IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

PLAINTIFFS' RENEWED MOTION FOR SUMMARY JUDGMENT ON COUNT ONE OF THE AMENDED COMPLAINT

Plaintiffs, through undersigned counsel, hereby respectfully move for an order granting them summary judgment on count one of the amended complaint and (1) declaring that the defendants may not implement Executive Order 13,233, (2) permanently enjoining them from doing so, and (3) requiring them to open Reagan-Bush and Bush-Quayle presidential and vice presidential records without regard to the terms of the Executive Order 13,233. The grounds for this Motion are set forth in full in the accompanying Memorandum of Points and Authorities.

Respectfully submitted,

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November 30, 2005

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PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THEIR RENEWED MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO DEFENDANTS' RENEWED MOTION TO DISMISS

INTRODUCTION

In 1978, Congress enacted the Presidential Records Act ("PRA"), 44 U.S.C. § 2201 *et seq.*, to secure public ownership and control of the papers and other records of presidents and vice presidents, beginning with those who would take office on January 20, 1981. The PRA provides that outgoing presidents and vice presidents may restrict access to records reflecting their communications with their advisers for up to 12 years. After the 12-year period ends, the PRA provides that such materials become freely available to the public, unless they fall within a statutory restriction category (for example, national security classified material) or are subject to a legitimate, *constitutionally based* claim of executive privilege.

Since November 1, 2001, when President George W. Bush promulgated Executive Order No. 13,233 (the "Bush Order"), the administration of the PRA has been turned on its head. The Bush Order grants former presidents, vice presidents, and their "representatives" the power to veto any release of materials by the Archivist simply by claiming executive privilege, regardless

of the merits of the claim, and it permits the release of presidential or vice presidential records only with the "authorization" of a former president or vice president. Since the promulgation of the Bush Order, every release of presidential records by the National Archives and Records Administration ("NARA") must await authorization by representatives of former presidents and vice presidents, including the representatives of deceased former President Ronald Reagan.

In this action, the plaintiffs, who are individuals and organizations with interests in access to the historical records of former presidents and vice presidents, seek an order directing the Archivist and his agency, NARA, to administer the PRA without regard to these provisions of the Bush Order, on the grounds that the Order is unauthorized, violates the PRA and its lawfully promulgated implementing regulations, and is not necessary to preserve the constitutional privilege of the presidency. Clear precedents of this circuit and this Court, including *Nixon v. Freeman*, 670 F.2d 346 (D.C. Cir.), *cert. denied*, 459 U.S. 1035 (1982), *Public Citizen v. Burke*, 843 F.2d 1473 (D.C. Cir. 1988), and *American Historical Association v. Peterson*, 876 F. Supp. 1300 (D.D.C. 1995), compel the conclusion that the Bush Order is unlawful.

The illegality of the Bush Order is a matter that can be decided without the need to resolve any disputed material facts. Accordingly, the plaintiffs seek a summary judgment declaring that the Bush Order is unlawful and may not be implemented by the Archivist and NARA to the extent it purports to give former presidents, vice presidents, and their representatives unilateral authority to direct the Archivist to withhold presidential and vice presidential records from the public. Plaintiffs further seek a permanent injunction ordering the Archivist and NARA not to implement the Bush Order, and to make Reagan-Bush and Bush-Quayle presidential and vice presidential records available to the public promptly and without regard to the Bush Order.

LEGAL AND FACTUAL BACKGROUND

A. The Presidential Records Act

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. *See generally Nixon v. United States*, 978 F.2d 1269 (D.C. Cir. 1992). Congress enacted the PRA in 1978 to establish public ownership and control of presidential records and to provide for public access to presidential records after a president leaves office. *Id.* at 177 n.19. 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. *See* 44 U.S.C. § 2201 note (citing effective date of PRA).

The PRA provides that when a president leaves office, custody and control over all his presidential records are immediately vested in the Archivist of the United States, who is solely responsible for preserving the records and preparing them for public access. 44 U.S.C. § 2203(f)(1). Generally, presidential and vice presidential records are maintained and administered by NARA in "presidential libraries" donated to the United States under 44 U.S.C. § 2112. Although such facilities often also include museums and exhibits operated by private foundations, the presidential and vice presidential records they house remain under the control of the Archivist and subject to the requirements of the PRA. 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." 44 U.S.C. § 2203(f)(1). The PRA provides that vice presidential records are also public property and are subject to exactly the same public access requirements as presidential records. 44 U.S.C. § 2207.

The PRA provides that there shall be no right to compel 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 the Freedom of Information Act (FOIA), which the PRA incorporates. *Id.* § 2204(c)(1). The availability of presidential records through FOIA requests, however, is limited by an outgoing president's right to restrict certain records from up to 12 years after he leaves office. 44 U.S.C. § 2204(a). Specifically, an outgoing president 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) (referred to by NARA as the "P5" restriction); and

vi. Information "the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." *Id.* § 2204(a)(6).

After the 12-year restriction period ends, formerly restricted materials become available to the public through FOIA to the same extent as unrestricted materials. *See id.* § 2204(b)(2), (c)(1). The PRA provides that presidential records are subject to all FOIA exemptions *except for* Exemption 5, *see* 5 U.S.C. § 552(b)(5), which incorporates the deliberative process and executive privileges. 44 U.S.C. §§ 2204(c)(1). 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 (that is, so-called "P5" records) for no more than 12 years.

Thereafter, such materials may not be withheld on the basis of the nonconstitutional privileges that may otherwise shield deliberative executive branch communications under FOIA's Exemption 5, but must be released to the public unless they continue to fall into a FOIA exemption other than Exemption 5 (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).

The PRA requires that the Archivist give a 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.* § 1270.46(c). When the Archivist rejects a former president's claim of privilege, NARA must withhold public access 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).

As a practical matter, when a requester seeks access to presidential records that include P5 materials within the 12-year restriction period, NARA will make those records publicly

available but will withhold those that are subject to the P5 restriction (as well as those that are subject to restriction for other reasons). Once the 12-year period expires, NARA provides notice to the former president and the incumbent that those formerly restricted materials will now be made available.[1] When records including P5 materials are requested after the expiration of the 12-year period, there is no statutory basis for withholding those records, so they are noticed for release together with other non-exempt records subject to the request.

B. The Reagan-Bush Records and the Background of the Bush Order

President Reagan and Vice President Bush left office on January 20, 1989. Thereafter, the Archivist received the Reagan presidential records, which include almost 44 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 in Simi Valley, California, a facility made available to the federal government under the Presidential Libraries Act (44 U.S.C. § 2112) and operated by NARA. The Bush vice presidential records, similarly, were received by the Archivist and are housed in the George Bush Presidential Library in College Station, Texas.

Similarly, President George H.W. Bush left office on January 20, 1993, and the Archivist received his presidential materials, comprising nearly 40 million pages of documents, together with the vice presidential records of Dan Quayle. The Bush-Quayle records are housed with the Bush vice presidential records at the George Bush Presidential Library.

[1] The same is not true for records subject to other restrictions corresponding to FOIA exemptions that are applicable after the 12-year restriction period ends. (The restriction for records concerning appointments to office, 44 U.S.C. § 2204(a)(2), referred to as the "P2" restriction, is similar to the P5 restriction in that many records that are withheld solely on P2 grounds will not be subject to a FOIA exemption after the 12-year period ends because of the unavailability of Exemption 5, which would otherwise apply to some of that material.)

Before leaving office, President Reagan and Vice President Bush, and later President Bush and Vice President Quayle, exercised their rights under the PRA to restrict for the maximum period of 12 years materials falling within the confidential advice restriction category, 44 U.S.C. § 2204(a)(5). The 12-year period of restriction for Reagan-Bush presidential and vice presidential records expired on January 20, 2001, and the restriction period for Bush-Quayle presidential and vice presidential records expired on January 20, 2005.

During the 12-year restriction period for the Reagan records, NARA's Reagan Library opened to the public, in response to FOIA requests, approximately 4.5 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.

As of the date on which 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. Soon after President George W. Bush took office in early 2001, NARA provided notice to him and to former President Reagan that it intended to open the 68,000 pages to the public. Under the PRA and its implementing regulations, 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 expired restriction imposed by former President Reagan, there was no statutory basis under the PRA for withholding them from the public.

In response to the Archives' notice, the White House, through White House Counsel Alberto Gonzales, three times directed the Archivist to postpone any release of the Reagan records (as well as any release of formerly restricted Bush vice presidential records) pending White House review of the PRA. On November 1, 2001, the White House's review culminated in President Bush's issuance of Executive Order 13,233.

C. The Bush Executive Order

The Bush Order, entitled "Further Implementation of the Presidential Records Act," 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 Order opens with a description of the supposed scope of the constitutional executive privilege of former presidents and vice presidents as well as incumbent presidents. The Order 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, work-product, and deliberative process privileges, as well as the state secrets privilege. Bush Order, § 2(a).

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 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 request is reasonable. *Id.* Upon completion of the former president's

review, the Bush Order provides that 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).

The Order goes on to state that the incumbent president has an unlimited amount of time in which to review, either concurrently with or after the review by the former president, 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, Order provides that the incumbent shall decide whether he "concurs in" the former president's decision 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. 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).

Even when the incumbent president finds that "compelling circumstances" 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 until a final, nonappealable court order requires that the records be released.

The Bush Order further provides that even 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 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.*

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 treated exactly the same as a claim of privilege by a former president — meaning that the Archivist must withhold access to materials once such a claim has been made, unless the former vice president authorizes public access or a court orders release of the records. Bush Order, § 11.

