



Protecting Health, Safety and Democracy

SEARCH



IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN HISTORICAL ASSOCIATION,)
400 A Street, S.E.)
Washington, D.C. 20003-3889,)

HUGH DAVIS GRAHAM,)
305 E. Islay Street)
Santa Barbara, CA 93101,)

STANLEY I. KUTLER,)
4112 Keewatin Trail)
Verona, WI 53593,)

THE NATIONAL SECURITY ARCHIVE,)
The George Washington University)
Gelman Library, Suite 701)
2130 H Street, NW)
Washington, D.C. 20037,)

ORGANIZATION OF AMERICAN)
HISTORIANS,)
112 North Bryan Avenue)
Bloomington, Indiana 47408-4199,)

PUBLIC CITIZEN, INC.,)
1600 20th Street, N.W.)
Washington, D.C. 20009,)

and)

THE REPORTERS COMMITTEE FOR)
FREEDOM OF THE PRESS,)
1815 N. Fort Myer Drive, Suite 900)
Arlington, VA 22209,)

Plaintiffs,)

v.)

THE NATIONAL ARCHIVES AND)
RECORDS ADMINISTRATION,)
700 Pennsylvania Avenue, N.W.)
Washington, D.C. 20408)

No. _____

and)
)
 JOHN W. CARLIN, ARCHIVIST OF)
 THE UNITED STATES,)
 700 Pennsylvania Avenue, N.W.)
 Washington, D.C. 20408,)
)
 Defendants.)
)
 _____)

COMPLAINT FOR DECLARATORY, INJUNCTIVE AND MANDAMUS RELIEF

Introduction

1. Plaintiffs, the American Historical Association, Hugh Davis Graham, Stanley I. Kutler, the Organization of American Historians, the National Security Archive, Public Citizen, Inc., and the Reporters Committee for Freedom of the Press bring this action under the Administrative Procedure Act ("APA"), 5 U.S.C. " 701 et seq., under their nonstatutory right to judicial review of unlawful executive action, and under the Presidential Records Act ("PRA"), 44 U.S.C. " 2201 et seq., to obtain a declaratory judgment that the Archivist of the United States and the National Archives and Records Administration ("NARA") must administer the Presidential Records Act without regard to the terms of Executive Order No. 13,233 (the "Bush Order"), and to compel the release of presidential materials of former President Ronald Reagan that are in the custody of NARA and are being withheld in violation of the PRA.

Jurisdiction

2. This Court has jurisdiction under 28 U.S.C. §§ 1331 and 1361.

Parties

3. Plaintiff American Historical Association ("AHA") is a nonprofit membership organization founded in 1884 and incorporated by Congress in 1889 for the promotion of historical studies, the collection and preservation of historical documents and artifacts, and the dissemination of historical research. As the largest historical society in the United States, with approximately 15,000 members, the AHA serves as the umbrella organization for historians working in every period and geographical area. As a part of their historical research activities, AHA's members regularly request and make use of presidential and vice presidential records held by NARA, including the record of former President Reagan and former Vice President Bush.

4. Plaintiff Hugh Davis Graham holds appointments as the Holland N. McTyeire Professor of History and as Professor of Political Science at Vanderbilt University, as well as a three-year appointment as Adjunct Professor of History at the University of California at Santa Barbara. He is a member of both the AHA and the OAH. His historical research has emphasized the development of domestic federal polic since World War II, especially in the fields of education, civil rights, and immigration policy, and he has published a number of books in thos and other areas. Professor Graham conducts much of his research in presidential libraries, Eisenhower through Reagan. Among the specific subjects he has researched at the Reagan Presidential Library is President Reagan's civil rights policy. He is co-director of a conference on the Reagan Presidency to be held in March 2002 and co-editor of a volume of papers, *The Reagan Presidency*, to be published in 2003.

5. Plaintiff Stanley I. Kutler is Professor Emeritus of History and Law at the University of Wisconsin, where he has taught since 1964. H is the founder and editor of the journal *Reviews in History* and the author of many books and papers on American presidents. In his research, he makes extensive use of the records of former presidents and vice presidents at presidential libraries and other NARA facilities Professor Kutler was historical consultant for the forthcoming Showtime film, *The Day Reagan Was Shot*, and made use of records from th Reagan Presidential Library for his work on the film.

