. I know that Chairman Horn is intent on pursuing this, as are many of his colleagues on both sides of the aisle. Your comments and insights will be incorporated into our deliberation. We thank you for coming. We are adjourned.

[Whereupon, at 4:40 p.m., the committee was adjourned.]

[The prepared statement of Hon. Constance A. Morella, Hon. Elijah E. Cummings, and additional information submitted for the hearing record follows:]

Access to Presidential Records

On Jan. 20, 2001, former President Ronald Reagan's papers were to be the first complete set of publicly available documents about the workings of a presidential administration released under the Presidential Records Act (PRA). But shortly after taking office, the newly elected Bush administration delayed the release in order to "review" the issue. The release was delayed two additional times over a number of months and then on Nov. 1, 2001, Bush signed Executive Order 13233, which effectively takes control of the papers away from archivists and returns it to the incumbent and former presidents. It also allows for the family or designated representatives of a former president to restrict the release of his records and extends the same executive privilege to vice presidents to control their own records.

Historians, archivists, legislators and the public have all expressed concerns that this executive order not only violates the PRA but will also significantly inhibit and delay the release of future records.

Unfortunately, this action by the Bush Administration is another instance of what now seems to be an obsession with secrecy. Examples include the withholding of information relating to the Energy Task Force, the refusal of the Justice Department to release deliberative documents on a 30 year old case involving gross misconduct by the FBI, and a recent memorandum by the Attorney General urging government agencies to legally resist FOIA request whenever possible.

In fact, this refusal to release public information is a continuation of efforts President Bush first begun as Governor of Texas. Presently, the President is embroiled in a case involving his own papers from when he was governor of Texas. In 1997, then Governor Bush had a bill passed that altered the policy on who could receive gubernatorial papers. After his term, he deposited those papers in his father's presidential library, which is administered by the National Archives and Records Administration and not subject to the state's open records law. The Texas Attorney General is currently working on an opinion of the matter.

While I understand the need that sensitive information, especially pertaining to national security, be kept confidential for a certain period of time, I echo the sentiments of the Supreme Court when it observed that "there has never been an expectation that the confidences of the Executive Office are absolute and unyielding...The expectation of the confidentiality of executive communications thus has always been limited and subject to erosion over time after an administration leaves office."

I welcome the expert testimony today of Mr. Dallek, Reeves, Kutler, and Hoff as they will be able to shed light on the possible historical ramifications of Executive Order 13223 and I yield back the balance of my time.

Statement of the Honorable Elijah Cummings
Full Committee Hearing
entitled,
The Importance of Access to Presidential Records: The Views of Historians

April 11, 2002

Thank you, Mr. Chairman,

We are here today to discuss a very important issue: the impact of Presidential Executive Order 13233 and what future effect it is likely to have on the extent and timing of the release of a former President's official duty records.

The Presidential Records Act of 1978 was enacted following Watergate. It stated that the records of a former President's official duties belong to the American people and it gave the Archivist of the United States custody of those records. The law was designed to ensure that the papers and tapes of presidents could not be permanently excluded from the public.

Former President Ronald Reagan later issued an Executive Order that established a process for the release of presidential records by the National Archives and Records Administration. However, on November 1, 2001, President Bush issued

an Executive Order restricting access to presidential records, thus nullifying President Reagan's previous Executive Order.

Mr. Chairman, I agree with one of today's witnesses, Dr. Stanley Kutler, when he said that, if the Executive Order of President Bush stands, then the President will substantially shut down historical research of recent presidents. Such a change will be a detriment not only to the future release of presidential records but would impede historical research.

This Executive Order is only one of a string of recent actions by the Bush Administration that limits the public access. The Administration has denied access to records of the energy task force, corrected census data, and documents relating to closed FBI cases in Boston. Earlier today, members of this committee meet with Governor Tom Ridge to discuss homeland security. Although I appreciate the briefing, I believe that the meeting should have been open to the public. The closed briefing is the latest example of the Administration restriction of information. This practice does not lead to open discussions and hinders the policy making process. The Bush Administration is quickly developing a reputation of restricting public access to information.

Mr. Chairman, I am pleased to join you, Ranking Member Waxman, Chairman Horn, Ranking Member Schakowsky, and other members of this committee in introducing legislation to amend the Presidential Records Act. This legislation would not only invalidate President Bush's Executive Order concerning presidential records, it would require judicial review of a former president's assertion of executive privilege, clarify that claims of executive privilege can only be made by former presidents, and that former vice presidents cannot exert executive privilege.

I look forward to hearing the historians on today's panel regarding the efforts of the Bush Administration to restrict access to presidential records.

Thank you.

ON PRESIDENTIAL RECORDS

When "The Unanimous Declaration of the Thirteen United States of America" was distributed on July 4,1776, its fourth complaint against the King of Great Britain read: "He has called together legislative bodies at places unusual,uncomfortable and distant from the depository of their Public Records, for the sole purpose of fatiguing them into compliance with his measures."

On November 1 of last year, President Bush signed Executive Order 13233, a document that clearly reversed recent trends toward openness in Presidential Records -- elevating Executive Privilege over the Public's Right to Know. My reaction was to send him copies of my books on President Kennedy and President Nixon. I said that they might be worth something some day as artifacts because it would be impossible to write them under his new order. I also enclosed a copy of a letter I had received from his father, George H.W. Bush, the 41st president. The old man said he thought "President Nixon:Alone in the White House" was an important contribution to history. He added, though, that before he read it he looked in the index to see what was said about him, then said: "It wasn't so bad. They never laid a glove on me -- except for Henry Kissinger always calling me an idiot."

That letter and the books, too, are probably classified by now. Don't want embarrass anyone, do we?

I have been plowing through presidential papers for more than fifteen years and think I have some insight into the thinking of people with power over this kind of information. They do not subscribe to the idea that what people don't know can indeed hurt them. My favorite "find" was an inscription by the Irish writer Brendan Behan in the Kennedy Library, classified for 25 years, apparently because it was on a copy of Evergreen magazine, considered something of a dirty book in those days. Finally getting them to open it, I read:"To my lantsman John Kennedy -- Best, Brendan Behan." Thank goodness, the American people were protected from that.

The fight to see Presidential papers is an old one. Another guy named George, Washington was his last name, took his papers home to Mount Vernon, thinking they were nobody's business but his, and he was outraged that members of Congress wanted to see documentation of casualties in the Indian frontier wars of the early Republic. Commenting on that and other presidential notions, James Madison wrote to a friend in 1822:

"A popular government without popular information, or the means of acquiring it,is but a prologue to a farce or a tragedy; or perhaps both. Knowledge will forever govern ignorance; and a people who mean to be their own governors must arm themselves with the power which knowledge gives."

Not everyone agreed. Abraham Lincoln's papers were not opened until 1949. They were considered private property, a legal condition that Richard Nixon changed -- by accident. The abuses of Watergate led to new laws opening papers to scholars,historians, journalists and even ordinary citizens. It is those laws and procedures Bush the younger seems determined to reverse.

To someone like me, those papers are almost self-protecting. First, presidents and their governments have the right and power to exclude most anything on the grounds of national security, executive privilege or personal privacy. Then, there are just too many papers. Even though much was destroyed and more lost, there are 44 million pages of the papers of President Nixon in the National Archives-- and millions more in other repositories -- along with thousands of hours of tape recordings. (There are more than 50 million pages of President Reagan's papers, though the number archived may decrease as Bush the younger or Reagan's heirs and representatives succeed in closing the ones they don't like.)

The biggest problems for presidents and their men are not only the chance of political embarrassment and such, the fact is these are valuable commodities. American officials, paid very little in relation to their power, generally depend on an informal system, scandalous, really, of deferred compensation. They say former President Clinton made $15 million last year -- almost as much as George Stephanapoulus. The documents, as private property, are valuable in the first instance as the second rough draft of history -- if journalism is the first -- the raw material for memoirs. Since Eisenhower, American presidents have copied Winston Churchill, whose credo was: Make the history and then write it yourself before anyone else can. Henry Kissinger was an apt pupil, and one of the amusements of Nixon tapes now being released is that that they show just how very good the good doctor could be in obscuring the truth. Because I had early access to the transcripts of the Kissinger-Chou-Nixon conversations, I knew the deceptive meaning of Kissinger's statement that the future of Taiwan was a minor item in those talks, barely mentioned, he said, and only at the beginning. So it was: the early and only mention was "Taiwan is part of China." So much for American protection of Chaing Kai Shek and his boys. "Okay", said Chou, then we can have a summit. For me, it least, at was a sunny morning when that hidden truth was confirmed by tapes and transcripts released this March -- and Kissinger had to start publicly backtracking on his artful dodging.

The Nixon-Kissinger emphasis on secrecy combined with the Churchill impulse of both men really led to their destruction. Nixon, whose role model was another anti-democratic democratic leader, Charles DeGaulle of France, was detemined to govern by suprise, which he did with brilliant manuevers to circumvent the checks and balances written into the Constitution. Remember his most important initiatives -- the opening to China changing the geopolitics of the world , and the taking the United States off the gold standard to change the economics of the world -- were both taken without a world of public debate or consideration. In each case, he came on television one night and announced what had already happened -- only Kissinger, in the first instance, and Treasury Secretary John Connally in the second, were involved in the planning -- no Congress, no press, no We the People were involved in the process. Nixon's real intent (and abuse of power) was a coup, almost successful, against his own government. He wanted to govern by secret decree -- and damned near did.

But that kind of surprise requires great secrecy and the secrecy requires level upon level of lies. In the end no one, including Nixon himself, knew the truth. He had built a House of Lies that came tumbling down when the first few were revealed. Everyone was spying on everyone else to try to figure out what Nixon was actually doing. The military, under Secretary of Defense Melvin Laird, was tapping White House phones, collecting the garbage in wastebaskets and photographing the papers in Kissinger's briefcase each night. The papers and film were delivered to the Chairmanof the Joint Chiefs, Admiral Thomas Moorer, who had installed a spy in Kissinger's office. It was that stolen material that the Department of Defense used to ignore Nixon orders, lying to him, for

instance, about weather conditions in the Persian Gulf in September of 1970 to avoid implementing his orders for air strikes against Syria and other countries after the simultaneous hi-jacking of five airliners, all headed for the United States, by Palestinians. Nixon grumbled, the military stalled and lied, and the crisis passed.

Scholars, operating on the premise that those who can't find history are prone to repeat it, now know such things because of a great irony: the Nixon papers were so well collected and filed by his chief of staff, H.R. Haldeman, who was a kind of pre-computer organizational genius. He required a written report within 48 hours from anyone who spoke to the President. That Rashomon picture of Nixon -- along with national security documents and devastating political records were collected as the White House Special File in1972. Those were the papers that Nixon wanted moved out or destroyed if he lost the election. Then when Watergate escalated and the FBI seized White House records, what they grabbed was those Special Files -- they got the real stuff. Cabinets were full of the double books of the Cambodian bombing, the financial records on Nixon's illegal contributions including hundreds of thousands of dollars to George Wallace to discourage him from running as an independent in 1972, the lies, the lies, the lies, all filed alphabetically. It was the shock of such revelations that led to the laws Bush would like now to reverse. Post-Nixon, Presidential Papers were no longer personal property. They belonged to the American people.

So, now we live in a new historical reality, although plenty of old tricks still work. Under any system, it is the White House that controls classification involving security, privilege and privacy. And, as Bush is demonstrating, there is always the possibility of post-facto vetting. The best example of that that was in the Kennedy papers. In the early 1970s, The New York Times investigated a rumor that Vice President Spiro Agnew was being ministered to by a New York doctor named Max Jacobson, better known later in tabloids as "Dr. Feelgood", who, it turned out, administered amphetamines to celebrities of all colors and creeds -- including President Kennedy. The Times could prove no Agnew connection, but their questioning around New York led the state medical board to revoke Dr. Jacobson's license to practice. Then, an interesting thing happened in Boston. From the day in 1972 when his name was revealed by The Times, documents bearing Jacobson's name began to disappear from the Kennedy archives -- and none were processed after that. He was being non-personed. Luckily for me, though, earlier airplane manifestos and hotel rosters and private photographs did prove that Jacobson travelled with Kennedy. I was also able to turn up his diary, describing him standing outside the door as Kennedy and Soviet Premier Khrushchev met in Vienna in 1961, ready to shoot up the president if he tired.

No matter what archival system is used, families and former aides will try to protect presidents and their reputation. They will try to create and write their own history and block any outsiders from challenging the official version.. I assume that a desire to protect his dad is one of Bush the younger's scrutiny of Reagan papers. But I believe that is only one of the reasons for Executive Order 13233. The real problem for recent presidents have been papers related to assassinations and assassination attempts. Castro. Diem. Trujillo. Lumumba. Allende. The American people are uncomfortable with the idea of a president signing death warrants before the subjects (targets) are dead. That stopped, I believe, after the1975 Church Committee hearings on the doings of the Central Intelligence Agency. The United States government got out of the assassination business for a time.

Obviously we are back in it, with Osama bin Laden on the top of the list.

Now, at the same time we are tracking down bin Laden, the globalization we cherish, which has done so much for us economically, is having unintended consequences. One of course is global terror. Another is the rise of global law. I don't think President George W. Bush wants to be sitting in a courtroom in the Hague twenty years from now explaining why he signed a National Security directive ordering the summary execution of CIA-identified terrorists. Better to keep the records secret -- or destroy them.

An aside here: We never seem to understand that we are not the only players in the game, and it is our leader who was shot down in 1963. Without enough forethought, we have set up systems to grab a Noriega in Panama or hundreds of alleged Taliban officials or possible terorists in Afghanistan and transport them to face charges before American courts or miltary tribunals. Okay. What do we do if the Vietnamese come to New York and kidnap Bob Kerrey and put him on trial in Hanoi for alleged war crimes?

Back to the mainstream of archives and future history. It is, in fact, almost impossible to destroy records now. The greatest historian, or historical tool of the past half-century, has been the Xerox machine. Now we have the hard drive: can anything really be erased anymore? In writing "President Nixon" I was convinced that new technology could recreate the famous 18-1/2 minute gap on the Nixon tapes. But you need the orginal tape try that experiment, and the government would not let anyone touch that little magnetized strip. I notice now,though, that the National Archives says it is going to try to do the same thing itself.

There are also a hundred other ways to find documents. You can triangulate from existing papers, old journalism and withdrawal slips and new interviews. There comes a moment when you realize there had to be an order....and you go looking for it. Or, someone tells you, "You know I meant to donate my papers, but I never got around to it. They're in the garage. Do you want to take a look?" One critical source for "President Kennedy", offered to allow me to stay in his office as long as I wanted to, overnight even, to read his handwritten notes of the Eisenhower-Kennedy transition in 1961. And in these days of special prosecutors, and criminal and civil investigations of White House doings, there are court records. Much of what I discovered about Watergate did not come from Justice Department and FBI archives sanitized with black ink blots covering names and key phrases. There were sparkling clean copies of the same documents in the courthouse across the street. Thank you again, Xerox.

An example: In doing the Nixon book, I interviewed a lawyer and literary agent named Arthur Klebanoff, whom I had first met as a young assistant to Daniel Patrick Moynihan in 1970.
After we finished talking about how the Nixon Domestic Council worked, Art said: " You know I was Bob Haldeman's agent when he wrote 'The Haldeman Diaries'". He then told me that the sections excised for security and privacy in the book (and a CD with additional material) were listed as "Secret" but had never actually been classified by the government. Practically running to the National Archives, I discovered that was true and that no one had even looked at those pages. Suddenly I was reading of Haldeman's role as a buffer between Nixon and Kissinger, with each of them telling him the other one was nuts. Actually it was Kissinger who seemed the hysterical one, telling the President the Russians were about to invade China or land in Cuba -- "If you do nothing, they will call you a weakling,Mr. President,"-- the line usually worked but the invasions seemed unlikely to Nixon. So unlikely, thought Nixon, that he told Haldeman not to let Kissinger back into the Oval Office until he saw a psychiatrist.

I love it. But it takes years. It is something like what I imagine diamond mining to be. You move around the muck and mire for weeks, for months, for years, and then suddenly something sparkles and you look at it. The found gems I remember best were documents from early 1961 indicating that President Kennedy knew in advance that the Berlin Wall was going up -- and that he wanted it up. He sent repeated signals to the Soviets, publicly and privately -- some through a KGB courier named Georgi Bolshakov, whom I tracked down in Moscow -- that what they did on their side of the border was their business, as long as they did not interfere with the inspection rights of the Allied occupiers of West Berlin, the United States, Great Britain and France. We had and retained the right to send officers into East Berlin on observation missions. "Checkpoint Charlie" and all that.

What Kennedy had figured out was that sooner or later, the communists were going to have to take military action to stem the flow of people fleeing from east to west through Berlin. Two thousand a day were walking in, driving in, taking the subway. They were the young,the best and the brightest, engineers, doctors, nurse, looking for a new life in the west. That was Khrushchev's problem. Kennedy's problem was that there were only 15,000 Allied troops in Berlin, surrounded by hundreds of thousands of Red Army troops. To "save" Berlin, or defend West Germany or even all of Europe, Kennedy would have to use nuclear weapons -- and he did not intend to do that.

"Better a wall than a war", he said in private. In public, of course he condemned the wall. He would have been impeached if the truth were known. But, I believe, the wall probably prevented a third World War -- if there were to be another great war in those days, it would not have started in Cuba or Africa, it would have started in Europe,in Berlin. That story was a secret -- and a valuable historical lesson -- that could only be revealed in archives. That's the point of archives. The truth, or the facts, shall make us free.

I set out years ago thinking that presidential history was not as tidy as all I had read about it in my life. Working in the White House, I had learned that everything happens at once, that a writer had to consider it all, what was on the president's mind and his desk on a particular day. What he knew and when he knew it. Kennedy didn't make decisions knowing he would be assassinated. Nixon didn't know he would have to resign. It has always been said that history is lived forward and written backward. With open archives, it was possible to write history forward by focusing tightly on what the president knew that day, that hour, that minute -- not on hindsight, not on what we would all find out years later.

So I need those papers. They mean money to me,too; this is how I make my living. I do battle for them. President Bush is on the other side of this game. So is Alexander Haig, a major figure in the book I am now doing on the presidency of Ronald Reagan. Here's the letter I got just the other day (March 1, 2002) from the assistant chief of the Manuscript Division of the Library of Congress, where Haig "donated" his papers -- or is hiding them.

"Dear Mr. Reeves:

"We have been notified that your request for permission to consult
Alexander Haig Papers
has been denied. Please let me know if we can be of any further assistance."

I guess I' m on my own. But that's the way it often is with politicians, government and history. There is an "us" and "them" quality to the game and I am greatly influenced by what I call Kelly's Law. I learned it in 1984 on a road in Honduras near Palmerola, the principal American base in the covert war against the Sandinista government of Nicaragua. I ran into a roadblock and stepped out the car, standing next to American truckdriver, who had also been stopped. "Sgt. Kelly" was the name on his uniform tag. His truck was carrying a huge load of telephone poles. Four old C-47s swept over the range of hills in front of us, coming toward us. Paratroopers began jumping out of the planes.

"What's that?" I said.

"What's what?" Sgt. Kelly answered.

"The paratroopers."

"What paratroopers?" he said.

That's the way it begins. It ends with assistants throwing papers into fireplaces and presidents closing their record to the public. But now we go to court to try to open them, it is our role to try to strike down the President Bush's order. To quote another president, his father:" This shall not stand!"

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Presidential Documents

Title 3—

The President

Executive Order 13233 of November 1, 2001

Further Implementation of the Presidential Records Act

By the authority vested in me as President by the Constitution and the laws of the United States of America, and in order to establish policies and procedures implementing section 2204 of title 44 of the United States Code with respect to constitutionally based privileges, including those that apply to Presidential records reflecting military, diplomatic, or national security secrets, Presidential communications, legal advice, legal work, or the deliberative processes of the President and the President's advisors, and to do so in a manner consistent with the Supreme Court's decisions in *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977), and other cases, it is hereby ordered as follows:

Section 1. *Definitions.*

For purposes of this order:

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

(b) "Presidential records" refers to those documentary materials maintained by the National Archives and Records Administration pursuant to the Presidential Records Act, 44 U.S.C. 2201-2207.

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

Sec. 2. *Constitutional and Legal Background.*

(a) For a period not to exceed 12 years after the conclusion of a Presidency, the Archivist administers records in accordance with the limitations on access imposed by section 2204 of title 44. After expiration of that period, section 2204(c) of title 44 directs that the Archivist administer Presidential records in accordance with section 552 of title 5, the Freedom of Information Act, including by withholding, as appropriate, records subject to exemptions (b)(1), (b)(2), (b)(3), (b)(4), (b)(6), (b)(7), (b)(8), and (b)(9) of section 552. Section 2204(c)(1) of title 44 provides that exemption (b)(5) of section 552 is not available to the Archivist as a basis for withholding records, but section 2204(c)(2) recognizes that the former President or the incumbent President may assert any constitutionally based privileges, including those ordinarily encompassed within exemption (b)(5) of section 552. The President's constitutionally based privileges subsume privileges for records that reflect: military, diplomatic, or national security secrets (the state secrets privilege); communications of the President or his advisors (the presidential communications privilege); legal advice or legal work (the attorney-client or attorney work product privileges); and the deliberative processes of the President or his advisors (the deliberative process privilege).

(b) In *Nixon v. Administrator of General Services*, the Supreme Court set forth the constitutional basis for the President's privileges for confidential communications: "Unless [the President] can give his advisers some assurance of confidentiality, a President could not expect to receive the full and frank submissions of facts and opinions upon which effective discharge of his duties depends." 433 U.S. at 448-49. The Court cited the precedent of the Constitutional Convention, the records of which were "sealed for more than 30 years after the Convention." *Id.* at 447 n.11. Based on those precedents and principles, the Court ruled that constitutionally based privileges available to a President "survive[] the individual President's tenure." *Id.* at 449. The Court also held that a former President, although no longer

a Government official, may assert constitutionally based privileges with respect to his Administration's Presidential records, and expressly rejected the argument that "only an incumbent President can assert the privilege of the Presidency." *Id.* at 448.

(c) The Supreme Court has held 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. See *United States v. Nixon*, 418 U.S. 683, 713 (1974). Notwithstanding the constitutionally based privileges that apply to Presidential records, many former Presidents have authorized access, after what they considered an appropriate period of repose, to those records or categories of records (including otherwise privileged records) to which the former Presidents or their representatives in their discretion decided to authorize access. See *Nixon v. Administrator of General Services*, 433 U.S. at 450-51.

Sec. 3. *Procedure for Administering Privileged Presidential Records.*

Consistent with the requirements of the Constitution and the Presidential Records Act, the Archivist shall administer Presidential records under section 2204(c) of title 44 in the following manner:

(a) At an appropriate time after the Archivist receives a request for access to Presidential records under section 2204(c)(1), the Archivist shall provide notice to the former President and the incumbent President and, as soon as practicable, shall provide the former President and the incumbent President copies of any records that the former President and the incumbent President request to review.

(b) After receiving the records he requests, the former President shall review those records as expeditiously as possible, and for no longer than 90 days for requests that are not unduly burdensome. 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.

(c) After review of the records in question, or of any other potentially privileged records reviewed by the former President, the former President shall indicate to the Archivist whether the former President requests withholding of or authorizes access to any privileged records.

(d) Concurrent 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.

(1) When the former President has requested withholding of the records:

(i) If under the standard set forth in section 4 below, the incumbent President concurs in the former President's decision to request withholding of records as privileged, the incumbent President shall so inform the former President and the Archivist. The Archivist shall not permit access to those records by a requester unless and until the incumbent President advises the Archivist that the former President and the incumbent President agree to authorize access to the records or until so ordered by a final and nonappealable court order.

(ii) If under the standard set forth in section 4 below, the incumbent President does not concur in the former President's decision to request withholding of the records as privileged, the incumbent President shall so inform the former President and the Archivist. Because the former President independently retains the right to assert constitutionally based privileges, the Archivist shall not permit access to the records by a requester unless and until the incumbent President advises the Archivist that the former President and the incumbent President agree to authorize access to the records or until so ordered by a final and nonappealable court order.

(2) When the former President has authorized access to the records:

(i) If under the standard set forth in section 4 below, the incumbent President concurs in the former President's decision to authorize access to the records, the Archivist shall permit access to the records by the requester.

(ii) If under the standard set forth in section 4 below, the incumbent President does not concur in the former President's decision to authorize access to the records, the incumbent President may independently order the Archivist to withhold privileged records. In that instance, the Archivist shall not permit access to the records by a requester unless and until the incumbent President advises the Archivist that the former President and the incumbent President agree to authorize access to the records or until so ordered by a final and nonappealable court order.

Sec. 4. *Concurrence by Incumbent President.*

Absent compelling circumstances, the incumbent President will concur in the privilege decision of the former President in response to a request for access under section 2204(c)(1). When the incumbent President concurs in the decision of the former President to request withholding of records within the scope of a constitutionally based privilege, the incumbent President will support that privilege claim in any forum in which the privilege claim is challenged.

Sec. 5. *Incumbent President's Right to Obtain Access.*

This order does not expand or limit the incumbent President's right to obtain access to the records of a former President pursuant to section 2205(2)(B).

Sec. 6. *Right of Congress and Courts to Obtain Access.*

This order does not expand or limit the rights of a court, House of Congress, or authorized committee or subcommittee of Congress to obtain access to the records of a former President pursuant to section 2205(2)(A) or section 2205(2)(C). With respect to such requests, the former President shall review the records in question and, within 21 days of receiving notice from the Archivist, indicate to the Archivist his decision with respect to any privilege. The incumbent President shall indicate his decision with respect to any privilege within 21 days after the former President has indicated his decision. Those periods may be extended by the former President or the incumbent President for requests that are burdensome. The Archivist shall not permit access to the records unless and until the incumbent President advises the Archivist that the former President and the incumbent President agree to authorize access to the records or until so ordered by a final and nonappealable court order.

Sec. 7. *No Effect on Right to Withhold Records.*

This order does not limit the former President's or the incumbent President's right to withhold records on any ground supplied by the Constitution, statute, or regulation.

Sec. 8. *Withholding of Privileged Records During 12-Year Period.*

In the period not to exceed 12 years after the conclusion of a Presidency during which section 2204(a) and section 2204(b) of title 44 apply, a former President or the incumbent President may request withholding of any privileged records not already protected from disclosure under section 2204. If the former President or the incumbent President so requests, the Archivist shall not permit access to any such privileged records unless and until the incumbent President advises the Archivist that the former President and the incumbent President agree to authorize access to the records or until so ordered by a final and nonappealable court order.

Sec. 9. *Establishment of Procedures.*

This order is not intended to indicate whether and under what circumstances a former President should assert or waive any privilege. The order is intended to establish procedures for former and incumbent Presidents to make privilege determinations.

Sec. 10. *Designation of Representative.*

The former President may designate a representative (or series or group of alternative representatives, as the former President in his discretion may determine) to act on his behalf for purposes of the Presidential Records Act and this order. Upon the death or disability of a former President, the former President's designated representative shall act on his behalf for purposes of the Act and this order, including with respect to the assertion of constitutionally based privileges. In the absence of any designated representative after the former President's death or disability, the family of the former President may designate a representative (or series or group of alternative representatives, as they in their discre tion may determine) to act on the former President's behalf for purposes of the Act and this order, including with respect to the assertion of constitutionally based privileges.

Sec. 11. *Vice Presidential Records.*

(a) Pursuant to section 2207 of title 44 of the United States Code, the Presidential Records Act applies to the executive records of the Vice President. Subject to subsections (b) and (c), this order shall also apply with respect to any such records that are subject to any constitutionally based privilege that the former Vice President may be entitled to invoke, but in the administration of this order with respect to such records, references in this order to a former President shall be deemed also to be references to the relevant former Vice President.

(b) Subsection (a) shall not be deemed to authorize a Vice President or former Vice President to invoke any constitutional privilege of a President or former President except as authorized by that President or former President.

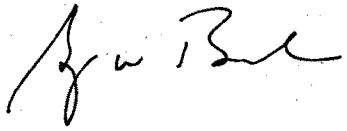
(c) Nothing in this section shall be construed to grant, limit, or otherwise affect any privilege of a President, Vice President, former President, or former Vice President.

Sec. 12. *Judicial Review.*

This order is intended to improve the internal management of the executive branch and is not intended to create any right or benefit, substantive or procedural, enforceable at law by a party, other than a former President or his designated representative, against the United States, its agencies, its officers, or any person.

Sec. 13. *Revocation.*

Executive Order 12667 of January 18, 1989, is revoked.



THE WHITE HOUSE,
November 1, 2001.

[FR Doc. 01–27917.
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Billing code 3195–01–P

Executive Order 13233 - signed by President Bush on Nov. 1 - "Just Made It Harder."

THE FORT WORTH STAR-TELEGRAM
Sun, 11 Nov 2001
Hugh Davis Graham
Editorial - The Weekly Review section

George W. Bush signed an executive order on Nov. 1 giving himself as incumbent president, and all former (and future) presidents since Jimmy Carter, the authority to veto public access to any of their presidential documents.

No explanations need accompany the denials, and no time limits need be observed. Not even Richard Nixon, fighting wartime leaks of Pentagon secrets and impeachment efforts in the Watergate crisis, claimed such breathtaking powers of government secrecy.

Nixon's attempt to maintain secrecy relied not on executive orders but on a 1974 agreement signed by a presidential appointee, Arthur Sampson, head of the General Services Administration, which then included the National Archives. The Nixon-Sampson agreement gave Nixon ownership and total control of all his presidential materials - 42 million pages of documents and 880 tape recordings.

Congress, however, quickly passed a law voiding the Nixon-Sampson deal. Then in 1978 Congress passed its major post-Watergate reform, the Presidential Records Act (PRA). Ever since, occupants of the White House have tried to short-circuit or subvert its provisions. Bush's new order is but the latest, and most extreme, of these efforts.

Three provisions lie at the heart of the PRA.

First, presidential records (beginning with the president elected in 1980) are owned not by the individual president but by the American public - by you and me as citizens, taxpayers, voters. The records are held in trust by the Archivist of the United States, who preserves, organizes and controls access to them.

Second, the public good requires eventual open access to the records. This recognizes the primacy in a democracy of the public's right to know what the government is doing. Importantly, it also provides incentives for government officials to avoid wrongdoing.

Abuse of power is probably unavoidable in the American presidency, given its enormous expenditure of funds and the global reach of American military and economic power. But the expectation

of full preservation and eventual release of presidential records act as a powerful curb on officials tempted to reward their friends and punish their enemies.

Third, the PRA recognizes and protects legitimate government needs for secrecy in sensitive policy areas. It provides qualified disclosure exemptions for such areas as national security, foreign relations, financial and trade secrets, and personal privacy. The hard questions are not whether to permit government secrecy in these areas but for how long and for what reasons.

To ease presidential worries over premature disclosure, Congress through the PRA added a novel provision: a 12-year moratorium on access to the president's advisory communications in all policy fields.

This meant, for example, that policy advice in any area for President Reagan, whose two-term presidency was the first to be covered by the PRA, could be closed until Jan. 20, 2001 - 12 years after Reagan left office. By establishing the 12-year moratorium, Congress provided a buffer to shield the president's advisers from the chilling effect of premature disclosure. This compromise balanced the PRA's intended chill of eventual full disclosure to discourage abuse of power.

The American presidency, however, instinctively prefers secrecy and fears openness. Presidents hate leaks, for some good reasons and for many bad ones. They publicize favorable information and hide the unfavorable.

Although most of the modern controversies, especially Watergate and Iran-contra, involved Republican administrations, the presidential preference for secrecy knows no party boundaries - witness, for example, Lyndon B. Johnson's credibility gap on Vietnam and Bill Clinton's lies about personal conduct.

In the tradition of presidential secrecy, George W. Bush's new order represents the third major attempt, and by far the most ambitious, to subvert the post-Watergate reforms of Congress.

The first came in 1985, when the Iran-contra controversy was heating up. Reagan's Justice Department directed the National Archivist to acquiesce in any claims of executive privilege by a former president. This was challenged in federal court, however, and in 1988 the U.S. Circuit Court of Appeals for the District of

Columbia overturned the directive on the grounds that the PRA gave the Archivist, not former presidents, the authority to open records, and the Constitution provided former presidents no such blanket privilege.

Then in January 1989, just four days before leaving office, Reagan signed an executive order giving incumbent presidents the authority to "review" (and presumably disapprove) the Archivist's proposals for opening presidential records, including those closed under an expiring 12-year moratorium.

That occasion arose, for the first time, early this year, when Bush was inaugurated and the same day, Jan. 20, the 12-year moratorium on Reagan's advisory communications expired. White House counsel Alberto R. Gonzales, however, froze the Archivist's proposal to begin opening these documents, and on Nov. 1, Bush's new executive order replaced Reagan's 1989 order.

Bush's order is wrongheaded and dangerous on many counts.

It attempts to change a public law, not by persuading Congress to revise it but by executive decree. It is disingenuous, turning the PRA on its head, displacing a premise of eventual openness with a license for permanent closure while pretending merely to assist the PRA's implementation. It weakens government accountability - granting to former presidents, for example, who are no longer accountable either to voters or to government officials, the authority to keep their records closed indefinitely.

Furthermore, by sharply diminishing the likelihood of public disclosure, the order abets government wrongdoing. This may be particularly attractive to a government that, in the aftermath of the terrorist attacks of Sept. 11, faces years of clandestine warfare and "dirty tricks," including recourse to political assassination.

Because legal precedents set in dealing with the Reagan records will govern access to subsequent presidential records, the Bush executive order invites conflicts of interest. Many senior officials in the current administration served in the Reagan presidency and may seek secrecy for particular files or episodes. Moreover, the new order gives our current president veto authority over release of his father's vice presidential papers, as well as giving both father and son veto authority over access to their own presidential papers.

Fortunately, Bush's executive order overreaches so aggressively that it is legally vulnerable.

Congress, currently divided by party control and rallying behind the president's war crisis program, seems unlikely to revisit the presidential records debates of the 1970s. The U.S. Supreme Court, additionally, has often deferred to constitutional claims of executive privilege by presidents, especially concerning national security issues.

But the claims of Bush's new executive order are so extreme - full veto authority by both incumbent and former presidents for an indefinite period over public access to any significant document in their records - that the federal courts are likely to overturn the order, much as the courts rejected the earlier, and less extreme, claims of Presidents Nixon and Reagan and the current president's father.

PHOTO(S): Star-Telegram Archives

Los Angeles Times
latimes.com.

HISTORY

All the Presidents' Words Hushed

By ROBERT DALLEK
Robert Dallek is the author of a two-volume life of Lyndon B. Johnson. He is completing a biography of John F. Kennedy

November 25 2001

BOSTON -- Ever since the presidency became the focus of U.S. political life during Theodore Roosevelt's years in the White House, journalists and historians have discussed the importance of presidential decision-making. Why do presidents give priority to one domestic issue over another? Why and how do they decide between war and peace?

Journalists initially answer these questions with the limited knowledge available to them, always mindful that "White House sources" provide them with the information that will advance a president's agenda and serve his political standing. Historians with the luxury of hindsight and, more important, access to a much fuller record usually give us a better understanding of presidential reasoning. Their studies are not simply exercises in academic analysis. They often educate presidents, who are always eager to learn what accounts for past White House successes and failures.