D. NARA's Application of the Bush Order

1. Application to Reagan-Bush P5 Materials Identified as of January 20, 2001

Following the promulgation of the Bush Order, the Archivist publicly announced his intention to abide by and implement the Bush Order, and NARA continued to withhold the 68,000 pages of formerly restricted Reagan records pending completion of the reviews called for

by the Order. Only after the completion of review under the Order by both former President Reagan's representatives and the White House were the 68,000 pages of materials released in three installments between January and July 2002. While that process was ongoing, approximately 1654 additional pages of Reagan P5 documents came to light; they, too, were subjected to review under the Order. The majority were eventually released, but former President Reagan's representative asserted privilege as to approximately 74 pages of the records, an assertion of privilege in which the White House initially "concurred" under the standards of the Order. Subsequently, the privilege claim was withdrawn as to a few of the materials, and the incumbent President independently asserted privilege over the rest. (This Court upheld the President's independent assertion of privilege, which did not depend on any of the disputed terms of the Order, in its September 24, 2005, Memorandum Opinion.)

In addition, the Order was applied to Bush vice presidential records that had been withheld from release on P5 grounds by the George Bush Presidential Library prior to January 20, 2001. Several hundred pages of such materials were reviewed by representatives of the former Vice President as well as the White House, and were released in July 2002 after both the former Vice President and the incumbent President authorized release under the Order.

2. Ongoing Application to Reagan-Bush Presidential and Vice Presidential Records

Following the release of those Reagan-Bush P5 materials that had been withheld from release before January 20, 2001, NARA has continued to apply the Bush Order to each subsequent release of Reagan presidential materials from the Reagan Library and Bush vice presidential materials from the Bush Library. That is, each time a member of the public makes a FOIA request to either library for release of materials and NARA determines that some or all of the materials requested are subject to release under the PRA, NARA notifies the former

officeholder's representative and the White House as required by the Order. The materials are then reviewed under the terms of the Order sequentially by the representative of the former officeholder and the White House, and are released only after "authorization" by both the representative and the incumbent President. Authorization by former President Reagan's representative is still required even though Mr. Reagan died in June 2004. *See* Plaintiffs' Statement of Undisputed Facts in Support of Their Renewed Motion for Summary Judgment on Count One of the Amended Complaint ("Pl. St.") ¶¶ 18-19, 22.

The result of these reviews is significant, ongoing delay in the release of Reagan-Bush presidential and vice presidential records. Plaintiff National Security Archive, for example, has a large number of pending requests for materials at both the Reagan and Bush libraries, and the time for processing and release of the requested materials now typically spans many months — indeed, years — at both libraries. The Reagan Library currently estimates that the time to process a request ranges from four to five years (depending on whether declassification review is necessary), and the time consumed by preparing the notices called for by the Bush Order, as well as to conduct the review by the former officeholders' representatives, adds several months to the process. *See* Pl. St. ¶¶ 20, 21; Declaration of Sharon Fawcett (D.E. 57) ¶¶ 4-7.[2]

3. Application to Bush-Quayle Records

The statutory restriction period for P5 materials among the presidential records of George H.W. Bush (and vice presidential records of Dan Quayle) expired on January 20. 2005. At that

[2] Ms. Fawcett's declaration does not separately break out the time attributable to review by former officeholders and to review by the White House on behalf of the incumbent president, but it does make clear that the two reviews do not go on simultaneously; rather, "the incumbent waits for the decision and any comments from the former before undertaking and concluding its review." Fawcett Dec. ¶ 7. Thus, delays attributable to reviews by former officeholders are in addition to any delays attributable to the incumbent's review.

time, the Bush Library had opened about 5.4 million pages of Bush-Quayle records, and had withheld approximately 57,000 pages on P5 grounds. *See* Pl. St. ¶¶ 14-15; NARA Media Alert, "Bush Presidential Records to be Released" (Feb. 18. 2005), at http://www.archives.gov/press/press-releases/2005/nr05-40.html. Under the terms of the Bush Order, the Archives notified the former officeholders and the White House that the materials were subject to release under the PRA. The materials remained unavailable to the public, however, until they had been reviewed first by the representatives of the former officeholders and then by the White House, and until both had authorized their release under the terms of the Order. So far, 30,519 of the 57,000 pages of materials have been opened to the public in a series of five releases in February, April, May, June, and October 2005. *See* Pl. St. ¶ 17; George Bush Presidential Library, "Information on released [*sic*] of documents formerly withheld under Presidential Records Act restrictions P-2 and P-5," http://bushlibrary.tamu.edu/research/releaseddocuments.html. The remainder of the formerly restricted materials remain unavailable to the public pending authorization of their release by the former officeholders and the White House.

Moreover, as with the Reagan-Bush presidential and vice presidential materials, all other as-yet unreleased Bush-Quayle presidential and vice presidential materials remain subject to the terms of the Bush Order. Thus, all further releases of materials from the George Bush Presidential Library require notice to the former officeholder's representatives and the White House, review by those representatives followed by White House review, and release only when both the former officeholder and the incumbent President provide their authorization. The situation of plaintiff National Security Archive again exemplifies the effect of the Order: The Archive has numerous pending requests to the George Bush Library, and the materials subject to

each of those requests are being withheld pending review and authorization of release by the former officeholder under the terms of the Order. *See* Pl. St. ¶¶ 18, 20.

ARGUMENT

I. PLAINTIFFS' CHALLENGES TO THE BUSH ORDER ARE JUSTICIABLE.

The Bush Order has been in effect for over four years, and NARA has faithfully applied it to each release of presidential and vice presidential records from the Reagan and Bush Libraries since it was issued. As the government's own declaration makes clear, moreover, NARA is continuing to apply the Order on an ongoing basis to every release of records from the Reagan and Bush Libraries — including records requested by plaintiffs in this action — and the result of reviews under the Order is to add to the lengthy delays already attendant to releases of presidential and vice presidential records of the Reagan-Bush and Bush-Quayle Administrations. Nonetheless, the government contends that it is still too soon to reach the merits of this case — that the plaintiffs' claims are nonjusticiable on standing grounds because they have allegedly not yet been injured by the features of the Order that they challenge (because no materials have been finally withheld solely on the basis of a former officeholder's assertion of privilege), and that the issues are not ripe for review. Neither of the government's arguments is correct.[3]

[3] The government does not contest that if the matter is justiciable, review of NARA's implementation of the Executive Order is agency action for which review is available under the Administrative Procedure Act and/or the nonstatutory right to judicial review of agency action in excess of statutory authority. *See Chamber of Commerce v. Reich*, 74 F.3d 1322, 1327-29 (D.C. Cir.) ("That the 'executive's' action here is essentially that of the President does not insulate the entire executive branch from judicial review. We think it is now well established that '[r]eview of the legality of Presidential action can ordinarily be obtained in a suit seeking to enjoin the officers who attempt to enforce the President's directive.'") (quoting *Franklin v. Massachusetts*, 505 U.S. 788, 815 (1992) (Scalia, J., concurring)). Here, plaintiffs may obtain review of the lawfulness of the Archivist's implementation of the PRA under the Administrative Procedure Act, 5 U.S.C. §§ 701-06, because the Archivist's determination to abide by the terms of the Order, his withholding of records pursuant to the Order, and his other actions in implementation

A. Plaintiffs Have Standing Because They Have Suffered Injury Caused by Each Challenged Feature of the Order.

Although conceding that the plaintiffs have suffered and are suffering ongoing injuries in the form of delay of access to presidential and vice presidential records, the government asserts in its renewed motion to dismiss that those injuries are not caused by the unlawful features of the Order that the plaintiffs challenge. As the D.C. Circuit has recently explained, "'the causation requirement for constitutional standing is met when a plaintiff demonstrates that the challenged agency action authorizes the conduct that allegedly caused the plaintiff's injuries, if that conduct would allegedly be illegal otherwise.'" *Shays v. FEC*, 414 F.3d 76, 92-93 (D.C. Cir. 2005) (quoting *Animal Legal Def. Fund, Inc. v. Glickman*, 154 F.3d 426, 440 (D.C.Cir.1998) (en banc)). To support standing, the injury need only be "fairly traceable" to the defendant's conduct, a requirement that is satisfied when an agency action "alters the legal regime to which the … agency is subject" and thus permits the injury to occur. *Bennett v. Spear*, 520 U.S. 154, 167,169 (1997). Here, contrary to the government's assertions, the acknowledged injuries are fairly traceable to conduct that is authorized by the Order and that would not occur but for the Order's unlawful features.

To begin with, the government fails to recognize the plaintiffs' most fundamental objection to the Order: President Bush had no authority to issue it because Congress, in the PRA, delegated authority to implement the Act through promulgation of regulations to NARA, and NARA has in fact issued regulations that are incompatible with the terms of the Order (as the government itself admits, *see* Defendants' Memorandum of Points and Authorities in Support of Their Motion to Dismiss Plaintiffs' Claims in Count 1 of the Amended Complaint ("Def.

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of the order constitute agency actions that are subject to review for their conformity to the requirements of the PRA. *See AHA v. Peterson*, 876 F. Supp. at 1315-18.