6. Plaintiff National Security Archive ("the Archive") is an independent non-governmental research institute and library located at The George Washington University in Washington, D.C. The Archive collects and publishes declassified documents acquired through the Freedom of Information Act ("FOIA"). The Archive is the world's largest nongovernmental library of declassified documents, has published more than 500,000 pages of declassified documents in various formats, and has become the leading non-profit user of FOIA. The Archive has made extensive requests for presidential and vice presidential records in NARA's custody, including Reagan presidential records maintained by NARA at the Reagan Presidential Library and Bush vice presidential records maintained by NARA at the Bush Presidential

Library.

7. Plaintiff Organization of American Historians ("OAH") is a nonprofit membership organization devoted to promoting the study and teaching of American history. The OAH's 11,000 members in the U.S. and abroad include individual historians working in a variety of scholarly settings as well as institutions such as libraries, museums, and historical societies. The OAH promotes the widest possible access to historical sources and scholarship, and supports the preservation, dissemination, and exhibition of historical sources. As a part of their historical research activities, the OAH's members regularly request and make use of presidential and vice presidential records held by NARA, including the records of former President Reagan and former Vice President Bush.

8. Plaintiff Public Citizen, Inc. ("Public Citizen"), is a public interest organization headquartered in Washington, D.C. Public Citizen is dedicated to protecting the rights of members of the public as both consumers and citizens. Public Citizen has long sought to preserve and advance the interest of citizens in open access to the records of their government, including presidential and vice presidential records. Public Citizen and its members regularly request government records and make use of them in their efforts to promote government reform and protect consumers.

9. Plaintiff Reporters Committee for Freedom of the Press is a nonprofit, unincorporated association of reporters and editors dedicated protecting freedom of the press and the right of journalists to open access to government information. The Reporters Committee has a longstanding interest in securing public and press access to presidential records.

10. Defendant John W. Carlin is the Archivist of the United States. In that capacity, he has custody and control under the PRA of all the presidential materials of former President Ronald Reagan as well as the vice presidential materials of former Vice President George H.W. Bush, and is charged with the responsibility of making them available to the public at the earliest practical date.

11. Defendant NARA is an agency of the United States operating under the direction of defendant Carlin. NARA is responsible for carrying out defendant Carlin's responsibilities under the PRA and has promulgated regulations implementing the PRA. The presidential records of former President Reagan are housed in NARA facilities including the Reagan Presidential Library in Simi Valley, California, and the vice presidential records of former Vice President George H.W. Bush are housed in NARA facilities including the Bush Presidential Library in College Station, Texas.

The Presidential Records Act

12. For much of our nation's history, the documentary materials generated during a president's term in office were largely subject to the president's control, both during and after his presidency, unless the president chose to donate them to the United States. Congress enacted the PRA in 1978 to limit presidential control over presidential records and to provide for public access to presidential records after a president leaves office. The PRA was made applicable to the materials of presidents beginning with the president who would take office on January 20, 1981, making President Ronald Reagan the first president subject to the PRA.

13. The PRA provides that when a president leaves office, custody and control over all his presidential records as defined in 44 U.S.C. § 2201(2) are immediately vested in the Archivist of the United States, 44 U.S.C. § 2203(f)(1), who thereafter is solely responsible for preserving and securing the records and preparing them for public access. The PRA specifically charges the Archivist with the "affirmative duty to make such records available to the public as rapidly and completely as possible consistent with the provisions of this Act." *Id.*

14. The PRA does not provide for public access to the records of an outgoing president for the first five years after the Archivist acquires them. 44 U.S.C. § 2204(b)(2)(A). After the expiration of the five-year period, the records become subject to public availability through the provisions of FOIA, which are incorporated in the PRA. *Id.* § 2204(c)(1).