President Bush, however, has severely crippled our ability to study the inner workings of a presidency. On Nov. 1, he issued an executive order that all but blocks access to the Reagan White House and potentially that of all other recent presidents. Practically speaking, Bush's order hinders the opening of 68,000 pages of confidential Reagan communications with his advisors. Under the 1978 Presidential Records Act, a systematic release of presidential papers in response to Freedom of Information requests can only occur 12 years after a president leaves office. The law's intent was to assure the timely release of presidential materials that would serve the government's and the public's understanding of the country's history, especially decision-making in the White House. The Bush administration, including a statement by the president himself, contends that the executive order is needed to guard against revelations destructive to national security. But this assertion will persuade no one who has even the slightest knowledge of presidential papers. Just a few days in the Kennedy or Johnson libraries would be enough to convince anyone that ample safeguards against breeches of national security and violations of personal privacy already exist, and these are for papers dating from the 1960s, not the 1980s. Moreover, access to previously closed documents make clear that presidents and government agencies always err on the side of excessive caution.

If national security is not the motivating force behind Bush's executive order, what is? We can only speculate that he is trying to protect members of his administration, who also served under Ronald Reagan, from embarrassing revelations. It is also possible that he is endeavoring to hide his father's role in the Iran-Contra scandal. And it is imaginable that he is already thinking about shielding the

inner workings of his own administration, or his excessive dependence on senior advisors in deciding both domestic and national-security issues about which many outsiders believe he has been poorly informed.

Researchers trying to reconstruct the country's past are not the only losers when access to historical records is reduced. Current policymakers dependent on useful analogies in deciding what best serves the national interest are also harmed. The more presidents have known about past White House performance, the better they have been at making wise policy judgments. President Franklin D. Roosevelt's intimate knowledge of President Woodrow Wilson's missteps at the end of World War I were of considerable help to him in leading the country into and through World War II. Lyndon B. Johnson's effectiveness in passing so much Great Society legislation in 1965 and 1966 partly rested on direct observation of how Roosevelt had managed relations with the Congress. President Harry S. Truman's error in crossing into North Korea was one element in persuading George Bush not to invade Iraq.

The recent release of additional Johnson tapes underscores how much historical understanding can influence presidential decision-making. Tapes of LBJ talking about Operation Rolling Thunder, the systematic bombing of North Vietnam begun in February 1965, reveal a president with substantial doubts about the wisdom of the air campaign. "Now we're off to bombing these people," Johnson said to Defense Secretary Robert S. McNamara. "We're over that hurdle. I don't think anything is going to be as bad as losing; and I don't see any way of winning."

"Bomb, bomb, bomb. That's all you know," Johnson said to Army Chief of Staff Harold K. Johnson. " ... I don't need 10 generals to come in here 10 times and tell me to bomb. I want some solutions. I want some answers," the president declared. "Airplanes ain't worth a damn, Dick ... " he complained to Senate Armed Services Chairman Richard Russell. "I guess they can do it in an industrial city. I guess they can do it in New York. ... But that's the damnedest thing I ever saw. The biggest fraud. Don't you get your hopes up that the Air Force is going to" win this war. "Light at the end of the tunnel," LBJ told Bill Moyers about the bombing. "Hell, we don't even have a tunnel; we don't even know where the tunnel is."

Johnson knew about post-World War II surveys of wartime bombing effectiveness. They demonstrated that the aerial campaigns against Britain and Germany not only didn't defeat them, they, in fact, stiffened resistance and encouraged greater civilian war efforts. Johnson's well-justified doubts about bombing made him all the more receptive to sending in ground forces.

It's too bad that he didn't have access to a memo President John F. Kennedy had sent to McNamara in November 1962, a week after the Cuban Missile crisis ended. An invasion plan for Cuba, which might still be needed if the Soviets did not follow through on a promise to withdraw "offensive" weapons from the island, impressed Kennedy as "thin." He worried that "we could end up bogged down. I think we should keep constantly in mind the British in the Boer War, the Russians in the last war with the Finnish, and our own experience with the North Koreans." If historical experience dictated against an invasion of Cuba, how would he have felt about sending hundreds of thousands of troops into the jungles of Vietnam?

Every president uses history in deciding current actions. President Bush is no different. Memories of his father's defeat over a failure to keep his promise about no new taxes and a seeming indifference to the plight of the unemployed have partly shaped his behavior as president. Bush might profit from a history of Reagan's dealings with former Soviet President Mikhail S. Gorbachev by an independent scholar, which his Nov. 1 executive order forecloses for the time being.

Indeed, the principal victim of Bush's directive will be himself and the country. The order will inhibit independent study of the Reagan and first Bush presidencies and will impoverish the White House's ability to make difficult decisions in both domestic and foreign affairs during the next three years. The more the country knows about presidential decision-making, the better it can decide who to send to the White House. The study and publication of our presidential history is no luxury or form of public entertainment. It is a vital element in assuring the best governance of our democracy. Congress should reverse Bush's order as a destructive act that return us to an imperial presidency and robs us of our history.

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Writing History to Executive Order

NYT A23
11/16/01

By Richard Reeves

WASHINGTON

With a stroke of the pen on Nov. 1, President Bush stabbed history in the back and blocked Americans' right to know how presidents (and vice presidents) have made decisions. Executive Order 13223 ended more than 30 years of increasing openness in government.

From now on, scholars, journalists and any other citizens will have to show a demonstrated, specific "need to know" in requesting documents from the Reagan, Clinton and two Bush presidencies — and all others to come. And if someone asks to see records never made public during a presidency but deposited in the National Archives by a former president, the requester will now have to receive the permission of both the former president and the current one.

My response was to send President Bush a couple of books on recent presidencies, along with a note saying they might become valuable artifacts because his order could prevent writers from doing similar research without approval from two presidents. I also attached a letter from his father to me explaining how important it is to document presidential decision-making.

Archival research is grinding work. It takes years of perseverance to follow the paper trail documenting how the nation goes to war or raises taxes, or how presidents choose their staffs. But the search becomes worthwhile when you see John F. Kennedy's initials on a memo talking of the possibility of a Berlin wall weeks before the Communists put it up, or when you find Richard Nixon asking Henry Kissinger, in a note, "Is it possible we were wrong from the start in Vietnam?"

The White House chooses secrecy on presidential records.

There are rules upon rules about which presidential papers become available and when — and some of them defy all reason. For more than 25 years, an inscription by the Irish writer Brendan Behan to President Kennedy was withheld from researchers by the National Archives and Records Administration, apparently because it was written on a copy of Evergreen Review, a literary magazine considered racy in those days. But the complicated rules have been changing in the direction of more access since the Freedom of Information Act became law on July 4, 1966.

From 1981, when the Presidential Records Act went into effect, until Mr. Bush issued his order, a citizen could request to review some presidential papers five years after the end of a presidency, or ask for all but the most sensitive records after 12 years. Ronald Reagan's records were the first to become available under the 12-year rule — except that they did not become available, because the Bush administration chose to review the policy for the past nine months.

That review resulted in the recent order. The White House reassured me that you can still go to court if an administration denies you access to archived information. Right. If you have years and tens of thousands of dollars to spare to take your case to the federal courts.

The White House argues that premature disclosure of decision memos and the like could stifle dialogue among presidential advisers. But this has been true for years, and the republic has managed to survive. The administration's second reason — to make the process more "orderly" — is simply ludicrous. It is hard to see how double presidential oversight will speed things up, unless the idea is to just say no.

And I think that is the idea. There may be Reagan-era records that could be embarrassing to some men and women now back in power with the second Bush administration.

Perhaps even more pertinent, they may not want to spend their retirements, 12 years after George W. Bush leaves office, defending the wartime decisions they are making now. □

From : LIMESTONEPZBLUM PHONE No. : 203 562 5229 Nov. 26 2001 4:50AM P02

313 St. Ronan St. New Haven CT. 06511 Nov. 26, '01

Committee on Government Reform
House of Representatives
2157 Rayburn Building
Washington, D.C. 20515

Re: Executive Order 13223

Dear Members:

The President's Executive Order 13223 imposes unnecessary and crippling restrictions on the accessibility of information of the first importance. Historians, of whom I am one, have fought for many years to prevent the kinds of executive secrecy that the order encourages. Their reasons are spelled out admirably in the New York TIMES op ed piece by Richard Reeves, of which you have a copy. I am particularly eager to associate my name with Reeves' views because President Bush observed at the last Yale commencement that he remembered me. Obviously he did not remember what I had said. In the course I taught and he took at Yale, I lamented past wartime restrictions on the freedom of information of just the kind he has now imposed.

Entirely apart from historians, his executive order is one part of a series of executive orders that will impede access to vital information by the Congress. The right of Congress to know the sources and purposes of policy does not expire in time of war. It must be protected by reassertion whenever it is threatened, and I urge you to do so as soon as possible. The executive in the American system is not an absolute monarch. Quite the contrary. The Bush administration needs to be told so.

Respectfully,

John Morton Blum

John Morton Blum
Professor Emeritus of History, Yale University

Arthur Schlesinger, Jr
455 East 51st Street
New York, NY 10022

To the House Committee on Government Reform:

I am glad to know that your committee is holding this important hearing on President Bush's Executive Order 13223. I regret that I am unable to testify in person, but I would hope that this letter might be incorporated in the record of the proceedings. I am a historian of the presidency, but I also have some sense of the official side of things, having served in the Roosevelt and Truman administrations and as a Special Assistant to Presidents Kennedy and Johnson.

Executive Order 13223 gives both former presidents and incumbent presidents new authority to withhold presidential papers from scholars and from the American people. The Order makes the incumbent president the final judge, empowered even to veto the approval by former presidents of the release of documents from their administrations.

The object of Executive Order 13223 is not to protect national security. The Presidential Records Act of 1978 already puts classified documents in a special category. That statute also provides, not for immediate access to unclassified presidential papers, but for access within twelve years after the end of the administration -- a reasonable restriction designed to protect the presidential communication and deliberative process privileges.

One wonders why in the world the President would wish further to restrict access to unclassified documents and thus to narrow a statute that Congress passed after careful inquiry into the issues involved. The suspicion is bound to arise that the people behind Executive Order 13223 have some things they wish to conceal from Congress, from the American people and from history.

A measure of secrecy is certainly essential to executive operations. But secrecy should be rigidly reserved for specific categories -- weapons technology and deployment, diplomatic negotiations, intelligence methods and sources, personnel investigations, tax returns, personal data given the government on the presumption it would be kept confidential. Secrecy, carried too far, becomes a means by which the executive branch dissembles its purposes, buries its mistakes, manipulates its citizens, escapes its accountability and maximizes its power.

History is not without its claim to public regard. After all, history is to the nation as memory is to the individual. As an individual deprived of memory becomes disoriented and lost, not knowing where he has been or where he is going, so a nation denied a conception of its past will be disabled in dealing with its present and its future. The protection of the right of scholarly inquiry can thus be said to be a national security issue.

Acquiescence in the secrecy system enfeebles a vital democracy. One must hope that the White House will reconsider its recent edict and support freedom of information and openness in government.

Arthur Schlesinger Jr

H.R. 4187, THE PRESIDENTIAL RECORDS ACT AMENDMENTS OF 2002

WEDNESDAY, APRIL 24, 2002

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON GOVERNMENT EFFICIENCY, FINANCIAL MANAGEMENT AND INTERGOVERNMENTAL RELATIONS,
COMMITTEE ON GOVERNMENT REFORM,
Washington, DC.

The subcommittee met, pursuant to notice, at 10:02 a.m., in room 2154, Rayburn House Office Building, Hon. Stephen Horn (chairman of the subcommittee) presiding.

Present: Representatives Horn, Lewis, Ose, Burton [ex officio], Schakowsky, Maloney, and Waxman [ex officio].

Staff present: J. Russell George, staff director and chief counsel; Bonnie Heald, deputy staff director; Henry Wray, senior counsel; Justin Paulhamus, clerk; Darin Chidsey, professional staff member; David McMillen, minority professional staff member; Jean Gosa, minority clerk; and Karen Lightfoot, minority senior policy advisor.

Mr. HORN. A quorum being present, the Subcommittee on Government Efficiency, Financial Management and Intergovernmental Relations will come to order.

This is our third hearing on Executive Order 13233 and its impact on the Presidential Records Act of 1978. Our subcommittee held the first hearing on this subject last November. The full Committee on Government Reform held a similar hearing on April 11th of this year. At both hearings historians, attorneys, and other experts testified that the Executive Order 13233 violates the Presidential Records Act and will greatly impede the public release of Presidential records as intended by the act.

Our early hearings fully explored the problems with Executive Order 13233. Today's hearing focuses on potential solutions. Specifically, we will consider H.R. 4187, a bill that I and several of my colleagues introduced on April 11th. H.R. 4187 would replace the Executive order with a statutory process for former and incumbent Presidents to review records prior to their release and assert executive privilege claims if they so choose.

Unlike Executive Order 13233, the review process in this bill complies with the letter and spirit of the Presidential Records Act. Most important, the bill imposes a firm time limit on the review of records and assertions of privilege claims. It would no longer be possible for a former or incumbent President to prevent the release of records indefinitely simply by inaction.

Given the safeguards already built into the Presidential Records Act, a former or incumbent President should rarely, if ever, need

to resort to executive privilege claims. Indeed, no such claims have yet been asserted. The problem is that the open-ended and unreasonably long reviews have substantially delayed public access for records under the act. The current administration prevented the release of an initial portion of former President Reagan's records for 1 full year after the date on which they should have come public under the requirements of the Presidential Records Act.

I hope that today's hearing will help us decide whether to move forward with H.R. 4187, and, if so, whether there are ways to improve the bill.

I regret that the Justice Department declined our invitation to testify at today's hearing. However, we have an excellent panel of witnesses who represent different viewpoints. I welcome all of you and I look forward to your testimony. We also have received several written statements, and without objection they will be included in the hearing record. One is the various parts of Judge Sirica to set the record straight, a very worthwhile book to read if you're going to talk about executive privilege and anything else. The other is from John Bradamus, a very distinguished Member of the House of Representatives and one of the key authors in the 1978 act. So both Dr. Bradamus and the judge's books we will file. Without objection, so ordered.

[The prepared statement of Hon. Stephen Horn and the text of H.R. 4187 follow:]

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Congress of the United States

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Opening Statement
Chairman Stephen Horn,
Subcommittee on Government Efficiency, Financial Management and Intergovernmental Relations
April 24, 2002

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Unlike Executive Order 13233, the review process in this bill complies with the letter and spirit of the Presidential Records Act. Most importantly, the bill imposes a firm time limit on the review of records and assertions of privilege claims. It would no longer be possible for a former or incumbent President to prevent the release of records indefinitely simply by inaction.

Given the safeguards already built into the Presidential Records Act, a former or incumbent President should rarely, if ever, need to resort to executive privilege claims. Indeed, no such claims have yet been asserted. The problem is that open-ended and unreasonably long reviews have substantially delayed public access to records under the Act. The current Administration prevented the release of an initial portion of former President Reagan's records for one full year after the date on which they should have become public under the requirements of the Presidential Records Act.

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I

107TH CONGRESS
2D SESSION

H. R. 4187

To amend chapter 22 of title 44, United States Code, popularly known as the Presidential Records Act, to establish procedures for the consideration of claims of constitutionally based privilege against disclosure of Presidential records.

IN THE HOUSE OF REPRESENTATIVES

APRIL 11, 2002

Mr. HORN (for himself, Ms. SCHAKOWSKY, Mr. BURTON of Indiana, Mr. WAXMAN, Mr. OSE, Mr. FRANK, Mr. MCDERMOTT, Mr. UDALL of Colorado, Mr. BENTSEN, Mr. ALLEN, Mr. BLAGOJEVICH, Mr. CLAY, Mr. CUMMINGS, Mr. DAVIS of Illinois, Mr. KUCINICH, Mr. LANTOS, Mr. LYNCH, Mrs. MALONEY of New York, Ms. NORTON, Mr. OWENS, Mr. TOWNS, Mr. LATOURETTE, and Mr. BAIRD) introduced the following bill; which was referred to the Committee on Government Reform

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A BILL

To amend chapter 22 of title 44, United States Code, popularly known as the Presidential Records Act, to establish procedures for the consideration of claims of constitutionally based privilege against disclosure of Presidential records.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the "Presidential Records
5 Act Amendments of 2002".

SEC. 2. PROCEDURES FOR CONSIDERATION OF CLAIMS OF CONSTITUTIONALLY BASED PRIVILEGE AGAINST DISCLOSURE.

(a) IN GENERAL.—Chapter 22 of title 44, United States Code, is amended by adding at the end the following:

"§ 2208. Claims of constitutionally based privilege against disclosure

"(a)(1) When the Archivist determines under this chapter to make available to the public any Presidential record that has not previously been made available to the public, the Archivist shall—

"(A) promptly provide notice of such determination to—

"(i) the former President during whose term of office the record was created; and

"(ii) the incumbent President; and

"(B) make the notice available to the public.

"(2) The notice under paragraph (1)—

"(A) shall be in writing; and

"(B) shall include such information as may be prescribed in regulations issued by the Archivist.

"(3)(A) Upon the expiration of 20 days (excepting Saturdays, Sundays, and legal public holidays) following provision of notice under paragraph (1)(A), the Archivist shall make available to the public the record covered by

1 the notice, except any record (or reasonably segregable
2 part of a record) with respect to which the Archivist re-
3 ceives from a former President or the incumbent President
4 a claim of constitutionally based privilege against disclo-
5 sure that meets the requirements of paragraph (4).

6 "(B) The Archivist may extend the 20-day period for
7 not more than 20 additional days (excepting Saturdays,
8 Sundays, and legal public holidays) if the Archivist deter-
9 mines, based on a showing by the former President or the
10 incumbent President, that such an extension is necessary
11 to allow an adequate review of the record.

12 "(4) A claim of constitutionally based privilege
13 against disclosure meets the requirements of this para-
14 graph if it—

15 "(A) is in writing;

16 "(B) specifies the record (or reasonably seg-
17 regable portion of a record) to which the claim ap-
18 plies;

19 "(C) is signed by the former President or in-
20 cumbent President making the claim; and

21 "(D) states the nature of the privilege and the
22 specific grounds for the claim.

23 "(b) The Archivist shall provide a copy of each claim
24 of constitutionally based privilege against disclosure of a
25 Presidential record—

1 "(1) to the person seeking the record, if any;
2 "(2) to the chairman and ranking minority
3 member of each of the Committee on Government
4 Reform of the House of Representatives and the
5 Committee on Governmental Affairs of the Senate;
6 and
7 "(3) upon request, to any member of the public.
8 "(c)(1) The Archivist shall not release a Presidential
9 record that is subject to a privilege claim submitted by
10 a former President until the expiration of the 20-day pe-
11 riod (excluding Saturdays, Sundays, and legal public holi-
12 days) beginning on the date the Archivist receives the
13 claim.
14 "(2) Upon the expiration of such period the Archivist
15 shall make the record publicly available unless otherwise
16 directed by a court order in an action initiated by the
17 former President under section 2204(e).
18 "(d)(1) The Archivist shall not release a Presidential
19 record that is subject to a privilege claim submitted by
20 the incumbent President unless—
21 "(A) the incumbent President withdraws the
22 privilege claim; or
23 "(B) the Archivist is otherwise directed by a
24 final court order that is not subject to appeal.

1 "(2) This subsection shall not apply with respect to
2 any Presidential record required to be made available
3 under section 2205(2)(A) or (C).
4 "(e) The Archivist shall adjust any otherwise applica-
5 ble time period under this section as necessary to comply
6 with the return date of any congressional subpena, judicial
7 subpena, or judicial process.".
8 (b) CONFORMING AMENDMENTS.—(1) Section
9 2204(d) of title 44, United States Code, is amended by
10 inserting ", except section 2208," after "chapter".
11 (2) Section 2207 of title 44, United States Code, is
12 amended in the second sentence by inserting ", except sec-
13 tion 2208," after "chapter".
14 (c) CLERICAL AMENDMENT.—The table of sections
15 at the beginning of chapter 22 of title 44, United States
16 Code, is amended by adding at the end the following:

"2208. Claims of constitutionally based privilege against disclosure.".

17 **SEC. 3. EXECUTIVE ORDER OF NOVEMBER 1, 2001.**
18 Executive Order number 13233, dated November 1,
19 2001 (66 Fed. Reg. 56025), shall have no force or effect.

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Mr. HORN. We will now get to panel one. As you know, this is an investigatory subcommittee, and if you have any aides helping you to answer the questions, we'll also put them under oath.

[Witnesses sworn.]

Mr. HORN. Thank you. The clerk will note that all four witnesses have affirmed the oath.

We will go as it is in the agenda, and that is by Jonathan R. Turley, professor of law, George Washington University Law School.

I'm going to yield first to the gentleman from California and the ranking member for the minority.

Mr. WAXMAN. Good morning. Thank you very much, Mr. Chairman.

I'd like to commend you and Representative Schakowsky for the work you've done on H.R. 4187. I believe it's a good bill and a necessary one. That's why I joined you and Chairman Burton as original cosponsors.

The Bush Executive order which changes the management of the Presidential Records Act is seriously flawed. The order takes a law that was designed to make documents readily available to the public and establishes procedures that are designed to block access.

In 1989, President Reagan issued an Executive order to implement the Presidential Records Act. This order set up a process for claims of executive privilege by former Presidents to be reviewed and evaluated. The new order by President Bush eliminates any review. Any claim of executive privilege, legitimate or not, must be followed by the Archivist. Once a former President claims executive privilege, President Bush's order also makes it very difficult for a citizen to challenge that claim. In order to prevail in court, the order requires a citizen to show a demonstrated and specific need for the documents. How do you do this if you are denied access to the documents?

President Bush's Executive order even appears to establish a process for extending executive privilege to former Vice Presidents. The first beneficiary of this new process would be his own father. No court has ever recognized such a right for Vice Presidents.

H.R. 4187 revokes the misguided Executive order issued by President Bush. In its place, it essentially codifies the terms of the Executive order issued by President Reagan. H.R. 4187 also puts into law specific time limits for the review of documents, thereby preventing current and former Presidents from delaying decisions indefinitely.

I hope we can move this bill through the committee quickly and then bring it before the House. I want to commend you and express my strong support for your efforts.

[The prepared statement of Hon. Henry A. Waxman follows:]

STATEMENT OF THE HONORABLE HENRY A. WAXMAN
AT THE LEGISLATIVE HEARING ON H.R. 4187
THE PRESIDENTIAL RECORDS ACT AMENDMENTS OF 2002

APRIL 24, 2002

Thank you, Mr. Chairman. I would like to commend you and Rep. Schakowsky for the work you have done on H.R. 4187. I believe it is a good bill, and a necessary one. That is why I joined you, Rep. Schakowsky, and full Committee Chairman Burton as an original cosponsor.

The Bush executive order, which changes the management of the Presidential Records Act, is seriously flawed. The order takes a law that was designed to make documents readily available to the public and establishes procedures that are designed to block access.

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Mr. HORN. I thank you for that.

We now have the gentleman from northern California, Mr. Ose, for an opening statement.

Mr. OSE. Thank you, Mr. Chairman. I appreciate the opportunity to join in this morning, and I do have an opening statement.

In the 1978 Presidential Records Act, Congress clearly intended to make Presidential records available for congressional investigations and then for the public after a 12-year period. The act authorized the National Archives and Records Administration to issue implementing regulations.

President Reagan's 1989 Executive Order 12267 expanded on NARA's implementing regulations. This order clarified some areas not specifically addressed in the regulations. Most importantly, the order identified only three areas where access to Presidential records could be limited: if disclosure might impair national security, law enforcement issues, or the deliberative processes of the executive branch—clearly, logical exclusions.

However, President Bush's 2001 Executive Order 13233 changed these access limitations. In a nutshell, law enforcement was dropped and two areas were added. The first area is communications of the President or his advisors, commonly known as the "Presidential communications privilege," and the second one is legal advice or legal work, which is the attorney/client or attorney work product privileges. Both of these added provisions could severely limit congressional access to key documents in its investigations of a former or current administration.

Last November, a week after issuance of President Bush's order, I raised concerns in the subcommittee's hearing on the order. I questioned the administration about the legal and substantive justification for this or other policy changes of this nature. After the hearing and further discussions with the administration, I'd hoped that the administration would amend or revoke its order. Unfortunately, it has not done so. As a consequence, I believe that legislation is needed to void the order—that's the Bush order—so that the Reagan order will again govern access to Presidential records. H.R. 4187, the Presidential Records Act Amendments of 2002, by the chairman would do just that.

The Bush order violates not only the spirit but also the letter of the Presidential Records Act, period. It undercuts the public's rights to be fully informed about how its Government operated in the past or operates today, period. It needs to be rescinded, period.

I yield back.

[The prepared statement of Hon. Doug Ose follows:]

Representative Doug Ose
Opening Statement
H.R. 4187, The Presidential Records Act Amendments of 2002
April 24, 2002

In the 1978 Presidential Records Act, Congress clearly intended to make Presidential records available for Congressional investigations and then for the public after a 12-year period. The Act authorized the National Archives and Records Administration (NARA) to issue implementing regulations. President Reagan's 1989 Executive Order (E.O. 12267) expanded on NARA's implementing regulations. This Order clarified some areas not specifically addressed in the regulations. Most importantly, the Order identified only three areas where access to Presidential records could be limited -- if disclosure might impair national security, law enforcement, or the deliberative processes of the executive branch.

President Bush's 2001 Executive Order (E.O. 13223) changed these access limitations. In a nutshell, law enforcement was dropped and two areas were added: "communications of the President or his advisors (the presidential communications privilege); [and] legal advice or legal work (the attorney-client or attorney work product privileges)." Both could severely limit Congressional access to key documents in its investigations of a former Administration.

Last November, a week after issuance of the Bush Order, I raised concerns in the Subcommittee's hearing on the Order. I questioned the Administration about the legal and substantive justification for this and other policy changes. After the hearing and further discussions with the Administration, I had hoped that the Administration would amend or revoke its Order. Unfortunately, it has not done so. As a consequence, I believe that legislation is needed to void the Bush Order, so that the Reagan Order will again govern access to Presidential records. H.R. 4187, "The Presidential Records Act Amendments of 2002," would do just that.

The Bush Order violates not only the spirit but also the letter of the Presidential Records Act. It undercuts the public's rights to be fully informed about how its government operated in the past.

Mr. HORN. I now yield to the gentleman from Kentucky, Mr. Lewis. We're delighted to have you here.

Mr. LEWIS. Thank you, Mr. Chairman. I have no opening statement. Thank you, though.

Mr. HORN. OK. Well, we will then proceed with Jonathan R. Turley, the professor of law for the George Washington University Law School.

Professor Turley.

STATEMENT OF JONATHAN R. TURLEY, PROFESSOR OF LAW, GEORGE WASHINGTON UNIVERSITY LAW SCHOOL

Mr. TURLEY. Thank you, Chairman Horn. It is an honor to once again appear before this subcommittee and its distinguished members. I know that your time is limited today, and so, with the consent of the committee I would like to submit a longer statement into the record. It is also an honor to lead a distinguished panel with three men that I have really boundless respect for, even though we have some disagreement on issues of executive privilege. That includes Professor Rozell, who I consider perhaps the Nation's leading expert on executive privilege, and Mr. Rosenberg, who is, I think, one of the greatest experts within the government on that subject, and also Mr. Gaziano, who takes, in my view, a different view of the Constitution, but one that deserves most serious attention.

As many of the members have already heard the oft-cited quote of James Madison that a popular government without popular information or the means of acquiring it is but a prologue to a farce or a tragedy. It is a warning that we all have to take to heart, because it establishes a close connection between popular government and public information. Public information is in some ways the oxygen upon which popular government lives and grows and flourishes, and in the category of public information there is no information that is more illuminating or important than Presidential papers. To look at government policy without looking at Presidential papers in a timely fashion is like reading the Bible without reading Genesis—it misses the very essence and creation of public policy when it is created in this country.

Obviously, when Presidents attempt to restrict access, there are suspicions of tailoring a legacy through the control of information. That suspicion, unfortunately, has been well based historically, as Presidents have changed their position on the release of information, depending on its content. As I note in my testimony, Richard Nixon is a great example, where in 1961 he was a great advocate for the release of information after the Bay of Pigs controversy, and then, as we all know, he changed his position and changed the government's entire philosophy on Presidential records in a series of excessive executive privilege assertions.

It is ironic to appear in a position today to advise this committee that I believe that the Executive order of President Bush is facially unconstitutional, because I was one of the academics that strongly encouraged this administration to attempt to repair executive privilege after a series of losses during the Clinton administration. So my disagreement with the Bush administration is one of degree rather than purpose.

I'm, quite frankly, perplexed by the executive privilege fights that have been selected by this administration. With executive privilege in a fairly anemic condition after a number of negative rulings, it was essential for this administration to select its fights carefully. I do not understand the selection process that has been made on this issue or previous issues in disagreements or confrontations with Congress.

In my view, Executive Order 13233 is flawed as a matter of law and extremely misguided as a matter of public policy.

My testimony goes through the history on Presidential papers and the disagreements that have occurred between these two branches of government. Suffice it to say, for much of our period we went through a proprietary period, as I refer to it in my testimony, in which Presidents asserted that Presidential papers were their personal property. That led to incredible historical losses, as Presidents like Grant and Pierce and Arthur had their papers destroyed. Some of Abraham Lincoln's papers were destroyed, as were other Presidents. Of course, it was Richard Nixon that brought a quantum change in this subject in the status of Presidential papers, for the most unexpected of reasons.

Out of the Nixon controversy Congress moved to change the status of Presidential papers. Congress asserted that those Presidential papers are public property. In my view, while this is referred to as a "change," I think it is more of a recognition. I think the view of private ownership was flawed from the beginning and these papers were always public property.

I'd like to move quickly to what I consider to be some of the flaws in the Executive order and why this particular piece of legislation is warranted.

In any constitutional analysis of the Executive order you have to start, I think, with a conceptual question, and that is: if these documents are truly public property, it changes the entire dimension of the constitutional analysis. Unless the Bush administration is going to challenge that concept, the threshold issue of public policy means that this body could have designated any other office to hold these papers, particularly after 12 years. For example, Congress could have established that after 12 years these papers are given to the Library of Congress, and thereby none of these executive privilege arguments would be compelling except for the ability to exert executive privilege and the possibility to go to court to protect that.

So the fact that this body could have given these papers to the legislative branch I think informs some of the questions here and creates an option, quite frankly, that this body may consider.

The problem with the Executive order is that it is in direct disagreement with the language of a Federal statute. An Executive order cannot engage in legislation. It cannot reverse a legislative decision by this body. As my testimony goes through, it does so.

Since my time is running out, I'll——

Mr. HORN. I'd just say with all you distinguished professors, let's go at least for 10, and maybe 12, and we'll give everybody the same thing, and when you're done we will have the opening statement of the ranking member.

Mr. TURLEY. There are thousands of deceased academics who are smiling from Heaven. Thank you. [Laughter.]

The 5-minute rule is like the final circle of hell for someone trained to speak in 50-minute increments.

Moving beyond the threshold constitutional question, unless there is a direct challenge to the constitutionality of the PRA, the Executive order cannot contradict or amend what this body has previously enacted, but it does so on a variety of issues. First, there is a negation of the statutory buffer period that the Congress established. In my view, the 12-year period is a generous period to allow confidential communications to go through a cooling period. After 12 years, I think arguments of executive privilege over confidential communications are somewhat suspect. It is a long period for which public access will be denied.

Second, it materially changes the role of the Archivist. In the PRA, the Archivist is a central player in this legislative scheme. The Executive order reduces the Archivist to a bit player. It negates his entire role or her entire role to move this material as expeditiously as possible into the public domain.

Under the Executive order, a former President can daisy-chain extensions indefinitely, thereby negating the ability of the Archivist to do what this body established as the Archivist's responsibility.

Three, it changes the status of a former President and allows the former President to exercise final control over records. In my view, this raises not just legal questions in terms of the statute, but constitutional questions. A former President has been recognized by the Supreme Court to have some lingering executive privilege authority, but in my view the Executive order takes that limited precedent and moves it far too radically in favor of an absolute privilege.

One of the most baffling aspects of executive privilege is to essentially give the heirs or designees the right to use executive privilege on behalf of a former President. Under the language of this executive privilege, the designee may not even be a family member. The designee could be a half-wit. It could be a foreign citizen. It could be Rasputin for all we know. You could have a foreign citizen exercising executive privilege over American documents.

Now, if one looks at the "L.A. Times" recently, you'll see that just yesterday the daughters of Richard Nixon have gone into a terrible fight over the future of his library and papers. That's an example of what this Executive order promises for the future. It can turn executive privilege from a limited constitutional doctrine into a matter for probate, in which the question is who is bequeathed a very important constitutional right. Well, the executive privilege isn't an ottoman. It is something that cannot be passed down from Presidents to their heirs or to their friends.

More importantly, the Executive order indicates that if a President is disabled, where a President may not even agree with the executive privilege, that the heirs can simply go to court, find the disability, and start to exercise executive privilege. In my view, that is an extremely dangerous and counterintuitive approach to executive privilege.

It also changes the burden for the release of documents and the standards for access to documents.

All of these, in my view, violate Federal law and therefore also violate the Constitution of the United States in terms of this body's inherent legislative authority.

I'll simply close by noting that I think it is unfortunate, but I think that in the last few months we have a case of the over-play of a constitutional hand. I think that the Bush administration was correct to make executive privilege a priority in terms of repairing damage done in the previous years, but it has not selected those issues very carefully. This is an issue that is enormously important to us as a people because it's about our legacy, it's about who we are, and the most incredible moment of a Madisonian democracy occurs in January when a President is converted from the most powerful person on Earth into an average citizen. That's something that is as important as the legacy of access to public documents. What's at stake here is not a simple, arcane, academic dispute. It goes to the very foundations of who we are as a Representative Democracy.

Thank you very much.

Mr. HORN. Thank you. That's a very eloquent statement.

[The prepared statement of Mr. Turley follows:]

STATEMENT OF
PROFESSOR JONATHAN TURLEY
SHAPIRO PROFESSOR OF PUBLIC INTEREST LAW
GEORGE WASHINGTON UNIVERSITY LAW SCHOOL
WASHINGTON, D.C.

"H.R. 4187: The Presidential Records Act Amendments of 2002"

April 24, 2002

Thank you, it is an honor to appear again before this Subcommittee and its distinguished members. Chairman Horn, Vice-Chairman Lewis, Ranking Member Schakowsky, members of the Subcommittee, my name is Jonathan Turley and I am a law professor at the George Washington University Law School where I hold the J.B. and Maurice C. Shapiro Chair for Public Interest Law. I know that your time is limited today and, with the consent of the Subcommittee, I would like to submit a longer written statement to augment my oral testimony on the Presidential Records Act (PRA) and its amendment in light of Executive Order (E.O.) 13233.[1]

I.
INTRODUCTION

James Madison once warned that "[a] popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Government must arm themselves with the power which knowledge gives."[2] Madison's warning is particularly apt in the context of presidential records. There is no information that is more illuminating in terms of public policy and governmental abuse than presidential records. Yet, every administration appears to develop a certain reflective hostility to the release of presidential material. In part this is due to the long-standing view of presidents that confidentiality is essential to the effective operations of the White House. It

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[1] This testimony is taken in part from a forthcoming article. Jonathan Turley, Presidential Records and Popular Government: The Continuing Struggle Between Executive Privilege and Legislative Authority in the Control of Presidential Material (2002).

[2] The Writings of James Madison 103 (G. Hunt ed., 1910).

may also be due in part to the vulnerability that raw records can pose to the legacy of a former president and his administration.