Mem.") 27). Without the Order, the timetables for review by former officeholders set forth in NARA's regulations would govern. And because, as the government concedes, the lengthy and unlimited reviews by representatives of former officeholders under the Bush Order *precede* any White House review (*see* Def. Mem. 16), the Order's unlawful issuance contributes to the delay plaintiffs suffer even if, as the government asserts, the incumbent's review would take just as long as it now does even without the Order.[4]

Second, the government overlooks that the plaintiffs' challenges to the Order's provisions for assertion of privilege by representatives of deceased and disabled former presidents and by former vice presidents have a direct causal link to the delays in access to presidential and vice presidential records attributable to the Order. But for the Order's unlawful recognition that a representative of a deceased president is empowered to claim privilege on his behalf, *there would be no privilege reviews under the Order* by the representatives of the late President Reagan, and the months of delays that attend such reviews would no longer occur. Thus, those delays are directly and causally attributable to the precise feature of the Order that plaintiffs attack. Similarly, but for the Order's unlawful empowerment of former vice presidents to claim a *vice presidential* privilege in their materials, there would be no privilege reviews under the Order by representatives of former vice presidents. Again, the causal relationship between the claimed illegality and the injury of delayed access is direct.

Third, the feature of the Order that is most obviously unlawful under binding Circuit precedent — its transformation of a former president's residual authority to *claim* privilege into a veto power over releases of their materials — is also directly related to the ongoing injuries that

[4] For the same reason, invalidation of the Order would redress plaintiffs' injuries by reducing the time required for review by former officeholders, even if it would not necessarily also reduce the separate delays attributable to review by the White House itself.

plaintiffs suffer. The Order grants former presidents this unilateral veto authority in two complementary ways: It provides both that NARA must withhold records when a former president claims privilege, regardless of whether the claim is meritorious or even whether the incumbent supports it, and that NARA may not release records until it has received affirmative *authorization* from both the former president and the incumbent. These provisions function as two halves of the same coin, depriving NARA of the ability to release materials otherwise available under the PRA whenever a former president objects or *has not affirmatively assented*.

The ongoing delays in access to Reagan-Bush and Bush-Quayle records are, fundamentally, the result of this unlawful feature of the Order. In every case, NARA withholds records until it receives the affirmative authorization of the former officeholder — a process that regularly takes months. The portion of the delay in access that stems from the need to obtain the former officeholder's permission for the release is directly caused by the Order's unlawful delegation of authority to former presidents to control public access to their records.

The government insists, however, that unless plaintiffs assert that the *incumbent* President is not entitled even to a "single minute" of review time to determine whether to assert privilege, they cannot claim injury resulting from the delays attributable to reviews by former officeholders and their representatives. Def. Mem. 14. The government's argument is nonsensical. Plaintiffs are not challenging the incumbent president's right to review presidential materials for privilege. Rather, they challenge the Order's provisions concerning privilege reviews and assertions of privilege by former presidents, former vice presidents, and their representatives, and the injury that gives plaintiffs standing flows from the review time attributable to the former officeholders, not the incumbent. As the government acknowledges, the former officeholders' review precedes and does not overlap with that of the incumbent under

the Order; hence, it constitutes an injury wholly separate from any delay attributable to the incumbent's own review.[5]

Finally, although the ongoing delays in access by themselves constitute an injury sufficient to support plaintiffs' standing with respect to all the challenged features of the Order, the imminent threat that plaintiffs will be denied access to materials on the basis of an assertion of privilege by a former president or vice president (or his representative) also provides plaintiffs with standing. The Bush Order authorizes private persons — the former officeholders and their representatives — to deny plaintiffs access to their materials through unilateral assertions of privilege. As the D.C. Circuit recently held in *Shays v. FEC*, when an agency action authorizes unlawful actions by third parties, the threat of injury suffices to support standing even when the threatened action has not yet been taken: "[W]hen adverse use of illegally granted opportunities appears inevitable, affected parties may challenge the government's authorization of those opportunities without waiting for specific [persons] to seize them." 414 F.3d at 90. For the same reason, the threat that former officeholders will use their authority under the Order to deny access to materials provides standing here.

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[5] The government attempts to cloud the issue by asserting that the review by former officeholders under the Bush Order is merely part of the White House's own review, undertaken for the purpose of advising the incumbent president. Def. Mem. 16. The Bush Order, however, clearly differentiates review by former officeholders from the White House's own review. *See* Bush Order, §§ 3(b), 3(d). If the unlawful features of the Order were invalidated, and the White House responded by attempting to impose the same delays by incorporating review by representatives of former officeholders into the White House's own review process, a new issue would arise as to whether such a process was compatible with the PRA's demand that materials be made public as rapidly as possible. The speculative possibility that the White House would react in such a way does not diminish the causal relationship between the Bush Order's challenged features and the injuries currently suffered by the plaintiffs, nor does it render those injuries nonredressable. *See Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. 59, 77 (1978) ("speculation" that if Court invalidated Price-Anderson Act, government would find another way to promote nuclear plant construction did not deprive plaintiffs of standing to challenge Act).

B. Plaintiffs' Legal Challenges to the Implementation of the Order Are Fully Ripe for Review.

The government's assertions that the case is not ripe for review are no more convincing than its standing arguments. The Order has been in effect and in constant application for more than four years. Moreover, the plaintiffs' challenges to the Order raise "purely legal" issues — issues that, under the ripeness doctrine as developed by the D.C. Circuit, are "presumptively suitable to judicial review." *Shays*, 414 F.3d at 95. Such cases, where "[n]o further factual development is necessary to clarify the issue before the court," are "currently fit for judicial review," and "nothing would be gained by postponing resolution of [plaintiffs'] challenge" in such circumstances. *Electric Power Supply Ass'n v. FERC*, 391 F.3d 1255, 1263 (D.C. Cir. 2004); *see also Whitman v. American Trucking Ass'n*, 531 U.S. 457, 479 (2001); *National Ass'n of Home Builders v. U.S. Army Corps of Engineers*, 417 F.3d 1272, 1281-82 (D.C. Cir. 2005); *Public Citizen v. Department of State*, 276 F.3d 634, 641 (D.C. Cir. 2002).

In such cases, the "hardship prong" of the ripeness doctrine "is largely irrelevant." *Id.*; *see also Venetian Casino Resort, LLC v. EEOC*, 409 F.3d 359, 364 (D.C. Cir. 2005). But in any event, "hardship," even if necessary for ripeness here, is clearly present. As explained above, the ongoing application of the challenged features of the Bush Order have resulted and continue to result in delays in the release of records under the PRA — delays that affect every request for records from the Bush and Reagan Libraries. The impact of these delays on plaintiffs' activities in seeking to obtain information for historical and research purposes easily satisfies the hardship standard, even assuming its applicability. *See Better Government Ass'n v. Department of State*, 780 F.2d 86, 93 (D.C. Cir. 1986); *see also Electronic Power Supply Ass'n v. FERC*, 391 F.3d at 1263 (frequent participant in agency proceedings faced "hardship" from agency policy permitting unlawful procedures even where that policy had not yet been applied to it).

The controversy with respect to the Bush Order satisfies the crux of the ripeness inquiry: It presents a legal issue that is fit for review without further factual development. As the D.C. Circuit has stated, "A case is ripe 'when it presents a concrete legal dispute [and] no further factual development is essential to clarify the issues, … [and] there is no doubt whatever that the challenged agency practice has crystallized sufficiently for purposes of judicial review.'" *Public Citizen v. Department of State*, 276 F.3d at 641 (quoting *Rio Grande Pipeline Co. v. FERC*, 178 F.3d 533, 540 (D.C. Cir. 1999)). That is precisely the situation here.

The government seeks to invoke the principle of constitutional avoidance in support of its prudential ripeness argument. But constitutional avoidance only goes so far. When a purely legal issue of constitutional law that requires no further factual development to resolve is presented by plaintiffs with standing, prudential ripeness does not bar a court from deciding it. *See, e.g., Beach Communications, Inc. v. FCC*, 959 F.2d 975, 986-87 (D.C. Cir. 1992). Indeed, even in the *Cheney* case, on whose rhetoric the government principally relies, the Supreme Court's holding was not that the courts below should *avoid* the constitutional issues presented, but that they *must face* the separation of powers questions advanced by the government in that case. *See Cheney v. United States District Court for the District of Columbia*, 124 S. Ct. 2576, 2592 (2004). Moreover, failing to address the constitutional issues presented here on ripeness grounds would run counter to the decisions in both *Public Citizen v. Burke*, 843 F.2d 1473, and *American Historical Association v. Peterson*, 876 F. Supp. 1300, both of which addressed the same types of issues in similar circumstances — that is, before the challenged orders had been applied to deny access to particular records.

Finally, the government asserts that the case is not ripe because plaintiffs seek adjudication in a "vacuum," "without reference to any actual invocation of privilege by a former

or incumbent Executive official." Def. Mem. 19. Thus, the government argues, we do not know "under what circumstances, if any, the President might ever" concur in a former officeholder's assertion of privilege. *Id.* The government ignores the fact that we do indeed know exactly how the Order operates when a former president's representative claims privilege, because former President Reagan's representative did just that with respect to approximately 74 pages of records in April 2003. Consistent with the Bush Order, NARA declined to release the materials as to which privilege had been asserted. Moreover, the White House in January 2004 "concurred" with the assertion of privilege even though, upon a later, independent review, the incumbent determined that the claim of privilege was not appropriate with respect to certain of the materials. These facts provide an entirely concrete illustration of the operation of the Order. To be sure, the White House's subsequent decision to moot the issue of the Order's application to these particular materials by making its own, independent claim of privilege (which this Court has sustained) renders any injury resulting from the withholding of these particular materials based on the Order unredressable for standing purposes. But for purposes of the prudential ripeness doctrine, these undisputed facts as to how the Order operates underscore that the legal issues presented are sufficiently crystallized to be appropriate for judicial decision.