15. The availability of presidential records through FOIA requests, however, is limited by an outgoing president's right to restrict certain records from access for a period not to exceed 12 years after he leaves office. 44 U.S.C. § 2204(a). Specifically, a president about to leave office may specify a period of restriction, not to exceed 12 years, for records that contain:

- i. National security information that is "properly classified pursuant to ... Executive order," *id.* § 2204(a)(1);
- ii. Information "relating to appointments to Federal office," *id.* § 2204(a)(2);
- iii. Information "specifically exempted from disclosure by statute," *id.* § 2204(a)(3);

- iv. "Trade secrets and commercial or financial information obtained from a person and privileged or confidential," *id.* § 2204(a)(4);
- v. "Confidential communications requesting or submitting advice, between the President and his advisers, or between such advisers," *id.* § 2204(a)(5); and
- vi. Information "the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." *Id.* § 2204(a)(6).

16. After expiration of the 12-year restriction period, formerly restricted materials become available to the public through FOIA to the same extent as materials that were not restricted by the former president. The PRA provides that presidential records are subject to all the exemptions from release under FOIA, *except for* the exemption set forth in 5 U.S.C. § 552(b)(5), generally referred to as "exemption 5," which incorporates the "deliberative process" and "executive" privileges. 44 U.S.C. §§ 2204(c)(1).

17. The effect of these provisions is that, under the PRA, a president may prevent disclosure of records that reflect confidential communications with or among his advisers for no more than 12 years. Thereafter, such materials may *not* be withheld on the basis of nonconstitutional privileges that may otherwise shield deliberative executive branch communications, but must be released to the public unless they continue to fall into some other FOIA exemption (for example, the exemptions for materials that are properly subject to national security classification or that relate to law enforcement investigations), or unless there is some "constitutionally based" right or privilege that prevents public release. See 44 U.S.C. § 2204(c)(2).

18. The PRA provides that vice presidential records are also public property and are to be opened for access to the public on the same terms as presidential records. 44 U.S.C. § 2207. Thus, the 12-year limit on the restriction of confidential communications (*id.* § 2204(a)(5)) applies to vice presidential records as well.

19. The PRA provides that the Archivist must give the former president notice "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). NARA has implemented this requirement through a regulation providing that whenever the Archivist intends to make public any presidential record, he must provide 30 days' notice to the former president to allow him (or his designated representative) to assert any rights or privileges that would foreclose access to the materials. 36 C.F.R. § 1270.46(a), (b), (d). NARA's implementing regulation further provides that the Archivist may reject such assertion of a right or privilege by the former president provided that the Archivist 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.* § 1270.50(c). The regulation further provides that when the Archivist rejects a former president's claim of privilege, public access will be withheld for an additional 30 days to allow the former president to seek judicial review. *Id.* § 1270.46(c), (d). Finally, the regulation states that a copy of any notice to the former president of the impending release of his records shall also be provided to the incumbent president. *Id.* § 1270.46(e).

The Reagan Executive Order

20. On January 16, 1989, President Reagan issued Executive Order 12,667, 54 Fed. Reg. 3403 (the "Reagan Order"), which purported to direct the Archivist with respect to the performance of certain of his functions under the PRA.

21. The Reagan Order provided that when the Archivist notified the incumbent and former presidents of his intent to open records, he also was required to "identify any specific materials, the disclosure of which [the Archivist] believes may raise a substantial question of Executive privilege." Reagan Order, § 2(a).

22. The Reagan Order purported to empower the president or his "designee" to extend beyond 30 days the time during which the Archivist must withhold from release, pending review by the incumbent president, presidential materials otherwise subject to public access under the PRA. Reagan Order, § 2(b).

23. The Reagan Order provided that the incumbent president, acting on advice of the Attorney General and the White House Counsel, could assert executive privilege and, on that basis, direct the Archivist not to release records of a former president. The Reagan Order required the Archivist to abide by any such direction unless otherwise ordered by a court or by a sitting president. Reagan Order, § 3.

24. The Reagan Order also provided that a former president could assert a claim of executive privilege to seek to bar the Archivist from releasing materials to the public, but that the Archivist would not be bound to accept such a claim of privilege. The Reagan Order required the Archivist to abide by any direction from the incumbent president or his "designee" as to whether to accept or deny a former president's claim of privilege, unless otherwise ordered by a court. Reagan Order, § 4.