It is precisely that latter issue that concerns both those seeking to restrict and those seeking to release presidential material. Efforts of an administration to restrict access or release immediately trigger suspicions of tailoring a legacy through the control of information. These suspicions may in fact be misplaced but it is based on a history of such motivations. A president's support for open government and unfettered access to government documents can change when the content of such material becomes known. For example, in 1961, Richard Nixon objected to possible restrictions to information involving the Bay of Pigs debacle under President John F. Kennedy. Nixon insisted that

> The concept of a return in peacetime demonstrates a profound misunderstanding of the role of a free press as opposed to that of a controlled press. The plea for secrecy could become a cloak of error, misjudgments, and other failings of government."[3]

Nixon's transformation from an advocate of maximum freedom to maximum control over government information should be a lasting lesson to the unwary. Public access to government information will remain an unreliable and content-driven policy so long as it is left to the discretion of those who have the most to fear from its release. The mere element of discretion invites officials to yield to temptation to control and regulate the flow of information. Such discretion is like a currency of fleeting value and only redeemable in its use. Officials who are given authority tend to use it, particularly when a legacy or historical record may hang in the balance. The only solution is to reduce such control and discretion to a minimum; to affirm a bright-line rule for the release of information to the public. After all, it was in the name of the American people that these communications and documents were made. They have a right to not only see what was done in their name but to be assured that access of these records will be afforded within a defined and determinate period.

The question raised by E.O. 13233 is an interesting mix of issues touching on the separation of powers, executive privilege, statutory interpretation, and

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[3] Martha J. Kumar & Michael B. Grossman, "The Refracting Lens: The President as He Appears Through the Media," in Presidency and Information Policy 107 (Harold C. Relyea, ed. 1981) (quoting an article in the *New York Times*)

fundamental notions of democratic government. I come to this subject as an academic who teaches, writes,[4] and litigates[5] in the area of constitutional law.

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[4] My prior scholarship covers a variety of aspects of the separation of powers, presidential powers, and executive privilege. See, e.g., Jonathan Turley, The Military Pocket Republic, 97 Northwestern University Law Review 1 (2002) (forthcoming); Jonathan Turley, Tribunals and Tribulations: The Antithetical Elements of Military Governance in a Madisonian Democracy, 70 George Washington Law Review ___ (2002) (forthcoming); Jonathan Turley, Paradise Lost: The Clinton Administration and the Erosion of Presidential Privilege, 60 Maryland Law Review 205 (2000) (Symposium); Jonathan Turley, "From Pillar to Post": The Prosecution of Sitting Presidents, 37 American Criminal Law Review 1049 (2000); Jonathan Turley, A Crisis of Faith: Congress and The Federal Tobacco Litigation, 37 Harvard Journal on Legislation 433 (2000); Jonathan Turley, Through a Looking Glass Darkly: National Security and Statutory Interpretation, 53 Southern Methodist University Law Review 205 (2000) (Symposium); Jonathan Turley, Senate Trials and Factional Disputes: Impeachment as a Madisonian Device, 49 Duke Law Journal 1 (1999); Jonathan Turley, The "Executive Function" Theory, the Hamilton Affair and Other Constitutional Mythologies, 77 North Carolina Law Review 1791 (1999); Jonathan Turley, Congress as Grand Jury: The Role of the House of Representatives in the Impeachment of an American President, 67 George Washington University Law Review 735 (1999) (Symposium); Jonathan Turley, Reflections on Murder, Misdemeanors, and Madison, 28 Hofstra Law Review 439 (1999) (Symposium); see also Jonathan Turley, Nothing Bars Questioning the President's Bad Ideas: The Limits of Executive Privilege, The Los Angeles Times, September 27, 1999, at A7.

[5] I have litigated a number of constitutional claims against both the legislative and executive branches. In the latter context, I represented four former attorneys general in the successful opposition to the so-called "secret service privilege." See In re Sealed Case, 148 F.3d 1073 (D.C. Cir. 1998) (counsel for the Hons. William Barr, Griffen Bell, Edwin Meese, and Dick Thornburgh); see also Susan Schmidt, Starr Wins Appeal in Privilege Dispute; Secret Service Fears Dismissed by Court, The Washington Post, July 8, 1998, at A01. I also serve as counsel to the workers at Area 51 who successfully compelled compliance with federal law as a secret military facility and defeated claims that federal laws were superceded by the President's inherent authority as commander-in-chief. See Kasza v. Browner, 133 F.3d 1159 (9th Cir. 1998); Kasza v. Browner, 133 F.3d 1159 (9th Cir. 1997); Frost v. Perry, 919 F. Supp. 1459 (D. Nev. 1996); John Doe v. Browner, 902 F. Supp.

This past work includes two areas of particular relevance to this hearing: legisprudence[6] and executive privilege.[7] After significant losses in the areas of executive privilege and attorney-client privilege under former President Clinton, I was one of the academics who encouraged the Bush Administration to make the repair of executive privilege a priority issue.[8] Accordingly, my disagreement with the Bush Administration in a series of recent controversies over executive

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1240 (D. Nev. 1995). See generally Jonathan Turley, Through a Looking Glass Darkly, supra.

[6] "Legisprudence" is the term often used for the study of statutory interpretation and such closely related constitutional doctrines as the separation of powers. I have explored the proper scope and function of statutory interpretation in a variety of contexts. See, e.g., Jonathan Turley, Dualistic Values in the Age of International Legisprudence, 44 Hastings Law Journal 145 (1992); Jonathan Turley, "When in Rome": Multinational Misconduct and the Presumption Against Extraterritoriality 84 Northwestern University Law Review 598 (1990); Jonathan Turley, Transnational Discrimination and the Economics of Extraterritorial Regulation, 70 Boston University Law Review 339 (1990); Jonathan Turley, Laying Hands on Religious Racketeers: Applying Civil RICO to Fraudulent Religious Solicitation, 29 William and Mary Law Review 441 (1988); Jonathan Turley, The Not-So-Noble Lie: The Nonincorporation of State Consensual Surveillance Standards in Federal Court, 79 Journal of Criminal Law and Criminology 66 (1988); Jonathan Turley, United States v. McNulty: Title III and the Admissibility in Federal Court of Illegally Gathered State Evidence, 80 Northwestern University Law Review 1714 (1986).

[7] Despite my litigation history in opposition to a variety of executive privilege claims, I have criticized the loss of executive privilege and related privileges under former President Clinton as weakening the presidency. Id.; see also Jonathan Turley, Checking the Executive Pulse, The Los Angeles Times, November 19, 1998, at A11; Jonathan Turley, The President and the Damage Done, The Legal Times, April 20, 1998, at 24; Jonathan Turley, Clinton Maneuvers Threaten His Office, The National Law Journal, February 23, 1998 at A19.

[8] Turley, Paradise Lost, supra; see also Jonathan Turley, Nothing Bars Questioning the President's Bad Ideas: The Limits of Executive Privilege, The Los Angeles Times, September 27, 1999, at A7; Turley, Checking the Executive Pulse, supra, at A11; Jonathan Turley, Praetorian Privilege, The Wall Street Journal, April 27, 1998 at A23; Turley, The President and the Damage Done, supra, at 24; Turley, Clinton Maneuvers Threaten His Office, supra, at A19; Jonathan Turley, Guarding the King, Not His Secrets, The Legal Times, February 2, 1998, at 28.

privilege is one of degree rather than purpose. Quite frankly, I have been perplexed by the Administration's selection of issues on which to fight executive privilege. Given the anemic condition of executive privilege after the Clinton losses in court, it was essential that the Administration chose wisely when and how to defend this vulnerable asset. Instead, the Administration has invoked and fought privilege claims that were often excessive and even unprecedented.[9] This has led to a number of losses and subsequent reversals by the Administration in areas ranging from the release of Energy Task Force documents to the appearance of Homeland Security Director Tom Ridge before Congress.[10] To put this developing record in the kindest possible light, there

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[9] A distinction can be drawn between invoking and litigating claims. Most administrations have been vigilant in asserting executive privilege in the natural institutional struggles with the legislative and judicial branches. However, there has been a long-standing policy to avoid court fights over executive privilege to protect the president and future presidents from adverse rulings. See Turley, Through a Looking Glass Darkly, supra. Accordingly, administrations have compromised with Congress and used non-binding waivers to reach mutual accommodation on divisive issues.

[10] The Ridge fight was particularly curious given the weakness of the White House arguments, the clear ability of Congress to compel his appearance, and the unnecessary damage done to interbranch relations. Ironically, the position adopted by the White House is reminiscent of the absolute privilege position taken by the Nixon Administration that was later rejected by both the judicial and legislative branches. Attorney General Richard Kleindienst once insisted that, regardless of the subject of a congressional hearing, "if the President of the United States should direct me or any other person on this staff not to appear before a congressional committee to testify or bring documents, that he has constitutional power to do so and that person should not do so." Harold C. Relyea, "The Presidency and the People's Right to Know," in Presidency and Information Policy 6 (Harold C. Relyea, ed. 1981). The constitutional claim raised with regard to Ridge was different but based on a similarly flawed notion of privilege. It was perfectly understandable that the White House did not want Ridge to be occupied by endless hearings when he must attend to the nation's security. However, as in other conflicts, the White House dug in on dubious constitutional ground. In this case, the White House insisted that, as a position that does not require Senate confirmation, a Homeland Security Director could and should refuse such appearances before Congress. Given the huge budget appropriated to this office and importance of the position to Congress' legislative and oversight authority, this

appears a lack of a coherent and consistent strategy in this Administration for the assertion and protection of executive privilege. The Administration's unexpected issuance of E.O. 13233 follows this pattern. Not only was there an apparent lack of consultation with Congress,[11] but the executive order was written in a fashion that seems to maximize the chances of another loss in court. As someone who is often on the other side of executive privilege assertions in court, I should be delighted by such a pattern. However, as someone who cares deeply about the Madisonian system of tripartite government, this record is as distressing as it is baffling.

In my view, E.O. 13233 is fatally flawed as a matter of law and extremely misguided as a matter of public policy. For that reason, I am supportive of H.R. 4187 in both its language and purpose. I commend Chairman Horn and the bipartisan supporters of this bill for defending a long-held policy of public disclosure.[12] It is the type of public interest legislation that has distinguished your career in this body, Chairman Horn, and it is all the more meaningful as one of your final legislative objectives before retirement. E.O. 13233 represents a troubling anomaly after decades of support for the maximum release of presidential records. This record extends through both democratic and republican administrations and the underlying policy has been championed by both parties in Congress. Fortunately, our system allows for corrective action to be taken when an Administration takes an action that is unwise or ill-considered. H.R. 4187 is precisely such a measured legislative response.

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argument bordered on the frivolous and made a showdown with bipartisan committee members inevitable.

[11] The lack of effective consultation with Congress is becoming something of a signature for this Administration. Repeatedly, the Administration has added unnecessarily to its political burden by failing to cooperate and communicate with the legislative branch. This has undermined some policy changes that were badly needed, but fatally undermined by a lack of coordination with Congress. See, e.g., Jonathan Turley, Seeing Red Over Blue Slips, The Los Angeles Times, May 16, 2001, at A15 (discussing the failure of the Administration to lay the foundation for ending the dubious practice of "blue slipping" judicial nominees).

[12] A previous hearing was held on this issue. U.S. House Government Reform Committee, Subcommittee on Government Efficiency, Financial Management and Intergovernmental Relations, Hearings on the Presidential Records Act, 107th Congress, First Session, Nov. 6, 2001.

II.
A QUESTION OF OWNERSHIP: PRESIDENTIAL PAPERS AS PUBLIC PROPERTY.

To understand the legal and policy issues relating to E.O. 13233, it is important to understand how we came to the enactment of the Presidential Records Act. The change in policy by the Bush Administration is far more fundamental than simply a new procedural framework for the release of presidential papers. There are aspects of the executive order that hearken back to a quasi-proprietary sense reminiscent of a long-abandoned view of some early presidents.[13]

When one considers the copious amounts of government records and documents produced each day in the federal system, it is hard to imagine that at the beginning of the republic we had a reputation for disdaining records and documentation. Alexis de Touqueville noted in his masterpiece, Democracy in America, that

> [In America, no one] bothers about what was done before his time. No method is adopted; no archives are formed; no documents are brought together, even when it would be easy to do so. When by chance someone has them, he is casual about preserving them. Among my papers I have original documents given to me by public officials to answer some of my questions. America seems to live from day to day, like an army on active service.[14]

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[13] Such disputes are not limited to presidents. President Bush was subject to considerable criticism when he transferred his records as governor of Texas to his father's presidential library rather than a state controlled library. Steven L. Hensen, The President's Papers are the People's Business, The Washington Post, Dec. 16, 2001, at B01. Likewise, former New York Mayor Rudoplf Guiliani caused an uproar when, in the final days of his administration, he had his records transferred to a private warehouse. Celestine Bohlen, Paper Chase: Whose History is it, Anyway: The Public's or the Officials'?, New York Times,, Feb. 24, 2002, at 3 (quoting one archivist as objecting that the documents constitute "our public heritage and that heritage should be under public control and administration.").

[14] Alexis de Tocqueville, Democracy in America (G. Lawrence trans. 1966) (quoted in Carl McGowan, Presidents and their Papers, 68 Minnesota Law Review 409 (1983)).

Today, the very suggestion of public officials giving original documents to answer inquiries is enough to send the most stalwart archivist into a fetal position. Perhaps the most valuable of such documents are presidential papers. While agencies generate important material in the execution of policy, it is in presidential papers that historians can divine the genesis of policy.[15] Moreover, the weakening of the PRA would be particularly damaging to our historical record because the act serves a unique function vis-à-vis record-keeping statutes like the Federal Records Act (FRA)[16] and information-forcing statutes like the Freedom of Information Act (FOIA).[17] The FRA not only does not cover White House offices, but the Supreme Court has ruled that it was intended "not to benefit private parties, but solely to benefit the agencies themselves and the Federal Government as a whole."[18] FOIA conversely mandates conditions for release, but does not contain record-keeping standards for the government.[19] The PRA strives to serve not the interests of agencies but that of history. It does this through a detailed process for the safekeeping and dissemination of presidential material.

For much of our early period as a republic, presidents and Congress assumed that presidential papers were the property of the departing Chief Executive. Accordingly, it was common for departing presidents to take their papers with them into retirement except for those papers with on-going significance or application in government.[20] This led to a series of historical losses of the greatest

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[15] Of course, archives of presidential records can reveal everything from the most inconsequential (like an order from Lyndon Johnson to move a White House toilet for a better sitting position) to more intriguing notes (like a note from John Steinbeck on his idea for a napalm grenade during the Vietnam War). Larry Berman, "The Evolution and Value of Presidential Libraries," in Presidency and Information Policy 89-90 (Harold C. Relyea, ed. 1981).

[16] 44 U.S.C. 2101-2118 (1988).

[17] 5 U.S. C. 552 (1988).

[18] Kissinger v. Reporters Committee for Freedom of the Press, 445 U.S. 136, 149 (1980).

[19] See generally James D. Lewis, White House Electronic Mail and Federal Recordkeeping Law: Press "D" to Delete History, 93 Michigan Law Review 794, 795 (1995).

[20] See generally Berman, supra, at 80.

magnitude.[21] George Washington left his papers to the control of his nephew, Associate Supreme Court Justice Bushrod Washington, who was described as a man of "little discretion" and "hazardous generosity."[22] In relatively short order, Washington's papers were dispersed among a wide array of private parties. Other presidents like Andrew Jackson allowed their papers to be distributed in equally haphazard ways.[23] Those presidents who did order the consolidation and preservation of their papers did not always succeed. Larry Berman has recounted how William Henry Harrison's papers were lost in a fire at the Harrison home in Ohio.[24] Civil war claimed the papers of John Tyler when Richmond burned in 1965.[25]

Other presidents or their relatives preferred destruction to dispersion in handling presidential papers. Fillmore's son actually ordered the destruction of his father's correspondence "at the earliest practicable moment" after his death.[26] Ulysses S. Grant followed this view and destroyed most of his presidential papers[27] as did Franklin Pierce and Chester A. Arthur.[28] and virtually all of the

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[21] See Berman, supra; Carl McGowan, Presidents and their Papers, 68 Minnesota Law Review 409 (1983); Hirshon, The Scope, Accessibility and History of Presidential Papers, 1 Government Publications Review 363 (1974).

[22] Id. at 80.

[23] Id. at 81. Jackson resisted congressional inquiries for such records during his term. In a characteristic exchange, he denied access to records related to the removal of funds from the Bank of the United States:

> I have yet to learn under what constitutional authority that branch of the Legislature has a right to require of me an account of any communication. . . . Might I be required to detail to the Senate the free and private conversations I have held with those officers on any subject relating to their duties and my own.

Archibald Cox, Executive Privilege, 122 U. Pa. L. Rev. 1383, 1403 (1974)

[24] Id.

[25] Id.

[26] Id. ("Fortunately, these instructions were never carried out and the personal papers later were discovered in the attic of a home in Buffalo, New York, and today are part of the Buffalo Historical Society collection.").

[27] Id.

[28] McGowan, supra, at 412.

private papers of Harding were destroyed by his wife.[29] Perhaps most shocking was the effort of Abraham Lincoln's son Robert, who "was caught by Mary Butler in the very process of destroying his father's Civil War correspondence."[30] While recognizing the public's interest in these papers, most presidents until the middle of the twentieth century took the view of Grover Cleveland that "if I desired to take [my presidential papers] into my custody I might do so with entire propriety, and if I saw fit to destroy them no one could complain."[31]

Presidents were not alone in this proprietary view of presidential papers. Congress and archivists treated presidential papers as personal property, as evidenced by purchases of collections by the government.[32] Over time, a new view emerged that did not deny the claim of personal ownership of some presidential papers, but viewed their sale or destruction as a public wrong. Franklin Delano Roosevelt symbolizes this shift in thinking in his decision to donate both land and his papers for the establishment of the first presidential library in Hyde Park, New York. He did so, however, in full recognition that this was a gift to the American people and not an obligation.[33] After Roosevelt, there was an expectation that these papers would eventually be placed in a public library or archive.[34]

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[29] Berger, supra, at 82; see also Kenneth Duckett and Francis Russell, The Harding Papers: How Some Were Burned . . . and Some Were Saved, 16 American Heritage at 24 (1965).

[30] Id.

[31] Id. (quoting Cleveland in a 1886 response to a Senate request of documents).

[32] Id. at 81 (detailing such government purchases as the acquisition of both Washington's official papers and his correspondence for $25,000 and $20,000, respectively).

[33] H.G. Jones explained the significance of this act in his work, Records of a Nation:

> Roosevelt made his most significant departure . . . by recognizing the paramount right of the public and by subordinating this claim to public custody, support, and management under the direction of civil servants governed by professional standards. This . . . fell short of the natural and logical goal. But it was a long, unprecedented step forward that no president thenceforth would be likely to disregard.

H.G. Jones, Records of a Nation 147 (1969); see also Berman, supra, at 83 (quoting H.G. Jones).

[34] Notably, even after presidential papers were viewed as historical documents that should be given to the government, there remained controversy over timing of

After Roosevelt, the view of a public duty rather than a public obligation continued to control the release of presidential records. Even when Congress enacted the Presidential Libraries Act of 1955,[35] presidents were not required to deposit their records into the libraries and, when they chose to do so, they controlled the conditions under which they would be available to researchers or the public.[36] Thus, Congress either did not consider presidential records to be public property or, more likely, it was content to leave the issue unresolved and to rely on the good intentions of former presidents.

It was Richard Nixon who brought about a quantum change in the status of presidential papers for most unexpected of reasons. Nixon would be the catalyst for the Supreme Court's modern articulation of executive privilege and its limits in his struggle with Congress over its investigations and impeachment. It is less known that Nixon also caused a reconsideration of the status of presidential documents and the process by which such documents would be acquired and released by government archivists. In a modern replay of prior scandals involving the destruction of presidential papers of presidents like Lincoln and Harding, an agreement was discovered by Congress that reasserted not only personal proprietary claims to these papers but also the right to destroy such property.[37] This so-called Nixon-Sampson agreement is often referred to by professional archivists with the same loathing that international politics scholars refer to the Stalin-Molotov agreement. Arthur Sampson was the Administrator of General Services and signed an agreement with Nixon that recognized his private property claim over all of his presidential papers. This private property included the incriminating tapes recorded in the Oval Office. Under the agreement, "Nixon could begin to destroy the tape recordings on or after September 1, 1979, so that all of them would be destroyed by September 1, 1984, or following the death of the

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such transfers. Margaret Truman, for example, was criticized for her exclusive access to presidential papers held by the family until after her publication on the life of her father. Berman, supra, at 82. Henry Kissinger was also criticized for such exclusive access vis-à-vis other writers. Alexandra K. Wignor & David Wignor, "The Future of Presidential Papers," in Presidency and Information Policy 97 (Harold C. Relyea, ed. 1981).

[35] 44 U.S.C. §2108 (1955). Before this act, presidential libraries were defined as Deeds of Gift due to the private ownership claim.

[36] 44 U.S.C. §§2212, 2211.

[37] See Nixon v. Sampson, 389 F.Supp. 107 (D.D.C. 1975).

former President, whichever occurred first."[38] The resulting controversy led to the enactment of the Presidential Recordings and Materials Preservation Act of 1974 (PRMPA),[39] which nullified the Nixon-Sampson agreement and protected the Watergate tapes from destruction.[40] A challenge from Nixon led to the Supreme Court's constitutional ruling in favor of Congress' right to protect such material from unilateral destruction by a president in Nixon v. Administrator of General Services.[41]

The Nixon-Sampson controversy also led to the establishment of a commission to study the question of presidential records.[42] The National Study Commission on Records and Documents of Federal Officials called for a final rejection of the private proprietary theory of presidential papers. Not only did the commission recommend that all such papers be viewed as public property but further suggested the current 15-year time period as a transition period to eventual public release.[43] This was the position ultimately adopted by Congress and President Jimmy Carter in the enactment of the Presidential Records Act of 1978.[44]

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38 Id. at 84-85.

39 Pub. L. No. 93-526, 1974 U.S.C.C.A.N. 1949, 1950, 88 Stat. 1695. The PRMPA ultimately allowed Congress to take "control of approximately 42 million pages of documents and 880 tape recording, which contained both personal and non-personal records." Catherine F. Sheehan, Opening the Government's Electronic Mail: Public Access to National Security Counsel Records, 35 Boston College Law Review 1145, 1161 (1994).

40 One of the interesting aspects of the PRMPA is the absence of an endorsement of the public property rationale that would be contained in the Presidential Records Act. In the various purposes stated in Section 104(a), none speak of this public property rationale. Instead, Congress spoke of the need to learn the "full truth, at the earliest reasonable date" of the abuses of governmental power" in Watergate as well as other Watergate related purposes. 44 U.S.C. 2107 (1976). In fact, the seventh stated purpose refers to "the need to give to Richard M. Nixon, or his heirs, for his sole custody and use, tape recordings and other materials which are not likely to be related to the need [related to Watergate] and are not otherwise of general historical significance." Id.

41 433 U.S. 425 (1977).

42 44 U.S.C. §3317 (1974).

43 Id. at 85 (quoting Lester Cappon as summarizing the recommendation "that all documentary materials made or received by public officials in discharge of their official duties should be recognized as the property of the United States; and that

The Nixon litigation reveals a transition from a period of reliance on private proprietary claims to reliance on executive privilege as a basis for withholding material. Nevertheless, a private proprietary claim was made by Nixon and led to a brief consideration of the issue of title to presidential records in United States v. Nixon.[45] While the Supreme Court declined to hold that presidential records are the property of the public rather than the president, it strongly suggested that there was a strong public claim to these documents, even against the wishes of a claim of private ownership. In a footnote that was a catalyst for the enactment of the PRA, the Court stated:

> We see no reason to engage in the debate whether appellant has legal title to the materials. . . . It has been accepted at least since Mr. Justice Story's opinion in Folsom v. Marsh, 9 F. Cas. 342, 347 (No. 4,901) (CC Mass 1841), that regardless of where legal title lies, "from the nature of the public service, or the character of the documents, embracing historical, military, or diplomatic information, it may be the right, and even the duty, of the government, to give them publicity, even against the will of the writers." Appellant's suggestion that the Folsom principle does not go beyond materials concerning national security and current Government business is negated by Mr. Justice Story's emphasis that it also extended to materials "embracing historical... information." Ibid. Significantly, no such limitation was suggested in the Attorney General's opinion to President Ford. Although indicating a view that the materials belonged to appellant, the opinion acknowledged that "Presidential materials" without qualification "are peculiarly affected by a public interest" which may justify subjecting "the absolute ownership rights" to certain "limitations directly related to the character of the documents as records of government activity."[46]

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officials be given the prerogative to control access to the materials for up to fifteen years after the end of their federal service.").

[44] 44 U.S.C. 2201-07 (1988).

[45] 418 U.S. 683 (1974).

[46] Id. at 445 n.8 (citations omitted).

Congress responded quickly to establish legislatively that title to this material belongs to the public, as position accepted by President Jimmy Carter and all of his successors in office.[47]

On this historical spectrum, it would be unfair to characterize President Bush's position as analogous to the line of presidents asserting private proprietary claim to presidential records. President Bush appears entirely respectful of the federal law making these documents public property and subject to public dissemination. Rather, President Bush appears to hold a view akin to a constitutional proprietary rather than a private proprietary claim over these records. By giving not only former presidents but their designated heirs a veto over the release of documents, he has created a new form of proprietary claim that returns a degree of unilateral control to former presidents and their heirs. With the exception of the right to sell or destroy material, this new constitutional proprietary view affords a degree of private control that has not been realized since the demise of the private proprietary theory.

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[47] The Court also seemed to invite the enactment of the PRA in Nixon v. Administrator of General Service, 433 U.S. at 452-53, when it noted:

> An incumbent President should not be dependent on happenstance or the whim of a prior President when he seeks access to records of past decisions that define or channel current governmental obligations. Nor should the American people's ability to reconstruct and come to terms with their history be truncated by an analysis of Presidential privilege that focuses only on the needs of the present. Congress can legitimately act to rectify the hit-or-miss approach that has characterized past attempts to protect these substantial interests by entrusting the materials to expert handling by trusted and disinterested professionals.
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> Presidents in the past have had to apply to the Presidential libraries of their predecessors for permission to examine records of past governmental actions relating to current governmental problems. . . . Although it appears that most such requests have been granted, Congress could legitimately conclude that the situation was unstable and ripe for change.

III.
THE PRESIDENTIAL RECORDS ACT AND E.O. 13233

A. A Brief Overview of the Presidential Records Act.

Unlike its immediate predecessor, the PRMPA, the Presidential Records Act was enacted with the purpose of "establish[ing] the public ownership of records created by future Presidents . . . in the course of discharging their official duties."[48] For decades, no president has questioned the public claim to these records. This may be in part due to both its genesis in a Supreme Court decision as well as its recognition of executive privilege and national security claims for withholding information.

A great deal of material under the PRA is either excluded or subject to destruction. The PRA does not cover personal records.[49] Rather presidential records are "any documentary materials relating to the political activities of the President or members of his staff, but only if such activities related to or have a direct effect upon the carrying out of constitutional, statutory, or other official or ceremonial duties of the President."[50] Even when covered by the PRA, Congress imposes a delay in the release of information to protect the immediate confidentiality or sensitivity of the information. Thus, a president is allowed to unilaterally demand a delay in the release of information for up to 12 years for material that fall into one of six categories.[51] These categories include material:

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[48] Presidential Records Act of 1978, H.R. Rep. No. 95-1487, 95th Cong., 2d Sess. 2 (1978). The PRA states clearly that "[t]he United States shall reserve and retain complete ownership, possession, and control of presidential records." 44 U.S.C. §2202.

[49] 44 U.S.C. 2201(2)(B)(ii) (1988). Personal records are defined as "all documentary materials . . . of a purely private or nonpublic character which do not relate to or have an effect upon the carrying out of the constitutional, statutory, or other official or ceremonial duties of the President." 44 U.S.C. 2201(3) (1988). This personal records exemption was intended to be narrow, as least in the view of the House Committee approving the PRA. H.R. Rep. No. 1487, 95th Cong., 2d Sess. 2 (1978), at 11-12, reprinted in 1978 U.S.C.C.A.N. 5732, 5733 (hereinafter "House Report"); see also Lewis, supra, at 809-10.

[50] 44 U.S.C. 2201(2)(A).

[51] Information that does not fall into one of the PRA exemptions is subject to release in five years after the end of a given administration. 44 U.S.C. §2204.

> (1) authorized to be kept secret for national security and foreign policy reasons; (2) relating to the appointment of federal officials; (3) exempted from disclosure by statute; (4) trade secrets and commercial or financial information which is confidential; (5) confidential communications between the President and advisors concerning requests for advice; and (6) personnel and medical files of which disclosure would be an invasion of privacy.[52]

The most relevant category for a review of E.O. 13233 is number five – the confidential communications category.

It is important to understand that the twelve-year limitation under the PRA does not mean that any and all material is then released. To the contrary, Congress incorporated the standards from FOIA as to allow the indefinite withholding of information under eight distinct categories. Only one category for withholding FOIA information was excluded – the FOIA exemption that covers most confidential communications.[53] The remaining exemptions include (1) any national security information that has been classified pursuant to an executive order;[54] (2) information that is "related solely to the internal personnel rules and practices of an agency";[55] (3) information that Congress has statutorily exempted from release;[56] (4) trade secrets and other information that would reveal privileged or confidential commercial or financial information;[57] (5) information that would violate an invasion of privacy;[58] (6) certain law enforcement records;[59] (7) information used

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52 44 U.S.C. 2204 (a)(1)-(6).

53 44 U.S.C. §2204 (C)(1) ("Presidential records shall be administered in accordance with section 552 of title 5, United States Code, except that paragraph (b)(5) of that section shall not be available for purposes of withholding any Presidential record. . . .") The category was a FOIA exemption for "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. §552 (b)(5).

54 5 U.S.C. §552 (b)(1).

55 5 U.S.C. §552 (b)(2).

56 5 U.S.C. §552 (b)(3)

57 5 U.S.C. §552 (b)(4).

58 5 U.S.C. §552 (b)(6).

59 5 U.S.C. §552 (b)(7). Specifically, this relates to information:

by "an agency responsible for the regulation or supervision of financial institutions;"[60] and (8) maps and other geological or geophysical information "concerning wells."[61]

The PRA allows for a fair degree of flexibility in both the maintenance and release of information. The Act does allow for destruction of records but bars the destruction of any records "that no longer have administrative, historical, informational, or evidentiary value."[62] The Act further requires an examination by the Archivist of the material who can notify Congress and trigger a 60-day waiting period to allow for a countermanding legislative act. For all other material, the Act establishes a simple process for the archiving and later public dissemination of material. As for a president's policies on record-keeping during his or her term, the Act leaves the matter entirely to his own discretion and does not provide for judicial review.[63]

> only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source, (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or (F) could reasonably be expected to endanger the life or physical safety of any individual.

Id.

60 5 U.S.C. §552 (b)(8).

61 5 U.S.C. §552 (b)(9).

62 44 U.S.C. 2203(c).

63 See Armstrong v. Bush, 721 F. Supp. 343, 346 (D.D.C. 1989). In my view, this is a gap in the PRA that undermines the statute. As shown in Armstrong, there

The role of the Archivist is central to the legislative intent and operation of the PRA. Congress essentially left to the Archivist to be a sentinel for history. While the Archivist has no independent authority to challenge a decision by a president, he has the authority to raise an alarm as to the loss of valuable material and to delay the destruction to allow Congress to act. This sentinel function is triggered by a requirement in the Act that a president must notify the Archivist of any destruction of records and the Archivist can then issue, if warranted, a written opinion in opposition to such a policy.[64] If the president chooses to ignore the recommendation of the Archivist, the latter may delay any destruction by 60 days and alert Congress to the potential loss.[65] The Archivist is given the express duty to release presidential records "as rapidly and completely as possible."[66] To accomplish this vital role, Congress sought "to shield the Archivist from unnecessary pressure" given the expected interest of a president to forestall the "release of embarrassing and inappropriate material concerning a predecessor, and from the predecessor to withhold materials. . . ."[67]

The Archivist also serves a sentinel function in protecting of executive privilege. The Archivist is required to notify a former president of the possible release of any documents that "may adversely affect any rights and privileges which the former President may have."[68] The former president then has 30-days to object to such a release and, if the Archivist rejects the claim of privilege, the former president is given an additional 30 days after notification of denial to seek judicial relief.[69]

At the end of his administration, President Ronald Reagan signed an executive order imposing additional procedures on the archiving and release under

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are compelling circumstances where some judicial review would be appropriate while reserving ample operational flexibility for a president.

[64] 44 U.S.C. 2203(c)(1).

[65] 44 U.S.C. 2203(c)-(d).

[66] American Historical Ass'n v. Peterson, 876 F.Supp. 1300, 119 (D.D.C. 1995).

[67] House Report, supra, at 9.

[68] 44 U.S.C. §2206(3).

[69] 36 C.F.R. §1270.46(a), (b), (c), (d).

the PRA.[70] Notably, neither President Reagan nor President George P. Bush opposed the provisions changing in E.O. 13233. Rather, President Reagan imposed relatively modest procedural requirements on the Archivist that did not trigger any substantial opposition from the public or Congress. For example, E.O. 12, 667 required the Archivist to "identify any specific materials, the disclosure of which [the Archivist] believes may raise a substantial question of Executive privilege."[71] This executive order was superceded by E.O. 13233.

B. Constitutional Analysis of E.O. 13233.

It is important to remember that the PRA recognized the newly defined principle of executive privilege, but did not seek to expand on the privilege in the control of presidential records.[72] In United States v. Nixon,[73] the Supreme Court had rejected Nixon's extreme view of executive privilege and held that such a privilege is qualified.[74] The resulting privilege was limited and fully incorporated into the PRA. The language of the executive order strongly suggests a view of executive privilege that contradicts not only the PRA but prior decisions of the federal courts in this area. In this sense, E.O. 13233 would effectuate fundamental changes in both an act of the legislative branch as well as prior rulings of the judicial branch. Since an executive order cannot constitutionally do either task under the separation of powers doctrine, the Administration can hardly expect to achieve both tasks in E.O. 13233.

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70 See Exec. Order 12, 667. The Reagan Administration had previously triggered litigation in its decision to destroy information contained in the White House computer system, or PROFS system. After various parties sued, a district court found the White House in violation of not just the PRA but also the Federal Records Act (FRA), 44 U.S.C. 2100 (1984) and the Administrative Procedures Act (APA), 5 U.S.C. 701 (1993). Armstrong, 721 F.Supp. 343 (D.D.C. 1993). The D.C. Circuit, however, ruled that there was no judicial review of the question under either the PRA or the APA. Id. at 290, 297. Ultimately, the government was found on remand to have violated the FRA. Armstrong v. Bush, 810 F.Supp. 335, 342-48 (D.D.C. 1993).

71 Exec. Order 12667, §2(b).

72 44 U.S.C. §2204(c)(2) ("Nothing in this act shall be construed to confirm, limit, or expand any constitutionally-based privilege which may be available to an incumbent or former President.").

73 418 U.S. 683 (1974).

74 Id. at 713.

There are a host of constitutional problems raised in this executive order. Given the limitation on time, I would like to focus on two general constitutional issues. First, there is the question of the constitutionality of the PRA as a threshold question. Despite the acceptance of prior administrations, the authority of Congress to compel the release of confidential communications could be challenged by the Bush Administration as violative of executive privilege. Second, if the authority of Congress to compel the release of such documents is accepted, there is the question of whether the President has attempted to use an executive order to negate or amend a statute.[75] This secondary question goes to the inherent conflict between the statute and E.O. 13233.