II. THE BUSH ORDER IS UNAUTHORIZED.

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 an exercise of power that "stem[s] either from an act of Congress or from the Constitution itself." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952). Absent such authority, an executive order "lack[s] the force and effect of law because it was never grounded in a statutory mandate or congressional delegation of

authority." *Chen v. INS*, 95 F.3d 801, 805 (9th Cir. 1996); *see also Chrysler Corp. v. Brown*, 441 US 281, 302-08 (1979).

Justice Jackson elaborated on the sources of presidential authority to issue executive orders in his influential concurring opinion in *Youngstown*:

> 1. 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. …
>
> 2. When the President acts in absence of either a congressional grant or denial of authority, he can only rely 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. Therefore, congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility. In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.
>
> 3. 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. Courts can sustain exclusive Presidential control in such a case only by disabling the Congress from acting upon the subject. Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.

343 U.S. at 635-38 (Jackson, J., concurring) (footnotes omitted). As Justice Jackson put it, the question facing a court addressing a challenge to the lawfulness of an executive order is, "Into which of these classifications does this executive [order] fit?" *Id.* at 638.

Here, as in *Youngstown*, "[t]here is no statute that expressly authorizes the President to [act] as he did here. Nor is there any act of Congress to which our attention has been directed from which such a power can fairly be implied." *Id.* at 586 (opinion of the Court). The Bush Order itself does not purport to be based on authority conferred by the PRA or any other act of Congress. Indeed, because the PRA comprehensively governs the disposition of presidential

records following a president's term in office and leaves no room for supplementation by presidential fiat, this case involves a "category 3" executive order according to Justice Jackson's typology.

Far from leaving open the possibility of presidential authority to engage in unilateral lawmaking regarding the procedures and substantive standards applicable to claims of executive privilege, the PRA expressly states that the power to promulgate regulations "necessary to carry out [its] provisions" is granted to the Archivist of the United States, and that this power must be exercised "in accordance with section 553 of title 5, United States Code" (providing for notice-and-comment rulemaking). 44 U.S.C. § 2206. Moreover, the Act provides that such regulations must include "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." *Id.* Thus, the very subject of the Bush Order has been committed by Congress to the rulemaking authority of the Archivist as constrained by the procedural requirements of the APA — which have been bypassed entirely through the promulgation of the Bush Order.

Moreover, the Archivist has already exercised the power delegated by Congress and, through the lawful APA process, promulgated regulations that not only address the subject matter covered by the Bush Order, but are fundamentally incompatible with that order. Thus, the Archivist's regulations provide that whenever the Archivist intends to make any presidential record public, he must provide 30 days' notice to the former president to allow him to assert any rights or privileges that would foreclose access to the materials. 36 C.F.R. § 1270.46(a), (b), (d). The Bush Order, by contrast, permits the former officeholder and his representatives unilaterally to take as much time as they desire to review materials proposed for release. Moreover, of

critical importance, the regulations provide — in direct opposition to the Bush Order — that the Archivist may reject an assertion of 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.* § 1270.46(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). The regulations promulgated pursuant to the statute thus contemplate exactly the opposite of the scheme envisioned by the Bush Order. Under the regulations, only *proper* assertions of executive privilege may be accepted by the Archivist, and the burden is on the *former president*, not the public, to seek judicial review when the Archivist determines that materials are to be released in the face of an assertion of privilege by a former president.

The Bush Order thus not only conflicts with congressional legislation that occupies the field of presidential records by creating a comprehensive administrative scheme governing them, but is also directly at odds with the specific terms of regulations having the force of law promulgated pursuant to that statutory scheme. Such an order is unlawful. *See Chamber of Commerce v. Reich*, 74 F.3d at 1338. Only if Congress lacked power to enact the legislation, or if the alterations in the statutory and regulatory scheme worked by the Bush Order were necessary to protect constitutional executive prerogatives that would otherwise be infringed, could the Bush Order be sustained. *See Youngstown*, 343 U.S. at 637 (Jackson, J., concurring) ("Courts can sustain exclusive Presidential control in such a case only by disabling the Congress from acting upon the subject.").

The Supreme Court has made clear that Congress possesses plenary authority to legislate upon the subjects of control over and public access to historical presidential records. In *Nixon v.*

Administrator, addressing a challenge to the Presidential Recordings and Materials Preservation Act of 1974, which seized President Nixon's presidential records and established a process for making them available to the public, the Court "reject[ed] at the outset [the] 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." 433 U.S. at 441. Rather, recognizing the "abundant statutory precedent for the regulation and mandatory disclosure of documents in the possession of the Executive Branch," *id.* at 445, the court held that congressional power to regulate presidential records existed as well, *id.* at 445-46, and it refused to accept the argument "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." *Id.* at 440. There can, therefore, be no argument that the Bush Order is necessitated or justified by any constitutional flaw in the regulations promulgated by NARA pursuant to its congressionally conferred authority, and the government does not contend otherwise.

In fact, the government now concedes, in its renewed motion to dismiss, both that the Bush Order conflicts with NARA's regulations and that the regulations themselves are not unlawful. Def. Mem. 32. Nonetheless, the government asserts that "President Bush now favors a different approach" from that set forth in NARA's regulations, and it suggests that the Bush Order is a lawful directive to NARA to change its regulations. *Id.*

Nowhere, however, does the Order explicitly purport to rescind existing regulations or direct the Archivist to issue new regulations. Moreover, the Archivist has evidently never interpreted the Order as such a directive, because new regulations have never been proposed, let alone promulgated following notice-and-comment rulemaking. The agency's lawfully

promulgated regulations have remained in place for the four years since the Order was issued, and NARA has given no sign that it intends to put new ones in place.

More importantly, even if the Order were accurately characterized as somehow directing NARA to revise its regulations, that could not justify the agency in violating its own rules pending their amendment through the means specified by law. Although a president may have the power to oversee agency subordinates in the rulemaking process, *Sierra Club v. Costle*, 657 F.2d 298, 404-10 (D.C. Cir. 1981), the president has no authority to supersede lawfully promulgated regulations through executive fiat exercised outside of the congressionally mandated procedural requirements for rulemaking under the APA. The Supreme Court has emphasized that rules have force of law only if and only if promulgated pursuant to congressional authority and in "conform[ity] with any procedural requirements imposed by Congress." *Chrysler Corp. v. Brown*, 441 U.S. at 302-03. Moreover, as long as such rules remain in force, executive branch officials are obliged to compel with them notwithstanding directives from their superiors. *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 266, 267 (1954). And, as the D.C. Circuit has recognized, the president may not override statutory rulemaking requirements, such as the requirement that any rule ultimately issued by the agency be based on the rulemaking record. *Sierra Club v. Costle*, 657 F.2d at 407-08. In sum, the president has no power to order agency officials to disregard requirements imposed by the APA and other statutes that constrain their decisionmaking authority. *See Portland Audubon Soc. v. Endangered Species Committee*, 984 F.2d 1534 (9th Cir. 1993).

Here, Congress directed that rules implementing the PRA be promulgated through the notice and comment procedures of the APA. 44 U.S.C. § 2206. The agency has complied. The regulations thus promulgated may only be amended through further notice-and-comment

rulemaking. *See, e.g., Marseilles Land & Water Co. v. FERC*, 345 F.3d 916, 920 (D.C. Cir. 2003); *Air Transp. Ass'n of Am. v. FAA*, 291 F.3d 49, 55-56 (D.C.Cir.2002). The government cites no authority for the novel proposition that the president may now institute an inconsistent regulatory scheme by mere fiat. As long as the validly promulgated regulations remain in effect, they, and not the Bush Order, have the force of law. *See Si v. Slattery*, 864 F. Supp. 397, 402 (S.D.N.Y. 1994) (holding that regulations actually issued by agency, not those supposedly directed by executive order, governed).

III. THE BUSH ORDER UNLAWFULLY GRANTS FORMER PRESIDENTS AUTHORITY TO COMMAND THE ARCHIVIST TO WITHHOLD RECORDS THAT ARE SUBJECT TO THE PRA.

Both by requiring the executive branch to defer to claims of privilege by a former president and by forbidding any releases of materials without the express authorization of a former president, the Bush Order violates not only the PRA, but also the obligation of the executive branch to "take Care that the Laws be faithfully executed" as required by Article II, section 3 of the Constitution. The D.C. Circuit's opinion in *Public Citizen v. Burke*, 843 F.2d 1473, establishes unambiguously that the Order's requirement that the Archivist withhold records upon a mere assertion of privilege by a former president cannot be squared with the law, and this Court's decision in *AHA v. Peterson*, 876 F. Supp. 1300, confirms that ceding control over records to a former president is unlawful.

The Presidential Records Act provides that records reflecting confidential communications among former presidents and their advisers may be restricted entirely from public access for no more than 12 years after the former president leaves office. 44 U.S.C. § 2204(a)(5). Thereafter, such materials become available to the public under the standards of the Freedom of Information Act ("FOIA"), "except that paragraph (b)(5) of that [Act] shall not

be available for purposes of withholding any Presidential record." *Id.* § 2204(c)(1). Since FOIA's (b)(5) exemption is the mechanism through which privileges attaching to confidential communications are asserted, the import of its unavailability under the PRA is clear: Confidential communications among the former president and his advisers may be shielded for 12 years, but thereafter are not subject to any statutory protection (unless they fall within some other protected category, such as information properly classified on national security grounds). The PRA goes on to provide that it does not "confirm, limit, or expand any constitutionally-based privilege which may be available to an incumbent or former President." *Id.* § 2204(c)(2). Thus, the effect of the Act's provisions, read together, is that confidential communications among the former president and his advisers must be made public after 12 years except when they are subject to a valid claim that their disclosure is barred by a constitutionally based privilege. Consistent with the Act, NARA's regulations provide that a former president may assert a constitutionally based claim of privilege, but that records will be released in the face of such a claim if the Archivist concludes that the claim is not proper. 36 C.F.R. § 1270.46(c).