The Reagan Presidential Materials

25. President Reagan left office on January 20, 1989. Thereafter, the Archivist received his presidential records, which include almost 4 million pages of documents, a great number of electronic records including e-mail messages, and many thousands of photographs and audio-visual materials. The Reagan presidential records are housed in the Ronald Reagan Presidential Library, a facility made available to the federal government under the Presidential Libraries Act (44 U.S.C. § 2112) and operated by NARA.

26. Before leaving office, President Reagan exercised his right under the PRA to restrict for the maximum period of 12 years all materials falling within the restriction categories specified by 44 U.S.C. § 2204(a)(1)-(6).

27. The 12-year period of restriction specified by President Reagan expired on January 20, 2001.

28. During the 12-year restriction period, NARA's Reagan Library opened to the public, in response to FOIA requests, approximately 4 million pages of documents. In accordance with the PRA, NARA withheld from public access documents that fell within any of the categories of material restricted by President Reagan, including the restriction category for "confidential communications" with advisers.

29. Members of plaintiff AHA were among those who requested access to Reagan presidential records, and who did not receive access to restricted records.

30. For example, Professor Graham made specific requests on July 10, 1996, and July 20, 1999, for Reagan presidential records concerning Edwin Meese's role in developing Reagan Administration policy on civil rights, affirmative action, and voting rights. In its responses to those requests on June 9, 1997, and August 24, 2000, NARA's Reagan Library withheld a total of 257 pages of records under the PRA's restriction category for "confidential communications."

31. As of the date the 12-year restriction period expired, NARA had identified approximately 68,000 pages of documents that were restricted solely because of President Reagan's invocation of the PRA's "confidential communications" restriction category. Those 68,000 pages of documents were not otherwise subject to restriction under the PRA or exempt from release under FOIA on grounds of national security classification or any other basis.

32. But for the "confidential communications" restriction, NARA would have made the 68,000 pages of documents available to those persons who requested them and to the public at large.

33. On or about February 28, 2001, NARA provided notice to President George W. Bush and to former President Reagan that it intended to disclose to the public the approximately 68,000 pages of Reagan presidential records that had formerly been restricted as "confidential communications requesting or submitting advice" and that were now no longer subject to that restriction as a result of the expiration of the 12-year period. NARA's notice did not state that any of the records "raise a substantial question of Executive privilege" within the meaning of § 2(a) of the Reagan Order.

34. As defendant Carlin has acknowledged in an article entitled "Presidential Papers and the NARA," published in the *OAH Newsletter*, there is "keen interest" in the 68,000 pages of formerly restricted Reagan presidential records "on the part of historians, journalists, lawyers members of Congress, students, and others--all of them seeking to discover the inner workings of the Executive Office of the President in the not-too-distant past." Moreover, NARA's decision to notify the White House and former President Reagan of its intention to open these formerly restricted documents to public access reflected its determination that, but for the now-expired restriction imposed by former President Reagan, there was no statutory basis under the PRA for withholding them from the public.

35. NARA's notice to the White House was provided in two letters, both of which included records schedules that identified and described in general terms the 68,000 pages of formerly restricted records. The White House did not receive from NARA actual copies of the 68,000 pages of records that NARA intended to open to the public, nor did the president or his staff seek to review those records during the 30 days provided for in Executive Order 12,667.

36. After receiving the Archives' notice, White House Counsel Alberto R. Gonzales twice sent letters to defendant Carlin instructing him to extend for 90 days the time for President Bush to review the materials and claim privilege under the Reagan Order. During the consecutive 90-day extensions that Mr. Gonzales granted to the White House, neither he, the president, nor other White House staff members reviewed the 68,000 pages of formerly restricted documents that NARA intended to open to the public. According to defendant Carlin in his *OAH Newsletter* article "Presidential Records and the NARA," rather than reviewing whether there was a basis for objecting to the release of particular documents that was consistent with the terms of the PRA, the White House was instead "conduct[ing] a thorough

legal review of the PRA and consider[ing] its long-term implications on the deliberative process for the Presidency and the Executive Branch."

