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.	)	

PLAINTIFF PUBLIC CITIZEN'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT ON COUNT TWO OF THE AMENDED COMPLAINT

INTRODUCTION

This motion concerns the public's right of access to 11 specific documents that are part of the historical records of the administration of the late President Ronald Reagan, who left office more than 15 years ago. The Presidential Records Act ("PRA") protects records containing confidential communications among the President and his advisers for 12 years after the President's term ends, but provides that such records must thereafter be made public upon request, unless the release of a particular record would violate the Constitution. Accordingly, despite delays occasioned by President George W. Bush's issuance of Executive Order 13,233, since the expiration of the 12-year period tens of thousands of records containing confidential communications within the Reagan White House about issues of the greatest sensitivity have been released to the public. The 11 documents at issue here, however, have been withheld because President Reagan's representative has purported to assert executive privilege to bar their release. The documents, which range in age from almost 16 years to nearly 22 years and concern

subjects as diverse as Mrs. Reagan's use of military aircraft, international economic issues, planning, litigation, the President's AIDS Commission, the Iran/Contra affair, presidential pardons, and (ironically) executive privilege, appear to have been arbitrarily singled out by the former President's representative from a host of similar documents that have been released to the public. Nonetheless, President Bush, consistent with the terms of Executive Order 13,233, has "concurred" in the assertion of privilege because, in his view, no "compelling circumstances" require release of the documents.

The Archives should be required to release the documents under the PRA for three reasons. First, the assertion of privilege to which President Bush has deferred under the terms of the Executive Order is improper because it was not made by the former President, but by a private individual who has no power to invoke the privilege. To the extent the Executive Order directs that weight be given to such an assertion, it is unlawful and cannot serve to bar the release of records that are otherwise subject to public access under the PRA.

Second, even if the assertion of privilege by a "representative" were equivalent to a claim by the former President, it is improper for incumbent executive branch officials (including the incumbent President) to defer to a privilege claim by a former President rather than making an independent judgment about whether the protection of the office of the Presidency requires assertion of a constitutional privilege. Again, the Executive Order is unlawful to the extent that it provides for such deference to claims of privilege by a former President, and it is that unlawful feature of the Order that has been applied in this instance to require the Archivist to withhold these records.

Third, any claim of privilege (whether made by the former President or the incumbent) as to these specific records is insufficient to override the PRA's command that they be released to

the public. The constitutional privilege afforded confidential communications between the President and his close advisers erodes with the passage of time, both because there has always been an expectation that such communications will eventually be made public and because of the great historical significance of their contents. Congress' choice of the 12-year period of protection for confidential advice reflects its judgment that this period is sufficient to protect the interest in fostering candid advice to the President that forms the basis for the constitutional privilege. Moreover, presidential libraries have typically made similar materials available after a comparable passage of time. And the release of tens of thousands of pages of Reagan records containing confidential communications among the President and his advisers itself belies the notion that protecting this handful of documents is essential to preserving the constitutional prerogatives of the Presidency. Absent any reason to believe that these documents that have been singled out for withholding are materially different from the thousands and thousands that have been released, the claim that the *Constitution* requires the Archive to withhold them despite the passage of so many years cannot be sustained.[1]

FACTS

This Court has described the legal and factual background of this case, including the terms of the PRA and the promulgation of the Executive Order, in its Memorandum Opinion of March 2004, and we will not repeat that discussion. We will focus instead on the facts specifically relevant to the 11 documents now at issue.

[1] All plaintiffs have previously moved for summary judgment on their claim that the President lacked authority to issue the Executive Order. That claim, too, would require the relief sought in this motion, because the withholding of the documents is based on the terms of the Executive Order and not an independent assertion of privilege by the President.

In the spring of 2002, following the filing of the parties' cross-motions for dismissal and summary judgment in this action, counsel for the plaintiffs learned that in addition to the approximately 68,000 pages of Reagan records whose withholding under Executive Order 13,233 originally gave rise to this action (and which were all released to the public by July 2002), there were approximately 1,500 pages of additional Reagan materials that had been withheld from the public under 44 U.S.C. § 2204(a)(5) prior to January 20, 2001, but that had not been included by the Archives in its notices to the former and incumbent Presidents of its intent to release formerly restricted documents. Plaintiff Public Citizen submitted a request under the PRA and FOIA[2] for release of those hitherto unknown documents on May 7, 2002. Exh. A.[3]

In June 2002, the Archives provided notice (as required by the Executive Order) to the former and incumbent Presidents of its intention to open these additional records, which, as it then disclosed, actually consisted of 1,654 pages of documents. *See* Exh. B. After ten months of review, White House Counsel Alberto Gonzales informed the Archives on April 24, 2003, that former President Reagan's representative (who was acting in place of the former President under the terms of the Executive Order because the former President was incapacitated) had asserted privilege with respect to 74 pages of the records as well as 15 minutes of videotape that the Archives was also treating as subject to Public Citizen's request. Mr. Gonzales further informed the Archives that President Bush would "concur" in the assertions of privilege under the terms of

[2] The PRA provides for the administration of presidential records "in accordance with section 552 of title 5, United States Code," 44 U.S.C. § 2204, so requests for access to presidential records held by the Archives under the PRA take the form of FOIA requests.