The Bush Order fundamentally reverses this statutory and regulatory scheme. It provides that upon the assertion of a privilege by a former president, the incumbent president (and the litigating apparatus of the federal government) will support the claim, whether they judge it valid or not, absent "compelling circumstances." And even if the incumbent president finds compelling reasons for opposing a former president's privilege claim, the Archivist still is not permitted to release any records as to which a former president has claimed privilege unless a party contesting the privilege claim obtains a court order requiring release. In short, the Order gives a former president the power to veto release by the Archivist by making a privilege claim,

whether it is valid or not. Only if the former president "authorizes" disclosure may *any* presidential records be released by the Archivist under the terms of the Bush Order.

In requiring that records be withheld even when a former president's claim of privilege is *not* valid, the Bush Order is contrary to the plain terms of the Act. The Act expressly states that, while not limiting any constitutionally based privileges, it does not expand them either. 44 U.S.C. § 2204(c)(2). Authoritative precedents of the Supreme Court and the D.C. Circuit, including *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977), *Nixon v. Freeman*, 670 F.2d 346, and, most unambiguously, *Public Citizen v. Burke*, hold that the scope of the constitutionally based executive privilege does not require that the Archivist bow to claims of privilege by a former president. By purporting to require the Archivist to do so, the Bush Order expands the protections afforded by the constitutionally based executive privilege, with the result that records required by the Act to be released are withheld from the public by the Archivist.

To be sure, the Supreme Court in *Nixon v. Administrator* recognized the standing of a former president to assert claims of executive privilege. 433 U.S. at 448-49. But it also recognized that a former president's authority in this regard was entitled to less respect than an incumbent's (*id.*), and that the privilege attaching to presidential historical records is subject to "erosion over time" (*id.* at 451) because "there has never been an expectation that the confidences of the Executive Office are absolute and unyielding" (*id.* at 450), and even the confidences of close presidential advisers have generally been opened to the public after a president has been out of office for some time (*id.* at 450-51). Most importantly, however, the Court emphasized that a former president does not have *carte blanche* to bar access to his materials simply by invoking the concept of privilege. Rather, a former president "may legitimately assert the Presidential privilege, of course, only as to those materials whose contents

fall within the scope of the privilege." *Id.* at 449. In other words, the mere invocation of privilege as to a record does not make that record privileged.

Moreover, the Court did *not* hold that the protection of the privilege requires that the former president be afforded the unilateral ability to block release of materials merely by asserting privilege. Instead, the Court held, the Act was constitutional because it afforded the former president the "*opportunity to assert* any … constitutionally based right or privilege." *Id.* at 450 (emphasis added). An opportunity to assert a privilege — and have it accepted if valid and rejected if not — is not the same as an absolute right to have that assertion accepted. Because the PRA and its implementing regulations assure former presidents the *opportunity to assert claims of privilege*, they fully satisfy the constitutional requirements announced in *Nixon v. Administrator*. The additional perquisite granted by the Bush Order — unilateral veto power over release of assertedly privileged records — is not required by the constitutional doctrine of executive privilege and, absent a constitutional basis, cannot override the terms of the Act and the lawfully promulgated regulations implementing it.

If *Nixon v. Administrator* left any room for doubt on these points, it was laid to rest in the D.C. Circuit's opinions in *Nixon v. Freeman* and *Public Citizen v. Burke*, both of which elaborated on the doctrine of *Nixon v. Administrator* in the context of issues relating to the application of the legislation governing the Nixon materials. In *Nixon v. Freeman*, the court considered, among other issues, challenges by former President Nixon to Archives regulations that permit members of the public to listen to tape recordings of his conversations with his advisers without showing the "particularized need" for access that he contended was required under the Supreme Court's decision in *United States v. Nixon*, 418 U.S. 683 (1974). The court squarely rejected this argument, holding that protection of the privilege did not require such a

showing as a prerequisite to access to communications between the former president and his advisers (access, the court added, that would in no case take place less than eight years after the former president left office). *Freeman*, 670 F.2d at 356. Rather, the court held, the constitutional privilege was fully protected by regulations that imposed a burden on the former president to invoke privilege on a disclosure-by-disclosure basis, and to seek judicial review if his claims were administratively rejected:

> [W]e think that those who see in disclosure a threat to the privilege must be given a meaningful opportunity to contest disclosure on that basis. The regulations give Mr. Nixon such an opportunity. He can raise a challenge by sending a letter to the Administrator explaining his position; only if his claim is rejected administratively need he present his claim in court.

Id. at 359. *Freeman* is thus flatly at odds with the notion, underlying the Bush Order, that preservation of the constitutional executive privilege requires executive branch officials automatically to accept assertions of privilege by former presidents and to place the burden of seeking judicial review of executive privilege issues on those who seek access to records.

In *Public Citizen v. Burke*, the D.C. Circuit added an exclamation point to its holding in *Freeman*. There, the issue was the lawfulness of an Office of Legal Counsel directive, imposed on the Archivist during the process of White House review of the regulations implementing the Nixon legislation. The directive required that the Archivist accept any claim of executive privilege by former President Nixon unless ordered otherwise by the incumbent, President Reagan. The Justice Department defended its directive by arguing that its terms were required by the constitutional doctrine of executive privilege as set forth in *Nixon v. Administrator*. *See* 843 F.2d at 1478. The D.C. Circuit rejected the argument out of hand, stating that "[w]e find no support for OLC's constitutional argument in *Nixon v. General Services Administration*." *Id.* at 1479. Indeed, the court stated, "we see no reason why the Archivist — an appointee of the

incumbent President — is himself constitutionally compelled to afford any more deference to Mr. Nixon's claim than would be the incumbent President. OLC's discomfort with the role that the Archivist would play under the regulations as written [in ruling on assertions of privilege by the former President] suggests more notions of lèse majesté than unconstitutionality." *Id.* The court also noted that its decision in *Freeman* had already rejected the argument that the constitution did not permit the Archivist to reject a former president's assertion of privilege: "Clearly in *Freeman* we saw no constitutional anomaly in the prospect of the Archivist rejecting a challenge by Mr. Nixon based on executive privilege." *Id.* at 1480.

Nixon v. Administrator, *Nixon v. Freeman*, and *Public Citizen v. Burke* together demonstrate that by requiring the Archivist to abide by any claim of privilege by a former president without regard to its merit, the Bush Order "expands" the scope of protection of the constitutionally based privilege in violation of the clear terms of the Act. By ceding authority to former presidents to veto releases of records that are required by the PRA, the Order also runs counter to Article II's command that the Executive Branch "take Care that the Laws be faithfully executed." The law here requires that records be released unless subject to a *valid*, constitutionally based claim of privilege. It is therefore unlawful for the Archivist to withhold records from the public upon a claim of privilege that is not meritorious. Indeed, the Bush Order implicitly acknowledges as much by recognizing that the Archivist can be ordered by a court to release records as to which an improper claim of privilege has been made. Thus, as the D.C. Circuit explained in *Public Citizen v. Burke*, it is an evasion of the Archivist's obligation to "take care" to conform his conduct to the law for the Archivist to withhold records without first making a determination of the merits of a claim of privilege:

> To say … that [a 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 as set forth in the statute and the accompanying regulations. It may well be unpleasant for the Executive Branch to be forced to consider the host of difficult questions that arise in this area, and the statute may place the incumbent in an awkward position by obligating him to take a position on claims of executive privilege put forward by former President Nixon. Nonetheless, since the Archivist is part of the Executive Branch, we do not see how the incumbent President's responsibility to take care that the laws be faithfully executed can properly be transferred to the Judiciary.

843 F.2d at 1479.

The Bush Order also runs afoul of Article II by delegating to persons outside the Executive Branch, and indeed outside the government, the power to give binding directions to the Archivist, a duly appointed officer of the United States. Under the Order, once a former president or vice president or a representative appointed by him or his family makes a claim of privilege, the archivist is compelled to refrain from releasing records to the public even in the face of the incumbent president's opposition to that claim. Only with the "authorization" of the former officeholder or his representative may the Archivist take the actions otherwise required by the PRA. Thus, the Bush Order places authority to give a binding directive to the Archivist in the hands of private citizens holding no government position. The D.C. Circuit found just such a delegation to a former president improper in *Public Citizen v. Burke*:

> If, whenever [the former President] asserts executive privilege, the Archivist in effect loses jurisdiction over his responsibilities to [e]ffect disclosure, the former President has gained power to withdraw from the Archivist some indefinite portion of the responsibilities that Congress delegated to him ….

Id. at 1480.

In addition, by requiring "authorization" by the former president before any of his records may be released, the Bush Order conflicts with one of the most fundamental terms of the PRA: the provision that vests the Archivist, once a president leaves office, with responsibility for "custody, control, and preservation of, and access to, the Presidential records of that President."

44 U.S.C. § 2203(f)(1). The Bush Order's requirement that any release be "authorized" by the former president violates this provision by placing control over access in the hands of the former president. As the court held in *AHA v. Peterson*, the PRA "leaves no room for any government official to … confe[r] … control of Presidential records [on] any person or entity other than the United States" — not even a former president. 876 F. Supp. at 1319.