37. On August 31, 2001, Mr. Gonzales again wrote defendant Carlin, this time granting the White House a further, indefinite extension of time to respond to NARA's notice of intention to release the formerly restricted documents. Mr. Gonzales' letter confirmed that the White House had not been reviewing particular documents to determine whether a basis existed for the president to invoke a constitutional privilege against their release, but had instead been considering what Mr. Gonzales referred to as "constitutional and legal questions" in order to arrive at some "legal framework and process" (other than the PRA and its implementing regulations) that would govern the release of the documents. The letter further stated that, at NARA's urging, the White House would consult with former presidents and review a "small sample of Presidential records" before taking action.

The Bush Executive Order

38. On November 1, 2001, President George W. Bush issued Executive Order 13,233 (the "Bush Order"), superseding the Reagan Order.

39. The Bush Order, entitled "Further Implementation of the Presidential Records Act," purports to set 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.

40. The Bush Order purports to describe the scope of the constitutional executive privilege of former presidents and vice presidents as well as incumbent presidents, and includes within that scope not only the privilege for confidential communications between the president and his close advisers, but also the common-law attorney-client and work-product privileges, the deliberative process privilege, and the state secrets privilege. Bush Order, § 2(a).

41. In contrast to the PRA, which makes presidential records available after the 12-year restriction period has ended under FOIA standards (which require no showing of need for access), the Bush Order 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(b).

42. The Bush Order 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 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.*

43. The Bush Order provides that upon the completion of the former president's review, the former president shall either request that the records be withheld on the basis of executive privilege or "authorize access" to them. Bush Order § 3(c).

44. 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).

45. The Bush Order states that, upon completion of the incumbent's review process, the incumbent shall decide whether he "concur[s] in the former president's decision either to "request withholding of or authorize access to the records." Bush Order § 3(d). The Order 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 claim is challenged." Bush Order § 4.

46. When the incumbent president "concur[s] in" a former president's request that materials be withheld on privilege grounds, the Order provides that the incumbent shall so inform the Archivist, and that the Archivist thereafter shall not permit access to the materials unless both presidents change their minds or a court orders that the materials be released. Bush Order § 3(d)(1)(i).

47. Even when the incumbent president finds 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.

48. The Bush Order further 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.

49. 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.

50. The Bush Order purports to authorize surrogates to assert constitutionally based privileges on behalf of a former president. The Order 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." 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.*

51. Finally, the Bush Order provides 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 subject to all the provisions of the Bush Order, including that the Archivist must withhold access to materials once such a claim has been made, regardless of its validity, until the former vice president agrees that the materials may be made public or a court so orders. Bush Order, § 11.

52. Defendant Carlin has publicly announced his intention to abide by and implement the Bush Order.

NARA's Continued Withholding of Records

53. During the months that have elapsed since former President Reagan's restrictions on the 68,000 pages of documents containing "confidential communications" expired, defendants Carlin and NARA have continued to withhold those documents from public access.

54. Former President Reagan's representatives did not, at any time between NARA's notice of its intent to open the 68,000 pages of records and the issuance of the Bush Order, review the 68,000 pages of records to determine whether a claim of privilege to bar the release of particular records would be made on former President Reagan's behalf.

55. President Bush and his aides have also not reviewed the 68,000 pages of records to determine whether to claim a privilege that would bar the release of particular records.

56. No one has asserted a constitutionally based right or privilege that would preclude release of the 68,000 pages of documents as otherwise required by the PRA.

57. As a result of the withholding of the 68,000 pages of records, plaintiffs have been denied the ability to make use of those records for historical research. For example, Professor Graham has been unable to review the documents withheld in response to his requests for records concerning Edwin Meese's role in civil rights policy, and his research in that area has been impaired as a result. Professor Graham and other members of the AHA and OAH who intend to participate in the upcoming March 2002 conference on the Reagan Presidency have been impeded in their ability to prepare for that conference which was originally scheduled to allow scholars at least a year to work with the Reagan presidential records after the expiration of the 12-year restriction period by the continued unavailability of the formerly restricted Reagan records.