1. The Constitutionality of the Compelled Disclosure of Confidential Communications under the Presidential Records Act.

The threshold constitutional analysis of the PRA naturally focuses on the assertion of congressional authority over confidential communications. This analysis begins with the clear decision of Congress not to exempt confidential communications when it decided not to incorporate FOIA exemption (b)(5). It is the category of confidential communications that appears to be the primary concern of the Bush Administration despite its earlier statements. The Bush Administration initially justified E.O. 13233 on the need to protect national security.[76] However, as already noted, there is ample protection for national security protection since both the PRA and the incorporated FOIA exemptions specifically cover information "properly classified pursuant to . . . Executive order."[77] The national security protections expressly bar the release of national security information during and after the twelve-year period. The extent that the Administration believed that E.O. 13233 was needed to protect national security information, it was simply incorrect in its reading of PRA.

A direct constitutional challenge to the PRA would seem both unwise and unwarranted. Executive privilege has long occupied a certain place in constitutional law. The privilege remains relatively recent in its articulation by the Supreme Court, though it can be traced to the very first administration of George

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[75] For a response from the Administration, see Alberto R. Gonzales, Freedom, Openness and Presidential Papers, Washington Post, Dec. 16, 2001.

[76] See, e.g., Allen & Lardner, Jr., supra.

[77] 44 U.S.C. §2204(a)(1); 5 U.S.C. §552 (b)(1).

Washington.[78] The Court recognized this privilege with considerable reservation as to its scope and duration of use. The Court has noted that an executive privilege claim of a former president is facially less compelling than it is for an incumbent.[79] Moreover, the Court has held that executive privilege is time-sensitive. Thus, while the Court has accepted that a former president can raise an executive privilege claim,[80] this claim diminishes with time. The Court was clear on this

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[78] See generally Turley, Paradise Lost, supra.

[79] In Nixon v. Administrator of General Services, 433 U.S. at 448, the Court noted:

> It is true that only the incumbent is charged with performance of the executive duty under the Constitution. And an incumbent may be inhibited in disclosing confidences of a predecessor when he believes that the effect may be to discourage candid presentation of views by his contemporary advisers. Moreover, to the extent that the privilege serves as a shield for executive officials against burdensome requests for information which might interfere with the proper performance of their duties, . . . a former President is in less need of it than an incumbent. In addition, there are obvious political checks against an incumbent's abuse of the privilege.

[80] The extension of executive privilege to former presidents is far from an obvious conclusion. A strong argument could be made that executive privilege should be tied directly and exclusively with the office of the president. Under this theory, when a president is returned to the status of a private citizen, he loses the authority that attended his prior official status. It would then be entirely the responsibility of the incumbent president to protect confidentiality of the office in the assertion of privilege over the papers of prior presidents. Conversely, the Court's rationale for extending privilege to former presidents is far from satisfying. In Nixon v. Administrator of General Services, the Court adopted the argument of the Solicitor General that:

> "This Court held in United States v. Nixon...that the privilege is necessary to provide the confidentiality required for the President's conduct of office. Unless he can give his advisers some assurance of confidentiality, a President could not expect to receive the full and frank submissions of facts and opinions upon which effective discharge of his duties depends. The confidentiality necessary to this exchange cannot be measured by the few months or years between the submission of the information and the end of the President's tenure;

point in Nixon v. Administrator of General Services when it noted that "[t]he expectation of the confidentiality of executive communications thus has always been limited and subject to erosion over time after an administration leaves office."[81] The only question is the rate of this decline. Congress clearly believed that twelve years was ample time for the confidentiality of communications to recede to the point that it is over-ridden by the countervailing need of public disclosure.

E.O. 13233 is premised on the notion that some confidential communications would remain privileged after twelve years. There is no question that some communications may prove embarrassing for a president or an advisor. This is particularly the case for younger presidents like former president Bill Clinton and President Bush who will live long after the release of their records. However, there is no evidence that a twelve-year period would in anyway diminish the frank communication of information in the White House. There is no guarantee that a former president will in fact invoke privilege over a particular communication at the time of its making. More importantly, the executive privilege builds on the highly uncertain ground of an invocation of a former privilege. It then attempts to project this claim beyond a decade in time. Given the Court's repeated position that this is a qualified and time-sensitive privilege, the suggested extension beyond the twelve-year period is highly dubious.

Ultimately, Congress has authority to assert public ownership over this material and to determine an adequate buffer period for confidential communication. Given the countervailing need for disclosure and the absence of any compelling evidence of a chilling effect on communications, it is doubtful that

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> the privilege is not for the benefit of the President as an individual, but for the benefit of the Republic. Therefore the privilege survives the individual President's tenure."

433 U.S. at 448-449 (quoting Solicitor General's brief). Yet, the privilege would survive an individual president's tenure in that it would be transferred to the incumbent president to use to the extent that it "benefit the Republic."

[81] Nixon, 433 U.S. at 451; see also Nixon v. Freeman, 670 F.2d 346, 356 n.13 (D.C. Cir. 1983) ("Although there is no fixed number of years that can measure the duration of the privilege, it is significant that no public access will occur until at least eight years after the event disclosed.").

a court would reconsider the constitutionality of the PRA in a direct constitutional challenge.

2. The Inherent Conflict Between the Presidential Records Act and E.O. 13233.

Unless the President is challenging the constitutionality of the PRA, he cannot supercede or modify a federal statute through an executive order.[82] Thus, the constitutional analysis must turn to the question of whether this executive order truly only adds a few additional procedures consistent with the statute, as claimed by the White House,[83] or abridges the statute in violation of the Constitution. In my view, there is little question that E.O. 13233 violates the PRA in changing almost every major element of the statutory scheme. As such, the executive order transgresses upon the constitutional authority of Congress and should be found unlawful in any challenge.

i. The Negation of the Statutory "Buffer Period."

E.O. 13233 stands in direct contradiction of a variety of statutory provisions and is, therefore, in violation of federal law. The most obvious is the stated statutory period for the release of information that is not exempted under the PRA. Congress expressly stated that the twelve-year delay was conceived as a "buffer period" for confidential communications.[84] It viewed the period as balancing the legitimate concerns of the Executive Branch with the need of the public to receive this information. The executive order would extend this period indefinitely and, in doing so, violates the very foundation of the PRA.

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[82] See Marks v. CIA, 590 F.2d 997 (D.C. Cir. 1978).

[83] Mike Allen & George Lardner, Jr., A Veto Over Presidential Papers; Order Lets Sitting or Former President Block Release, Washington Post, Nov. 2, 2001, at A1.

[84] While it is dangerous to rely too heavily on legislative history, this view emerges repeatedly in the consideration of the proposed act. See, e.g., Cong. Rec. H34895 (daily ed. Oct. 10, 1978) (statement of Rep/ Brademas) ("In our view, the best way to insure that ideas would be expressed [within the Executive Branch], and also that they would be set down in writing and be available to later researchers, was to permit the institution of a "buffer period," so to speak, during which time these materials could be protected.").

ii. The Reduction of the Authority of the Archivist.

E.O. 13233 also materially alters the statutory role of the Archivist. Despite the decision in Public Citizen v. Burke[85] in highly analogous claims, the executive order would transform the Archivist from a central to a bit player in disputes over presidential records. Where the PRA allows the Archivist to override an unreasonable assertion of privilege by a former president, the executive order would give the former president an effective veto – even when the incumbent president views the assertion to be unfounded.[86] Moreover, in cases of death or disability, the PRA expressly gives the Archivist the authority to exercise the authority of the former president.[87] This authority is expressly transferred to the family under the executive order, even without the approval of the former president.[88] Even the duty of the Archivist to carry out the insular schedule for review is changed under the executive order. E.O.13233 allows a former president to take 90 days for such review. However, it then mandates that a president can simply request an extension and effectively bar release.[89] A former president can simply daisy-chain such extension indefinitely. Once the most active component of the PRA process, the Archivist is reduced to a largely pedestrian role. Such changes negate authority given to the Archivist by Congress to control these records, which cannot be accomplished through an executive order.

iii. The Expansion of the Authority of a Former President.

E.O. 13233 also materially changes the authority of a former president. In the PRA, Congress declined to give a former president control over presidential records.[90] A former president was required to yield to the judgment of the Archivist or seek judicial relief. The executive order violates the Act by reconstructing the status of the former president in giving him final control over his records. Under the executive order, a former president is allowed to independently veto the release of material even when the Archivist finds the basis to be unsupported and the incumbent president finds "compelling circumstances" to

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85 Public Citizen v. Burke, 843 F.2d 1473 (D.C. Cir. 1988).
86 Exec. Order No. 13233, §3(d)(1)(i).
87 44 U.S.C. §2203(d).
88 Exec. Order No. 13233, §10.
89 Exec. Order No. 13233, §3(b).
90 American Historical Ass'n v. Peterson, 876 F.Supp. 1300, 1315 (D.D.C. 1995).

disagree with the assertion of privilege.[91] Giving a private citizen (let alone his heirs) the continuing right to unilaterally control access not only violates the PRA, but raises serious constitutional questions.[92] A former president is simply a private citizen and cannot compel an executive official to impose improper or unsupported restrictions on public material. This point was specifically addressed in Public Citizen v. Burke, where the court rejected the notion that a former president could supplant the jurisdiction of the Archivist through an assertion of privilege. Such authority would allow the former president to "gain[] power to withdraw from the Archivist some indefinite portion of the responsibilities that Congress delegated to him."[93]

iv. The Expansion of Parties with Ability to Control Access to Presidential Records.

E.O. 13233 also materially changes the PRA by adding parties who can claim privilege and control access to presidential records.[94] In perhaps the most baffling element of the executive order, the Bush Administration would add parties who may invoke privilege, including an unconstitutional extension of authority to a family member or designees. Under this executive order, a president could select any designee from a foreign citizen to a half-wit to assert executive privilege.[95] Moreover, the executive order allows for family members to designate a

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[91] Exec. Order No. 13233, §3(d)(1)(ii). Like much of this executive order, these provisions appear to be maddening in their contradiction. The requirement of the review of an incumbent president proves to be entirely superfluous given the ultimate control of the former president. This is only one example of a chronic lack of cohesion and consistency in the executive order.

[92] Public Citizen v. Burke, 843 F.2d 1473, 1480 (D.C. Cir. 1988).

[93] Burke, 843 F.2d at 1480.

[94] Exec. Order No. 13233, §10. There is also a suggestion that the Vice President can assert executive privilege, an extremely controversial position.

[95] Ironically, in his influential book, Records of the Nation, H.G. Jones specifically noted that private proprietary theories would support anyone, including the least qualified, in exercising control over these records. Jones, supra, at 162-63 ("The assumption that the papers of the Presidency are private property leads those who support it into the illogical and quite unconstitutional proposition that a private citizen—perhaps one who never had exercised the office of President or could even be eligible to do so—could decide what papers of the Presidency a subsequent holder of its powers might or might not see.")

representative in the case of "death or disability," including a series or group of individuals at their sole discretion.[96]

Putting aside the obvious policy implications, this would create new authority not just under the PRA but under federal law. As a general matter, executive privilege rests exclusively with the government and "can neither be claimed nor waived by a private party."[97] Executive privilege is not some ottoman that can be bequeathed to successive generations. The executive order would mutate a limited constitutional doctrine into a matter for probate. Given the fact that a former president's claim to executive privilege is itself both derivative and time-sensitive, the suggested extension to family members shows a breathtaking misunderstanding of the law in this area. There is no constitutional basis for such a transfer of authority to the heirs of a former president.

v. Shifting of the Burden for Release.

E.O. 13233 also fundamentally changes the legal burden in disputes over the withholding of presidential records. Under the PRA, it was the duty of a former president to seek a court order to override a decision of the Archivist to release material after the twelve-year period has run. The executive order would place this burden on the person seeking the material, a burden that is likely to discourage most researchers with limited funds. A former president is given public support both in terms of his administrative costs as well as his library. Moreover, a former president has access to a legion of lawyers who would gladly serve pro bono in any litigation. The burden imposed under the PRA is not particularly heavy for a former president, but could be determinative if shifted to a researcher or scholar. Regardless of the public policy implications of such a shift, it is clearly a material change in the federal statute and, therefore, unlawful.

vi. Imposition of New Standards for Access to and Withholding of information.

E.O. 13233 also introduces an entirely new threshold standard for access to presidential material. Under the executive order, "a party seeking to overcome the constitutionally based privileges that apply to Presidential records must establish at

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[96] Id.

[97] United States v. Reynolds, 345 U.S. 1, 7 (1953); see also Turley, Paradise Lost, supra, at 212.

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."[98] This standard is grafted onto the statute, which places no such threshold showing for access.[99] In combination with the shifting of the burden, it represents an impermissible amending of a federal statute through the promulgation of an executive order.

The executive order also imposes a curious standard on the incumbent president who "will concur" with the claim of a former president absent "compelling circumstances." It is a mystery where this standard comes from. An incumbent president presumably will either agree or disagree with an executive privilege assertion made by a former president. There is no basis on which to mandate agreement of an incumbent president with an unfounded privilege assertion. There is no indication what "compelling circumstances" are supposed to entail[100] but the implication is highly disturbing. The executive order mandates that, absent the undefined "compelling circumstances," an incumbent "will support" the claim of a former president "in any forum in which the privilege claim is challenged."[101] That would presumably include a federal court, where a president is expected to support valid assertions of privilege. The executive order seems to suggest that an incumbent president could seriously question an assertion, but lacking "compelling circumstances," litigate for its recognition in court. This raises serious ethical and legal questions as well as constitutional questions. Moreover, it impermissibly changes the structure and process of the PRA.

vii. The Expansion of Executive Privilege.

Finally, E.O. 13233 clearly violates the decision of Congress not to expand executive privilege authority under the PRA.[102] As aforementioned areas indicate, the executive order would radically expand executive privilege under the auspices of the PRA. Not only is this expansion unsupported by controlling constitutional precedent, but it does precisely what Congress barred under the PRA. If the Bush

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98 Exec. Order No. 13233, §2(b).

99 See Nixon v. Freeman, 670, F.2d 346, 359 (D.C. Cir.), cert. denied, 459 U.S. 1035 (1982).

100 Once again, the failure to define such a standard borders on an almost conversational style of writing an executive order.

101 Exec. Order No. 13233, §4.

102 44 U.S.C. §2204(c)(2).

Administration believes that the PRA violates executive privilege, then it may initiate a direct constitutional challenge to that statute. However, if the constitutionality of the statute is conceded (as it should be), the PRA was written to avoid its use as a vehicle for the expansion of executive privilege claims. E.O. 13233 would impermissibly use the PRA for a radical expansion of executive privilege beyond the confines articulated by the federal courts.

C. An Analysis of the Policy and Historical Implications of E.O. 13233.

The constitutional and legal infirmities of E.O. 13233 should be determinative in any review of this controversy. However, it is also important to note that the executive order would be a disservice to both history and the public. In some respects, the executive order constitutes a throw-back to an earlier period of executive authority over presidential records. The transfer of absolute control of access to documents to former presidents and their heirs is closely analogous to the private proprietary model that was rejected by the federal courts, Congress, and prior presidents. The Bush Administration has placed itself on the wrong side of history in trying to resurrect such family control over public material.

The executive order also moves constitutional law in the wrong direction by inflating the status of former presidents and their families. The Madisonian democracy is a curious system for many outsiders. We give a single man or woman the greatest power in the world but they, as presidents, cannot use any of that power for themselves. More importantly, at the end of their term, these presidents are transformed into citizens with no lingering claims of official status or power. It is this transformation that is a defining part of our system. From our earliest debates, we have resisted efforts to give presidents or former presidents trappings of a monarchy. Even the smallest symbol of such monarchial authority was rejected. In an earlier academic piece, I recounted the debate over whether writs should be issued in the name of the president or in the name of the people of the United States.[103] James Madison and others rejected the call from John Adams to issue writs in the name of the president.[104] Senator William Maclay referred to such views as the "old leaven" of an earlier royal period.[105] While not well-known, this debate reflects a fundamental change brought about with our revolution in the

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[103] See Jonathan Turley, "From Pillar to Post": The Prosecution of American Presidents, 37 American Criminal Law Review 1049, 1064-66 (2000).
[104] Id. at 1065.
[105] Id.

status of a chief executive. The attempt to extend executive privilege not only for the life of former presidents, but also for his heirs is precisely the type of "old leaven" that Maclay and other stood against in the First Congress.[106]

The transfer of privilege assertions to designated family members only magnifies the fundamental conflicts between E.O. 13233 and our constitutional system. It also creates the opportunity for endless controversy. As noted earlier, the greatest abuses during the private proprietary period were often committed by relatives acting by such designation. Destruction of material was often the result of sheer ignorance or simply recklessness.[107] The executive order also opens up the possibility of legal challenges over who has the right to exercise a former president's executive privilege. Just yesterday, the *Los Angeles Times* reported on an intense fight between daughters of former president Nixon over his library.[108] There is no reason why the bequeathed privilege will not also become an object of intrafamily litigation. This is particularly the case when the executive order leaves open the possibility that "the family of the former president may designate a representative (or series or group of alternative representatives, as they in their discretion may determine) to act on the former President's behalf."[109] Moreover, the Administration would allow the family to

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[106] H.G. Jones attributes earlier claims of private ownership over presidential records to "a lingering vestige or the attributes of monarchy, not an appropriate or compatible concept of archival policy for the head of a democratic state to adopt." H.G. Jones, Records of a Nation (1969).

[107] Some destruction occurred out of an effort to satisfy a desire for any material in the hand of a president. Thus, relatives like George Washington Parke Curtis wrote:

> I am now cutting up fragments from old letters & accounts, some of 1760 . . . to supply the call for Any thing that bears the impress of his venerated hand. One of my correspondents says send me only the dot of an I or the cross of a t, made by his hand, & I will be content.

Letter from George Washington Parke Curtis to John Pickett (Apr. 17, 1857), (quoted in McGowan, supra, at 412).

[108] Faye Fiore & Geraldine Baum, 2 Nixon Sisters, 1 Big Feud, The Los Angeles Times, April 23, 2002, at A1. The Nixon controversy also involves allegations that relatives with publishing and speaking interests are trying to retain control over documents, precisely the past concern in privately held libraries. Id. at A14.

[109] Exec. Order No. 13233, §10.

act without the approval of a living but "disabl[ed]" president.[110] Thus, we could see litigation in which a president is legally found to have a disability and his view of privilege overridden by his family. Ironically, it is fortunate that this provision if facially unconstitutional because it would otherwise be a recipe for disaster in actual application.

Ultimately, however, the executive order presents the greatest threat to history. The executive order would allow for endless delay in the release of documents, long past the death of a former president. Such was once the case when papers of presidents like Lincoln were sealed for over 80 years before scholars could see them.[111] The loss to history is in the inability to use documents to interview individuals who may have played a role in events. As time passes, the ability of history and law professors to delve into particular events is severely retarded and curtailed. This does not mean that such release is costless for former presidents. However, a free and open society comes at some cost. It is a choice that has been made by the citizens through their representatives in Congress. This Administration may believe that it was the wrong choice, but it is binding on this president unless and until he seeks a legislative change in the PRA.

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[110] Id. ("In the absence of any designated representative after the former President's death or disability, the family of the former president may designate a representative (or series or group of alternative representatives, a they in their discretion may determine) to act on the former President's behalf for purposes of the Act and this order, including with respect to the assertion of constitutionally based privileges.").

[111] Joseph Sax, Playing Darts with a Rembrandt 82 (1999). Sax noted some of the more extraordinary delays:

> President Lincoln's son, after destroying what he deemed of little value, deposited the remainder with the Library of Congress pursuant to a very restrictive provision that they remain sealed from public access—which they were—until 1947, eighty-two years after Lincoln's assassination. The John Quincy Adams papers were entirely closed to public access until 1956, 127 years after he left office. McKinley's secretary (and his son after him) controlled access over that president's papers until 1954, more than half a century after his assassination.

Id.

IV.
H.R. 4187:
THE PRESIDENTIAL RECORDS ACT AMENDMENTS OF 2002

As should be obvious from my critique of E.O. 13233, I strongly favor the enactment of H.R. 4187. In my view, this legislation represents precisely the type of institutional role that James Madison foresaw in the design of the tripartite system of government. The Madisonian system depends greatly on the integrity of the legislative process and the avoidance of what I called "legislative circumvention."[112] I previously testified against such legislative circumvention by the Clinton Administration vis-à-vis the courts.[113] E.O. 13233 is another variation on this theme; an attempt to avoid a legislative debate over a highly controversial and questionable change in the law. This executive order would work a new and radical change in the status of former presidents. It is a question that should not be answered by some unilateral presidential fiat.

I have little doubt that E.O. 13233 is unconstitutional. However, the issuance of a facially unconstitutional executive order should not be used to gain an effective exemption from federal law during the period of appeal. Congress should respond without delay and in a bipartisan manner to such direct challenges to its constitutional authority. When one branch goes outside the lines of the Madisonian democracy, the aggrieved branch is given the authority needed to check the assertion of extraconstitutional authority and thereby preserve the constitutional balance. It is this exercise of institutional vigilance and self-protection that brings stability to the system as a whole. To put it simply, in a Madisonian democracy, good fences do make for good neighbors.

H.R. 4187 further improves the PRA by creating some procedures designed to assist former presidents in their review of material. While I personally have some question over the exercise of executive privilege authority by former presidents, H.R. 4187 complies with the clear precedent permitting such assertion by former presidents and fully accommodates the exercise of this privilege. The result is a

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[112] See Jonathan Turley, A Crisis of Faith: Congress and The Federal Tobacco Litigation, 37 Harvard Journal on Legislation 433 (2000).

[113] See "Big Government Lawsuits: Are Policy Driven Lawsuits in the Public Interest?," United States Senate, Committee on the Judiciary, November 2, 1999 (testimony of Professor Jonathan Turley).

PRA that is both reaffirmed in its most fundamental provisions and improved in its procedures. It is the type of balanced legislation that should receive the support of this Administration in combination with the immediate recision of the E.O. 13233.

V.
CONCLUSION

E.O. 13233 appears a case of the over playing of a constitutional hand. At a time of international conflict, the Administration may have expected greater deference in asserting executive privilege. Certainly, this was the ideal environment to repair the losses under the Clinton Administration. However, the assertions of executive privilege by the Bush Administration have been so excessive that it may soon rival the Clinton Administration in losses and reversals in the area. E.O. 13233 is indicative of the absence of a coherent and well-constructed strategy. E.O. 13233 is so far out of the bounds of accepted executive privilege that it almost seems designed for failure. Congress, however, should not wait for a final judicial judgment on appeal. In 1978, the United States made a historic commitment in the enactment of the PRA. It is now time for this Congress to protect the historic work of a prior Congress. H.R. 4187 will protect that legacy and further improve a statute that has become a symbol of our unique form of open and democratic government.

I would be happy to answer any questions that the Subcommittee may have on this subject.

Mr. HORN. Now I yield to the gentlewoman from Illinois, Ms. Schakowsky, for an opening statement.

Ms. SCHAKOWSKY. Thank you, Mr. Chairman, for holding this legislative hearing and for your pursuit of the public's right to know. I look forward to working with you to move this bill quickly through the committee process and convincing the Republican leadership of the House to allow a vote on the bill.

I appreciate Mr. Turley's testimony and look forward very much to the others, and just want to make these comments.

President Bush has made an unprecedented assault on the public's right to know. In doing so, the President has challenged the Congress and is attempting to keep the public in the dark. The intent of the Presidential Records Act is clear. Deliberative documents are to become public after 12 years. President Bush's intent is equally clear. He intends to do everything in his power to keep deliberative Presidential documents out of public hands.

Vice President Cheney refused to tell the GAO who he met with in developing the administration's energy policy. He claimed that to do so would make it difficult for the President to get unvarnished advice; however, the President's Executive order on Presidential records makes it clear that the goal is to try to keep these documents from the public forever.

The President's men do not fear that the advice will be tarnished. Their fear is that the public will discover their real motivations for drilling in Alaska, for the tax cut, or for privatizing Social Security.

In reality, the legislation we are discussing today I believe is really a gift to President Bush. It's a way out. He and his administration should support it. I don't think the President and his men want to have a Papergate on their hands.

Secretary Evans is fighting the Congress and the public over releasing corrected census counts. The courts have been clear that these numbers should be public not deliberative and should be released. Still, the administration persists.

When the Attorney General learned that the court had ordered the census data released, he called in a new team of lawyers to plead for reconsideration. They, too, failed, but in doing so they laid the groundwork for the administration's defense of not releasing the energy information.

The list of secret activities goes on and on—energy, census, tobacco, health and the environment, to name just a few.

The Executive order that led to the bill before us today is particularly outrageous. First, it makes it easier for Presidential records to be withheld from the public, just the opposite of the reason Congress passed the act in the first place. Second, the order tries to extend that protection into the grave by giving the President's family or representatives the right to assert executive privilege. If that weren't enough, the order then tries to give executive privilege to the Vice President. We've got Presidents, past Presidents, Vice Presidents, dead Presidents.

We should not have been surprised at the goal of this order. Just before the President left Austin, he made a deal to move his gubernatorial papers out of the State archive to his father's library,

where no one can gain access to them. Those are public records that do not belong to President Bush, Senior or Junior.

The Presidential Records Act was a high-water mark for Congress. It asserted the public's right to know how the administration does business in an unprecedented way. For the first time in the country's 200-year history, the public was granted access to the documents that guided policy at the highest levels. Now, just as the act is beginning to have an effect, President Bush wants to undo it.

Again, I have to ask: What is he trying to hide? Is there something in his father's papers about the Iran contra scandal that would embarrass the family? Or did the President's advisors know that the Reagan tax cut would drive the government into deficit, just as the Bush tax cut has? Reagan's Interior Secretary James Watt was convicted of withholding documents from a grand jury investigating the scandals at HUD. Do these papers tell more of that story? Just what is it they are trying to hide?

Thank you, Mr. Chairman.

[The prepared statement of Hon. Janice D. Schakowsky follows:]

**STATEMENT OF THE HONORABLE JAN SCHAKOWSKY
AT THE LEGISLATIVE HEARING ON
THE PRESIDENTIAL RECORDS ACT AMENDMENTS OF 2002**

April 24, 2002

Thank you Mr. Chairman for holding this legislative hearing. I look forward to working with you to move this bill quickly through the committee process, and convincing the Republican leadership of the House to allow a vote on the bill.

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Vice President Cheney refused to tell the GAO who he met with in developing the Administration's energy policy. He claimed that to do so would make it difficult for the President to get unvarnished advice. However, the President's executive order on presidential records makes it clear that the goal is to try to keep these documents from the public, forever.

The President's men do not fear that the advice will be censored, their fear is that the public will discover their real motivations for drilling in Alaska, for the tax cut, and for privatizing Social Security

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The list of secret activities goes on and on -- energy, census, tobacco, health, and environment, to name just a few.

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Again, I have to ask: What is he trying to hide? Is there something in his father's papers about the Iran-Contra scandal that would embarrass the family? Or, did the President's advisors know that the Reagan tax cut would drive the government into deficit, just as the Bush tax cut has? Reagan's Interior Secretary James Watt was convicted of withholding documents from a grand jury investigating the scandals at HUD. Do these papers tell more of that story? Just what is it they are trying to hide?

Mr. HORN. We now move to Morton Rosenberg, the specialist in American public law for the Congressional Research Service, Library of Congress, a group that we count on to give us a bipartisan, correct view.

STATEMENT OF MORTON ROSENBERG, SPECIALIST IN AMERICAN PUBLIC LAW, AMERICAN LAW DIVISION, CONGRESSIONAL RESEARCH SERVICE

Mr. ROSENBERG. Thank you for having me here today. This is an important subject and one that needs immediate attention, which your committee is giving.

Let me start with my conclusion. I believe that Congress' authority over the papers of past Presidents has been recognized by the Supreme Court and lower courts since 1977. Your bill, H.R. 4187, is well within the parameters of its acknowledged authority in this area. The bill, therefore, may repeal Executive Order 13233 and replace it with procedures that assure an opportunity for former and incumbent Presidents to assert constitutionally based privileges.

Moreover, the substantial legal and constitutional questions that have been raised by key provisions of the Executive order gives further impetus to the congressional option of enacting a legislative solution immediately by legislation rather than waiting for the outcome of litigation that is likely to be quite extended and might not even be dispositive of the merits issues.

Finally, I believe that experience under the order suggests that unilateral delay is a strong likelihood, despite the recent release of all but 150 pages of the originally withheld 68,000 pages. Millions of pages of documents are yet to be processed, and the potential for unwarranted delay, however, remains embedded in this order.

As you well know, the President's order has precipitated much controversy and resulted in this being the third hearing by this committee, the filing of a lawsuit challenging the legality of the order, and an outpouring of public commentary.

I believe this has well served the committee's concerns with the legal and practical problems raised by the order with respect to the effective implementation of the Presidential Records Act.

The bill would repeal Executive Order 13233 and establish a new process for consideration of claims of constitutionally based privileges by past and incumbent Presidents.

Like the President's order, the bill would require the Archivist to notice past and present Presidents of his intention to publicly release Presidential records that have not been made previously available. The Archivist would be required to withhold records or parts of records for which incumbent Presidents claim privilege. Under the bill's scheme, a requester would have the burden of going to court to challenge the withholding, and the Archivist could not release the materials until the court so ordered or the privileged is waived by the incumbent President.

But with respect to a former President, the bill provides that, after a review period by him of 20 work days, which may be extended to an additional 20 work days, the Archivist may release the records unless the past President invokes privilege, and on receipt of the privilege claim the Archivist must wait 20 days before releasing the subject material unless, before the expiration of that

period, the past President initiates a legal action under Section 2204(e) of the act and a court enjoins the release of those papers.

Claims of privilege under your bill would have to be in writing, specify the record or the portion of the record to be withheld, be signed by the incumbent or past President, and state the nature of the privilege.

The bill, I believe, would appear to raise no substantial constitutional or legal questions. There would appear to be no question that Congress may repeal an Executive order. Well over 200 orders have been revoked or modified since the second Cleveland administration. Nor do the procedures adopted in the bill materially differ from those found constitutionally appropriate by the Supreme Court in *Nixon* v. *Administrator of General Services* dealing with the Nixon papers, or subsequent lower court rulings treating issues under the Nixon papers legislation.

H.R. 4187 does not appear to interfere with the ability of a former or incumbent President to exercise to the fullest extent the protections of executive privilege accorded them under the Constitution and the case law interpreting the scope of that privilege.

The D.C. Circuit's rule in *Public Citizen* v. *Burke* would appear particularly supportive in its holding that an attempt by the Justice Department to force the Archivist to acquiesce in any claim of privilege asserted by former President Nixon, and thereby block disclosure of materials, was inconsistent with the Presidential Recordings and Material Preservation Act and a regulation promulgated pursuant to it which empowered the Archivist to reject claims of privilege and which required the former President to seek court redress.

The court set the standard with respect to such a provision as one that would afford an opportunity to Mr. Nixon to assert his privileges. The opportunity to assert constitutionally based privileges is fully accorded to the former and incumbent Presidents under your bill, and therefore is likely to be held constitutional.

As Professor Turley has pointed out, the Executive order is considerably flawed. I think the most serious flaw in it, as Professor Turley has pointed out, is the denigration of the role of the Archivist. If you look at the litigation in American Historical Association that is presently going on, the view espoused by the government in attempting to defend against the suit is essentially that the Archivist, who was appointed by the President and is removable by him, is beholden to him. It is an assertion or a reassertion of what I believe to be a now-discredited theory of unitary executive, and it totally ignores both the case law with regard to Congress' authority in an area such as this, as well as another line of case law which has rejected the idea of the hierarchical nature of the executive branch.

As Professor Turley has pointed out, the PRA is the product of a history which, prior to 1974, Presidents exercised complete control over Presidential papers.

Following the resignation of President Nixon in 1974 and his attempt to, through an agreement with the Administrator of General Services to maintain control of his papers, Congress acted to take control of official records of Presidents and enacted the Presidential Recordings and Materials Preservation Act, which directed GSA to

take custody of all tape recordings and other Presidential materials accumulated during that Presidency and required the Administrator to promulgate regulations governing access. The Supreme Court upheld that act as facially constitutional.

But the controversy over the Nixon papers prompted further action by the Congress, and that reconsideration resulted in the passage of the Presidential Records Act in 1978, which terminated the tradition of private ownership of Presidential papers and reliance on volunteerism to determine the fate of their disposition.

Under the PRA, the Archives Administration and the Archivist are given total control of the management, preservation, and ultimate public dissemination of records of past Presidents, which are made the property of the United States. The act gives specific directions for the custody and administration of such records, the end goal being the affirmative duty of the Archivist to make such records available to the public as rapidly and as completely as possible.

This encompassing supervisory role of the Archivist is central to the accomplishment of the congressional purpose. Section 2203 (a) and (b) directs the President, under the supervision of the Archivist, to ensure adequate documentation and to categorize and file appropriately those documents to the extent practicable. It restricts the President while in office from disposing of those materials.

The directions in the PRA start with a new administration, ensure that records are preserved, ensure that, during the period of an administration that—for instance, if a President wants to destroy records, that the Archivist has a say over it, and ultimately they can come to Congress and lay before—the Archivist can come to Congress and place before Congress for a 60-day period a stay on disposition of records that allows the Congress to stop any kind of destruction of documents. It continues after, of course, a President leaves office.

This entire scheme is a complete scheme that, as two courts recently have held, occupies the field of Presidential documents. In those two cases, one during the Clinton administration and the second in this Bush administration, involved Executive orders that attempted to circumvent certain labor laws established under the National Labor Relations Act, which makes the National Labor Relations Board the focal point of regulating and facilitating collective bargaining in the private sector. Both those orders by President Clinton and President Bush altered the scheme, and in both those cases the courts declared those Executive orders unlawful, essentially on the ground that Congress had delegated the authority with respect to regulation in those areas specifically by law to another office of the United States, and the President, by Executive order, could not change them.

The question with respect to the power of a President over subordinates whom he can fire is perhaps one of the most important constitutional issues of this day and past days. The question presented by the government's assertions in the American Historical Association case is whether the President, as in this—is whether the President may direct the head of an agency to alter his judgment as to the appropriate manner in which he complies with specific

congressional mandates to him, or even displace the judgment of the agency head by acting on his own.

Based on a long line of Supreme Court precedents, this question presents very little difficulty. The President does not have the authority to displace the ultimate decisionmaking power vested in the head of an agency by Congress. The Supreme Court rulings in *Morrison* v. *Olson* in 1988 and *Mistretta* v. *the United States* in 1989 have clearly dispelled the notion that executive power is hierarchical and uniquely vested in the President, alone—the so-called "theory of the unitary executive." Morrison and Mistretta confirmed what has been understood since the dawn of the republic—that the President's duty under Article Two to take care that the laws are faithfully executed vests him with no supervening substantive power, but simply is meant to enlist him to ensure that subordinates in whom Congress vests the duty to carry out its directions do so scrupulously.

Historically, Article Two has been seen as clearly anticipating the creation of an administrative bureaucracy by mentioning heads of departments, and the necessary and proper clause makes it certain that it would be Congress, alone, that would do the creating. In this scheme, Congress can assign to the head of a department or a subordinate official executive power not textually reserved to the President in Article Two. Moreover, Congress has properly understood that the take care clause has not been read by the courts to vest absolute power in the President over heads of departments and other subordinate officials. That clause has been held to require only that the President shall take care that the laws be faithfully executed, regardless of who executes them, a duty that is quite different from the claim of a single-handed responsibility for executing all the laws.

A literal reading of the take care clause confirms that the President's duty to ensure that officials obey—confirms that it is the President's duty to ensure that officials obey Congress' instructions. It does not create a Presidential power so great that it can be used to frustrate congressional intention. In the words of the Supreme Court, where a valid duty is imposed upon executive officials by Congress, the duty and responsibility grow out of and are subject to the control of the law and not to the direction of the President.