[3] References to exhibits are to the exhibits attached to the Statement of Undisputed Facts in support of this motion.

the Executive Order absent some "compelling circumstance," and that the White House would keep the Archives apprised of the status of the review of the documents. Exh. C.

On January 12, 2004, after nearly 19 months, the White House finally concluded its review of the materials, and White House Counsel Gonzales notified the Archives that the President concurred in the assertion of privilege for the 74 pages. Mr. Gonzales further informed the Archives that President Reagan's representative had withdrawn the claim that the video footage was privileged, and, although he did not expressly say so, President Bush evidently concurred in the Reagan representative's decision to authorize access to the videotape. Exh. D.

Based on the results of the Executive Order review process, the Archives informed Public Citizen by letter dated January 25, 2004, that its PRA/FOIA request had been granted in part (as to the 1,580 pages and the videos) and denied in part (as to the 74 pages). The Archives' denial letter stated that "[i]n accordance with the Presidential Records Act and Executive Order 13233, the remaining 74 pages are being withheld pursuant to constitutionally based privileges that have been asserted by the former and incumbent Presidents." Exh. E. As required by the Archives' FOIA regulations, Public Citizen filed a timely appeal of the denial on February 27, 2004. Public Citizen's appeal letter argued that because of its erosion over time, the constitutionally based privilege for presidential communications was no longer sufficient to override the interest in public access to the materials; that the invocation of the privilege by the representative of the former President was improper; and that the Executive Order could not justify the withholding of the records because it was unlawful for the reasons already set forth by Public Citizen and the other plaintiffs in this litigation. Exh. F.

The Archives denied Public Citizen's appeal on April 1, 2004. The denial letter noted that Public Citizen's grounds for appeal "involve your taking issue with continued assertion by

former President Reagan and President George W. Bush of a constitutionally based privilege over the remaining documents being withheld." Without addressing the merits of Public Citizen's arguments, the letter stated that the Archives had "again contacted the legal representatives of both former President Reagan and President George W. Bush to ascertain their current views" about whether the records could be disclosed, and that "both have affirmed to us that they continue to maintain the assertion of a constitutionally based privilege over these pages. Accordingly, your appeal is denied under Executive Order 13233, § 3(d)(1)(i)." Exh. G.

The letter denying Public Citizen's appeal described each of the 11 separate documents, consisting of 74 total pages, that were being withheld (*id.*):

> 1. March 13, 1986 Alfred H. Kingon, "The White House, Washington, Memorandum for Donald T. Reagan [*sic*], "International Economic Issues." (1 copy totaling 4 pages)
>
> 2. January 6, 1987, Donald T. Regan, Chief of Staff to the President, Memorandum for the President, "Planning for 1987." (10 pages) (3 copies totaling 30 pages)
>
> 3. December 8, 1986, Peter J. Wallison, Counsel to the President, Memorandum for Thomas F. Gibson, Special Assistant to the President and Director of Public Affairs, "Talking Points on Iran/Contra Affairs." (2 pages) (3 copies totaling 6 pages)
>
> 4. August 5, 1986, Peter J. Wallison, Counsel to the President, Memorandum for the File, "Executive Privilege, Release of Rehnquist Papers." (4 pages) (3 copies totaling 12 pages)
>
> 5. November 14, 1986, Peter J. Wallison, Counsel to the President, Memorandum for Donald T. Regan, Chief of Staff to the President, "Executive Privilege." (1 copy totaling 3 pages)
>
> 6. November 22, 1988, Arthur B. Culvahouse, Jr., Counsel the [*sic*] President, Memorandum for the President, "Pardon for Oliver L. North, John Poindexter, and Joseph Fernandez" (1 copy totaling 4 pages)
>
> 7. December 1, 1988, Arthur B. Culvahouse, Jr., Counsel to the President, Memorandum for the President, "Pardon for Oliver L. North, John Poindexter, Joseph Fernandez." (1 copy totaling 2 pages)