By granting the former president the power to "control" the Archivist's release of materials under the PRA, the Bush Order not only runs afoul of the plain language of the Act, but also, again, of the principle that Executive Branch authority to execute the laws may not properly be ceded to private persons. In *AHA v. Peterson*, the court found an improper delegation of Executive Branch authority in an agreement between former President Bush and then-Archivist Wilson, which purported to cede "control" over the Archivist's disclosure of presidential records to former President Bush:

> Under *Burke* and Article II of the Constitution, the … Archivist is subject to the direction of [the incumbent president], and former President Bush has 'no constitutional power to direct the Archivist.' … Under the terms of the Bush-Wilson Agreement, however, which former Archivist Wilson signed, former President Bush is purportedly empowered to direct the Archivist's disposition of Presidential information … and to oversee decisions by NARA concerning access to information on the materials. … [T]his Court, as in *Burke*, finds that such an Agreement cannot be sustained under the Constitution.

Id. at 1321. The Bush Order's cession of authority to former presidents can no more be sustained than could the Bush-Wilson Agreement.

In the face of these precedents, the government's defense of the Order is hollow. The government insists that because the judiciary owes some deference to a former president's claim of privilege, it follows that the incumbent president also may give deference to a former president's assertion of privilege (by "concurring" in it absent "compelling circumstances" and by instructing the Archivist to abide by it even if the incumbent does not concur). *See* Def.

Mem. 22. The government's argument, however, overlooks the D.C. Circuit's clear statement in *Public Citizen v. Burke* that the incumbent president owes no deference to a former president's claim of privilege. 843 F.2d at 1479.

The government further asserts — twice — that the D.C. Circuit recognized in *Public Citizen v. Burke* that the incumbent president "has the constitutional authority to direct the Archivist to deny access to presidential records based on the assertion of privilege by a former President." Def. Mem. 24; *see also* Def. Mem. 15 (both citing 843 F.2d at 1478). Contrary to the government's claim, however, the "premise" that the court characterized as "powerful" in *Public Citizen v. Burke* was not that the incumbent could direct the Archivist to abide by a *former* president's claim of privilege, but rather that he could direct the Archivist to honor his *own* claim of privilege. *See* 843 F.2d at 1478. Although the court accepted that premise, it refused to accept the conclusion that the government urged on it there (and also urges here): that the incumbent may also instruct his subordinate to accept a former president's claim of privilege. *Id.* The extent to which the government has distorted the D.C. Circuit's analysis on this point is demonstrated by a complete quotation of the passage in question (843 F.2d at 1478):

> The government's constitutional argument is essentially this: An executive privilege claim could be raised by the incumbent President to release any of the Nixon papers. In that event, it is wholly inconsistent with Article II to contemplate the Archivist, an appointee of the President, independently determining whether the President's claim is meritorious. The Archivist would instead be obliged to honor the claim of his constitutional superior. Since, moreover, a former President retains his right to claim executive privilege, *Nixon v. General Servs. Admin.*, 433 U.S. at 448-49, 97 S.Ct. at 2792-93, it follows according to the government that the Archivist must afford him the same deference that he gives the incumbent President: "[J]ust as we believe … that the Archivist must and will honor any claim of executive privilege asserted by an incumbent President, we believe that the Archivist must and will treat any claim by a former President in the manner outlined in this opinion." Assuming arguendo that the government is correct in its premise — we recognize its argument on that point is powerful — its conclusion does not follow. Ronald Reagan, not Richard Nixon, is the constitutional superior of the Archivist. Ronald Reagan has the constitutional power to direct the Archivist, not Richard Nixon.

Indeed, *Public Citizen v. Burke* holds exactly the opposite of what the government says it does: that the incumbent president (and his subordinate, the Archivist) would violate their duty to take care that the laws be faithfully executed if they withheld records based on a mere claim of privilege by a former president and left it to the judiciary to evaluate the merits of that claim. 843 F.2d at 1479.

IV. THE BUSH ORDER EFFECTIVELY INVENTS A "VICE PRESIDENTIAL" PRIVILEGE.

One of the most novel features of the Bush Order is that it gives former *vice president*s the same authority to direct the Archivist to withhold their materials that it gives former presidents. Specifically, section 11(a) of the Order provides: "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." In so providing, the Order posits the existence of an independent, constitutionally based privilege for vice presidential communications, to which it offers protection independently of whether such communications may also fall within the scope of the executive privilege covering confidential presidential communications.[6] Indeed, the Order makes clear that the privilege it authorizes a former vice president to assert is an exclusively vice

[6] The Order does state that nothing in it "shall be construed to grant, limit, or otherwise affect any privilege of a President, Vice President, former President, or former Vice President." But although the Order may not formally "grant" the vice president a privilege, it nonetheless treats a former vice president as if he possesses one because it requires the Archivist to withhold any record as to which the former vice president *claims* a constitutionally based privilege, whether such a claim is proper or not.

presidential privilege, because it simultaneously forbids a former vice president to "invoke any constitutional privilege of a President or former President except as authorized by that President or former President." Bush Order, § 11(b).

There is no basis, however, for the proposition that an independent, constitutionally based *vice presidential* privilege exists. The deliberations of executive branch officers who lack the high constitutional powers and duties of the president receive protection, if at all, only through the deliberative process privilege, which "is primarily a common law privilege." *In re Sealed Case*, 121 F.3d 729, 745 (D.C. Cir. 1997).[7] The constitutionally based privilege for presidential communications recognized by the Supreme Court in *United States v. Nixon*, 418 U.S. 683 (1974), 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*, 121 F.3d at 745.

The Supreme Court summarized the president's "unique position in the constitutional scheme" in *Nixon v. Fitzgerald*, 457 U.S. 731, 749 (1982):

> Article II, § 1, of the Constitution provides that "[t]he executive Power shall be vested in a President of the United States …." This grant of authority establishes the President as the chief constitutional officer of the Executive Branch, entrusted with supervisory and policy responsibilities of utmost discretion and sensitivity. These include the enforcement of federal law — it is the President who is charged constitutionally to "take Care that the Laws be faithfully executed"; the conduct of foreign affairs — a realm in which the Court has recognized that "[i]t would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret"; and management of the Executive Branch — a task for which "imperative reasons requir[e] an unrestricted power [in the President] to remove the most important of his subordinates in their most important duties."

[7] Again, a common law privilege cannot, under the PRA, bar release of presidential or vice presidential records after the expiration of the 12-year restriction period because FOIA's (b)(5) exemption is inapplicable under the PRA, and a common law privilege does not fall within the PRA's provision preserving "constitutionally based" privileges.

Id. at 749-50 (footnotes omitted). It is these critical constitutional functions that require that the president's paramount role "in the process of shaping policies and making decisions" receive some protection in the form of a qualified privilege of confidentiality "rooted in the separation of powers under the Constitution." *United States v. Nixon*, 418 U.S. at 708. As the Supreme Court put it in *Nixon v. Administrator*, "the privilege of confidentiality of Presidential communications derives from the supremacy of the Executive Branch within its assigned area of constitutional responsibilities." 433 U.S. at 447.

In stark contrast to those of the president, the vice president's constitutional duties are few. The vice president does not share in any of the executive powers granted to the president by Article II, except in cases of presidential incapacity. Indeed, the *only* duties and functions of the vice president under the Constitution are: (1) serving as the presiding officer of the Senate (except in cases of presidential or presumably vice presidential impeachment) and casting tie-breaking votes (Art. I, § 3); (2) opening the certified votes of the electoral college (Amend. XII); (3) succession to the presidency in case of the removal, death or resignation of the president (Amend. XXV, § 1); (4) exercise of the powers and duties of the president as "Acting President" in cases of presidential disability (*id.*, § 3); and (5) certification of the disability of the president (with the concurrence of a majority of the cabinet) (*id.*, § 4). Outside of the situations of presidential death, disability, removal or resignation — upon which the vice president assumes the duties of the presidency (and thus becomes the holder of the executive privilege covering confidential *presidential* communications) — the vice president's constitutional duties are extremely limited and are not even executive in nature.[8]

[8] As John Adams wrote after four years in the office: "My country has in its wisdom contrived for me the most insignificant office that ever the invention of man contrived or his imagination conceived; and as I can do neither good nor evil, I must be borne away by others and

The very limited constitutional role of the vice president hardly justifies recognition of an independent, constitutionally based vice presidential privilege. We are aware of no precedents recognizing such a privilege. *See In re Sealed Case*, 121 F.2d at 736-53 (comprehensively canvassing precedents on executive privilege and citing no cases involving a vice presidential privilege). Indeed, even in the *Cheney* case, which concerned access to materials documenting meetings and communications involving the vice president, the underlying constitutional concern was whether disclosure would "substantial intrusions on the process by which those in closest operational proximity to the *President* advise the *President*." *Cheney*, 124 S. Ct. at 2587 (emphasis added). To be sure, as *Cheney* suggests, the vice president's role as a subordinate and adviser of the president (when the president sees fit to let him play such a role) may under some circumstances bring vice presidential records within the potential scope of the *presidential* privilege, but (as the Bush Order correctly acknowledges) that privilege would be for the president to assert, not the vice president. Thus, in empowering a former vice president to block the Archivist from allowing public access to his records by asserting a claim not of presidential but of vice presidential privilege, the Order requires the withholding of records whose release is otherwise mandated by the PRA *on the basis of a "constitutional privilege" that does not even exist*. This provision of the Order facially violates the terms of the PRA, is not in any way required by or consistent with the Constitution, and therefore cannot lawfully be relied upon by the defendants to deny plaintiffs and other members of the public the access they have sought to records of former vice presidents.