In the past, similar claims of broad substantive authority deriving from the take care clause have been consistently rejected by the courts. The Supreme Court at Youngstown Steel is a principal one.

This constitutional flaw in itself condemns this order and commends your action in attempting to repeal it and substitute appropriate procedures in its stead.

Thank you.

Mr. HORN. I thank you.

[The prepared statement of Mr. Rosenberg follows:]

STATEMENT

OF

MORTON ROSENBERG
SPECIALIST IN AMERICAN PUBLIC LAW
CONGRESSIONAL RESEARCH SERVICE

BEFORE THE

HOUSE SUBCOMMITTEE ON EFFICIENCY, FINANCIAL MANAGEMENT AND INTERGOVERNMENTAL RELATIONS, COMMITTEE ON GOVERNMENT REFORM

CONCERNING

H.R. 4187, THE PRESIDENTIAL RECORDS ACT AMENDMENTS OF 2002

PRESENTED ON

APRIL 24, 2002

Mr. Chairman and Members of the Subcommittee:

My name is Morton Rosenberg. I am a specialist in American Public Law in the American Law Division of the Congressional Research Service (CRS). Among my areas of professional coverage at CRS are the problems raised by the interface of Congress and the Executive which involve the scope of congressional oversight and investigative prerogatives, the validity of claims of executive and common law privileges before committees and the courts, and issues of separation of powers raised by the exercise of presidential authority through executive orders and directives.

Background: The Presidential Records Act and the E.O. 13,233

You have asked me here today to discuss the legal and practical efficacy of H.R. 4187, the Presidential Records Act Amendments of 2002, which is designed to address the constitutional and other legal issues that appear to have been raised by President Bush's issuance of Executive 13,233 on November 1, 2001. That Order, entitled "Further Implementation of the Presidential Records Act," sets forth procedures and substantive standards to govern claims of executive privilege by former and incumbent Presidents following the expiration of the 12-year period of restricted access under the Presidential Records Act (PRA). 44 U.S.C. 2201-2207 (2000). At the end of that period, the PRA requires that materials involving confidential communications between former Presidents and their advisors which had been withheld must be made publically available by the Archivist of the United States unless they fall within one of the exemption categories of the Freedom of Information Act (FOIA), 5 U.S.C. 552 (2000), except for the exemption set forth in 5 U.S.C. 552 (b)(5), which incorporates the "deliberative process" and other common law

evidentiary privileges *Id.*, Section 2204 (c) (1); or are subject to a constitutionally based claim of executive privilege. *Id.*, Section 2204 (c) (2); 2206 (3).

The PRA provides that vice-presidential records are also public property and are to be opened for public access on the same terms and conditions as presidential records. *Id.*, Section 2207. Thus, the requirement that confidential communications be made public after the 12-year restriction period expires applies to vice-presidential records as well.

Finally, the PRA requires that the Archivist of the United States give a former President notice "when the disclosure of particular documents may adversely affect any rights which the former President may have." *Id.*, Section 2206 (3). Under his authority to promulgate regulations to implement the provisions of the PRA, the Archivist issued a rule providing that whenever he intends to make public any presidential record, he will provide 30 days' notice to the former President to allow him (or his designated representative) to assert any rights or privileges that would foreclose public access to the materials. 36 CFR 1270. 46 (a), (b), (d). The Archivist's implementing regulation further provides that he may reject the assertion of a right or privilege by a former President provided that he states the basis for his decision in writing and notifies the former President of the date on which he will disclose the records in question. *Id.*, Section 1270 46 (c). When the Archivist rejects a former President's claim of privilege he must withhold public access for an additional 30 days to allow the former President to seek judicial review. *Id.*, Section 1270. 46 (c), (d). See also 44 U.S.C. 2204 (e). Notice of a rejection of a privilege claim of a former President must also be given to the incumbent President. *Id.*, Section 1270. 46 (e).

Thus at the beginning of the current Bush Administration, when the 12-year restriction period expired, applicable law and regulations vested authority in the Archivist to determine

whether to release a past President's documents upon expiration of the 12-year restriction period; allowed the former President to raise a claim of constitutionally based privilege with respect to particular records covered by the release announcement within 30 days of his notification; permitted the Archivist to reject the former President's claim of privilege; and, upon notification of the former President of the rejection, allowed the former President 30 days to file a court challenge to the determination and seek a restraining order to prevent disclosure pending a court ruling on the merits.

Executive Order 13,233 was promulgated some nine months after the expiration of the 12-year restriction period for the withheld papers of President Reagan and Vice President George H.W. Bush.The delay in disclosure was effected pursuant to Section 2(b) of Executive Order 12,667, issued by President Reagan on January 18, 1989, which provided that during the 30 day notification period "the incumbent President or his designee [could instruct the Archivist] to extend the time period.." On January 20, 2001, the expiratiion date of the restriction period, some 68,000 pages of documents that had been restricted by President Reagan as "confidential communications" were subject to release, according to the Archivist. As of March 7, 2002, the White House Counsel announced that President Bush had authorized the release of all but 150 pages of the documents.

Section 2 (a) and (b) of the new Order purports to describe the scope of the constitutionally based privileges of former and incumbent Presidents and Vice-Presidents. While recognizing that the PRA incorporates the FOIA (but not exemption 5's coverage of common law evidentiary privileges) in setting the standards and procedures for release of presidential records after the 12-year restriction period ends, the Order declares that a "President's constitutionally based privileges subsume privileges for records that reflect: military, diplomatic, or national security secrets [the states secrets privilege];

communications of the President or his advisors [the presidential communications privilege]; legal advice or legal work [the attorney-client or attorney work product privileges]; and the deliberative processes of the President or his advisors [the deliberative process privilege)." Moreover, in contrast to the PRA, which makes presidential records available under FOIA standards-- requiring no showing of need for access--the Order asserts that "a party seeking to overcome the constitutionally based privileges that apply to Presidential records must establish a 'demonstrated, specific need' for particular records, a standard that depends on the nature of the proceeding and the importance of the information to that proceeding." It would appear that the showing of need requirement would apply to the common law evidentiary privileges noe subsumed in the Executive Order's recitation.

Section 3 of E.O. 13,233 supercedes of the Archivist's authority under his regulations that provide for rejection of a former President's claim of privilege and place the burden on the former Chief Executive to go court to vindicate his claim. Under Section 3, the Archivist must notify both the former and incumbent Presidents of a request for presidential documents. The former President is given an initial 90 days to review any requests "that are not unduly burdensome," but he may request a further extension for an unspecified period of time, at the end of which time the former President informs the Archivist whether he authorizes access or claims privilege. During the former President's review the Archivist must withhold access. Section 3(c). The incumbent President is allowed to review the requested materials either concurrently with or subsequent to the former President's review for an unspecified period of time. Section 3(d). The Order provides 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 is challenged." Section 4. When the incumbent President concurs in the former President's privilege decision, the Archivist is directed not to permit access to the

materials unless both Presidents change their minds or a court orders the materials released. Section 3(d)(1). If only the former President claims privilege, and the incumbent President does not concur, the Archivist still must not disclose until both Presidents concur. Section 3(d)(1)(ii). Similarly, if only the incumbent claims privilege, the Archivist cannot disclose. Sections 3(d)(2)(ii).

The new Order authorizes surrogates to assert constitutionally based privileges on behalf of a former President. Section 10 provides that a former President or his family may designate a representative "to act on his behalf for purposes of the Presidential Records Act and this order." 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."

Section 11 of E.O. 12,233 appears to provide that a former Vice-President may assert an independent claim of executive privilege to bar access to his materials under the PRA, and that such a claim will be treated exactly the same as a privilege by a former President, which means that the Archivist would have to withhold access to materials once a claim is made, unless the former Vice-President authorizes access or a court orders release of the records.

Finally, Section 13 of the Order revokes President Reagan's Executive Order 12,667 of January 18, 1989.

At this time, although the Archivist has indicated that he will acquiesce in those respects that the Order differs from his regulations, the regulations have not yet been amended pursuant to the required notice and comment process. Moreover, there has as yet been no claim of constitutionally based privilege with respect to any requested document.

The Committee's Legislative Response: H.R. 4187

The President's Order has precipitated much controversy and resulted in hearings by this Committee, of which this is the third, the filing of a law suit challenging the legality of the Order, and an outpouring of public commentary. These hearings, the public input, and the lawsuit challenging the legality of the Order, *American Historical Association et al.* v. *The National Archives and Records Administration, et al.*, No. 1:01CV02447 (CKK) (D.D.C.) (*AHA* suit), have served to inform the Committee's concerns with legal and practical problems raised by E.O. 13,233 with respect to the effective implementation of the PRA..The Committee is exploring an immediate legislative solution to the perceived problems. H.R. 4187 is that vehicle.

The bill would repeal E.O. 13,233 and establish a new process for consideration of claims of constitutionally based privileges by past and incumbent Presidents. Like the present Order, the bill would require the Archivist to notify past and present Presidents of his intention to publically release presidential records that have not been made previously available. New 44 U.S.C. 2208 (a)(1),(2). The Archivist would be required to withhold records (or parts of records) for which the *incumbent* President claims privilege. Under the bill's scheme, a requester would have the burden of having to go to court to challenge the withholding and the Archivist could not release the materials until a court so ordered or the privilege is waived. *Id.*, Section 2208 (d). With respect to a former President, the bill provides that after a review period by him of 20 work days, the Archivist may release the records unless the past President invokes privilege. Upon receipt of a privilege claim the Archivist must wait 20 days before releasing the subject material unless before the expiration of that period the past President initiates a legal action under Section 2204 (e) and the court enjoins release. *Id.* Section 2208 (a)(3)(A), (B), (C)(1), and (2). Claims of privilege must be in writing; specify the record (or reasonably segregable portion of a record) to which the

claim applies; be signed by the former or incumbent President; and state the nature of the privilege and the specific grounds for the claim. *Id.*, Section 2808 (a)(4).

The bill to raise no substantial legal or constitutional issues. There would appear to no question that Congress may repeal an executive order. Well over 200 orders have been revoked or modified since the second Cleveland administration. See William J. Olson and Alan Woll, Executive Orders and National Emergencies: How Presidents Have Come to "Run the Country" by Usurping Executive Power, *reprinted in* Hearing, "The Impact of Executive Orders on the Legislative Process: Executive Lawmaking?", House Subcom. On Legislative and Budget Process, Com. on Rules, 106th Cong., 1st Sess. 124-127 (1999). See generally, T.J. Halstead, Executive Orders: Issuance and Revocation, CRS Rept. No. RS 20846, March 19, 2001. Nor do the procedures adopted in the bill materially differ from those found constitutionally appropriate by the Supreme Court in *Nixon* v. *Administrator of General Services*, 433 U.S. 425 (1977), dealing with the Nixon papers, or subsequent lower court rulings treating issues under the Nixon papers legislation and the PRA. See *e.g.*., *Nixon* v. *Freeman*, 670 F. 2d 346 (D.C. Cir. 1982)), *cert. denied sub nom. Nixon* v. *Carmen*, 459 U.S. 1035 (1982); *Public Citizen* v. *Burke*, 843 F. 2d 1473 (D.C. Cir. 1988); *American Historical Association* v. *Peterson*, 876 F. Supp. 1300 (D.D.C. 1995). H.R. 4178 also does not appear to interfere with the ability of a former or incumbent President to exercise to the fullest extent the protections of executive privilege accorded them under the Constitution and the case law interpreting the scope of that privilege. *Public Citizen* v. *Burke, supra*, would appear particularly supportive in its holding that an attempt by the Justice Department to force the Archivist to acquiesce in any claim of executive privilege asserted by former President Nixon, and thereby block disclosure of materials, was inconsistent with the Presidential Recordings and Materials Preservation Act and a regulation promulgated pursuant to it which empowered the Archivist to reject claims of privilege and which

required the former President to seek court redress. 843 F. 2d at 1480 (the duty of the Archivist under the PRMPA is to "afford an 'opportunity' to Mr. Nixon to *assert* his privileges.") The "opportunity to assert" constitutionally based privileges is fully accorded to former and incumbent Presidents under H.R. 4187.

Discussion

As previously indicated, the hearings, public commentary, the pleadings in the *AHA* litigation indicate that the Executive Order raises substantial legal and constitutional issues by virtue of the manner in which deals with public and congressional access to the papers of past presidents under the PRA. The most salient for current purposes appear to be the Order's conflict with the role contemplated for the Archivist under the PRA; the Order's authorization of representatives of a disabled or deceased former President to invoke constitutional privileges; the Order's indication that former Vice Presidents may claim constitutionally based privileges; and the Order's limitation on congressional rights of access to presidential materials pursuant to its constitutionally based oversight and investigatory powers. I will briefly discuss each of these legal issues

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1. The Role of the Archivist Under the PRA

The PRA is a product of a history in which, prior to 1974, President's exercised complete control over their presidential papers. See *Nixon* v. *United States*, 978 F. 2d 1269, 1277 (DC. Cir. 1992) (recounting past history of control of presidential papers through the passage of the PRA). While some Presidents insured that such papers would pass by descent,

others made outright gifts of their papers, often imposing personal restrictions on public access, and a number of Presidents destroyed their records. 978 F. 2d at 1277-80. But following the resignation of President Nixon in 1974 and his attempt, through an agreement with the Administrator of the General Services Administration, to maintain control of his presidential papers and tapes, Congress acted to take control of official records of Presidents. Before the Nixon-Sampson agreement became effective, it was superseded by the Presidential Recordings and Material Preservation Act, Pub. Law 93-526 (1974). The Act directed GSA to take custody of all tape recordings and other presidential materials accumulated during the Nixon presidency and required the Administrator to promulgate regulations governing public access to the materials. The Supreme Court upheld the facial constitutionality of the Act in *Nixon* v. *GSA*, 433 U.S. 425 (1977).

The controversy over the Nixon materials, however, prompted reconsideration of the disposition and preservation of presidential materials. That reconsideration resulted in the passage of the PRA in 1978, which "terminate[s] the tradition of private ownership of Presidential papers and the reliance on volunteerism to determine the fate of their disposition." H. Rept. No. 95-1487, 95th Cong., Sess. 2 (1978). Under the PRA, the National Archives and Records Administration (NARA) and the Archivist are given total control of the records of past Presidents, which are made the property of the United States. The Act gives specific directions for the custody and administration of such records, the end goal being the "affirmative duty" of the Archivist "to make such records available to the public as rapidly and completely as possible." 44 U.S.C. 2203 (f)(1). The encompassing supervisory role of the Archivist is central to the accomplishment of the congressional purpose. Section 2203 (a) and (b) directs the President, under the supervision of the Archivist, to ensure adequate documentation of his official activities, and to categorize and file appropriately those documents to the extent practicable. The section also restricts the

President while in office from disposition of materials that he thinks have no historical or other informational value unless he obtains the opinion of the Archivist. If the Archivist chooses, he may request the advice of Congress when a President intends to dispose of records and he considers them of special interest to Congress or if he determines that consultation with Congress is in the public interest. Congress has 60 days to act. *Id.*, Section 2203 (d), (e).

The Archivist may dispose of records he determines to have insufficient administrative, historic, informational, or evidentiary value to warrant preservation. *Id.*, Section 2203 (f)(3).

The Archivist is given the authority, during the 12 year restricted period, to make the discretionary determination whether to grant access to a restricted presidential record or to a reasonably segregable portion of that record. Such a determination is not subject to judicial review except by a former President who challenges the Archivist's determination as a violation of his rights or privileges. The Archivist must provide internal appeal procedures for denied public requesters. *Id.*, Section 2204 (b)(3), (e).

Access to records during and after the 12 year restricted period are to be administered in conformity with the FOIA, minus exemption (b)(5), and for the purpose of FOIA access the records are deemed to be records of NARA. Thus the Archivist makes final accessibility determinations. *Id.*, Section 2204 (c)(1).

On death or disability of the President or former President, any discretion or authority of the President or a former President will be exercised by the Archivist unless a representative was previously provided by a written notice. *Id.*, Section 2204 (d).

The Archivist is given authority to promulgate rules necessary to carry out the Act's provisions, and must include regulations, among others, which provide notice to former Presidents that he will release records under Section 2205 (2) or that he has determined to release particular documents that may adversely affect a former President's rights and privileges. *Id.*, Section 2206 (2),(3).

In short, the scheme of the Act indicates a congressional intent to totally commit the area of supervision and control of presidential papers to the exclusive jurisdiction of the Archivist. Executive Order 13,233 appears to contradict that statutory commitment. .

Under the constitutional scheme of separation of powers, the President has no general authority to legislate, whether through issuance of executive orders or otherwise. An executive order is lawful only if it constitutes on exercise of power that is granted to the President by an Act of Congress or directly by the Constitution: "The President's power, if any, to issue an executive order must stem either from an Act of Congress or the Constitution itself." *Younstown Sheet & Tube* v. *Sawyer*, 349 U.S. 579, 585 (1952). Justice Jackson's concurring opinion in the Steel Seizure case has become an influential model for resolving such separation of powers conflicts. Justice Jackson established a tri-partite scheme for analyzing the validity of presidential actions in relation to constitutional and congressional authority. *Id.* at 635-638.

Jackson's first category focuses on whether the President has acted according to an express or implied grant of congressional authority. If so, according to Justice Jackson, presidential "authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate," and such action is "supported by the strongest of presumptions and the widest latitude of judicial interpretation." Secondly, Justice Jackson

maintained that, in situations where Congress has neither granted or denied authority to the President, the President acts in reliance only "upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain." In the third and final category, Justice Jackson states that in instances where presidential action is "incompatible with the express or implied will of Congress," the power of the President is at its minimum, and any such action may be supported pursuant only the President's "own constitutional powers minus any constitutional powers of Congress over the matter." In such a circumstance, presidential action must rest upon an exclusive power, and the Courts can uphold the measure "only by disabling the Congress from acting upon the subject." *Id.* at 637-38.

Two recent rulings, utilizing Jackson-like analyses, have stuck down executive orders that courts found to have conflicted with a statutory scheme. First, Congress committed exclusive jurisdiction over a subject matter--federal supervision of collective bargaining--to a particular agency, the National Labor Relations Board. Finding Justice Jackson's third category applicable, the courts declared unlawful the attempted intrusion on the exclusive domain of the NLRB. See *Chamber of Commerce* v. *Reich*, 74 F. 3d 1322, 1328-29 (D.C. cir.), *modified on other grounds*, 83 F. 3d 439 (D.C. Cir. (1996); *Building and Construction Trades Dept., AFL-CIO* v. *Allbaugh*, 172 F. Supp. 2d 138 (D.D. C. 2001), *appeal filed.*

In the *AHA* litigation, the government challenges this view, arguing both that the statutory scheme does not evidence such a total preempting commitment; and that in any event the Executive Branch is a legal hierarchy in which executive power is vested in the President and all subordinate responsibility flows up to the Chief Executive. The government points to the fact the Archivist himself is appointed by the President and is removable by him at will.

The question presented by the government's assertions is whether the President may *direct* the head of an agency to alter his judgment as to the approriate manner in which he complies with specific congressional mandates to him, or *displace* the judgment of the agency head by acting on his own. Based on a long line of Supreme Court precedents, the question presents little difficulty: The President does not have the authority to displace the ultimate decisionmaking power vested in the head of an agency by Congress.

The Supreme Court's rulings in *Morrison* v. *Olson,* 487 U.S. 654 (1988) and *Mistretta* v. *United States*, 488 U.S. 361 (1989), have clearly dispelled the notion that executive power is hierarchical in nature and uniquely vested in the President alone, the so-called theory of the unitary executive. *Morrison* and *Mistretta* confirm what has been understood since the dawn of the Republic: That the President's duty under Article II to "take care" that the laws are faithfully executed vests in him no supervening substantive power, but simply is meant to enlist him to assure that subordinates in whom Congress vests the duty to carry out its directions do so scrupulously.

Historically, Article II has been seen as clearly anticipating the creation of an administrative bureaucracy by its mention of "Heads of Departments," U.S. Const. Art. II, § 2, cl. 2. And the Necessary and Proper Clause of Article I, art. 1 §8, cl. 18, makes it certain that it would be Congress alone that would do the creating. In this scheme, Congress can assign to a "Head of Department" any executive power not textually reserved to the President in Article II. Moreover, Congress has properly understood that the "take care" clause has not been read by the courts to vest absolute power in the President over heads of departments and other subordinate officials. That clause has been held to require only that the President "shall take care that the laws be faithfully executed," regardless of who executes them, a duty quite different from the claim of a single-handed responsibility for executing all laws.

A literal reading of the "take care" clause confirms the President's duty to ensure that officials obey Congress's instructions; it does not create a presidential power so great that it can be used to frustrate congressional intention. In the words of the Supreme Court, where a valid duty is imposed upon an executive official by Congress, "the duty and responsibility grow out of and are subject to the control of the law, and not to the direction of President." *Kendall v. United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524, 610 (1838). In the past, similar claims of broad substantive authority deriving from the "take care" clause have been consistently rejected by the courts. See, *e.g., Youngstown Sheet & Tube Co. v. Sayer*, 343 U.S. 579, 587 (1952)(holding that the President does not have the power to take possession of private property in order to keep labor disputes from stopping steel production); *In re Olson*, 818 F. 2d 34. 44 (D.C. Cir. 1987)(explaining that the "take care" clause does not require the President himself to execute the laws); *National Treasury Employees Union v. Nixon*, 492 F. 2d 587, 604 (D.D.C. 1973)(ruling that the executive branch does not have the inherent power to impound congressionally appropriated funds). Finally, the Court of Appeals for the Ninth Circuit, in condemning reliance on the "take care" clause as a justification for ignoring the mandate of an act of Congress, stated: "To construe this duty to faithfully execute the laws as implying the power to forbid their execution perverts the clear language of the 'take care' clause." *Lear Siegler, Inc. v. Lehman*, 842 F. 2d 1102, 1124 (9th Cir.), *reh'g en banc ordered sub nom Lear Siegler, Inc. v. Ball,* 863 F. 2d 693 (9th Cir. 1998)(*en banc).*

In sum, the pertinent case law, together with the statutory scheme of the PRA, would likely lead a reviewing court to find that Congress intended the Archivist to occupy the field of presidential papers control and supervision, thereby precluding the displacement effected by E.O. 13,233.

2. The Order's Authorization of Representatives of a Disabled or Deceased Former President to Invoke Constitutional Privileges

Delegation of authority to private citizen to direct an officer of the United States in the performance of his functions raises serious constitutional concerns. The Order's provisions that give an assertion of privilege by a representative of a deceased or disabled President the same effect as an assertion by the former President is legally suspect, for the constitutionally based privilege likely cannot be asserted except by the incumbent President or the former President personally.

The constitutionally based executive privilege for confidential presidential communication belongs to the office the President, not to a President individually. It is "the privilege of the Presidency" and serves the "needs of the Executive Branch." *Nixon* v. *Administrator*, *supra*, 433 U.S. at 448, 449. As such, it is not a personal property right of a President, and cannot be assigned or descended by gift, bequest or devise. The family of a President or former President has no legitimate claim to it. And although there is no definitive judicial ruling on the subject, it is likely that a court considering the matter would hold that the privilege must be asserted by the President (or former President) personally. See, *In re Sealed Case*, 121 F. 3d 729, 745 n. 16 (noting that *U.S.* v. *Reynolds*, 345 U.S. 1, 7-8 (1953), suggests "that the President must assert the presidential communications privilege personally."). Moreover, the notion of ceding control over the execution of the laws by an officer of the United States to a private party appears anomolous and has been rejected by the courts. See, *e.g. American Historical Association* v. *Peterson*, 876 F. Supp. 1300, 1321 (D.D.C. 1992).

3. The Order's Indication That Vice-President's May Claim Constitutionally Based Privileges

The Order appears to posit, in Section 11, the existence of an independent, constitutionally based privilege for vice presidential communications. Such a privilege has never been recognized in any case and is antithetical to the basis recognized by the courts: that the constitutionally based privilege for presidential communications recognized by *U.S.* v. *Nixon* and *Nixon* v. *Administrator*, applies "specifically to decisionmaking of the President" and is rooted in constitutional separation of powers principles and the President's unique constitutional role." *In re Sealed Case, supra*, 121 F. 3d at 745. In the *AHA* case, the government supports Section 11 on the ground that no court has ever addressed the question and therefore it remains open and arguable.

4. The Order's Limitation on Congressional Rights of Access to Presidential Materials

Section 6 of the Order in effect would allow Congress to wait indefinitely for a response to a request to the Archivist for presidential documents or a demand by subpoena. Section 2205 of the PRA makes it clear that Congress is not subject to the statutory restrictions of the Act and that it has not waived its constitutional prerogatives of oversight and investigation. In this regard, on its face Section 6 works a usurpation of congressional prerogatives and is unlawful.

Conclusion

Congress' authority over the papers of past President's has been recognized by the Supreme Court and lower federal courts since 1977. H.R. 4187 is well within the parameters

of its acknowledged authority in the area. It therefore may repeal E.O. 13, 233 and replace it with procedures that assure an opportunity for former and incumbent President's assert constitutionally based privileges. Moreover, the substantial legal and constitutional questions raised by key provisions of E.O. 13,233 gives impetus the congressional option of enacting a legislative solution immediately by legislation rather than waiting for the outcome of litigation that is likely to be extended. Finally, experience under the Order suggests that unilateral delay is a strong likelihood despite the recent release of all but 150 pages of the originally withheld 68,000 pages. Millions of pages of documents are yet to be processed. The potential for unwarranted delay remains.

Mr. HORN. We will now go to Professor Mark J. Rozell, the Catholic University of America.

We're glad to have you here.

STATEMENT OF MARK J. ROZELL, PROFESSOR OF POLITICS, THE CATHOLIC UNIVERSITY OF AMERICA

Mr. ROZELL. Thank you. Thank you, Mr. Chairman, for the opportunity to address the subcommittee.

I am the author of various studies on executive privilege, and I testified last year before this subcommittee that the Bush Executive order improperly expands the scope of the executive privilege and that it wrongly supersedes Congress' legislative authority. There was a very strong consensus at that hearing—and the scholarly community has since overwhelmingly weighed in—that the Executive order is deeply flawed. In addition to violating the traditional standards of executive privilege and the legislative power, the Executive order unlawfully displaces the decisionmaking authority vested in the Archivist. The Executive order, as Mr. Ose said in his opening statement, undercuts both the text and the legislative history of the Presidential Records Act.

In our constitutional system of separated powers, the President does not have the authority to use Executive orders to negate statutory policy, as my colleague Mr. Turley said in his opening statement. An Executive order is proper when it concerns an independent Presidential power contained in the Constitution or some executive power granted by an act of Congress. Neither circumstance exists in this case.

The Supreme Court ruled in *Nixon* v. *Administrator of General Services* that Congress possesses the power to legislate in the area of public access to Presidential papers. No legislative enactment authorizes an Executive order to govern the release of Presidential records.

Thus, the question no longer is whether the Executive order is legitimate—clearly, it is not—but whether a legislative remedy is proper or necessary. I believe that it is well within the congressional authority to repeal this Executive order and also to define the process for claiming and resolving executive privilege claims that arise from requests for the papers of past administrations.

It is not sufficient, in my view, for Congress merely to reinstate the Presidential Records Act and to repeal the Executive order. The administration, I believe, is correct in its view that the Presidential Records Act needs to be revisited and that, in hindsight, some of the law's provisions may be flawed. And the Executive order raises some legitimate points about the practical difficulties of implementing Congress' intent under the law in certain circumstances such as the disability of a former President. But a legislative remedy is the appropriate course of action to solve such problems, rather than to allow an Executive order to supersede an act of Congress.

As my colleague, Mark Rosenberg, said in his statement, I also believe that a legislative remedy is far preferable to waiting for a resolution in the courts or a redrafting of the Executive order by the executive branch, which I don't believe is forthcoming.

Presidential papers I believe should be handled by statute and not by Executive order. Presidential papers are ultimately public

documents. They are a part of our national records and they are paid for with public funds. They should not be treated merely as private papers.

The Bush Executive order conflicts with the established principle that an ex-President's interest in maintaining confidentiality erodes substantially once he leaves office and it continues to erode over time, and that is quite clearly established in constitutional law. Executive privilege exists for former Presidents, but the standard for sustaining such a claim of privilege is very, very high. Executive Order 13233 actually allows an ex-President's claim of privilege in almost all cases to override a sitting President's judgment, and yet executive privilege is an exclusive Presidential power.

The Bush Executive order creates overly burdensome procedures that prevent access to Presidential records. The legal constraints built into the Executive order will have the effect of delaying documents for years as these matters are fought over in the courts. These obstacles, alone, will settle the issue in favor of former Presidents, because many with an interest in access to governmental records will conclude that they do not have the time or financial resources to stake a viable challenge. Under the Executive order, the burden shifts from those who must justify withholding information onto those who have made a claim for the right of access to information.

The Bush Executive order allows a former President to designate a representative to make executive privilege claims on his behalf even after the former President has died. In testimony before this subcommittee last year, the administration's witness stated that a former President "may designate whomever he sees fit." Thus, the Executive order wrongly allows executive privilege and exclusive Presidential power to be transferred to a private citizen.

Now, as I stated in my November 6, 2001, testimony before this subcommittee, I am very dubious about the idea of a legislated definition of executive privilege. Very appropriately, H.R. 4187 leaves the definition of the scope of that power to Presidents and the courts and instead merely remedies troublesome procedures over the exercise of the privilege. Thus, this bill does not infringe on a President's or ex-President's constitutional prerogative. Indeed, the bill protects the interests of former and incumbent Presidents by establishing a procedure whereby they are provided a reasonable time period to review governmental records to consider whether to claim executive privilege.

The bill further requires the Archivist to abide by any such claim of privilege by an incumbent President, and it does place a burden on those seeking access to such records to seek a judicial remedy.

There is nothing in the bill that suggests the likely outcome of any executive privilege dispute. The bill appropriately allows such disputes to be settled on a case-by-case basis, either through a process of accommodation or in the courts.

H.R. 4187 thus fulfills some of the objectives of the Bush Executive order without improperly expanding the scope of executive privilege. It also allows a reasonable timeframe for former and incumbent Presidents to consider a claim of executive privilege, which protects the interest of those in need of a timely release of information.

This bill remedies the problem of the Executive order displacing the authority vested in the Archivist. Under the Executive order, the Archivist loses his or her discretion to rule on the propriety of a former President's claim of privilege. This provision clearly conflicts with the congressional intent of the Presidential Records Act of 1978.

H.R. 4187 offers a workable middle ground by requiring the Archivist to withhold records long enough for the former President to file a suit to protect his claim of privilege. H.R. 4187 reaffirms the principle that executive privilege is a Presidential power that cannot be delegated to some other person and cannot be exercised independently by a current or former Vice President.

The bill also reaffirms the important principle that the incumbent or former President formally invoke executive privilege in writing and specify the reasons for so doing.

Finally, this bill overcomes a major flaw in a provision of the Bush Executive order that requires an incumbent President to support a former President's claim of privilege even if the incumbent disagrees. This provision clearly violates the constitutional requirement that the President take care to faithfully execute the law. For a President to uphold what he believes may be an improper use of executive privilege by a predecessor would violate the Article Two, Section Three Take Care Clause of the Constitution.

In my previous testimony, I expressed a concern that the Bush Executive order improperly shifts the burden from those seeking to withhold documents to those seeking access to public records. Consistent with the intent of the Presidential Records Act, H.R. 4187 places the burden once again where it belongs—on those who want to withhold information. Secrecy occasionally is necessary for any government to function, even a democracy; but in a democracy the presumption must be in favor of openness. In our system of government, secrecy should be the rare exception and not the rule.

Thank you.

Mr. HORN. Thank you very much.

[The prepared statement of Mr. Rozell follows:]

"H.R. 4187, the Presidential Records Act Amendment of 2002"

Mark J. Rozell
Professor of Politics
The Catholic University of America
Congressional Testimony before the
Committee on Government Reform's
Subcommittee on Government
Efficiency, Financial Management,
and Intergovernmental Relations
April 24, 2002

Thank you, Mr. Chairman, for the opportunity to address the subcommittee. I am the author of various studies on executive privilege and I testified last year before this subcommittee that Executive Order 13233 improperly expands the scope of the privilege and that it wrongly supercedes Congress's legislative authority.

There was a strong consensus at that hearing, and the scholarly community has since overwhelmingly weighed in, that the Executive Order is deeply flawed.[1] In addition to violating the traditional standards of executive privilege and the legislative power, the Executive Order unlawfully displaces the decision-making authority vested in the Archivist. The Executive Order undercuts both the text and the legislative history of the Presidential Records Act.

In our constitutional system of separated power, the president does not have the authority to use executive orders to negate statutory policy.[2] An executive order is proper when it concerns an independent presidential power contained in the Constitution or some executive

[1]Statement of Mark J. Rozell, U.S. Congress, House Subcommittee on Government Efficiency, Financial Management and Intergovernmental Relations. Hearing: "The Implementation of the Presidential Records Act of 1978." November 6, 2001, 2154 Rayburn House Office Building, Washington, D.C. See also "American Political Science Association Response to Executive Order 13233," "American Historical Association Response to Executive Order 13233," and Martha Joynt Kumar, "Executive Order 13233: Further Implementation of the Presidential Record Act," all in Presidential Studies Quarterly, Vol. 32, No. 1 (March 2002).

[2] An exception may be that an executive order could negate a congressional enactment if the statute trenched upon executive authority.

power granted by an Act of Congress.[3] Neither circumstance exists in this case. The Supreme Court ruled in Nixon v. Administrator of General Services that Congress possesses the power to legislate in the area of public access to presidential papers.[4] No legislative enactment authorizes an executive order to govern the release of presidential records.

Thus, the question no longer is whether the Executive Order is legitimate - clearly, it is not - but whether a legislative remedy is proper or necessary. I believe that it is well within congressional authority to repeal this Executive Order and also to define the process for claiming and resolving executive privilege claims that arise from requests for the papers of past administrations.

It is not sufficient for Congress merely to reinstate the Presidential Records Act and to repeal the Executive Order. The administration is correct in its view that the Presidential Records Act needs to be revisited and that, in hindsight, some of the law's provisions are flawed. And the Executive Order raises some legitimate points about the practical difficulties of implementing Congress's intent under the law in certain circumstances, such as the disability of a former president. But a legislative remedy is the appropriate course of action to solve such problems rather than to allow an executive order to supercede an Act of Congress. I also believe that a legislative remedy is far preferable to waiting for a resolution in the courts or a redrafting of the Executive Order by the executive branch.

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[3]"The Presidential power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself." Youngstown Sheet & Tube Co. V. Sawyer, 343 U.S. 579, 585 (1952). Justice Jackson's famous concurring opinion in Youngstown is germane: "When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter." 343 U.S. 579, 638 (1952).

[4]Nixon v. Administrator of General Services, 433 U.S. 435 (1977).

A Flawed Executive Order

Presidential papers should be handled by statute and not by an executive order. Presidential papers are ultimately public documents - a part of our national records - and they are paid for with public funds. They should not be treated merely as private papers.

The Bush Executive Order conflicts with the established principle that an ex-president's interest in maintaining confidentiality erodes substantially once he leaves office and it continues to erode over time.[5] Executive privilege exists for former presidents, but the standard for sustaining such a claim of privilege is very high. Executive Order 13233 actually allows an ex-president's claim of privilege in almost all cases to override a sitting president's judgment.