8. May 3, 1988, Arthur B. Culvahouse, Jr., Counsel to the President, Memorandum for the President, "AIDS Commission Litigation — Executive Privilege." (2 pages) (2 copies totaling 4 pages, one copy of which with annotations)

9. November 10, 1982, H.P. Goldfield, Associate Counsel to the President, Memorandum for Fred F. Fielding, Counsel to the President, "Use of Military Aircraft by Mrs. Reagan." (1 copy totaling 4 pages)

10. August 25, 1988, Arthur B. Culvahouse, Jr., Counsel to the President, Memorandum for the President, "Whether to Appeal Federal District Court Decision Allowing the PLO Observer Mission at the United Nations Office to Remain Open." (1 copy totaling 3 pages)

11. Undated Memorandum for the President from the Attorney General, "Appeal of the Decision Denying the Enforcement of the Anti-Terrorism Act of 1987." (Attachment to August 25, 1988 Culvahouse Memorandum for the President, described #11 [*sic*] above.) (1 copy totaling 2 pages)

Following this Court's issuance of its Memorandum Opinion and Order on March 29, 2004, and its subsequent Order dated May 24, 2004, plaintiffs filed their First Amended Complaint on July 2, 2004. The Amended Complaint's second claim for relief, on behalf of plaintiff Public Citizen, seeks release of these 11 documents, and Public Citizen now requests summary judgment on that claim.

SUMMARY OF ARGUMENT

Based on the undisputed facts, Public Citizen is entitled to judgment as a matter of law on its claim that the withholding of the 11 documents at issue is unlawful. The Presidential Records Act permits a President to restrict access to documents containing confidential communications among the President and his advisers for up to twelve years, but thereafter requires their release. Only if records are subject to a valid claim of *constitutional* privilege may they be withheld in the face of this statutory command. Here, there is no valid constitutional basis for withholding the documents. Rather, the records are being withheld as a direct result of two unlawful features

of Executive Order 13,233: first, its provisions that give effect to claims of privilege by "representatives" of incapacitated or deceased Presidents as if such claims had been made by a former President or an incumbent President; and second, its requirement that the incumbent President (and, as a result, the Archivist) defer to a claim of privilege by a former President, even if that claim is not well-grounded, absent "compelling circumstances." The result of these two features of the Order is that the records have been withheld on the basis of a supposed constitutional privilege even though the privilege was invoked by someone not entitled to assert it, and even though no sitting executive branch official has ever made an independent determination that the records are entitled to protection by the privilege (that is, a determination that the interests served by the constitutional privilege outweigh the public interest in access to these specific historical records).

Beyond these two points, even if a claim of constitutional privilege had been properly asserted, that claim would not suffice to justify withholding of these documents at this time. The constitutional privilege afforded to communications between the President and his advisers is a qualified one that erodes as time passes. It exists only to help ensure the candor between the President and his advisers that is essential to the President's performance of his constitutionally assigned functions. That candor is not threatened, however, by the release of historically significant documents many years after the President leaves office, because it has long been part of the expectations of Presidents and their advisers that such records will become available to the public after some years have elapsed. Moreover, the expectations of advisers in the Reagan White House, and in the administrations of subsequent Presidents, are specifically shaped by the 12-year restriction period provided by the PRA. The withholding of an arbitrarily selected handful of documents, years after the fact, even while thousands of pages of similar documents

are being released, will be so unlikely to affect the candor of presidential advisers that any marginal beneficial effect it may have is vastly outweighed by the strong public interest in access to historically significant records. Put another way, because the release of the documents will cause no damage to the office of the Presidency, the Constitution does not require that the statutory command that they be released be overridden.

ARGUMENT

I.
THE PRESIDENTIAL RECORDS ACT REQUIRES RELEASE OF THE MATERIALS UNLESS THEY ARE SUBJECT TO A CONSTITUTIONAL CLAIM OF PRIVILEGE.