First Claim for Relief B APA, Nonstatutory Judicial Review and PRA B Declaratory Relief Against Implementation of Bush Order

58. Plaintiffs incorporate the allegations of paragraphs 1 through 57 above.

59. The PRA requires the Archivist to release to the public presidential and vice presidential records formerly subject to the restriction for confidential communications between the president and his advisers after the 12-year restriction period has expired, unless an applicable FOIA exemption applies or the materials are subject to a valid claim that the Constitution bars release. Thus, after the 12-year period expires, only a valid, constitutionally based claim of right or privilege can bar release of records that are no longer subject to any statutory

restriction or exemption from release. When the Archivist withholds such records from release in the absence of a valid claim of constitutional right or privilege, as defendant Carlin is now doing, he violates the express terms of the PRA.

60. The Bush Order violates the PRA by instructing the Archivist, after the expiration of the 12-year restriction period, to withhold the release of records that are not restricted under the Act and that are not subject to a valid claim of constitutional privilege. Terms of the Bush Order that are contrary to law include:

- i. The Bush Order provides that access to materials may be delayed for an unlimited period of time after the expiration of the 12-year restriction period while a former president and the incumbent president "review" materials proposed for release by NARA, in violation of the PRA's commands that records may not be restricted after the 12-year period expires and that the Archivist has an affirmative duty to make them public as soon as possible;
- ii. The Bush Order provides that when a former president makes a claim of executive privilege seeking to bar release of materials whose disclosure is otherwise required by the PRA, the incumbent president "will concur" in that claim absent "compelling circumstances," and "will support that privilege claim in any forum in which the privilege claim is challenged" B even if the privilege claim is legally improper or unfounded;
- iii. The Bush Order provides that, regardless of whether the incumbent president "concurs" in a former president's claim of privilege under the "compelling circumstances" standard, the Archivist "shall not permit access to the records" unless and until the former president agrees, or a court orders that materials be released, even if the claim of privilege is legally improper or unfounded;
- iv. The Bush Order provides that the constitutional privileges of the executive branch may be asserted by a surrogate who has never held the office of the presidency, if the surrogate has been "designated" to do so by a former president who is deceased or disabled c by the family of a deceased or disabled former president, even though the Constitution does not allow for assertion of a claim of executive privilege by someone who has not held the office of president; and
- v. The Bush Order provides that a former vice president may assert a claim of executive privilege independent of the privilege of the former or incumbent president, and the Order compels the Archivist to accord such a claim the same respect as a claim of privilege made by a former president, even though there is no constitutional basis for a vice presidential executive privilege.

61. The Bush Order is also contrary to NARA's regulations. NARA's regulations explicitly provide that when a former president asserts a claim of privilege seeking to bar access to a presidential record, the Archivist may "nevertheless determin[e] that the record in question should be disclosed" (36 C.F.R. § 1270.46(c)) and may open the record to the public 30 days after giving the former president notice of the denial of his claim of privilege. *Id.* § 1270.46(d). The Bush Order's command that the Archivist withhold records whenever the former president asserts a claim of privilege is directly at odds with these regulatory provisions. The regulations, having been lawfully promulgated under the notice-and-comment procedures of the APA (5 U.S.C. § 553) pursuant to authority properly delegated to NARA by the PRA (see 44 U.S.C. § 2206), take precedence over the Bush Order, which is based on no statutory authority and was issued without adherence to the APA rulemaking process.

62. The terms of the Bush Order are not required by, and are in fact contrary to, the proper constitutional scope of executive privilege.

63. The issuance and implementation of the Bush Order have harmed and will continue to harm the plaintiffs and their members by depriving them of access to presidential and vice presidential records and the ability to make use of those records for historical research.

64. Implementation of the Bush Order by the Archivist constitutes agency action that is arbitrary, capricious, an abuse of discretion, not in accordance with law, and in excess of statutory authority and limitations within the meaning of the APA (5 U.S.C. § 706(2)(A)&(C)). Plaintiffs have a right to judicial review of, and declaratory relief against, such action under 5 U.S.C. " 702, 704 and 706 and 28 U.S.C. § 2201.

65. In the alternative, and regardless of whether there has yet been agency action with respect to the Bush Order, plaintiffs have a nonstatutory right to obtain judicial review of the lawfulness of the Bush Order's restrictions on the defendants' ability to comply with their legal obligations. Because the Bush Order is contrary to the terms of the PRA and lacks a valid constitutional basis, plaintiffs are entitled to declaration under 28 U.S.C. § 2201 that the Order is unlawful and that the defendants may not implement it.