The Bush Executive Order creates overly burdensome procedures that prevent access to presidential records. The legal constraints built into the Executive Order will have the effect of delaying documents requests for years as these matters are fought in the courts. These obstacles alone will settle the issue in favor of former presidents because many with an interest in access to government records will conclude that they do not have the time or the financial resources to stake a viable challenge. Under the Executive Order, the burden shifts from those who must justify withholding information on to those who have made a claim for access to information.

Finally, the Bush Executive Order allows a former president to designate a representative to make executive privilege claims on his behalf, even after the former president has died. In testimony before this subcommittee last year, the Administration's witness stated that a former president "may designate whomever he sees fit."[6] Thus, the Executive Order wrongly allows

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[5]Ibid at 451.

[6]Statement of Acting Assistant Attorney General Edward Whalen III, U.S. Congress House Subcommittee on Government Efficiency, Financial Management and Intergovernmental Relations. Hearing: "The Implementation of the Presidential Records Act of 1978." November 6, 2001, 2154 Rayburn House Office Building, Washington, D.C.

executive privilege - an exclusive presidential power – to be transferred to a private citizen.

A Proper Legislative Response

As I stated in my November 6, 2001, testimony to this subcommittee, I am very dubious about the idea of a legislated definition of executive privilege. Very appropriately, H.R. 4187 leaves the definition of the scope of that power to presidents and the courts and instead merely remedies troublesome procedures over the exercise of the privilege. Thus, this bill does not infringe on a president's or ex-president's constitutional prerogative.

Indeed, the bill protects the interests of former and incumbent presidents by establishing a procedure whereby they are provided a reasonable time period to review government records to consider whether to claim executive privilege. The bill further requires the Archivist to abide by any such claim of privilege by an incumbent President and places a burden on those seeking access to such records to seek a judicial remedy.

There is nothing in the bill that suggests the likely outcome of any executive privilege dispute. The bill appropriately allows such disputes to be settled on a case-by-case basis either through a process of accommodation or by the courts.

H.R. 4187 thus fulfills some of the objectives of the Bush Executive Order, without improperly expanding the scope of executive privilege. It also offers a reasonable timeframe for former and incumbent presidents to consider a claim of executive privilege, which protects the interests of those in need of a timely release of information.

This bill remedies the problem of the Executive Order displacing the authority vested in the Archivist. Under the Executive Order, the Archivist loses his or her discretion to rule on the propriety of a former president's claim of privilege. This provision clearly conflicts with the

congressional intent of the Presidential Records Act.[7] H.R. 4187 offers a workable middle ground by requiring the Archivist to withhold records long enough for the former president to file a suit to protect his claim of privilege.

H.R. 4187 reaffirms the principle that executive privilege is a presidential power that cannot be delegated to some other person and cannot be exercised independently by a current or former vice president.[8] The bill also reaffirms the important principle that the incumbent or former president formally invoke executive privilege in writing and specify the reasons for so doing.

Finally, this bill overcomes a major flaw in the provision of the Bush Executive Order that requires an incumbent president to support a former president's claim of privilege, even if the incumbent disagrees. This provision clearly violates the constitutional requirement that the president "take care" to faithfully execute the law. For a president to uphold what he believes may be an improper use of executive privilege by a predecessor would violate the Article II, Section 3, "take care" clause of the Constitution.

In my previous testimony, I expressed the concern that the Bush Executive Order

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[7] Indeed, the D.C. Circuit Court rejected an attempt by the Reagan administration Office of Legal Counsel (OLC) to require the Archivist to abide by any claim of privilege by a former president. The court ruled that the OLC position violated the intent of the Presidential Records Act as well as the "take care" clause of the Constitution. See Public Citizen v. Burke, 843 F.2d 1473 (D.C. Cir. 1988).

[8]The D.C. Circuit Court ruled that the " presidential communications privilege" applies to advice that pertains to direct presidential decision making. Thus, the court reasoned that this privilege is a presidential power alone and involves the president's independent powers under Article II. In re Sealed Case, 121 F. 3d 729 (D.C. Cir. 1997). These powers do not belong co-equally to the vice president. Professor Peter Shane, in testimony before this subcommittee, put it well: "I know of no authority that suggests that there is an independent executive privilege to protect the office of the vice presidency." Statement of Peter M. Shane, U. S. Congress, House Subcommittee on Government Efficiency, Financial Management and Intergovernmental Relations. Hearing: "The Implementation of the Presidential Records Act of 1978." November 6, 2001, 2154 Rayburn House Office Building, Washington, D.C.

improperly shifts the burden from those seeking to withhold documents to those seeking access to public records. Consistent with the intent of the Presidential Records Act, H.R. 4187 places the burden once again where it belongs: on those who want to withhold information. Secrecy occasionally is necessary for any government to function. But in a democracy, the presumption must be in favor of openness. In our system of government, secrecy is the rare exception, not the rule.

Mr. HORN. Our next presenter is Todd Gaziano, director, Center for Judicial and Legal Studies of the Heritage Foundation.

Glad to have you here.

STATEMENT OF TODD GAZIANO, DIRECTOR, CENTER FOR JUDICIAL AND LEGAL STUDIES, THE HERITAGE FOUNDATION

Mr. GAZIANO. Thank you, Mr. Chairman and other members of the subcommittee for inviting me here to testify on H.R. 4187.

Unfortunately, I must reluctantly disagree with my good friends who are testifying with me today and express my grave doubts about its constitutionality. I should add, as Professor Turley did, that I agree with many of the premises in their testimony. I believe they draw some of the wrong conclusions. But I am grateful, because I have worked with them in the past—particularly Professor Turley—in protecting executive privilege in past administrations.

Let me begin with an important observation about the relative openness of the three branches of government. The Executive is by far the most open of the Federal branches in terms of the release of internal deliberative documents and almost every other kind of document.

As a result of the PRA, which I think is a very important and sound legislative act that may have gone a little bit too far, all Presidential documents from President Reagan's administration onward will eventually be released to the public, and I'm very grateful for that.

Moreover, the President does not have the final say, or a former President, for that matter, over whether his claim of executive privilege is valid or whether it will prevail over a given requester. His claim of executive privilege is presumptively valid, as I think it must be under Supreme Court in separation of powers law, but it may be overridden by a court with proper jurisdiction.

In contrast, almost no documents maintained by individual Members of Congress or the Supreme Court, even those created with public funds, are subject to public release, and very few are released without the voluntary assent of the Member or the justices. We can't examine the Supreme Court Law Clerk's memos or memos from one justice to another, even of a case that occurred 50 years ago. The heirs of those justices own those papers outright. We can't examine the internal memos of Senate staff that wrote to Senators about some momentous public issue a decade ago, or a copy of any Representative's confidential calendar, or a copy of staff notes taken when particular interest groups met with a Member. No matter how historically relevant or vital that information might be to an informed public, it's our tough luck because no law or court can force their release.

But my testimony today is in support of your private communications and strategy sessions because I think they are necessary for the well-functioning of your branch and of the courts, and, as I've explained in my written testimony, I think the Supreme Court got it exactly right that for you all to have to open up every strategy session would not serve the public interest. Nevertheless, Congress probably could require your own papers to be opened up to the public. You can do that to yourselves, but the constitutional separation of powers imposes limits on Congress' attempts to invade or inter-

fere with the private sphere of the co-equal branches. You can go so far, and the Presidential Records Act in the main is about as far as you can go.

The Supreme Court correctly recognized that constitutionally based privileges, including executive privilege, are necessarily rooted in the separation of powers. The Presidential Records Act of 1978 makes no attempt, as you know, to expand or contract claims of executive privilege. Instead, it recognizes in Subsection 2204(C)(2) of the codified version—and two other places in the statute, I should add—that the President will assert executive privilege with regard to some documents that are otherwise subject to release under the PRA.

Mr. Waxman said that he thought the 12-year period was long enough, but, as the legislative history of the PRA makes clear in 1978, Senator Percy said he expected executive privilege claims to go on for 20 years. Senator Percy and the legislative history make absolutely clear that they expected Presidents to assert privilege for up to two decades.

And, as Congress knew at the time when it passed that law, the Supreme Court had just ruled a year earlier that some constitutionally based privileges survive the individual President's tenure. Thus, former President Richard Nixon was free to continue to assert executive privilege with regard to documents from his administration. The Supreme Court cited the practice of the Constitutional Convention with approval. The Framers ensured that the records of the Convention would be sealed for more than 30 years. I've explained in my written testimony why that was important and necessary and serves the public interest.

Let me turn briefly to an analysis of Executive Order 13233 because I think there has been, in my view, some mis-readings of that Executive order.

President Bush established in that Executive order neutral principles for the incumbent and former President to review documents subject to release and neutral principles for the invocation of constitutionally based privileges. The bulk of the Executive order is not only lawful and prudent, but, with minor exceptions, I believe practically the only way to implement the Presidential Records Act in a constitutional manner.

Most of the outside criticism focuses on a former President's invocation of the privileges—which the Supreme Court says he can—with respect to documents that contain confidential communications or reflect high-level executive branch deliberations, but it is even more important for a former President to review these kind of documents. It is possible, even likely, that only he is aware of the sensitive nature of many Presidential documents from his administration. He may have a personal recollection of requests for confidentially. He has a duty to make sure that, by revealing those documents, he doesn't hurt a future Presidents' ability to get frank and candid advice.

Now, I do have a concern with allowing heirs to exercise a constitutional executive privilege, but in my view there's another way to read the Executive order that maybe the statute, the Presidential Records Act, authorized that. There is also the precedent, of course. Lady Bird Johnson has been exercising control over the

Presidential papers, as others did. If that reading of the Executive order is right, this is one of the areas that you all may be able to legislate, but I'd like to explain why I think the President could respond in a different way and create a committee of the former President's staff if he's deceased to advise him in his privilege decisions.

Let me turn to another very important, I think, misunderstanding of the Executive order. Witnesses today have said that they believe the Executive order requires the Archivist to follow orders from the previous President, but that isn't so. In addition, a witness from the subcommittee's earlier hearing asserted that a case called *Public Citizen* v. *Burke* decided by the D.C. Circuit was inconsistent with a former President's exercise of privilege, but that also is not correct.

The D.C. Circuit in that case was concerned about the Archivist's duty if he received a conflicting instruction from both the former President and the incumbent President. The court, in its view, believed that its duty to the incumbent President was paramount in that potential conflict rendered the directive invalid. That directive, by the way, didn't come from President Reagan, so the theoretical conflict was possible. But Executive Order 13233 doesn't have that flaw. It is an order from the incumbent President telling him that he shall follow the former President's invocation, but he is, in a sense, as I've explained in the written testimony, ratifying every one of the former President's invocations of privilege.

In that case there's no possible conflict. In that case, the Archivist has all of the authority of the former President and all of the authority of the incumbent President, and under those dual commands—because we know they both possess some constitutional authority—I submit the Executive order is clear, and in that case the Archivist is not following any order from the former President, he's following orders from the current one.

Let me now turn to an analysis of your very-well-intended legislation.

Subsection (C) of the new section to me is the most constitutionally problematic. Subsection (C), as you know, provides that former President's assertion of executive privilege is good for only 20 days, and after that period the Archivist must release the documents unless the former President has already secured by that point a court order barring the release.

Subsection (C) attempts to convert an executive privilege that is presumptively valid and can only be overturned by an affirmative court order into a right to delay the release for 20 days.

Executive privilege is not just a right to go to court, as Mort said. It is a right to bar the release of documents pending a court order otherwise, so the President's opportunity to go to court is not a cure for the constitutional defect. In separation of powers analysis, Congress simply has no power to take a Presidential power that is exclusively his, like the executive power, like the pardon power, like the Commander-in-Chief power, and condition it on the affirmative assent of another branch of government.

Let me turn now to what I believe are inadequate and inflexible deadlines in Subsection (A)(3). Subsection (A)(3) purports to grant the incumbent President or former President 20 days with the pos-

sibility of a 20-day extension to review up to millions of documents that are going to be requested. It doesn't matter if the President is engaged in a war. It doesn't matter if the former President is recovering from a stroke. I believe this inadequate 20—inflexible 20 to 40-day timeframe for the review of hundreds of thousands of documents is imprudent, to say the least, to the extent that it burdens the President's ability to exercise his executive power and perform other vital duties of his office. I believe it is constitutionally suspect.

Now let me jump—by the way, I make an analogy to the Congress' expansion of the power of the President to have acting officers serve in Senate-confirmed offices—very important offices. They extended it from 120 to 210 days, with possibility of extension. And so I believe that the time periods under the Executive order are positively speedy. But I do discuss in my written testimony one way that you probably would have authority to cabin the President's delay, and I think it has been constructive that you are attempting to engage the White House on that issue.

The next issue I want to briefly touch on—because Mort has at some length—is a flaw I think in several provisions of the bill that violate Article Two and Separation of Powers when they attempt to make the Archivist the President's superior. The Constitution provides that the executive power shall be vested in the President, not some of it. The Supreme Court properly held that this requires the President's control over all officers who exercise significant executive power. That decision, by the way, was the Myers decision in 1926 which some people believe is completely superseded, but it hasn't been. All other Supreme Court decisions make minor exceptions to it, but the Supreme Court still recognizes that it's good law.

Let me address just very briefly Mort's comments. He cites the fact in his written testimony that the heads of departments are mentioned in the Constitution so this must anticipate that Congress would give them statutory authority. Now, it is true that the Framers knew that there were going to be departments in Government and it is true that it expected Congress to give them some specific role to play, but the reasons that the heads of department were mentioned in the Constitution twice and in both cases were to show that the President controlled them. The first time the heads of department are mentioned in the Constitution is to signify that they must give their opinion in writing on any subject within their Department to the President. That, as everyone knows, is a means of control.

The second time the heads of department are mentioned in the Constitution is when it says who shall appoint them. And, as the Myers opinion explains in about 300 pages in some versions, the Supreme Court has said that was hotly debated topic, meant that the President must be able to control them.

I also have a concern with Subsection (A)(4) that requires the President to communicate his claims of privilege to the Archivist in a particular way. I submit Congress could not tell the President how he must communicate his military commands to the troops on the field using congressionally approved memo pads in triplicate. The President can communicate his commands to his subordinates

orally or in writing or any way he chooses, and this is an area, when he's exercising his constitutional power, I submit that you have no authority over his management directives.

With regard to *Morrison* v. *Olson* as my written testimony explains, it does muddy the water. I think there has been more recent criticism of it than there was at the time. But even if the court wouldn't reconsider it today, I believe that even that court wouldn't sanction so basic a violation of executive power regarding the interests identified in this legislation.

Let me touch one more concern, and that's with regard to this committee or Congress' ability to overturn the Executive order.

I clearly think, by the way, that is more likely to be upheld than affirmative obligations, but I think both are unconstitutional.

Congress' power to modify or overrule a Presidential directive depends on the front of the President's authority over the subject matter of the directive. With the chairman's request, I have cited a study that I published a year ago on the use and abuse of Executive orders and other Presidential directions.

Congress certainly can revoke Executive orders based on where the President is exercising a statutory power, and I was fully in support of revoking a lot of President Clinton's Executive orders. Where the President is exercising a power you give him, clearly you can revoke those Executive orders, so those may comprise all of the 200 orders that you all have revoked. When you have shared powers, you all have some authority, but it depends on the facts and circumstances and clauses, as I've explained in my written testimony. But with regard to powers like the executive powers that are conferred solely on the President by the Constitution, Congress has practically no authority to interfere with the President's management decision.

Although Executive Order 13233 relates to the implementation of the PRA, at its core it establishes procedures for the invocation of the President's constitutional powers.

In short, I think that it would be the legislation that would be deemed to have no force and effect if it were passed, and not the Executive order.

Let me tell you again that I think that this committee's hearings have been very constructive. By highlighting the concerns of the historians, journalists, and others regarding the time in which the President reviews documents subject to release under the PRA, I hope you have helped convince the White House to speed up its review process, although I think waging a war is cause for some delay, and having to do it the first time, as President Bush did, is also a reason for some delay.

But, notwithstanding the good intentions of the legislation and these constructive hearings, my sincere and respectful advice is that further progress will be advanced more effectively based on an exchange with the White House rather than on legislation that purports to dictate terms to the President. I think under those circumstances, if I were in the Justice Department, I would have to reluctantly urge a veto.

Thank you.

Mr. HORN. Thank you.

[The prepared statement of Mr. Gaziano follows:]

TESTIMONY OF

TODD F. GAZIANO

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BEFORE THE UNITED STATES HOUSE OF REPRESENTATIVES

COMMITTEE ON GOVERNMENT REFORM

SUBCOMMITTEE ON GOVERNMENT EFFICIENCY,
FINANCIAL MANAGEMENT AND INTERGOVERNMENTAL RELATIONS

REGARDING

H.R. 4187, THE "PRESIDENTIAL RECORDS ACT AMENDMENTS OF 2002"
AND OTHER PROCEDURES FOR THE INVOCATION OF EXECUTIVE PRIVILEGE

24 APRIL 2002

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Thank you, Chairman Horn and Members of the Subcommittee, for inviting me to testify today on H.R. 4187. I will also be testifying more broadly on the procedures for the invocation of executive privilege under the Presidential Records Act and the resolution of those claims. As a former chief counsel of another subcommittee of the Government Reform Committee, I know that the Members of this Subcommittee, particularly its Chairman, are genuinely interested in hearing all relevant views and are open to them. That is fortunate for me, because I must reluctantly disagree with my friends who are testifying today and express my grave doubts about the constitutionality of H.R. 4187, the "Presidential Records Act Amendments of 2002."

For the record, I am a Senior Fellow in Legal Studies and Director of the Center for Legal and Judicial Studies at The Heritage Foundation, a nonpartisan research and educational organization. I am a graduate of the University of Chicago Law School and a former law clerk to the U.S. Fifth Circuit Court of Appeals. Of special relevance today, I also served in the U.S. Department of Justice, Office of Legal Counsel (OLC), during separate periods in the Reagan, Bush, and Clinton Administrations, where I provided constitutional advice to the White House and four Attorneys General. Among its duties, OLC helps draft the President's executive orders and is primarily responsible for advising him on matters relating to executive privilege.

The Most Open Branch

Let me begin with an important observation about the relative openness of the three branches of government with regard to internal, deliberative documents. This observation runs counter to the impression several historians have conveyed in their testimony at previous hearings before this Subcommittee and full Committee. All three branches create and make available some public documents that announce proposed actions and final decisions, and these documents often contain an explanation for the proposed or final action. For example, courts issue legal opinions that explain the rationale for their decisions. Executive branch agencies publish proposed regulations with an explanation of why they are being proposed and final regulations with a statement of how public comments were taken into account. Congressional committees publish committee reports with the committees' recommendations or conclusions, and most legislative acts are public.

But the executive is by far the most open of the federal branches in terms of the release of internal, deliberative documents—and almost every other kind of document. When President Lyndon Johnson signed the Freedom of Information Act, he granted broad access to most executive branch documents. That Act was significantly strengthened and made judicially enforceable in 1974. *See* 5 U.S.C. 552. Even without being asked, executive agencies routinely release countless documents and raw data, ranging from weather reports to crime statistics and from hearing records to tide charts.

With regard to presidential documents, the Supreme Court ruled in 1977 that most presidential papers are the personal property of each President. When President Carter signed the Presidential Records Act of 1978 (PRA), he made the presidential papers of all future Presidents public documents. Pub. L. 95-591, § 2(a) (further references are to the amended statute at 44 U.S.C. 2201-2207). As a result, all presidential documents from President Reagan's administration onward will eventually be released to the public. The PRA provides that a President may restrict access to certain types of sensitive presidential records for up to 12 years. § 2204. After that, the majority of presidential documents are subject to release if a request is made. Some documents containing national security secrets may remain exempt from disclosure at that time, but are subject to eventual release after being declassified under national security rules. Even documents which are subject to a valid claim of privilege will eventually be released, generally no later than thirty years after they were created.

Moreover, the President does not have the final say over whether his claim of privilege is valid or whether it will prevail over a given requester. His claim of executive privilege is presumptively valid, as it must be, but it may be overridden by a court with proper jurisdiction. In *United States* v. *Nixon*, 418 U.S. 683, 713 (1974), the Supreme Court held that a party seeking to overcome a constitutionally based privilege must first establish a "specific need" for the particular records at issue. That may turn on the nature of the proceeding or request and the importance of that information to the proceeding or other use. If such a showing is made, the court will weigh the President's interest in maintaining the confidentiality of the particular documents against the asserted need of the requester.

Thus, a special prosecutor or a congressional committee with subpoena power might well be able to overcome a weak claim of executive privilege if it is shown that specific documents are relevant and important to an official investigation. By contrast, a broad fishing expedition launched by a voyeur or conspiracy theorist would be insufficient. Nevertheless, the Supreme Court has explained that the executive branch's interest in confidentiality wanes continually with the passage of time. After thirty years or so, such an interest might be easily defeated by a routine inquiry. In sum, every presidential document eventually will be released, and even in the short run, the President does not have the final word over the confidentiality of documents he claims are privileged.

The Most Dangerous Branch

In contrast, almost no documents maintained by individual Members of Congress, even those created with public funds, are subject to public release, and very few are released without the voluntary assent of the Member. If *The New York Times* wanted a copy of the internal memos that Senate staff wrote to Senators about some momentous public issue, it has no legal means to obtain them (even if the documents are more than twelve years old). If historians or members of the press wanted a copy of a Representative's confidential calendar or if they wanted a copy of staff notes taken when particular interest groups met with the Member, they would have no legal recourse to get them. With enactment of new campaign finance legislation, a majority of both houses of Congress seem to have accepted the argument (mistaken, in my view) that the potential for special interest groups to corrupt Members of Congress is great. Yet, the public has no enforceable right to examine correspondence between such special interest groups and Members of Congress. No matter how historically relevant or vital that information might be to an informed public, it's our tough luck because no law or court can force their release (absent special circumstances such as a properly constituted criminal investigation).

Many of us also would be quite interested in reading the memoranda that Supreme Court law clerks write to the justices that employ them. Historians and legal scholars would find memoranda one justice sent to another to be particularly valuable, even if the memos were about cases decided a decade or more ago. But none of us has any legally enforceable right to such memoranda, notwithstanding that these documents were produced with public funds and involve decisions that have a tremendous impact on our lives. Even fifty years after a given case is decided, the heirs of a deceased justice have complete control over his or her official court papers. We get to see only what they want us to see.

I am not surprised that you have chosen to keep your internal staff documents and at least some of your communications with your colleagues confidential. My testimony today is in support of your private communications and strategy sessions. I don't think it would be prudent for you to force your fellow Members of Congress to release such documents. Although it would keep us better informed about your individual decision-making processes and what influenced your decisions, it would not serve the overall public interest. The most probing legislative analysis is crystallized in writing, and good note-taking is essential to almost any productive office. I don't want to inhibit your staff from giving you valuable and candid written advice, and I don't want to chill communications between you and your constituents or interest groups, whether they are "special" or not. But if Congress did force the release of such

information, at least that would not violate the constitutional separation of powers. Congress probably can inflict such wounds upon itself.

Yet, the constitutional separation of powers does impose limits on Congress's attempts to invade or interfere with the private sphere of the other two co-equal branches. The separation of powers is not an amorphous, unwritten aspect of the Constitution. It is contained in the structure of our written Constitution and in many explicit provisions of the Constitution, including the vesting clauses of Articles I, II, and III. As the framers made clear, its ultimate purpose is to protect individual liberty by preventing any one branch, or two branches together, from usurping authority and prerogatives that were granted to another branch. James Madison lamented that the separation of powers had broken down at the state level, and that the price of failure at the federal level was nothing less than tyranny. *Federalist Nos. 47-48*. It is easy for one branch to discount the harm that flows from the violation of this principle, but the separation of powers itself was designed to counter this bias. Indeed, the framers observed that the legislative branch was throughout history "the most dangerous branch," and they tried to strengthen the President's hand by creating an office with "Energy in the Executive." *Federalist Nos. 48* and *70*, respectively.

Executive Privilege and the Separation of Powers

Such refinements in separation of powers design take many forms and are among the most important innovations of the U.S. Constitution. The Supreme Court of the United States correctly recognized that constitutionally based privileges, including the executive privilege, are necessarily rooted in the separation of powers. Just as Congress may not order justices of the Supreme Court to release drafts of their opinions (even after they have been superseded by a published opinion), there are limits to how far Congress may invade the deliberative process and national security decisions of the President and his senior staff.

The Presidential Records Act makes no attempt to expand or contract claims of executive privilege. Instead, it recognizes in subsection 2204(c)(2), and elsewhere, that Presidents will assert executive privilege with regard to some documents that are otherwise subject to release under the PRA. That subsection provides that "[n]othing in [the PRA] shall be construed to confirm, limit, or expand any constitutionally-based privilege which may be available to an incumbent or former President."

As Congress knew, the Supreme Court ruled in *Nixon* v. *Administrator of General Services*, 433 U.S. 425, 449 (1977), that some constitutionally based privileges "survive[] the individual President's tenure." Thus, former President Richard Nixon could continue to exercise executive privilege with regard to documents from his administration. That decision also set forth the constitutional basis for including confidential communications within the privilege. "Unless [a President] can give his advisers some assurance of confidentiality, a President could not expect to receive the full and frank submissions of facts and opinions upon which effective discharge of his duties depend." *Id.* at 448-49.

The Supreme Court cited the practice of the Framers during the Constitutional Convention, who ensured that the records of the Convention would be "sealed for more than 30 years." *Id.* at 447 n.11. The Framers did this for two reasons: (1) to promote vigorous and candid debate at the Convention, and (2) to permit the participants to present a unified front in support of the final product. A modern President has the same need to ensure confidential communications, especially among his senior advisors and cabinet officers. To get unvarnished advice, he must give assurances that the advice will remain confidential for some reasonable length of time. For success in his administration, he must also ensure that the vigorous debate we want to take place on important matters does not leak out prematurely and undermine the implementation of what is ultimately decided.

Several historians who have testified before this Committee or commented publicly on E.O. 13233 have expressed skepticism about the proposition that presidential advisers would either trim their advice out of fear of criticism or grandstand with an eye toward history. The historian-objectors' view conflicts with the well-known principle of human behavior embodied in the Hawthorne Effect: the mere act of examining someone alters his character or behavior. The historians' statements also have a self-contradictory quality, for they appear simultaneously to assert that the public remains tremendously interested in such confidential communications twelve or more years after the events have transpired but that none of the participants would ever bear that in mind. Has no high-ranking public official ever maintained a diary with the thought of using it for a memoir?

These self-interested historians imply that they are the only ones who would be conscious enough of an historic moment to think about how future generations would react to it. Yet, the careers and reputations of government officials often extend beyond twelve years, and they are very conscious of this. The automatic release of deliberative documents, even after twelve years, would undoubtedly affect the advice a President receives when he most desperately needs frank advice: when the stakes are momentous and when the matter being debated is highly sensitive or subject to disagreement.

Even if the historian-objectors (who may represent a small subset of all historians) are correct, their argument should be addressed to the Supreme Court. It is the Supreme Court that held the executive privilege extends to confidential communications and deliberative documents. It was the Court that decided (correctly, in my view) that this was necessary to ensure candid and complete deliberations. The objectors' ire is misdirected at the President.

Executive Order 13233

President George W. Bush is the first President who has had to implement certain aspects of the PRA because he is the first President in office twelve years after the conclusion of the first administration (President Reagan's) covered by the PRA. Last fall, President George W. Bush issued Executive Order No. 13233 to establish neutral procedures for the incumbent and former Presidents to review documents subject to release and invoke constitutionally based privileges. The bulk of E.O. 13233 is not only lawful and prudent, but it is—with minor exceptions—practically the only way to implement the PRA consistent with the incumbent and former Presidents' constitutional obligations.

E.O. 13233 identifies several types of documents subject to constitutionally based privilege (state secrets, presidential communications, deliberative process documents). These are often thought of as subsets of the executive privilege. Separate laws govern the release of state secrets and national security information, and there is not much dispute that access to these documents should remain restricted. Some have argued, however, that all such documents are in fact removed by the Archivist before a request under the PRA is processed. With all due respect to the staff of the Archivist and the Archivist himself, the incumbent and former Presidents have an independent duty to ensure that no classified documents that would harm national security are released. And, in at least some cases, the incumbent and former Presidents' access to other national security information would put them in a much better position to know whether a particular document implicates our national security or not.

Most of the outside criticism focuses on a former President's invocation of privilege with respect to documents that contain confidential communications or that reflect high-level, executive branch deliberations. But it is even more important for a former President to review these types of documents. It is possible, even likely, that only he is aware of the sensitive nature of many presidential documents from his administration. The incumbent President might be from another party and be unfamiliar with the relationships between the advisors and other officers in the former President's administration more than twelve years past. Moreover, the former President may have a direct recollection of the particular debate or

discussion that the documents reflects. He may even remember specific requests for confidentiality or other reasons why the documents reveal a sensitive communication or deliberation.

The Supreme Court was not troubled that a former President might, in some cases, invoke executive privilege to protect former administration officials from embarrassment. Indeed, it is the former President's obligation to shield officials from embarrassment (with regard to confidential communications or high-level deliberations) if he thinks that course is necessary to preserve a confidential atmosphere within which future Presidents can receive complete and frank advice when they need it.

Accordingly, E.O. 13233 establishes procedures for the incumbent and former Presidents to review all documents that are being sought under the PRA for potentially privileged documents. The review period for a request made by a non-governmental party is up to 90 days, but it may be extended if the request is "unduly burdensome." E.O. 13222, § 3(b). The review period for a request originating from Congress or the Courts is 21 days, but it too may be extended if the request is "burdensome." *Id.*, § 6. In the executive order, President Bush also instructs the Archivist to withhold all documents that either the incumbent or former President assert are privileged. *Id.*, § 3(d). Finally, the executive order states that "[a]bsent compelling circumstances, the incumbent President will concur in the privilege decision of the former President" to release documents under the PRA. *Id.*, § 4.

Executive Order 13233 and D.C. Circuit Law

A witness at the Subcommittee's earlier hearing asserted that *Public Citizen* v. *Burke*, 843 F.2d 1473 (D.C. Cir. 1988), was inconsistent with a former President's exercise of executive privilege in E.O. 13233, but that is not correct. In *Burke*, the D.C. Circuit Court struck down a Justice Department directive that was similar in some respects to E.O. 13233, § 3(d), but distinguishable in two other critical respects. The Justice Department directive instructed the Archivist to defer to any claim of privilege asserted by former President Nixon. In *Nixon* v. *Administrator of General Services*, the Supreme Court made clear that a former President could continue to assert executive privilege over documents from his administration, but that case did not consider a possible clash with the incumbent President. What if the incumbent President disagreed with a former President's privilege claim and instructed the Archivist not to honor the position of the former President? The D.C. Circuit believed that the Archivist's obligation to the incumbent President was paramount, and that he need not defer to a former President's claim if he concluded it was not proper.

Although I think the D.C. Circuit may have erred in *Burke*, E.O. 13233 is nevertheless fully consistent with it. The D.C. Circuit may have erred because the Archivist probably does have a responsibility to treat a former President's privilege claims as presumptively valid (pending resolution by a court), even if the incumbent President disagrees. That said, the D.C. Circuit was principally concerned about the Archivist's duty if he received conflicting instructions from the former President and the incumbent President. The Justice Department directive did not come from President Reagan himself; so a hypothetical conflict was possible.

In contrast, E.O. 13233 is an order from the incumbent President to the Archivist, instructing the Archivist to honor any privilege claim by a former President unless and until it is withdrawn or overturned by a court with proper jurisdiction. The executive order further states that "the incumbent President will support that privilege claim [by the former President] in any forum in which the privilege is challenged." § 4. To the extent that *Burke* rested on the Archivist's obligation to the incumbent President, that obligation is clear in E.O. 13233. Under E.O. 13233, the Archivist never has to take orders from a former President, but he does have to follow orders from the incumbent President. In effect, President George W. Bush has announced to the Archivist in advance that he will ratify and enforce a former President's claim of privilege whenever it is asserted. The result is that the Archivist is acting under the combined constitutional

authority of the former President (who clearly retains some constitutional authority as against outside parties) and the incumbent President. *Burke* has nothing to say about that situation.

Analysis of H.R. 4187

With the preceding framework in mind, there are several provisions of H.R. 4187 that appear to be flatly unconstitutional and others that raise serious constitutional concerns. These defects tend to compound each other, so that taken together, they render the entire bill even more clearly unconstitutional. The four most serious problems are analyzed below.

Subsection (c): Nullifying a Former President's Executive Privilege Authority

Subsection (c) of the proposed new section 2208 of title 44 is the most constitutionally problematic. The historian-objectors before this Committee and Subcommittee have expressed particular angst that the Supreme Court has allowed former Presidents to continue to invoke executive privilege with regard to documents from their administrations. Subsection (c) provides that a former President's assertion of such privilege is good for only twenty days. After that period, the Archivist of the United States must release the documents unless the former President has already secured a court order barring the release.

Subsection (c), if it were constitutional, would effectively nullify a former President's right to assert executive privilege over documents from his administration. It would convert an executive privilege that is presumptively valid and can only be overturned by an affirmative court order into a right to delay the release for twenty days. The President's opportunity to seek court action does not cure the constitutional defect, because Congress simply has no power to take an exclusive presidential power and condition it on the assent of another branch. That is a basic tenet of separation of powers doctrine. It should be self-evident that a power which flows from the separation of powers (the executive privilege) cannot be conditioned on approval from the courts (subsection (c)).

Subsection (c) may be predicated on the belief that the former President is in a better position to bear the cost of litigation than the requester. There are four logical responses to this notion. First, it is not true with regard to large media corporations. Second, Congress could subsidize such litigation, but since it failed to do so, it makes more sense for the person who seeks to profit by such information to bear the cost of litigation—regardless of relative wealth. Third, the former President already must devote substantial amounts of time to reviewing burdensome document requests for potentially privileged documents; he should not also have to bear the burden of initiating litigation when a requester might be satisfied with the balance of what is released. Fourth, and most important, a policy concern—no matter how well founded—cannot trump a constitutional right.

Subsection (a)(3): Inadequate and Inflexible Deadlines

When the President is exercising a power derived from the Constitution, as opposed to a statutory power, Congress has very limited authority to micromanage the timing of his actions. Congress could not pass a law requiring the President to make a pardon decision within 20 days after receipt of any such request from the Department of Justice. Nor could Congress require a President to decide whether to sign a treaty within 20 days of any international treaty convention. Many other examples are equally illustrative of the basic point: if the President derives a particular power from the Constitution and there is no time limit on the exercise of that power in the Constitution (such as the veto power), Congress cannot impose one on his exercise of that power.

Nevertheless, subsection (a)(3) purports to grant the incumbent President and former President only 20 days, with the possibility of a 20-day extension, within which to assert any constitutionally based

privilege claims. It does not matter what number of documents is being requested by an outside party or group of parties—be they 1,000 or 100,000. It does not matter that the President may be engaged in prosecuting a war or responding to a terrorist attack. It does not matter whether the former President is recovering from a stroke or is traveling on an important diplomatic mission. Moreover, subsection (a)(4) requires that the incumbent or former President personally sign every claim of privilege, so they might feel it necessary to personally review each potentially privileged document.

An inflexible 20-40 day time frame for the review of thousands of documents and the invocation of privilege is imprudent to say the least. To the extent that it significantly burdens the President's ability to exercise his executive privilege power and perform other vital obligations of his office, subsection (a)(3) is constitutionally dubious.