The PRA reflects Congress' judgment that the records of the Presidency are of great historical value and public importance and should be made available to the public as soon as possible. In the PRA, Congress expressed these judgments by providing that presidential records were subject to the "complete ownership, possession, and control" of the United States, 44 U.S.C. § 2202, and requiring that upon the conclusion of a President's term they be entrusted to the custody and control of the Archivist of the United States. 44 U.S.C. § 2203(f)(1). To drive home its emphasis on the importance of public access to historical records, the Act explicitly provides that "[t]he Archivist shall have an affirmative duty to make such records available to the public as rapidly and completely as possible consistent with the provisions of this Act." *Id.*

The PRA balances its emphasis on the importance of access with a recognition that, as to certain types of records, premature access may have damaging effects. Thus, the PRA permits a President to restrict access to certain categories of records for up to 12 years after he leaves office, but no longer. As relevant here, those categories include "confidential communications requesting or submitting advice, between the President and his advisers, or between such advisers." 44 U.S.C. § 2204(a)(5). After the 12-year restriction period expires, the former

President's records become available under the Freedom of Information Act, except that Exemption (b)(5) of FOIA, which provides protection for privileged documents, does not apply. 44 U.S.C. § 2204(c)(1). Thus, unless advisory documents are subject to some other exemption available under FOIA (such as the protection for national security classified information or for various forms of private or proprietary information), the statute requires their release, upon request, after the 12-year restriction period expires.[4] As the House Report on the PRA explained, "these confidential communications would be publicly made available upon the termination of the mandatory restriction period set by the former President, unless an appropriate FOIA exemption other than (b)(5) were available." H.R. Rep. No. 95-1487, at 14 (reprinted in 1978 U.S.C.C.A.N. 5732, 5745).[5]

The statutory command that presidential advisory communications be disclosed at the end of the 12-year restriction period is subject to one qualification: The Act states that it does not "confirm, limit, or expand any constitutionally-based privilege which may be available to an incumbent or former President." 44 U.S.C. § 2204(c)(2). The effect of this provision is unambiguous. If a constitutional privilege is properly invoked, and if its effect is to require that particular records not be disclosed, then the PRA does not purport to override the commands of the Constitution, and the documents must be withheld. Conversely, however, if the Constitution does not *require* that particular documents be withheld, then the PRA affirmatively mandates their release; otherwise, the constitutionally based privilege would be "expanded," contrary to

[4] The 11 documents at issue have not been withheld on the basis of other FOIA exemptions. For example, they are not national security classified.

[5] See also this Court's Memorandum Opinion, at 5-6.

the PRA's express terms. In short, the PRA *permits* withholding for privilege after 12 years only where the Constitution *requires* it.

The issue in this case, therefore, is whether a constitutional privilege requires the Archivist to withhold the 11 documents at issue. The constitutional privilege in question is the one recognized by the Supreme Court in *United States v. Nixon*, 418 U.S. 683, 708 (1974), and *Nixon v. Administrator of General Services*, 433 U.S. 425, 447-51 (1977), which protects confidential communications among a President and his close advisers.[6] For purposes of this motion, three features of this privilege are of critical importance. First, because the privilege exists to protect the office of the President, it may be invoked only with the personal authorization of one who has held that office: the incumbent President or a former President. *See Nixon v. Administrator*, 433 U.S. at 447-49. Second, the mere invocation of the privilege by a former President is not enough to command incumbent executive branch officials to withhold records; rather, incumbent officers must make an independent determination that the claim is well-founded because if it is not, their duty to comply with the law compels them to release the records. *See Public Citizen v. Burke*, 843 F.2d 1473, 1479 (D.C. Cir. 1988). And third, the privilege itself is not only a qualified one, in the sense that other, competing interests may override it, but it is also one whose force diminishes with the passage of time, so that interests in access may overcome the privilege more easily as more time goes by. *Nixon v. Administrator*, 433 U.S. at 450-51.

[6] White House Counsel Gonzales' January 12, 2004, letter to the Archives also refers to the deliberative process privilege, but that common-law privilege (*see In re Sealed Case*, 121 F.3d 729, 745 (D.C. Cir.1997)) cannot be asserted under the PRA after the 12-year period expires. 44 U.S.C. § 2204(c)(1).

It follows from these principles that the determination whether the constitutional privilege requires withholding of the records at issue requires examination of, first, whether the privilege has been invoked by a person with authority to do so; second, whether incumbent executive branch officials have properly exercised their own constitutional responsibility to evaluate the claim of privilege independently; and, finally, whether, in light of the nature of the materials and the passage of time, an assertion of privilege is sufficient to overcome the strong public interest in access to the records.

II.
A "REPRESENTATIVE" OF A FORMER PRESIDENT HAS NO AUTHORITY TO ASSERT THE PRIVILEGE.

The records now at issue are being withheld because of the assertion of privilege not by a former President, but by a representative of a former President who was incapacitated at the time the claim was made. Consistent with the terms of the Executive Order, the incumbent President deferred to the representative's assertion of privilege, "concurring" in it because there were in his view no "compelling circumstances" that required release of the records. Absent the representative's assertion of privilege, the incumbent President would have authorized release of the documents unless he found that "compelling circumstances" required that they be withheld. Thus, the withholding of the documents is the direct result of the representative's assertion of privilege.