Second Claim for Relief B APA and PRA B Injunction Requiring Release of Records

66. Plaintiffs incorporate the allegations of paragraphs 1 through 65 above.

67. The approximately 68,000 pages of materials that were the subject of NARA's notice to the White House on February 28, 2001, are "presidential records" of Ronald Reagan as defined by the PRA, 44 U.S.C. § 2201(2), and thus are required to be "administered in accordance with the provisions of [the PRA]." 44 U.S.C. § 2202.

68. Under the PRA, defendants Carlin and NARA are "responsib[le] for the custody, control, and preservation of, and access to" the Reagan presidential records, and they "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." 44 U.S.C § 2203(f)(1).

69. The 12-year restriction imposed by former President Reagan under the PRA against release of records containing "confidential communications requesting or submitting advice, between the President and his advisers, or between such advisers" (44 U.S.C. § 2204(a)(5)) expired on January 20, 2001. The PRA does not permit extension of this restriction beyond the 12-year limit.

70. There is no statutory basis for the invocation of any nonconstitutional privilege to withhold the 68,000 pages of records, since FOIA' "exemption 5," 5 U.S.C. § 552(b)(5), which otherwise would permit invocation of such privileges, is inapplicable to records under the PRA. See 44 U.S.C. § 2204(c)(1).

71. NARA has determined that the 68,000 pages of formerly restricted records are not subject to any statutory bar to disclosure under the PRA and has stated its intention that they should be opened to the public. There is no statutory basis under the PRA for withholding these materials, and no such basis has been asserted by former President Reagan or by President Bush. Defendants' continued withholdir of the records is therefore contrary to law.

72. Because the Bush Order is unlawful and in violation of the PRA, its terms cannot be relied upon as a basis for continued withholdin of the 68,000 pages of records.

73. Defendants have a mandatory, nondiscretionary duty to make the 68,000 pages of Reagan presidential records available to the public.

74. Plaintiffs and their members have been injured and continue to suffer injury through the denial of access to the 68,000 pages of records and the deprivation of the opportunity to make use of them for historical research.

75. The refusal by defendants Carlin and NARA to make the 68,000 pages of formerly restricted materials available to the public upon the conclusion of the 12-year restriction period in accordance with their own previously expressed intention constitutes both agency action that is arbitrary, capricious, an abuse of discretion, not in accordance with law, and in excess of statutory authority and limitations (5 U.S.C. § 706(2)(A)&(C)), and the unlawful withholding of or unreasonable delay in agency action (5 U.S.C. § 706(1)). Plaintiffs have a right of action under 5 U.S.C. §§ 702, 704 and 706, 28 U.S.C. § 2201, and 28 U.S.C. § 1651, for review of, and for declaratory, injunctive, and mandamus relief against, the defendants' refusal to release the formerly restricted materials to the public.

Relief Requested

Wherefore, the plaintiffs pray for the following relief:

- i. A declaratory judgment that Executive Order 13,233 is contrary to law and that defendants Carlin and NARA may not lawfully implement that Order;
- ii. A declaratory judgment that defendants Carlin and NARA have unlawfully withheld the 68,000 pages of formerly restricted records in violation of the PRA;
- iii. An injunction requiring defendants Carlin and NARA to make the 68,000 pages of formerly restricted records available to the publi at the Reagan Presidential Library forthwith;
- iv. In the alternative to the relief requested in subparagraph (c), a writ of mandamus compelling the defendants to carry out their nondiscretionary duty to make the 68,000 pages of records available to the public at the Reagan Presidential Library forthwith;
- v. Costs and attorney fees as authorized by the Equal Access to Justice Act, 28 U.S.C. § 2412;

vi. Such other and further relief as the Court may deem proper.

Respectfully submitted,

Scott L. Nelson, D.C. Bar No. 413548
David C. Vladeck, D.C. Bar No. 945063
Michael Tankersley, D.C. Bar No. 411978
Public Citizen Litigation Group
1600 20th Street, N.W.
Washington, D.C. 20009
(202) 588-1000
Attorneys for Plaintiffs

November 28, 2001