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meet the common fate." Letter to Abigail Adams, December 19, 1793. More colorfully, former Vice President John Nance Garner described the office as "not worth a pitcher of warm [spit]." O.C. Fisher, *Cactus Jack*, ch. 11 (1978).

The government's defense of this provision is lukewarm, at best. The government does not argue that the vice presidential privilege hypothesized by the Bush Order actually exists, *see* Def. Mem. 29, but it nonetheless argues that the Order is necessary because it would "unduly burden a Vice President's opportunity to assert privilege" not to permit the vice president to make a claim of a vice presidential privilege that "may" exist. Def. Mem. 30.

The Order, however, goes far beyond merely permitting a vice president to assert a vice presidential privilege that may or may not exist. It effectively creates and then enforces the non-existent privilege by prohibiting the Archivist from releasing vice presidential materials unless and until authorized by the former vice president, and by commanding the Archivist to abide by any claim of vice presidential privilege made by a former vice president. Given the Act's requirement that materials be made public unless a constitutional privilege *prohibits* their release, these features of the Order cannot be justified unless, at a minimum, there is such a thing as a constitutional vice presidential privilege — and the government here does not even argue that there is.

Moreover, even if the Order did no more than permit a former vice president to make a claim of privilege, the government's defense would still fall short. There is no need to protect the right to claim a privilege that does not exist. The opportunity to claim a fictitious privilege cannot be "unduly burdened." Nor can a nonexistent privilege justify a privilege review that delays access to materials that, after the completion of the 12-year restriction period, are required to be released to the public "as rapidly and completely as possible" (44 U.S.C. § 2203(f)(1)) subject only to constitutionally based privileges (44 U.S.C. § 2204(c)(2)).

V. THE BUSH ORDER UNLAWFULLY GRANTS "REPRESENTATIVES" OF PRESIDENTS, VICE PRESIDENTS, AND THEIR FAMILIES THE POWER TO DIRECT THE ARCHIVIST TO WITHHOLD RECORDS.

The Order does not stop with giving former presidents and vice presidents an unlawful veto power over the release of their records: It extends that veto power far beyond their lifetimes by allowing it to be exercised by "representatives" of deceased or disabled presidents and vice presidents. Moreover, these representatives may be designated not only by the former officeholders before their deaths or the onset of their disabilities, but also by members of their families at any time. Under the Order, claims of alleged constitutionally based privilege by these representatives must be treated exactly as claims made by the former president himself — that is, they constitute binding directives to the Archivist to withhold records from the public, regardless of their legal merits.

Delegation of authority to private citizens to direct an officer of the United States in the performance of his functions is even more offensive to Article II than delegation of such authority to a former president, who at least once had authority to direct Executive Branch officials. *Cf. Public Citizen v. Burke*, 843 F.2d at 1479-80; *AHA v. Peterson*, 876 F. Supp. at 1321. Even leaving this problem aside, 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 himself are unlawful, for the constitutionally based privilege cannot properly be asserted except by the incumbent president or a former president personally.

The constitutionally based executive privilege for confidential presidential communications belongs to the Executive Branch, not to the president as an individual: It is "the privilege of the Presidency" and serves the "needs of the Executive Branch." *Nixon v. Administrator*, 433 U.S. at 448, 449. As such, it is not a personal property right of the president,

and it cannot be assigned or descend by gift, bequest, or devise. The family of a president or former president has no legitimate interest in it or claim to it.

Moreover, as head of the "department" possessing the privilege, the president must assert it personally. *See United States v. Reynolds*, 345 U.S. 1, 7-8 (1953); *see also In re Sealed Case*, 121 F.2d at 745 n.16 (*Reynolds* suggests "that the President must assert the presidential communications privilege personally"). In *Nixon v. Administrator*, the Supreme Court, with some hesitation, extended standing to assert the privilege to former presidents in order to protect the institutional needs of the Executive Branch, although it recognized that a former president had "less need of [the privilege] than an incumbent" (433 U.S. at 448) and that a former president's assertion of privilege was entitled to less weight than an incumbent's (*id.* at 449). But nothing in *Nixon v. Administrator* remotely suggests that the Court would have exempted a former president from the generally applicable requirement that the privilege be asserted personally, or that the Court would have countenanced extending the privilege still further by allowing it to be asserted by persons, such as presidential friends, associates, family members, or other designees, who had never been at the head of the branch of government to which the privilege properly belongs.

A purported claim of privilege made by a representative who lacks lawful authority to assert it cannot provide a basis for finding that there is a "constitutionally-based privilege" that bars release of records within the meaning of 44 U.S.C. § 2204(c)(2). Absent such a constitutionally based privilege, the PRA does not permit the withholding of presidential or vice presidential records (other than those that fall within specific, non-privilege-based FOIA exemptions) once the 12-year restriction period has expired. To the extent that it purports to authorize withholding of records based on assertions of privilege by representatives who lack

any constitutionally based authority to claim the privilege, the Order facially conflicts with the PRA; and, again, because no constitutional basis exists for extending the privilege to such "representatives," there can be no basis for any claim that this provision of the Order is necessary to vindicate any constitutional interests of the Executive Branch.

The government offers three defenses of the provision authorizing representatives to stand in for deceased and disabled presidents. First, it asserts that "[t]he Constitution does not bar a delegatee from asserting constitutional privilege on a former President's behalf." Def. Mem. 27. The issue, however, is whether the Constitution *requires* that a representative be permitted to make privilege claims for a deceased or disabled president. If not, then the Order's provisions for privilege reviews and claims by representatives cannot stand, for the PRA commands that materials no longer subject to statutory restrictions be released unless the Constitution *requires* otherwise.

Second, the government asserts that the privilege must survive a former president's lifetime because the privilege "would mean little if it automatically vanished upon the death of a President." Def. Mem. 28. Our argument, however, is not that the privilege dies with the president; rather, it is that the privilege may only be asserted by the former president himself or by the incumbent, not by one who has never held office. As the government itself points out, the privilege does not exist for the benefit of "the President as an individual," Def. Mem. 27 (quoting *Nixon v. Administrator*, 433 U.S. at 449); rather, it is "tied to the office." Def. Mem. 28. One who has never held the office and has only a personal relationship with the former president is in no position to purport to exercise such a privilege; rather, once the former president can no longer claim it due to death or disability, the privilege can only be exercised by its principal steward — the incumbent.

Finally, the government asserts that before the PRA, the families of former presidents effectively controlled access to presidential records through "private control and access restrictions." Def. Mem. 28. But that effective control over access was not premised on the former president's family or representatives having somehow inherited the presidential privilege; rather, it was based on the view that presidential materials were the president's personal property, and the power to control access was merely one of the rights that ownership conferred (just as a homeowner has the power to exclude others from access to her property). *See Nixon v. United States*, 978 F.2d at 1277-78. The PRA, of course, was intended to reverse the tradition of private ownership. Permitting the ownership concept to creep back into the Act by empowering the former president's family and representatives to assert the same control under the guise of "privilege" would be antithetical to the Act's intent.

VI. THE BUSH ORDER UNLAWFULLY DELAYS ACCESS TO RECORDS.

There is no dispute that the Bush Order's provisions for review by former officeholders and their representatives result in significant delays in access to presidential and vice presidential records on a continuing and ongoing basis. *See* Fawcett Dec. ¶¶ 5-7. The PRA, by contrast, commands NARA to make records available as rapidly as possible. 44 U.S.C. § 2203(f)(1), subject only to statutory restrictions on access and to the proviso that the Act does not limit constitutionally based privileges. 44 U.S.C. § 2204(c)(2). Unless, therefore, the delays attributable to the Order are either necessary to protect constitutionally based privileges (which, as demonstrated above, they are not) or otherwise necessary to serve some statutory purpose (which the government does not assert), they cannot be squared with the Act's requirements. For this reason, too, the Bush Order's provisions concerning review by former officeholders and their representatives must fall.

CONCLUSION

The Bush Order is unauthorized and unlawful, and NARA and the Archivist cannot implement it without violating the PRA. The sole possible justification for the Order — that it is somehow necessary to protect the constitutionally based executive privilege — is directly foreclosed by clear precedents binding on this Court. Accordingly, plaintiffs request that the Court grant summary judgment declaring that the defendants may not implement the Bush Order, enjoining them from doing so, and requiring them to open Reagan-Bush and Bush-Quayle presidential and vice presidential records without regard to the Order.

Respectfully submitted,

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November 30, 2005

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

PLAINTIFFS' STATEMENT OF UNDISPUTED FACTS IN SUPPORT OF THEIR RENEWED MOTION FOR SUMMARY JUDGMENT ON COUNT ONE OF THE AMENDED COMPLAINT

1. The National Archives and Records Administration (NARA) administers presidential and vice presidential records from the administrations of President Reagan forward under the Presidential Records Act, or PRA, 44 U.S.C. § 2201 *et seq.* Such materials are generally held by NARA in presidential libraries established under 44 U.S.C. § 2112. The PRA provides that presidential and vice presidential records are generally not available to the public for the first five years after a president leaves office. After five years have elapsed, members of the public may obtain access to records by making Freedom of Information Act (FOIA) requests, but the PRA provides that until 12 years after a president has left office, access to materials falling within certain categories may be restricted. *See* 44 U.S.C. § 2204(a).[9]

[9] Paragraphs 1-13 and 22 of this Statement are based on information previously set forth in statements of undisputed fact submitted by the parties, supporting exhibits and declarations, and periodic reports to the Court supplying information regarding the status of processing of materials subject to the litigation. Because these facts have never been disputed, and, indeed, have largely been incorporated into the court's two previous memorandum opinions (*see* Sept.