Several years ago, Congress extended the time President Clinton and future Presidents would have to fill vacancies in Senate-confirmed offices with acting appointments from 120 to 210 days, and that period can be further extended. 5 U.S.C. 3345-49. E.O. 13233 provides for an initial 21- or 90-day review period, with the possibility of an extension. By comparison to the Vacancies Act, the President's proposed time frame for review of PRA documents is positively speedy. I see no reason to interfere with this scheme, particularly for documents that are already twelve years or more old.

If there were a vital need to place some outer limit on the President's initial review of documents, I think the most Congress could do is to authorize some sort of court supervision if the President failed to act within a reasonable length of time (say, 180 days). Such a proceeding might be analogous to a mandamus action to force an agency to rule on a petition under 5 U.S.C. 553(e). Since a proper court can overrule a claim of executive privilege, it might (with appropriate legislation) be able to force a President to make a decision that will trigger the potential litigation. Such a process is also more likely to be upheld by the Supreme Court because the lower court will have had the opportunity to consider the special facts and circumstances of each request and the length of delay.

Making the Archivist Superior to the President

Several provisions of H.R. 4187 violate a separate aspect of Article II and separation of powers doctrine when they attempt to make the Archivist the President's superior. The Constitution provides that "*[t]he* executive Power shall be vested in a President," not *some* of it. Art. II, § 1, cl. 1 (emphasis added). The Framers debated and rejected the creation of a plural executive in favor of a unitary executive. Their conscious design was to vest "the execution of [the laws in] a single hand." *Federalist No. 37*. The Supreme Court properly held that this requires the President's control over all officers who exercise significant executive power. *Myers* v. *United States*, 272 U.S. 52 (1926).

Subsection (a)(3)(B) requires the Archivist to deny the President an additional 20 days to review the requested documents unless *the Archivist* determines that "such an extension is necessary to allow an adequate review of the record." Imagine the following letter to the President from the Archivist: "Sorry Mr. President, but I just can't determine in good faith that an extension is 'necessary,' given that the confidential calendar you sent over for next week includes a golf outing, a fundraising banquet, and a trip to Europe (again!). Better luck next time."

Subsection (a)(4) requires the President to communicate his claim of executive privilege to the Archivist in a particular way, the failure of which purports to require the Archivist to treat the President's claim as invalid. Congress could not pass a law telling the President he must communicate all military orders in triplicate, using only approved congressional memo pads. The President may communicate his orders to his subordinates any way he wishes, orally or in writing, in polite terms or peppered with

profanity. But according to subsection (a)(4), if the President does not dot all "i"s and cross all "t"s, the Archivist must treat his command to withhold the documents as a nullity.

Morrison v. *Olson*, 487 U.S. 654 (1988) muddies the constitutional waters somewhat, because it created an exception to the rule in *Myers* for independent counsel under the now expired Ethics in Government Act. (Other exceptions for "independent" commissions are distinguishable because the Court concluded they do not exercise executive authority.) Many constitutional scholars who once defended *Morrison* have ceased to do so in recent years, and perhaps the Court would rule differently today. But surely even the *Morrison* Court would not sanction so basic a violation of the unitary executive doctrine in order to further the comparatively unimportant interest identified in H.R. 4187.

Attempting to Overrule E.O. 13233

A President may issue an executive order or other directive to implement any of the powers properly conferred to him. *See generally* Todd Gaziano, Legal Memorandum No. 2, "The Use and Abuse of Executive Orders and Other Presidential Directives," The Heritage Foundation, Feb. 21, 2001 (available at http://www.heritage.org/library/legalmemo/lm2.html). Congress's power to modify or overrule a presidential directive depends on the font of the President's authority over the subject matter of the directive. *See id.* at 4; *Youngstown Sheet & Tube* v. *Sawyer*, 343 U.S. 579 (1952) (the "Steel Seizure Case"). The President has express and implied powers conferred to him by the Constitution (*e.g.*, the pardon power), powers that are shared with Congress under the Constitution (*e.g.*, war powers), and powers that are conferred exclusively by statute (*e.g.*, appropriations).

Congress has broad discretion to restrict or overrule presidential executive orders that are based solely on a statutorily conferred power, although there still are some limits to the congressional micro-management of the President's execution of the laws. In other words, the greater power does not always include all lesser controls. *See INS* v. *Chadha*, 462 U.S. 919 (1983).

Congress has some power to regulate executive directives based on shared constitutional powers, but it would depend on the facts, circumstances, and clauses at issue. With regard to the war powers, Congress may condition when and how the President shall call up reserves to serve in the armed forces of the United Sates, but as explained above, it could not dictate how the President communicates his tactical commands to troops on the field of battle.

With regard to powers conferred solely on the President by the Constitution, Congress has practically no authority to interfere with the President's management directives. The President may issue secret pardons or he may pardon whole categories of individuals in an executive order, as President Andrew Johnson did with regard to former confederate soldiers. *See* Legal Memorandum No. 2, *supra* at 11 (noting that the Supreme Court upheld President Johnson's blanket pardon).

Section 3 of H.R. 4187 states that E.O. 13233 "shall have no force and effect." Although E.O. 13233 relates to the implementation of the PRA, at its core, it establishes procedures for the invocation of presidential powers (executive privilege claims) that Congress cannot alter. It is axiomatic that the President's authority to implement his constitutional powers is "vested in [him] by the Constitution." *See* E.O. 13233, Preamble. Thus, E.O. 13233 contains the President's public statement regarding how he will exercise his constitutional power (and respect the constitutional power of former Presidents) within the framework of the PRA. It also contains his instructions to the Archivist in such matters.

H.R. 4187 does not amend the framework of the PRA that is within Congress's power, but it is an attempt to modify, condition, and partially nullify incumbent and former Presidents' constitutional powers. In these respects, H.R. 4187 would be void even if it were passed. *See generally* Statement of Antonin

Scalia, [then] Assistant Attorney General, Office of Legal Counsel, on S. 2170, the Congressional Right to Information Act, Before the Subcommittee on Intergovernmental Relations, Committee on Government Operations, United States Senate, Oct. 23, 1975 (explaining that Congress lacks the power to establish procedures that the President would have to use when invoking executive privilege). In sum, it is H.R. 4187 that "shall have no force and effect," not E.O. 13233.

The Combined Defects of H.R. 4187

The combined defects of H.R. 4187 render it even more constitutionally questionable, in part because each defect compounds the rest. A 20-40 day initial review period is an even greater burden on a former President if he must also secure a court order within the next 20 days to enforce his privilege claims. Congress's attempt to elevate the Archivist over the President (with regard to constitutionally based privilege claims) is based on the mistaken premise that Congress can overrule a presidential management directive.

I have no doubt that this Subcommittee and full Committee have proceeded with their oversight and legislative hearings in good faith. But a President has a responsibility to vigorously resist any erosion in the power of his Office. Separation of powers principles require no less. If I were still in the Office of Legal Counsel, I would strongly urge the President to veto any legislation similar to H.R. 4187. I think the Department of Justice under any President would take the same position.

Conclusion

My belief that H.R. 4187 is unconstitutional does not mean that the Subcommittee's hearings have served no constructive purpose. By highlighting the concerns of historians, journalists, and others regarding the time in which the President reviews documents subject to release under the PRA, I hope you have helped convince the White House to speed up its review process (although waging war is cause for some delay). But my sincere and respectful advice to this Subcommittee is that further progress must be based on a polite exchange with the White House rather than legislation that purports to dictate terms to the President.

If the Subcommittee continues pursuing H.R. 4187 or similar legislation, it will engage in a futile act that will waste its time, and possibly that of the President and the courts. But if the Subcommittee properly engages the White House on this issue, I am confident that the White House will reach an appropriate accommodation regarding the Subcommittee's concerns.

Mr. HORN. The chairman of the full committee has arrived, and I will yield such time as he needs.

Mr. BURTON. Thank you, Mr. Chairman.

How long have you been in the White House? How long have you been in government?

Mr. GAZIANO. I was in government. I'm at the Heritage Foundation now. I was in the Office of Legal Counsel in three different periods, which is the office that advises the President on executive privilege.

Mr. BURTON. OK. Well, I have an opening statement I'd like to put in the record, Mr. Chairman. I was going to read it, but after listening to the dissertation of the gentleman that just spoke I think I'll speak off the cuff.

We had a—so without objection I hope you'll put this in the record.

Mr. HORN. Without objection, it is in the record at this point. And if you want it, it will be as if spoken.

Mr. BURTON. Thank you, Mr. Chairman.

[The prepared statement of Hon. Dan Burton follows:]

STATEMENT BY CHAIRMAN DAN BURTON
APRIL 24, 2002

I think Executive Order 13233 went too far. I'm concerned that this Order can be used to bottle up records that belong to the American people. I'm also concerned that the Order is not consistent with the intent of the Presidential Records Act. The Executive Branch appears to have crossed over the line. Only Congress can legislate, and I think some of the President's lawyers have lost sight of the fact that they are not permitted to change the law because they don't like the law.

The President is doing a great job, and he has my unconditional support. Unfortunately, he got some bad advice on this issue. This is not the first time I have said this. Last month we finally got documents that President Bush claimed executive privilege over. These documents relate to law enforcement corruption in New England that goes back to the 1960s. The White House didn't want us to see them. They were wrong. And they finally had to give us access to them. I won't go into what these particular documents have revealed, but I will say that one shows that subordinates were misleading their bosses. The lower level employees had their way and protected two violent criminals named Whitey Bulger and Stevie "The Rifleman" Flemmi. They did not give their bosses honest,

candid advice. After they gave Bulger and Flemmi a free pass, these thugs committed a number of brutal murders. There was testimony just this last week that after Bulger and Flemmi were let off the hook, they both strangled the daughter of Flemmi's girlfriend. They also killed government witnesses. And all the while, the FBI was helping to make sure that Bulger and Flemmi never got into trouble.

The point I am making is that oversight is important. If the White House had its way, we wouldn't know how lower level employees in the Justice Department spun their bosses and gave Bulger and Flemmi a get out of jail card. We wouldn't be able to understand what really happened. When you think about it, the FBI got

into the mess that it is in in New England because there was no oversight.

Access to Presidential records isn't that much different. Documents provide future generations the ability to understand the past. They provide future Presidents the ability to make better decisions. There should be legitimate protections. I think the old Reagan order did protect what needed to be protected. But I have severe reservations about delegating executive privilege. I just can't see any reason in the world for Amy Carter, or Chelsea Clinton, or Neil Bush to be able to claim privilege on behalf of a relative. I also don't see why Vice President's should be able to claim executive privilege.

This may seem like a very arcane subject. It is very technical and procedural. But it is important. These rules and procedures have real-life implications. These rules will exist for many future administrations. At some point, they will be abused. We represent the American people, and we have an obligation to make sure that their interests are protected – not just now, but in the future as well.

I look forward to today's testimony and I thank the witnesses for being here.

Mr. BURTON. You know, this Executive order goes too far. That's all there is to it. It just goes too far. And we had a similar situation where the President claimed executive privilege after I talked to him about a fellow who was in prison for 30-some years for a crime he did not commit and the FBI knew he didn't commit it and they kept him there because they were protecting informants from the mafia. And the President said that we weren't going to get those documents under any circumstances. And so I said I was going to move to hold the President in contempt of Congress, and then we got the documents.

Now, you know, you can go into all the hyperbole you want to about the President's rights and all that other thing, but he's got to work with the Congress of the United States and he's got to have votes to pass a budget and appropriation bills and everything else.

Now, the practical matter of the situation is this: one House is Democrat and the other he has about a six-vote majority that's Republican. Now, if this Executive order stands and the Congress can't have access to the Presidential records that we need, he's going to have big problems with me. That's one vote. And when he needs a crucial vote on the budget or on appropriations or other things, he's not going to get it.

Now, the message—I don't know if anybody is here from the White House. It doesn't look like many people are paying much attention. But for the White House to block the Congress from documents that they rightfully have access or should have access to is absolutely insane. Now, he can say all he wants to that he has the right to do this, and he can go into all the technical aspects of the Constitution that you believe gives him that right, but from a political standpoint, with the political situation in Washington being what it is right now, it makes no sense to me. For him not to allow Congress to see President Clinton's records or his father's records or Ronald Reagan's records or Jimmy Carter's records over there without them signing-off on it when Congress may need those for pertinent investigations that deal with corruption or illegal campaign contributions coming from communist China or Macao or Indonesia or South America or wherever they came from, or other things, is just wrong.

So I think this legislation has merit, and if the legislation gets to the floor and it is explained properly, I believe it will pass. And if he vetoes it, he vetoes it at his own peril. And you're hearing this from a Republican that supports him a great deal. I think he's doing a great job on the war on terrorism. I think he's doing a great job in the economy. He's my kind of guy. He says it like it is. But somebody down there—Mr. Gonzales or somebody is giving him pretty bad advice. They gave him bad advice on the Salvati case over at the Justice Department, and as a result the White House got egg all over its face because they gave us the documents anyhow. We had to force it.

Now, I don't understand why when people sometimes become President, they listen to people who say self flagellation is the way to go. Let's just get a cat-of-nine-tails and beat the hell out of ourselves. It makes no sense.

Now, I don't know if you still have influence down at the White House or not, but I hope you'll take my statement and take it back down there.

Mr. GAZIANO. I'll——

Mr. BURTON. Just give it to the President. He probably is going to get this at some point.

Mr. GAZIANO. He would get it anyway, but I'll be glad to.

Mr. BURTON. But the point is I really like this guy. I have been down there. I've had dinner with him and his wife. I've gone to the movies at the White House. I think Laura Bush is a wonderful lady. I think he's a great guy. But somebody is leading that guy down the wrong path on some of this stuff and it needs to be cleaned up.

Mr. GAZIANO. I'm sure he would read your remarks, or the White House will, but I'll be glad to pass on the emotion.

And let me tell you how much I admire——

Mr. BURTON. You don't need to pass emotion. The words will carry the emotion.

Mr. GAZIANO. I'm sorry. Let me tell you how much I admire your work, and when I served on a subcommittee under you how much I tried to help the late, great Barbara Olson in her endeavors, and I've worked with both Mort and Professor Turley on some of the individual disputes. Comity is owed both directions between the White House and Congress. And when I was an oversight staffer, I think your points are absolutely valid that the White House needs to respond to the legitimate concerns of over-using executive privilege.

I do differ in one minor respect though, for the record. I haven't followed every last detail of this President's invocation of executive privilege, but I think that this administration really does have a different approach than the previous administration. And it may not appear that way, and maybe if I was doing oversight still for this committee I would——

Mr. BURTON [assuming Chair]. I appreciate your comments, but Congress still has power of the purse and they still have power over taxation and everything else that the President needs and appropriations, you know, and with the political situation being like it is with her party controlling the Senate and us controlling the House by a small majority, it doesn't make any sense for them to be pulling these stunts because it doesn't work, and we've already proven it once when we had to take on the Justice Department. So they need to get some smarts down there. They're doing a great job in a lot of areas, but somebody has got them stepping on the long hair running down their back, and it's a mistake.

Did you have any comments you want to make, or did you want to go to questions?

Would you like to start? I yield to Ms. Schakowsky. Go ahead.

Ms. SCHAKOWSKY. Thank you, Mr. Chairman.

This has been a level of testimony that doesn't often happen at all of our committees, and I appreciate the academic approach that all of you have taken, and actually would—because there was such a difference of opinion expressed here, and not to gang up on you, Mr. Gaziano, but because you had the last word, I would actually like to ask the other three who might differ in opinion with yours

to comment on some of the very different conclusions that you arrived at from their testimony, and one that I would like to definitely address is this question of the short-time period that Mr. Gaziano says that he feels that the time limits imposed on the President are much too short. So that's just one of those. But I noticed that you were taking some notes, and I would appreciate your sharing your views that might run different to his.

Mr. TURLEY. First of all, I try not to disagree with Todd, because it indicates most likely that I'm wrong, but our disagreements I think reflect a different view of executive privilege and its limits.

The examples that Todd gave I think are good ones, actually, for the committee to consider. When Todd refers to this body requiring the President to communicate in a certain way, and the analogy driven by Todd is, you know, could you require him to speak to his military commanders in the field using particular forms, I think that actually is a good example, but I think it cuts the other way.

The difference between President Bush communicating with a military officer in the field is that it's a conversation occurring within the branch. The difference in this circumstance is you have two branches involved. This is a conversation between two branches, and the Constitution doesn't allow one branch to control that conversation.

I think that this body can impose some methodology, some procedure by which it will communicate with the executive branch and the executive branch will communicate with it. I think that it is——

Ms. SCHAKOWSKY. I'd just ask you that he argued that—and I suppose you could argue that, yourself—that if one branch can't—doesn't control the conversation, then does the Congress have the right to prescribe the way the President would communicate with it?

Mr. TURLEY. I think that it does, because the question is whether the prescribed period cuts back upon the constitutional authority. That is, you cannot prescribe a period that would negate the constitutional authority of the President, but we're not talking about 20 days. We're talking about 20 days plus 12 years. So when you look at 20 days, it looks actually sort of short for most of us, particularly those of us who are procrastinators. Twenty days can go by pretty quickly. But it's not 20 days. It is a 12-year period, and this is an important date on the calendar of any former President. So I believe that period does not cut back on the constitutional authority of the President. I think it can be prescribed.

But I do believe that we have to think seriously about Mr. Gaziano's view, because it is a well-founded one, and for that reason I think that you should put in a severability clause into this bill to say that if the issue of writing or days is found to transgress upon executive privilege, that it can be, in fact, struck down by a court and the bill survive.

Ms. SCHAKOWSKY. Thank you for that suggestion.

Go ahead.

Mr. GAZIANO. And then the other thing is that the example of executive privilege in the analogy to pardons I think is also a very good thing to focus on. There is a difference between a constitutional right that is expressly given to the President in terms of par-

dons and a constitutional right that was defined by the Supreme Court.

I happen to agree, actually, with Professor Rozell who made a terrific history of this to show that this privilege really does go back to George Washington, but it was articulated in its modern form by the Supreme Court in the Nixon cases. But it is not the pardon power. That is, it is a limited and conditional privilege. It is a privilege that, in *Nixon* v. *Administrator of General Services,* the court said, erodes over time. And so it is not the same thing, and so it is in that ambiguity that all of us are struggling, I think—struggling in good faith.

But I don't want to dominate this response. I would like to give my colleagues a chance.

Mr. ROSENBERG. Just a couple of comments. I've known Todd for a long time, and I think it is very difficult not to disagree with him, but we come from different perspectives, obviously.

With regard to the length of time, I think the Congress can prescribe it. I think Professor Turley has hit on the key aspect that this is at the end of a 12-year period of accumulation by the Archivist, and during which time the former President has had opportunity to make claims, to restrict various categories of documents, and as those come through—and then, of course, the Congress has provided ex-Presidents with sufficient staff, and I think perhaps they will be even more utilized to screen documents and to know and to be able to go back to them to see what documents they want to claim privilege for.

With regard to making the former President and the present President put in writing, I don't understand how you could take exception to that. As Professor Turley and Todd understand, the executive privilege is a qualified privilege which can be overcome by certain levels of showing of necessity and unavailability. It is a higher burden with regard to an incumbent President, but, as *Nixon* v. *Administrator of General Services,* made very, very clear, it is not so high with regard to ex-Presidents.

This qualified privilege then has to be justified at some particular point. It is presumptive, but presumptive doesn't then allow and mean that nobody can look at what they want.

In this kind of—as the chairman is well aware, when privilege claims are made, one of the things we want to know about documents, since we can't see the documents, we require that a privilege law be submitted to the particular committee, you know, against which a claim of privilege is made so that we can at least know what kind of a document we're talking about, when it was executed, what its general subject matter is, and that's an important part of the investigative process and of determining what kind of deference or consideration to give the claim of privilege.

To request or require under a statute that a President or an ex-President put in writing the claim of privilege seems to me to be important so that there can be an assessment that goes on during this period. Without it, we're kept in the dark and kept at bay.

I think that in that respect the time limits are appropriate. The requirement of writing is almost implied in the case law that a President has to claim himself and, you know, make it clear, you know, that he is—as President Bush did when he claimed executive

privilege, and as President Reagan and the first President Bush did. So I think this is an unexceptionable requirement.

Mr. GAZIANO. Certainly Congress' subpoenas are different than—to the extent that you subpoena documents, I think Professor Turley is absolutely right that it is a communication between the branches and you certainly accommodate—suggest you can require writing an explanation kind of privilege log, I hope with the exception that if it implicates national security that the President can take other precautions, as Dean Kmiec has pointed out in his prepared testimony, it is not just that it be in writing, but it is the type of writing that raises concerns.

But with respect—this legislation requires the President to communicate to the Archivist all of these formalities whenever he is invoking privilege as against anybody, and that is an internal executive branch communication that is analogous to the military hypothetical that I gave, and there I think lies a much more constitutional question.

Very briefly, with regard to the point that this is after 12 years and it's not just 20 days, a new President coming in office could never have looked at those documents, and if there are millions of documents requested, he has an obligation to see that national security materials are gleaned out, and he can't rely on the fact that the former President may have done so.

I also submit it's a little bit curious that, as soon as a President goes out of office, instead of going on vacation he has to go through millions of documents, many of which may never be requested, but he's got to be ready. He's got to be ready, so he should go through—spend the next 12 years—I don't—it's a helpful point, I agree, and in some cases 20 days might be enough, but the inflexible period in this statute I think is over-broad and probably would be struck down on its face.

Ms. SCHAKOWSKY. There was one—I'm not an attorney, and so when I heard you say the deference, it sounds, that is paid to ex-President over current President, and that in a sense it sounded to me that you were saying that the's all right, but yet the current President would have to—was mandated to accept the privilege that was being invoked by the current President. That doesn't make a lot of sense to me.

Mr. GAZIANO. Let me try to be more clear than I was, if you don't mind. One of the most fascinating questions in all of this—and I really enjoyed research—is whether the Archivist would have to follow the former President's orders, regardless of what the current President thinks. The D.C. Circuit said no. I think that might be wrong. But the Executive order—the D.C. Circuit law says he doesn't; that the former President has some power, but it is unclear how much power he has.

But what this Executive order does say, "You aren't going to follow the former President's claims because he says so. You are going to follow them because I say so, and I am going to . . .."

Ms. SCHAKOWSKY. But the current President has to say so.

Mr. GAZIANO. Well, he's announced in advance. He's done two things. There are two provisions at issue in Executive order. The first says, "I'm announcing to you, my subordinate, I will defend any claim the former President makes. He has some power over

you, but I don't know how much, but I definitely have power over you and I'm telling you whenever he says it I will approve it." Two, he says in a separate section cited in my written testimony, "I will defend his claim in any court."

Now, under that or under any forum, in that context—you may think it is imprudent of him to do that, but I think it is his constitutional power. There's a logical reason, by the way, why he might do it, which is that he believes, as I think the Supreme Court does, that only the former President is in a good position to know whether the documents implicate a sensitive area, so that's——

Ms. SCHAKOWSKY. I was persuaded by the take care argument. Was that yours, Mr. Rozell? Maybe you could comment on it?

Mr. ROSENBERG. I think each one of us made that argument, actually, that the take care clause applies here, that it would violate the President's authority under the Constitution; that the President may disagree with a former President's invocation of executive privilege. The President has the authority to take care that the law is faithfully executed, but he's obligated to accept the former President's claim of privilege and not do what he, the President, believes is constitutionally proper or necessary. I think that's wrong.

Mr. GAZIANO. Since I went over, I'm the only one who didn't address that. I do think the take care clause is absolutely relevant to this case, but it supports the President.

Mort correctly said that the take care clause means the President can't—in the government he can't execute the law all by himself, so—but I think he draws the wrong conclusion from that.

What that means is if he has responsibility to take care, he and no one else has the constitutional obligation to take care, that means if other people are exercising some of his power—and that follows from Myers and from the vesting clause of Section One, Clause One, of Article One—then he must manage them and it's his word that is final.

Mort correctly said the take care clause gives him no substantive power to legislate. That is correct. But it gives him management responsibility. It gives him procedural management power over the lower branch officials. It tells him, "Not only can you supervise them, you must. You, Mr. President—" and this was the brilliance of the Framers' design. They wanted it accountable and responsible. "You, Mr. President, are responsible. You can't get away with saying, 'Congress gave power to your heads of departments and they've gone astray.' You are responsible. You shall take care that the laws are faithfully executed, and since you can't execute the laws yourself, that means you must supervise your subordinates."

Mr. ROSENBERG. But you can't override a duty placed in a subordinate. He can fire the Archivist just the way President Nixon fired Archibald Cox and the way Andrew Jackson fired two or three Secretaries of the Treasury who wouldn't disobey the law Congress had passed which said you can't put money from the Bank of the United States into State banks, and he fired a couple of Secretaries of the Treasury until he found one—we ultimately appointed Chief Justice of the United States, apparently in reward—who did the unlawful act.

That's not to say—I mean, yes, he can be fired, but Congress—it has been recognized since, as I said, the dawn of our country, they had the say as to—you know, except with regard to certain national security and things like that.

I think you're mistaken here about the power that Congress has with respect to subordinates of the President.

Mr. TURLEY. Could I also throw in—I hate to gang up, but that's what academic fights are all about. I just want to note a couple things about what Todd said, and that is, first of all, this is an independent agency, and the status of an independent agency has always been something of a controversy as to what extent an independent agency could disagree with the President when it's part of the executive branch. There's one easy way to get rid of this problem—that is, if the issue is that the Archivist is part of the executive branch, I still think that you can order all these documents to be given to the Library of Congress, and then the President would be able to utilize his executive privilege in court for any documents that he feels are not being properly protected and protected from release.

But, to cut to the chase, if these are public—if this is public property, you can treat it like White House furniture and you can direct that it be given to the Library of Congress and leave it to the President to protect his constitutional authority.

But I also want to note, very quickly, about two things. First of all, I am perplexed by the idea that a former President would invoke privilege, the current President would not necessarily accept the invocation, but, absent compelling circumstances, I feel that he must, therefore, defend it in court.

As someone who has been in court on executive privilege a number of times, I would be quite peeved if I found out the Department of Justice opposite of me was fighting executive privilege on an assertion that the White House didn't agree with. There are serious ethical questions about going into court and fighting for an executive privilege argument, a constitutional argument that the lawyers and the White House do not agree with.

Finally, I want to note, in terms of this business about the President leaves and immediately has to, you know, come back from Vale and start reading through millions of pages of papers, I think we need to look at the practicalities of this. The current President has a running obligation to protect executive privilege, and that is a running obligation not to his documents but also to the prior President's documents.

Now, the Justice Department may have to spend money to review, as this 12-year period comes up, to guarantee that there is nothing that gets over the transom that they don't want, and they may come to you, and I would strongly encourage you to give them that extra money to look at it, but it's not the former President's obligation, alone. In my view, it rests very heavily on the incumbent President.

Mr. BURTON. Mr. Chairman, could I ask one question, because I do have to leave.

Mr. HORN [resuming Chair]. Yes.

Mr. BURTON. I'll just ask one question. Let's just say that a President commits a crime while in office—and I'm speaking hypo-

thetically, not about any individual Presidents. You know about what we've done in the past. But I'm just talking about any President. Let's say he commits a crime, and the proof is in documents that are in the archives, and you want to get to this crime which may be a heinous crime before the statute of limitations runs out. What's the position of Congress and what can they do if this Executive order stands? Is there any recourse that they have?

Mr. TURLEY. In my view, that's a lead pipe cinch of a case because Congress would override any executive privilege argument as to those documents. You have a stated constitutional duty in terms of impeachment to investigate those matters. I don't think it would withstand a serious challenge from the White House to keep you from those. But I also want to add——

Mr. BURTON. What about the previous President claiming executive privilege over the documents that may be detrimental to him?

Mr. TURLEY. Well, I've been critical of those executive privilege assertions in the past. But I do want to note one thing, Mr. Chairman, and that is the Supreme Court, in *United States* v. *Nixon,* not only rejected the absolute executive privilege argument being made by that President, but specifically called in an archaic view of the separation of powers as requiring three airtight departments of government. I think that's very relevant to these discussions.

First of all, the question you asked I think is a direct branch-to-branch conflict, but in terms of the role of the Archivist, the Supreme Court has recognized that the separation of powers is not that neat, that there is overlap.

Mr. BURTON. Well, maybe I didn't make my question clear enough. The case can't be made. In the Nixon case they had the tapes and they had a lot of other things, you know, that made the case, but I'm talking about where there may be evidence in the archives that we believe is there but there's no concrete evidence, and so it's not in the public domain, and so you can't make the case unless you get that evidence. So it's not something that's out in the open, it's something that you know is there or you think is there and you can't get to it because of the executive privilege.

Mr. TURLEY. In my view—and I'm sorry to have moved on to that secondary point, but, Mr. Chairman, in my view the executive privilege argument would still fail; that this body's constitutional authority would trump it in that circumstance. Now, the executive branch can go to court to try to seek restrictions if they wish, and this body——

Mr. BURTON. What course of action would the Congress follow? Let's say that this committee which has oversight responsibilities over the executive branch wanted those documents, and they said, "Well, you can't get them because he doesn't want those to be revealed or in the public domain at the present time."

Mr. TURLEY. Are you referring to under the Bush Executive order?

Mr. BURTON. Yes.

Mr. TURLEY. That's part of my miscommunication because I really do believe the Bush Executive order is just facially unconstitutional.

Mr. BURTON. But you would have to go to court to——

Mr. TURLEY. That's right.

Mr. BURTON [continuing]. Make that case.

Mr. TURLEY. Congress would. That's right. It would be——

Mr. BURTON. So what you're talking about could be a long, drawn-out legal procedure which, in and of itself, could take a long time.

Mr. TURLEY. I think that's right, and——

Mr. BURTON. So this Executive order has created a real mischievous situation for the Congress and a Gordian knot that we would have to cut in order to get through it.

Mr. TURLEY. I think that's actually one of the reasons this bill is so useful, quite frankly. I truly believe that this Executive order could not have been written in a way to more guarantee its loss on a challenge, and so I believe this bill will be found unconstitutional in part or in whole.

Mr. BURTON. You mean the Executive order?

Mr. TURLEY. Bloody hell. I'm sorry. I believe that the bill will be found—the Executive order will be found unconstitutional, but that will take time and there will be an appeal, and I don't believe that this body should remain dormant during that period. I think that it is an institutional interest for this body to protect itself. James Madison gave you the devices to protect yourself and to preserve balance between the branches, and I think this bill really comes out of that principle.

Mr. TURLEY. Thank you.

Thank you, Mr. Chairman.

Mr. HORN. I thank you, Mr. Chairman, for coming, and I share your remarks, having gone through the hearing with you on the FBI situation, and it's so silly you can't imagine. I did tell the new director just to chop heads, and you are here not doing it. It happened under J. Edgar Hoover, and we ought to have the Attorney General and the director do those things and bring those papers to the chairman.

Do you have any specific changes in the bill, H.R. 4187? What would you want to add or subtract? We'll start with you, Mr. Turley.

Mr. TURLEY. I actually think the bill is very well written. I would definitely add a severability clause to deal with issues such as the writing requirement and the day requirement. I tinkered with the idea of, well, maybe the days should be extended, but, quite frankly, when you look at that you ask yourself, well, how much, in addition to 12 years, would be adequate? If you increase it to 30 days, is 10 days going to change this dimension? Is 40 days going to do it? After 12 years, the period of time becomes, in my view, less significant. Twenty days is sufficient for the President of the United States to go into a Federal court and to get an order that protects it from release, and I expect that most judges would be highly accommodating to do that type of preliminary order.

So I believe that it is, in fact, adequate, and I don't have any other major changes. There are aspects, quite frankly, of this field that I would change if I was declared emperor for a day, but those go beyond the immediate issue of concern here and I think would simply add controversy to something that should not be controversial.

Mr. HORN. Thank you very much.

Now, Mr. Rosenberg, what would you subtract or add?

Mr. ROSENBERG. It was actually one thing that I might add as a note of caution, and I—in repealing the Executive order, a question has arisen that has never been, I think, decided by any court is that: What does that do to the repealed Executive order of President Reagan? That is, if you, by statute, repeal this order, are you thereby in some way reviving President Reagan's Executive order which, itself, has some problems and has been utilized to delay, as we well know? That order was used to delay action from January through November because it was utilized to delay, you know, the opening of the 68,000 pages until the new Executive order was issued which then caused a further delay.

I'm not quite certain, and perhaps Professor Turley or one of my colleagues here can say what effect that might have in perhaps reviving the Reagan order.

The second question I have is I think the procedural additions are excellent. I wonder if, as a pragmatic thought, knowing the position of the Justice Department in the American Historical Society suit and the position that they have generally taken in this area, whether this will assure a veto by the President. Without the additional procedures, it would look—a veto would look simply like an attempt to continue secrecy.

Based on Todd Gaziano's arguments and the view that there are constitutional difficulties, intrusions on Presidential prerogatives and privileges, that could be an excuse to veto.

On balance, I would go straight ahead with your entire bill, however.

Mr. HORN. Thank you for that advice.

Mr. Rozell, what would you add or subtract?

Mr. ROZELL. I, too, think it is a good bill and I, too, would advise going forward with it, and I also expect that there is a strong likelihood of a Presidential veto should it get to the President's desk at some point. I also struggled with the issue of the timeframe, the 20-day period, and really that was the only part of the legislation, the proposed legislation, that I thought could be looked at and reconsidered. Again, as Mr. Turley said, whether you add it to 30 days or 40 days as opposed to 20 I'm not sure substantively makes a great deal of difference, but we've heard one substantial criticism of the bill on the basis that it is just not enough time, and it is conceivable to me that that provision could be struck down, so, perhaps as a matter of protecting this legislation against other further criticism or a constitutional test on that basis, increase the timeframe.

Mr. HORN. Well, would you do above 20 or below 20?

Mr. ROZELL. Well, that's what I'm saying. I'm merely suggesting this as an insurance policy perhaps as opposed to I personally believe it needs to be more than 20 days. I do not. But if it is a good insurance policy to increase 20 to 30 or 20 to 40, prudence may suggest doing so. But I don't think, from my own standpoint, that it weakens the bill substantively not to increase it. Merely that would be an insurance policy against outside criticism and an argument by others that would be a reason for opposing it or vetoing the bill.

Mr. HORN. Well, obviously we'd like to get this legislation moving, and I would hope the White House would take a second look and get things moving.

Mr. ROZELL. I agree. Thank you.

Mr. HORN. Mr. Gaziano.

Mr. GAZIANO. You have been very tolerant of me. I think the time limit is one of the areas where you do have some remote authority. I want to draw your attention to a citation in the testimony from then Assistant Attorney General Antonin Scalia, where he argued that you had little or no authority over the procedure the President used to invoke executive privilege, and since he taught a separations of powers course I attended, I don't think his views have changed, and they're worthy of review.

As far as the time limit is concerned, I suggested in my written testimony that probably any deadline would be constitutionally suspect. Maybe you could get one that's 365 days that might pass muster on a compromise vote. But the way you can do that, in my view, constitutionally—and here I might get in trouble for making this recommendation—is to say that beyond some period of time—180 days would be reasonable by analogy to some other statutes—you can authorize a person to go to court and the court can then supervise the time in which the President has to invoke executive privilege.

But I should add that, with regard to your own subpoenas, I don't see that the Executive order changes things one way or the other. And with regard to your own subpoenas, there is just this longstanding period of debate between the branches. I've worked on both sides, and I think that you can insist on shorter deadlines that are more particularized based on the particular requests that you have, and the executive branch is responsible to try to accommodate your requests.

Mr. HORN. Well, thank you.

Let me just ask one question, and then that's it. The bill rescinds the Executive Order 13233 and it replaces it with a statutory process for Presidential reviews and possible executive privilege claims. Do you think it would be better just to rescind the current Executive order one way or the other?