2. Among the records that are subject to the 12-year restriction under the PRA are records reflecting confidential, advisory communications between the President and his advisers or among those advisers, 44 U.S.C. § 2204(a)(5). After the 12-year restriction period expires, records falling within these categories become available to the public, and the FOIA exemption normally applicable to privileged communications (including communications subject to the "deliberative process" and "executive" privileges), is not available to provide a basis for withholding them. *See* 44 U.S.C. § 2204(c)(1). Other FOIA exemptions remain applicable to presidential records after expiration of the 12-year period.

3. NARA refers to records that fall within the restriction category established by 44 U.S.C. § 2204(a)(5) for confidential advice as "P5" materials. When members of the public request records from a presidential library that include materials falling within the P5 restriction prior to the expiration of the 12-year restriction period, NARA withdraws the restricted materials from the records before making them available to the public, and notifies the requester that materials have been withheld as a result of the P5 restriction.

4. President Ronald Reagan and Vice President George H.W. Bush, the first president and vice president to whom the PRA applied, left office on January 20, 1989. The Reagan presidential records comprise approximately 44 million pages of records and are maintained by NARA at the Ronald Reagan Presidential Library in Simi Valley, California. The

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24, 2005, Memorandum Opinion at 4-7, 9-10, 12-14; March 28, 2004, Memorandum Opinion at 3-6, 7-9, 11-12), plaintiffs do not wish to burden the Court by resubmitting the supporting materials. Paragraphs 14-21, by contrast, contain new material that is supported by citation to the accompanying Second Declaration of Thomas S. Blanton (and the materials cited therein) and to the Declaration of Sharon Fawcett (D.E. 57) submitted by the government in support of its motion to dismiss count one of the amended complaint.

Bush vice presidential records are maintained by NARA at the George Bush Presidential Library in College Station, Texas.

5. Before the expiration of the 12-year restriction period for Reagan presidential and Bush vice presidential records on January 20, 2001, the Reagan and Bush Presidential Libraries had opened significant quantities of those materials to the public, and in doing so had withheld materials falling within the P5 restriction category.

6. Following the expiration of the 12-year restriction period, in February and June of 2001, NARA notified President Bush and the representative of former President Reagan of its intention to release approximately 68,000 pages of records of former President Reagan that had been subject to the P5 restriction.

7. On March 23, 2001, June 6, 2001, and August 31, 2001, then-White House Counsel Alberto Gonzales wrote letters to then-Archivist of the United States John Carlin directing NARA not to release certain presidential and vice presidential materials under the Presidential Records Act (PRA) pending White House review of the PRA. As a result, NARA did not release the 68,000 pages of materials at that time.

8. On November 1, 2001, President George W. Bush issued Executive Order 13,233. The Order is officially published at 66 Fed. Reg. 56025 (Nov. 5, 2001), and is available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=2001_register&docid=fr05no01-104.pdf.

9. Following the issuance of Executive Order 13,233, NARA continued to withhold the 68,000 pages of formerly restricted Reagan presidential materials, despite formal requests for their release from plaintiffs in this litigation, until representatives of the former President and the

incumbent President reviewed them and authorized their release in accordance with the terms of the Order.

10. Following review under the Executive Order, the approximately 68,000 pages of records were opened to the public in three installments: About 8,000 pages were opened on January 3, 2001; approximately 60,000 pages were opened on March 15, 2002; and the final 150 pages were opened on July 24, 2002.

11. Another 1,654 pages of documents that had been withheld on P5 grounds prior to January 20, 2001, were noticed for release after plaintiffs' counsel learned of their existence and requested their release under the PRA. The 1,654 pages of documents were subjected to the review process called for by Executive Order 13,233, and were withheld from release to the public by the Archives pending the completion of that process. On April 24, 2003, the White House notified the Archives that the representative of former President Reagan had asserted privilege as to 11 documents comprising 74 of the 1,654 pages of records. On January 12, 2004, the White House notified the Archives that President George W. Bush "concurred" in the Reagan representative's claim of privilege as to the 74 pages under Executive Order 13,233.

12. On September 16, 2004, the incumbent President, through then-White House Counsel Gonzales, formally and independently asserted privilege as to nine of the 11 documents. Mr. Gonzales' declaration stated that unlike President Bush's earlier "concurrence" in the claim of privilege by former President Reagan's representative, this new assertion of privilege was "a separate assertion of privilege that is not dependent on President Reagan's assertion." At nearly the same time, both the incumbent President and former President Reagan's representative withdrew their assertions of privilege as to two of the 11 documents, which were then made available to the public at the Reagan Library.

13. In addition to the nearly 70,000 pages of Reagan presidential records that were restricted on P5 grounds until January 20, 2001, and subsequently subjected to review under Executive Order 13,233, approximately 884 pages of George H.W. Bush vice presidential records had been restricted before January 20, 2001, on either P5 grounds or the similar restriction for appointment-related records under 44 U.S.C. § 2204(a)(2). On April 23, 2002, NARA provided notice to President Bush and former Vice President Bush of its intent to open those 884 pages of Bush vice presidential records. The records were then reviewed under Executive Order 13,233, and 844 pages of them were opened to the public on June 17, 2002. The remaining 40 pages received further review before being opened to the public on July 24, 2002.

14. The second presidential administration to which the PRA applied was that of President George H.W. Bush and Vice President Dan Quayle, who left office on January 20, 1993. Accordingly, the 12-year restriction period for presidential records of President George H.W. Bush and vice presidential records of Vice President Dan Quayle expired on January 20, 2005.

15. The George H.W. Bush presidential records and the Quayle vice presidential records are maintained by NARA at the George Bush Presidential Library (together with the Bush vice presidential records). As in the case of the Reagan records, NARA had opened substantial quantities of material at the Bush Library before the expiration of the 12-year restriction period, but had withheld from public release thousands of pages of records subject to the P5 restriction. NARA estimates that approximately 57,000 pages were withheld by the Bush Library on that basis prior to January 20, 2005. *See* Second Declaration of Thomas S. Blanton

¶ 4 (citing NARA Media Alert, "Bush Presidential Records to be Released" (Feb. 18. 2005), at http://www.archives.gov/press/press-releases/2005/nr05-40.html.).

16. During the 12-year restriction period, plaintiff National Security Archive had made numerous requests to the Bush Library, and over 1,000 pages of records were withheld from the materials opened in response to those requests on the basis of the P5 restriction. *See* Second Blanton Dec. ¶ 4.

17. Following the expiration of the 12-year restriction period for the Bush-Quayle Administration records, materials that had been withheld in response to requests for Bush-Quayle records on the basis of the P5 restriction have been subject to review under the terms of Executive Order 13,233, and NARA has indicated its intention to release them "on a rolling basis over the course of several months." *See* Second Blanton Dec. ¶ 4 (citing George Bush Presidential Library, "Information on released [*sic*] of documents formerly withheld under Presidential Records Act restrictions P-2 and P-5," at http://bushlibrary.tamu.edu/research/releaseddocuments.html.). The records have not been released to the public unless and until the former officeholders have completed their review and have authorized release under the Executive Order 13,233. According to its website, the Bush Library has so far released approximately 30,519 pages of the materials in five releases dated February 18, 2005 (9,727 pages); April 5, 2005 (6,999 pages); May 12, 2005 (2,616 pages); June 7, 2005 (1,457 pages); and October 28, 2005 (10,720 pages). *See id.* The release of the remaining documents (amounting to over 25,000 pages) has not yet been authorized under the terms of Executive Order 13,233.

18. In addition to being applied to records that had been identified and withheld on P5 grounds during the now-expired 12-year restriction periods for Reagan-Bush and Bush-Quayle

administration presidential and vice presidential records, Executive Order 13,233 continues to be applied, on an ongoing basis, to all presidential and vice presidential materials requested from the Reagan and Bush Presidential Libraries. Records are not released from either library until representatives of the former officeholders have authorized their release under the terms of the Order. *See* Declaration of Sharon Fawcett ¶¶ 6-7 (D.E. 57). Review by the White House on behalf of the incumbent president does not take place until representatives of the former officeholders have completed their review under the Order. *Id.* ¶ 7.

19. Former President Reagan died on June 5, 2004. Despite his death, representatives of the former President and his family continue to review materials requested from the Reagan Library under Executive Order 13,233, and Reagan presidential records are not released until the Reagan representative has authorized their release under the Order. Second Blanton Dec. ¶ 3.

20. Plaintiffs continue, on an ongoing basis, to request the release of documents from the Reagan presidential records at the Reagan Library and the Bush presidential and vice presidential records and Quayle vice presidential records at the Bush Library. The National Security Archive, in particular, currently has multiple requests outstanding to both libraries. All records requested by plaintiffs from the Reagan and Bush Libraries are subject to review under the Order. Second Blanton Dec. ¶¶ 3, 6.

21. In part because of the need for review and authorization of release under the Executive Order, there are currently lengthy delays in releasing documents from both libraries. At the Reagan Library, the average processing time for a request for release of presidential materials has now reached 60 months – five full years. Although similar estimates of processing time at the Bush Library are not available, delays are significant there as well. Second Blanton

Dec. ¶¶ 3, 6. Substantial portions of the delay are attributable to review of the materials by the representatives of the former presidents/vice presidents. Fawcett Dec. ¶¶ 6, 7.

22. Since the issuance of Executive Order 13,233, NARA has complied with the Order and intends to continue doing so indefinitely. Such compliance involves the application of Executive Order 13,233 to each proposed release of presidential and vice presidential records from the Reagan and Bush Presidential Libraries.

Respectfully submitted,

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