Mr. GAZIANO. Me first this time?

Mr. HORN. Yes.

Mr. GAZIANO. You know, yes, it's better to do less constitutional harm than more.

Mr. HORN. Right.

Mr. GAZIANO. I think that, you know, that act would also be constitutionally problematic, since I think that as—that was the nature of Scalia's testimony was that you couldn't regulate the President's procedures for invoking executive privilege either, but I clearly think that the legislation raises additional problems that make it more problematic.

Mr. HORN. We have a little situation here of a markup across the hall that I have to vote in, and Mr. Ose will be taking over here for me.

Mr. OSE [assuming Chair]. Mr. Rozell, same question. Do you think it would be better just to rescind the current Executive order?

Mr. ROZELL. I would like to see the Executive order rescinded, but I believe that it is not sufficient merely to reinstate the Presidential Records Act of 1978. It would be far preferable, in my view, for there to be a legislative remedy at this time.

I think, given the controversy over the Bush Executive order, the various lawsuits that have been raised in response to it, and the fact that I believe that there are some problems with certain procedures articulated in the Presidential Records Act, this is a particularly good time for a legislative action and it's appropriate that the legislative branch should get involved.

Mr. OSE. Mr. Rosenberg.

Mr. ROSENBERG. I don't think it would be—I was thinking what kind of a void would it leave, and the answer to that is you have the Archivist who has rules and—you have the Archivist. There are rules presently in place that provide an orderly process, and if there is any doubts let's leave it at—certainly let's get rid of this order and take our changes with the Archivist, whose rules right now I think are pretty good.

Mr. OSE. Mr. Turley.

Mr. TURLEY. I would tend to agree with Professor Rozell. I think that there is room to improve the act. Frankly, I think that the act is ripe for improvement. It is about that time when Congress can take another look at an act and tweak it and improve it. I think this bill comes out with a better PRA, and I think that you should go forward with it, not just simply rescind the Executive order.

Mr. ROSENBERG. One further addendum. What the Archivist does is subject to congressional review under the Congressional Review Act. He changes his current—the procedures with regard to executive privilege claims, you can get it that way and very effectively deal with the Archivist, and in some ways with that weapon in the background, maybe leaving the Archivist and coming back to the status quo with the PRA and the Archivist regulations and no Executive order might be preferable.

Mr. OSE. Thank you for your answers to that question.

On behalf of Chairman Horn and the rest of the committee, I want to especially thank our witnesses today for their insightful testimony on this important matter. I think you hear virtual unanimity up here that Congress must reclaim both the spirit and the letter of the Presidential Records Act. In 1978, Congress and the President decreed that Presidential records belong to the public. It's a pretty unequivocal statement. I believe that H.R. 4187 will ensure that this important goal is achieved.

Next week this subcommittee will meet again to markup this bill. Your suggestions for improvements to the legislation have been appreciated. To the extent you have additional ones, we would welcome those.

We're going to leave the record open for additional questions or input you may have for a period of 5 days.

I would like to thank the following for their efforts on this hearing: J. Russell George, our staff director and chief counsel; Bonnie Heald, the deputy staff director; Henry Wray, senior counsel; Justin Paulhamus, clerk; Darin Chidsey, professional staff member; David McMillen, minority professional staff member; Jean Gosa,

minority clerk; and Karen Lightfoot, minority senior policy advisor; and our court reporter, Joan Trumps.

We thank you for coming. This hearing is adjourned.

[Whereupon, at 11:53 a.m., the subcommittee was adjourned, to reconvene at the call of the Chair.]

[Additional information submitted for the hearing record follows:]

PRG

Presidency Research Group

April 24, 2002

The Honorable Stephen Horn
Chairman, Subcommittee on Government Efficiency, Financial Management, and Intergovernmental Relations
B-373 Rayburn House Office Building
House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

I am again writing on behalf of the governing board of the Presidency Research Group, an international, nonpartisan organization composed of nearly 500 presidency scholars, to express our support for H.R. 4187, The Presidential Records Act Amendment of 2002. In doing so, we also voice our continued grave concerns over Executive Order 13233.

To summarize our concerns regarding the Bush administration's Executive Order, and our support for this legislative remedy, we first share the concerns of many that E.O. 13233 attempts improperly to supersede a law passed by Congress. Second, E.O. 13233 shifts the burden of responsibility pertaining to access to documents, as Professor Mark Rozell notes, "from those seeking to withhold documents to those seeking access to public records." Third, the E.O. unilaterally and improperly extends executive privilege to vice presidents and all former presidents in the same manner and force with which it applies to sitting presidents. Fourth, it fails to recognize the principle that executive privilege for a former president does, and must, diminish over time (a principle recognized in *Nixon v. GSA* (1977). Fifth, by placing the burden for obtaining documents on those seeking them, it requires that the investigator already have specific information on the documents sought; yet as presidential scholars such as Robert Caro have noted, this precludes the prospect of simply examining documents for the sake of examining them (since researchers cannot request specific documents if they do not know of their existence), an extremely important research tactic. Sixth, presidents under the E.O. can forestall

records disclosure indefinitely, as former presidents can designate anyone they choose, including descendants, to prevent document disclosure after the death of the former president. Seventh, the E.O. requires mutual agreement from both a sitting president and a former president to obtain release of the latter's papers and documents, a procedure that raises both practical and theoretical concerns. Eighth, the E.O. robs the National Archivist of a proper, useful, and efficient role in the documents release process. Ninth, the E.O. imposes a remedy for which no problem exists. The cumulative research experiences of our member scholars support the proposition that the pre-existing system has worked well in balancing issues of access with those of security and proper confidentiality. We find no basis for the assertion that the system that existed before enactment of E.O. 13233 was somehow unwieldy, disorderly, or improper.

We wholeheartedly support the terms of H.R. 4187, including its provisions to provide former presidents with a reasonable period of time to review documents, its revisions of the role of the Archivist, and its affirmation that executive privilege does not belong to vice presidents or to former presidents indefinitely. Finally, we firmly support the principle that Congress possesses both the right and the authority to effect such changes. While our organization studies the presidency, it does so with the insight that presidential power cannot, and does not, exist in a vacuum, but rather in the context of a three-branch constitutional system.

We request that this communication be included in the record of your Hearings on H.R. 4187. Thank you for your attention to this important matter.

Sincerely,

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Dean & St. Thomas More Professor

April 21, 2002

The Honorable Stephen Horn
Congress of the United States
House of Representatives
Committee on Government Reform
2157 Rayburn House Office Building
Washington, DC 20515-6143

Re: H.R. 4187

Dear Congressman Horn:

Thank you for inviting me to participate in the hearing on H.R. 4187, the Presidential Records Act Amendments of 2002.

I regret that a prior commitment to participate in another program out of state makes it impossible for me to attend your deliberations on the 24th of April, but I wanted to share a few thoughts by letter in the event they are helpful.

First, I want to commend you and the committee for inquiring into the proper relationship between the prerogatives of the Presidency and public disclosure. History depends upon an accurate accounting of public decision, and history can only be well written if the relevant materials are available. Of course, our nation does not only live in the past, it has an obligation to the present, so there is a corresponding duty to ensure that the Office of the Presidency can function both in these times of war, as well as in times of peace.

While I believe your proposal is well-intended, in my judgment, it strikes an incorrect and constitutionally questionable balance. The Presidential Records Act of 1978 was, in itself, a dramatic step toward the opening of public documents. Prior to the Act, presidents owned their papers outright. This was something well accepted by our founders. It was Justice Story, after all, who opined that George Washington owned his presidential papers and could bequeath them to his estate or grant a copyright in them to others.

In the wake of Watergate, and its unfortunate and indefensible abuse of public power, Congress reset that balance. In doing so, Congress was careful not to undermine the constitutional responsibilities of the Presidency, both by allowing the restriction of access to executive documents for up to 12 years, and by explicitly providing that "nothing in the Act shall be construed to confirm, limit, or expand any constitutionally-based privilege which may be available to an incumbent or former president."

Without those carefully stated words, the 1978 Act would have been open to serious constitutional doubt. While President Nixon's particular privilege claim was not sustained, *United States v. Nixon* 418 U.S. 683 (1974) recognized the unmistakable constitutional origin of executive privilege and that the need "to protect military, diplomatic, or sensitive national security secrets" might even trump the need for presidential materials in a criminal trial. More generally, the Court specified that "there is a legitimate governmental interest in the confidentiality of communications between high Government officials, e. g., those who advise the President, and that '(h)uman experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process.'" 418 U.S., at 705. Indeed, the opinion noted that Government confidentiality has been a concern from the time of the Constitutional Convention in 1787, as these seminal meetings were conducted in private, 1 M. Farrand, The Records of the Federal Convention of 1787, pp. xi-xxv (1911). The records were also sealed for more than 30 years after the Convention. See 3 Stat. 475, 15th Cong., 1st Sess., Res. 8 (1818). See generally Charles Warren, *The Making of the Constitution* 134-139 (1937).

Subsequently the Court elaborated in *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977), that executive privilege extends to both incumbent and former presidents. Unless the President can give his advisers some assurance of confidentiality, a President could not expect to receive the full and frank submissions of facts and opinions upon which effective discharge of his duties depends. Said the Court adopting the words of the Solicitor General; "The confidentiality necessary to this exchange cannot be measured by the few months or years between the submission of the information and the end of the President's tenure; the privilege is not for the benefit of the President as an individual, but for the benefit of the Republic. Therefore the privilege survives the individual President's tenure."

As Assistant Attorney General for the Office of Legal Counsel to President Reagan, it was my responsibility to review for form and legality Executive Order 12667. That Executive Order implemented the 1978 Act by directing the Archivist to fully honor an incumbent President's assertion of privilege, but left to the Archivist's discretion, and subject to court order, whether or not to honor a claim of a former president. It was not clear to me why the White House in 1989 preferred to differentiate incumbent and former president privilege claims. While this differentiation was not mandated by the 1978 Act or judicial precedent, it did not slight constitutional requirement so long as it was understood that the Archivist would not disclose documents until after a time sufficient was allowed to the former president to litigate any privilege claim.

A more prudent course is to treat the privilege claims of incumbent and former presidents as equivalent. Such equivalency better recognizes that the privilege is not a personal one, but one intended within the constitutional design to protect the Office of the Presidency, especially as it relates to state secrets, open law enforcement files, and the deliberative process of the President, which of course, extends to communications with the Vice-President, the cabinet, and other high ranking advisors. This more prudent course was the one adopted by President George W. Bush in Executive Order 13233 signed on November 1, 2001. Under the Bush Executive Order, a claim of privilege by either the incumbent or a former president preserves the confidentiality of the material unless the parties seeking disclosure receive a final court order confirming a demonstrated need for the document's release.

While it is possible to construe the Bush Executive Order as more restrictive, in operation it need not be. In fact, where a former president opts for release (which as a practical matter is more often than not after twelve years), the Order provides an incumbent concession that "absent compelling circumstances, the incumbent President will concur in the privilege decision of the former President." In such circumstance, the Bush Order can be reasonably read as creating a presumption of disclosure of former presidential documents, unless there is compelling reason – from the vantage point of the incumbent and the present exigencies of the Office – to withhold materials. This presumption of disclosure in the Bush Order was not present in that signed by President Reagan. Perhaps, it is in exchange for this deference to public release, that when a former president does assert a privilege under the Bush order, "the incumbent President will support that privilege claim in any forum in which the privilege claim is challenged." This pledge to defend is constitutionally sensible, equitable, and responsive to the needs of a presidency that at the moment faces unparalleled challenges to maintaining the safety and security of the Nation.

Regrettably, I do not find the same sense of constitutional prudence in H.R. 4187. First, it would seem that rather than striving for balance, the proposed amendment is designed to weaken the Presidential Office without deference to the constitutional importance of maintaining the integrity of privileged material. For example, the proposal resurrects the unwarranted differentiation of privilege claims, treating those asserted by a former president as implicitly less worthy of respect. In this regard, a former president is once again put in the awkward position of suing his successor, unless his successor incumbent concurs in the nonrelease. Even more troubling, the assertion of privilege claims by either an incumbent or former president is made subject to predicate requirements that require the identification of the specific record, the specific grounds of the claim, and the circulation of this information to members of Congress, the person seeking the record, and the general public. While it might be theoretically possible to write such claims obliquely without disclosing privileged material, in some cases, especially as they relate to military and law enforcement matters, that would be impossible. It would also appear that some of the time periods for review of material have been narrowed from the 1978 Act, and given the substantial volume of some disclosure claims, this in itself would likely prove constitutionally troublesome. Finally, the above changes aggravate some of the lingering constitutional doubts related to the 1978 Act – specifically, the fact that the proposed amendment effectively denies the validity of a constitutionally based privilege, whether made by an incumbent or former president, when the information is sought pursuant to 44 U.S.C. 2205(2) (A) (criminal matters) or (C) (committee requests).

We know this is a delicate moment in our Nation's history. Our Constitution and its separation of powers has served us well. Respectfully, I do not believe the H.R. 4187 fully observes this important constitutional doctrine, and I urge the committee not to pursue the changes it proposes.

Sincerely,

Douglas W. Kmiec
Dean & St. Thomas More Professor

Apr-22-02 03:02pm From-ASSOCIATION HEADQUARTERS 2023672100 T-469 P.002/006 F-448

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April 22, 2002

The Honorable Steve Horn
Chairman
House Government Reform Subcommittee on Government Efficiency, Financial Management and Intergovernmental Relations
B-373 Rayburn House Office Building
Washington, DC 20515-6143

Subject: Statement supporting H.R. 4187, Presidential Records Act Amendments of 2002

Dear Chairman Horn:

On behalf of the membership of ARMA International, records and information managers serving in organizations of both the public and private sectors, I am writing to respectfully submit written testimony regarding our support of your proposal to repeal Executive Order 13233. To support your efforts, I am also enclosing a statement from ARMA that we would request be included in the written record of the April 24, 2002 scheduled hearing on H.R.4187.

Established in 1956 with a current membership of over 10,000, ARMA is the oldest and largest association for the records and information management profession. ARMA serves as an international forum for establishing policies, processes and technologies for responsible records management, and its members are responsible for the efficient maintenance, retrieval, and preservation of vital information created in public and private organizations in all sectors of the economy.

ARMA stands ready to extend the expertise of the records management profession to you and your colleagues as you continue to review the Presidential Records Act, Executive Order 13233, and public access to presidential records. Please do not hesitate to contact us if we may be of further assistance on this matter.

Sincerely,

Terrence J. Coan
President
ARMA International

Enclosure

Apr-22-02 03:02pm From-ASSOCIATION HEADQUARTERS 2023672100 T-466 P.003/006 F-448

Statement for the Record

Submitted by
ARMA International

To the
Subcommittee on Government Efficiency, Financial Management
and Intergovernmental Relations
Committee on Government Reform
U.S. House of Representatives
Washington, DC

Regarding its Hearing on
H.R.4187, the Presidential Records Act Amendments of 2002

April 24, 2002

Recent events compel ARMA International to offer its comments to the Committee on the importance of established and implemented policies for careful and appropriate records and information management, including those relating to presidential records. The disregard of information collected and records held in public trust or for fiduciary purposes by institutions in both the public and private sectors threaten the very essence of our democratic form of government and our economic system.

About ARMA International

Established in 1956 with a current membership of over 10,000, ARMA International is the oldest and largest association for the records and information management profession. ARMA serves as an international forum for establishing policies, processes and technology standards to ensure responsible records management. Its members are responsible for the efficient maintenance, retrieval, and preservation of vital information created in public and private organizations in all sectors of the economy.

ARMA has long supported policies that provide for the efficient and appropriate management of records and information in all forms and in all settings. These include policies that allow information to flow between different systems, sectors, and entities, reduce barriers to access to public information, and preserve vital records and information resources that document the history and heritage of public and private institutions and organizations.

The membership of ARMA endorses the adoption and implementation of records and information management policies and procedures, based on best practices and standards, which are well known to the profession of records management, that provide guidance on organizing, retaining, preserving, and appropriately destroying records. Acknowledgement of the importance of records management by an organization's leadership and a commitment of resources serve as safeguards against inappropriate or unlawful uses and destruction of vital information.

The membership of ARMA also endorses policies that provide for an appropriate access to information by stakeholders, whether they be employees, researchers, auditors with fiduciary responsibilities, or the general public. This clearly includes access to information necessary to the essential role of congressional oversight of our governmental agencies. While recent events demonstrate the significance of appropriate access to information regarding the conduct of publicly held organizations, access to information residing in our governmental and public institutions is particularly compelling. The information collected and the records retained by our government are crucial to the organization of our society and essential to the daily operations of government and commerce. The value of some records endures beyond their active use because they provide unique evidence of significant actions and transactions that have affected the public. Furthermore, the accomplishments and accountability of government are revealed through the creation, maintenance, and preservation of public records. The means and level of access in any instance may vary, but the establishment and confirmation of systems that preserve information and provide for appropriate access are similar in their goals of preserving confidence in our public and private institutions.

The Importance of Records Management Policies and Procedures

Essential to the appropriate access to information are the policies and procedures regarding records management established by organizations, whether in the public or private sector, whether publicly charged or privately held. Established policies and procedures, created by and maintained in a transparent process and based on best practices appropriate to the organization involved, are at the core of records management. These policies guide the management of information within the organization. They create integrity in the process of records management and instill confidence in those both within the organization and the stakeholders outside the organization. Best practices require that everyone involved with the maintenance and management of information be informed of and acknowledge the importance of the policies in place. Likewise, changes to these policies should be undertaken in an appropriately transparent and deliberate manner to maintain confidence and integrity. Properly implemented, records and information management is neither ad hoc nor reactionary; rather, it is a structure of policies and procedures that ensure the appropriate use of and access to information.

Policies and procedures outline when the destruction of documents is appropriate and when documents must be preserved. They also identify what role various individuals within an organization play in making policy decisions regarding the management of documents.

Records management policies may also be established by rules of procedures or law, as in the case of state open meeting laws or rules applicable to federal advisory committees to provide public access to meetings and information conducted by public entities. Records management policies may also be established for accessing specific information, as in the case of the Freedom of Information Act and the Presidential Records Act of 1978 (PRA).

Balancing Competing Public Policy Interests

ARMA recognizes that in many instances records and information management, particularly those aspects involving access to information, require balancing competing, but equally

legitimate, public policy interests. For example, the impact of Executive Order 13233, signed by the President on November 1, 2001, on the carefully crafted framework for the management and access to presidential records created by the (PRA) raises important issues. The tension that exists between the Executive Order and the PRA highlights the importance of preserving the integrity of an established records management policy.

The PRA for the first time established public ownership of presidential records and created procedures governing the preservation, management, and public availability of these records. The Act also anticipated that presidential records would become available for public scrutiny at some date certain, recognizing the importance in a democratic society for the public to access important historical documents in an appropriate manner and at an appropriate time. It balances the clear public interest in accessing presidential records with the legitimate need to afford a President an environment that allows for the frank and candid input of trusted advisors.

By establishing a period of 12 years, Congress acknowledged that concerns regarding privilege would diminish over time, while, with the creation of public ownership and the imposition of the Archivist in the preservation and management of these records, the public interest in accessing presidential records would not diminish. Of particular concern to ARMA, Executive Order 13233 threatens the core of the framework of presidential records management established by the Presidential Records Act. It potentially extends indefinitely the period of time during which presidential records are withheld from public access without a valid assertion of executive privilege.

Executive Order 13233 is violative of the spirit and letter of the PRA, which was established to allow for the access of presidential papers after 12 years. This law clearly establishes that presidential records are the property of the U.S. government and the authority to manage these records resides in the office of the Archivist of the United States. Executive Order 13233 would remove the authority from the Archivist and place such responsibility with the incumbent and past presidents. The intent of the PRA was to permit access to the vital historical records of this country, not to hinder access.

Congress carefully crafted the PRA to balance national security, the integrity of governmental processes, and other interests that may require limiting access to certain information versus full access to information and documents created through the constitutional, statutory, and ceremonial responsibilities of the office of the president. The objectivity required for maintaining this balance was intentionally given to the Archivist as part of the records management function.

Perhaps most important to ARMA, which is focused on the integrity of records management systems, is that substantive changes to the systems and procedures created for presidential records by the PRA be debated in an open and transparent forum. ARMA recognizes the significance of executive privilege and the fact that its assertion may interfere with the intended access to information. Certainly there may be legitimate issues that the Executive Order attempts to address, and certain provisions of the law, passed over 20 years ago, may require modification. As with the modification of any records management policy, care must be taken not to unduly limit the intended access and use of the covered information. Modifications, if necessary, are best achieved by undertaking a thorough review of the established procedures of

access in the same manner that the original policy was established. This principle of transparency and open debate, however, is essential for maintaining confidence and integrity in the framework established for managing these as well as other public records.

Preserving Public Confidence and Trust

ARMA recognizes that no entity is immune from activity on the part of those intent on acting outside the parameters of established organizational policies. ARMA also recognizes that important public policy questions are raised in regards to assertions of executive privilege and the effective operation of our executive and legislative branches of government. Nevertheless, the existence of established policies for records management, based on the profession's best practices and procedures; an awareness of the importance of these policies by those within their respective organizations in both public and private sectors; and an organizational culture that acknowledges the importance of information to stakeholders will do much to ensure that records and information are properly managed and to preserve public confidence and trust in our economic and governmental systems. Any departure from these procedures requires careful scrutiny.

ARMA International supports the bipartisan work of Chairman Horn and Ranking Member Schakowsky in introducing H.R.4187, the Presidential Records Act Amendments of 2002. H.R.4187 would rescind Executive Order 13233 and aims to strike a balance between executive concerns about privilege and the public's right to access information created by our governmental processes. As is essential in a system reliant on checks and balances, it is wholly appropriate that Congress give serious review to any assertions of executive privilege, as well as the use of other administrative or legal maneuvers, intended to withhold information ordinarily made available under established rules of procedure and necessary for the oversight of governmental operations, preservation of the public health, safety and welfare, and preservation of our cultural and historical records.

Respectfully Submitted,

Terrence J. Coan
President
ARMA International
4200 Somerset Drive, Suite 215
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(913) 341-3808

SUPPLEMENTAL STATEMENT OF
PROFESSOR JONATHAN TURLEY
SHAPIRO PROFESSOR OF PUBLIC INTEREST LAW
GEORGE WASHINGTON UNIVERSITY LAW SCHOOL
WASHINGTON, D.C.

"H.R. 4187: The Presidential Records Act Amendments of 2002"

April 24, 2002

At the conclusion of today's hearing, the witnesses were encouraged to add any supplement testimony on issues related to H.R. 4187 and the amendment of the Presidential Records Act (PRA). A couple of issues were raised by staff following my testimony that I would like to briefly address.

I. REMOVAL OF MATERIAL FROM THE NATIONAL ARCHIVES AND RECORDS ADMINISTRATION.

I was specifically asked about my observation that Congress could within its constitutional authority mandate the transfer of this material to the Library of Congress or some other component of the legislative branch. I was further asked if this would be my preferred course of action.

In my view, these records are public property that Congress could transfer to a component of the legislative branch after the twelve-year "buffer period." Some of the issues raised against both H.R. 4187 under separation of powers rest on the facts that National Archives and Records Administration (NARA) is part of the executive branch and the Archivist is an appointed executive officer. Some of these issues would be avoided with a transfer to a legislative repository. Congress could certainly designate such a legislative repository with statutory language tracking the of language both the PRA and H.R. 4187. These provisions would include requirements that (1) notice be given to the current or former president of any potential release of material; (2) an ample opportunity be given for the current or former president to raise executive privilege objections; (3) sufficient time be given for a former president to secure a court order barring release; and (4) a legislative archivist comply with any court order. The president's executive privilege authority would remain unchanged since he could still bar release of the information. Moreover, if this transfer occurred after the twelve-year period, the executive

privilege claims would have diminished with the passage of time. Finally, those documents that would be excluded under the incorporated FOIA standards (including national security material) would not be subject to release.

I do not, however, recommend such a course of action for a variety of reasons. First, a transfer of documents to the legislative branch would trigger a different constitutional question of whether the president has the right to retain control of material in the executive branch that is deemed privileged. I believe that such an argument can be challenged,[1] but it would raise a substantive issue. On the most basic level, this material becomes public property like furniture after the end of an Administration. However, there is no question that both an incumbent and former president retain some official control of the handling and release of privileged material. A president is under a continuing obligation to protect privileged information and the wholesale transfer of material could be viewed as jeopardizing the exercise of this authority.

Second, the transfer of material to a congressional repository like the Library of Congress will not necessarily eliminate the problems associated with the Archivist. The three branches are not hermetically sealed and entirely separate in the Madisonian system.[2] While the Library of Congress is part of the legislative branch, the Librarian of Congress is appointed by the President and confirmed by the Senate.[3] Accordingly, there would remain tension between the two branches over

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[1] A law that included the aforementioned elements (including protection of such material from immediate release, notice to incumbent and former presidents, and guaranteed period to challenge release) would mitigate some of these concerns.

[2] The Supreme Court has noted that it previously "squarely rejected the argument that the Constitution contemplates a complete division of authority between the three branches .... [and an argument] rest[s] upon an 'archaic view of the separation of powers as requiring three air tight departments of government.'" Nixon v. Administrator of General Services, 433 U.S. 425, 442 (1977) (quoting the lower court).

[3] A comparison can be made to Eltra Corporation v. Ringer, 579 F.2d 294 (4th Cir. 1978), where the court rejected a claim based on the fact that the Copyright Office was part of the legislative branch. It is important, however, to note that the court premised its decision on the fact that "[t]he Supreme Court has properly assumed over the decades since 1909 that the Copyright Office is an executive office, operating under the direction of an Officer of the United States." Id. at 301.

the decision of the Librarian or the Librarian's subordinate officers. The creation of a separate legislative archivist would avoid this issue, but (as previously noted) raise other issues in the loss of control over the documents.

Third, NARA is the most obvious location for this material from a historical and practical standpoint. There is a value to minimizing the changes brought about by this legislation and, accordingly, minimizing the vulnerability of the legislation to challenge.

For all of these reasons, I would not recommend the removal of the Archivist from this legislative scheme. NARA is an independent agency that is well-suited, with the proper legislative guidance and executive oversight, to resolve disputes over the release of this material.

II. ADDITIONAL SUGGESTED CHANGES TO H.R. 4187

A. The Inclusion of a General Severability Clause.

In today's hearing, I made only one suggestion for the alteration of the legislation: the inclusion of a severability clause. I strongly suggest the inclusion of a provision that would read: "If any provision of this Act or the application thereof to any person or circumstance is held invalid, the remainder of the and the application of such provision to other persons or circumstances shall not be affected thereby."

B. An Increase in the Period for a Constitutional Challenge.

During the hearing, I also stated that I was fairly agnostic as to whether you increase the period for a former president to challenge the release of material from 20 to 40 days. After twelve years plus a potential 48-72 day period,[4] I do not

[4] In reality, the reference to 20 days is misleading. First, there are twenty working days that do not include weekends or holidays. Thus, at a minimum, a former president has 24 days to prepare a challenge. Second, this twenty-day period will run after a prior 20-day period for review. This preceding period also excludes weekends or holidays. Thus, at a minimum, a former president has 48 days or more. Third, these two periods are subject to a discretionary extension by the Archivist of an additional 20 working days.[4] Thus, this minimum 48-day period is likely to be extended to a 72-day period. Finally, these three preceding

believe that adding 10 or more days would constitute either a necessary extension for a former president or a meaningful change from the standpoint of constitutional review. I view this period as simply a period to seek a preliminary order from a court to stop release. As someone who has filed motions for preliminary injunctions in a fraction of that time, I fail to see why a longer period is necessary. However, a modest extension could be viewed as advantageous to show a degree of institutional accommodation and comity. If the Subcommittee chooses such a course I would recommend no more than a 40-day period to challenge a release given the cumulative period described in footnote four of this supplemental statement.

C. A Limitation on the Assertion of Privilege to Incumbent and Former Presidents.

I would also recommend a provision that expressly limits any assertion of privilege to an incumbent or former president to avoid the use of surrogates or transfers of this authority. While I believe such a provision would bring valuable clarity, I do not believe that it is essential. H.R. 4187 would rescind E.O. 13233 and its highly dubious provision on the transfer of executive privilege authority to a former president's heirs or designees.[5] Moreover, I believe that a court would hold that executive privilege can not be exercised by such parties or designees. Finally, H.R. 4187 contains in the amendment to Section 2208(a)(4)(C) that requires that a claim of constitutionally based privilege be "signed by the former President or incumbent President making the claim."

One would hope that the current language and the overwhelming opinion of academics would be determinative on this issue, However, given the express support found in E.O. 13233 and prior assertions by family members like Lady Bird Johnson, this is an issue that could be resurface in the years to come. In part, this practice is invited by an ill-conceived and poorly written provision in the PRA that states:

> Upon the death or disability of a President or former President, any discretion or authority the President or former President may have had under this chapter shall be exercised by the Archivist unless otherwise

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periods will follow a twelve-year period for a former president to review these documents.

[5] Exec. Order No. 13233, §10.

> previously provided by the President or former President in a written notice to the Archivist.[6]

The reference to a previous written notice is highly ambiguous and can be viewed as opening the door to a transfer of authority – despite the obvious constitutional problems raised by such a transfer. A federal court would likely read this provision to avoid an unconstitutional interpretation and adopt a narrow interpretation.[7] However, this practice is sufficiently repellant as a constitutional matter that it justifies an express prohibition. Such a provision could simply mandate that the Archivist shall not act on any assertion of executive privilege that is not made by either the incumbent president or a former president. Clearly, both an incumbent or a former president could utilize any number of people to assist in the asserting of privilege. However, the formal assertion of executive privilege should only be made by a current or former chief executive. Notably, such a provision would also effectively bar assertions by current or former vice-presidents. This would place the obligation on the incumbent or former president in asserting privilege over any legitimately privileged documents.

I read the language of H.R. 4187 as eliminating assertions by designees of current or former presidents (as well as any assertions by current or former vice-presidents or their designees). Yet, there is always the danger of a designee appearing with a transfer of authority "signed by the former President . . . making the claim" attached to a document that "specifies the record (or reasonably segregable portion of a record) to which the claim applies." Once again, I would view such an interpretation as facially unreasonable under the existing language of

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[6] 44 U.S.C. §2204(d).

[7] See Hooper v. California, 155 U.S. 648, 657 (1895) ("[T]he elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality."); see also NLRB v. Catholic Bishop of Chicago, 440 U.S. 490, 499-501 (1979); Machinists v. Street, 367 U.S. 740, 749-750 (1961); Ashwander v. TVA, 297 U.S. 288, 341 (1936). Crowell v. Benson, 285 U.S. 22, 62 (1932). This long-standing principle of statutory construction recognizes that Congress must be assumed to be advancing a constitutional purpose. Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Const. Trades Council, 485 U.S. 568, 575 (1988) ("This approach . . . also recognizes that Congress, like this Court, is bound by and swears an oath to uphold the Constitution. The courts will therefore not lightly assume that Congress intended to infringe constitutionally protected liberties or usurp power constitutionally forbidden it.")

H.R. 4187. However, while it could always be challenged in court by a former president or heirs, an express prohibition would (hopefully) put an end to this curious concept of bequeathed or transferred privilege authority.

D. A Suggestion for Consideration of a Later Appropriations Matter.

While I do not necessarily encourage its inclusion in this bill, the Subcommittee may want to consider the necessity of an office within the United States Department of Justice for the review of presidential papers under the PRA. There is a legitimate concern over the increasing size of presidential records and the ability of either the incumbent or the former president to fully review this material. Moreover, the Archivist holds a unique position between the two branches in registering and reviewing privilege assertions. The PRA contemplates that a president or former president would review these records separate from the Archivist. Congress could extend an institutional accommodation by appropriating funds for the establishment of a small office to assist both presidents and former presidents in this task. This office could significantly reduce the tension over the time periods mandated under the acts by giving resources and personnel to the executive branch to better utilize the twelve-year buffer period. While it is too late in the process to include such a provision (given the need to consult with the Justice Department), it is an issue that should be considered for possible reference in any report or floor statement in conjunction with enactment of this bill.

I appreciate the opportunity to expand on my earlier oral and written testimony.

Department of History and Politics
College of Arts and Sciences

March 19, 2002

The Honorable Stephen Horn
Committee on Government Reform
2157 Rayburn Building
Washington, DC 20515-6143

Dear Representative Horn:

I write to add my voice to those of my fellow historians in protest against Presidential Executive Order 13223 on the securing of presidential records. Particularly at a time when a veil of secrecy has shrouded virtually all operations of the executive, the attempt to withhold public access to historical records seems a preemptive attempt not only to rewrite history but to prevent a fully informed and accurate account from ever being written. The intent of the Congress in the Presidential Records Act of 1978 was precisely the reverse. Public accountability is the essence of democracy; without it, the people can never know the actions performed in their name, and thus cannot give consent to their government. Not only timely information in the present, but the timely release of public documents pertaining to past action is essential to the maintenance of popular government. Executive Order 13223 strikes at the root of this principle. It cannot be allowed to stand.

Sincerely,

Robert Zaller

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The Honorable Stephen Horn
Chairman, Subcommittee on Governmental Efficiency
Committee on Government Reform
2157 Rayburn House Office Building
Washington, DC 20515-6143

Dear Mr. Chairman,

Thank you for your letter and enclosures concerning the Presidential Records Act of 1978. I want to commend you and your cosponsors for drafting and seeking to enact a reasonable response to the concern raised about the 1978 Act. As a Member of the House when the 1978 Act was passed, I believed that the Act established once and for all the public nature and ownership of official presidential records. It sought to put to rest the claim by some former Presidents that they could withhold such records from the public indefinitely.

However, as is true of most legislation, not all problems were solved by the 1978 Act. A workable procedure for claiming executive privilege was not set forth, nor were the timetables and burdens for release of the records as clear as they could have been. Unfortunately, Executive Order 13233 seeks to resolve those ambiguities in a way that would largely destroy the original purpose of the 1978 Act. The single biggest difficulty that I see in the Executive Order is its effort to "define" executive privilege. That is a task far too awesome for any single executive order, or indeed, for the entire executive branch itself. Having looked at the problems of executive privilege as a participant in all three branches of government, that doctrine defies a simple definition–as it should. Courts have always been reluctant to put too many contours on the claim of executive privilege because the invocation of such privilege frequently means that the first and second branch of government are involved in a serious dispute. The third branch of government is understandably reluctant to choose up sides unequivocally and broadly.

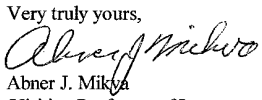
Frequently, those disputes are resolved by accommodations between the political branches. Such accommodations are far better for the country than a judicial ukase. And they certainly are preferable to either of the first two branches declaring for itself, finally and precisely, what the scope of executive privilege ought to be. So often that scope of privilege turns on the

facts and background of the claim. President Nixon's claim for privilege for the White House tapes of Watergate are altogether different than a sitting President's claims to privilege for contingency battle plans during wartime. Any attempt to create a single definition of executive privilege which will appropriately differentiate between different scenarios is doomed to failure.

In my opinion, the features of HR 4187 appropriately address the problems that have been raised about the original 1978 Act; it does so in a way that does not destroy the original purpose of declaring and providing for the public's right to know our own history after it becomes history. And it does so in a way that does not seek to create a false and undesirable certainty about one of the tensions of our separation of powers doctrine. There are good reasons why executive privilege has defied precise definition over the years. Neither an executive order nor legislation ought to ignore those reasons.

Thank you for giving me the opportunity to comment on your proposal. And thank you for addressing this problem of our right to know our history in such reasonable terms.

Very truly yours,



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