As explained in plaintiffs' original motion for summary judgment in this action, however, a representative of a former President has no power to assert the privilege. Rather, the privilege must be claimed "by the minister who is the political head of the department, and … he should have seen and considered the contents of the documents and himself have formed the view that on grounds of public interest they ought not to be produced." *United States v. Reynolds*, 345

U.S. 1, 8 n.20 (1953) (citation omitted); *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"). *Nixon v. Administrator* extended the ability to claim privilege to a former President to ensure that the needs the privilege serves would be fully protected, *see* 433 U.S. at 448-49, but nothing in that opinion suggests that the privilege may be asserted by a private individual who has never held the office of the Presidency. *See, e.g., Blumenthal v. Drudge*, 186 F.R.D. 236, 242 (D.D.C. 1999) (only incumbent and former Presidents have authority to invoke privilege).

Indeed, such an extension of the privilege would be antithetical to the interests it is designed to advance. As the Supreme Court emphasized in *Nixon v. Administrator*, it is the "Executive Branch in whose name the privilege is invoked." 433 U.S. at 448. The assertion of privilege reflects "a President['s] conclu[sion]" that, in light of the institutional needs of the executive branch, disclosure "would be injurious to the public interest." *United States v. Nixon*, 418 U.S. at 713. Such a decision, by its nature, must be made "by a policy-maker who can be assumed to have the larger public interest in mind." *United States v. AT&T*, 86 F.R.D. 603, 604 (D.D.C. 1979). Accordingly, a President "has the primary, if not the exclusive, responsibility of deciding when presidential privilege must be claimed, when *in his opinion* the need of maintaining confidentiality in communications . . . outweighs whatever public interest or need may reside in disclosure." *Dellums v. Powell*, 561 F.2d 242, 247 (D.C. Cir. 1977) (emphasis added).

The authority to make such judgments on behalf of the public and the executive branch does not reside in an individual just because he or she has been designated to act as a representative of an incapacitated or deceased President. Only one who has held the office of President can claim to have been entrusted to make that judgment in the first instance. Here, the

required judgment has never been made by a President or former President. Instead, a private citizen has chosen which documents are to be withheld, and the incumbent, rather than exercising independent judgment, has deferred to that choice on the ground that there are no "compelling circumstances" that require him to override it. The Constitution surely does not command that documents designated in this manner ever be recognized as privileged, let alone when disclosure is otherwise required by statute. And absent a constitutional imperative that the documents be withheld, the PRA mandates their release.

III.
INCUMBENT EXECUTIVE BRANCH OFFICIALS MAY NOT DEFER TO A FORMER OFFICEHOLDER'S CLAIM OF PRIVILEGE.

Even if the assertion of privilege by a representative of an incapacitated former President could permissibly be viewed as the equivalent of a claim of privilege by the former President himself, it would remain improper for incumbent executive branch officials — including not only the Archivist but the President as well — to defer to the former President's claim without exercising independent judgment about whether it is well-founded. Such deference disregards the statutory command that records be disclosed unless the Constitution requires otherwise.

As the D.C. Circuit recognized in *Public Citizen v. Burke*, 843 F.2d at 1479, when a statute requires that records be disclosed unless they are constitutionally privileged, the duty of the incumbent President and his subordinates to "take care that the laws be faithfully executed" requires them to make their own determination whether the Constitution requires withholding of records rather than granting deference to a former President's claim of privilege.[7] As the Court

[7] *Public Citizen v. Burke* is fully described in plaintiffs' earlier summary judgment papers and our opposition to the motion to dismiss. We will not repeat that discussion, but will merely point to those aspects of the D.C. Circuit's reasoning most pertinent to the issue here: whether the "concurrence" standard applied to these documents under the Executive Order is lawful.

put it, "an incumbent President, aided perhaps by his close subordinates, must exercise some discrimination and judgment with respect to a former President's assertion of executive privilege if he wishes to support it." *Id.* Indeed, the court emphasized that the executive branch's "responsibility" to make its own judgment of the validity of a former President's claim of privilege could not, consistent with the statutory and constitutional responsibilities of the incumbent President, be "transferred to the Judiciary." *Id.*

That, however, is precisely what the President, following the terms of his Executive Order, has done in this case. Instead of judging whether the 11 documents at issue are genuinely entitled to constitutional protection against disclosure so many years after they were written, the President has simply "concurred" in the refusal by the representative of the former President to authorize their release because he sees no "compelling" reason to release them.[8] Just as in *Public Citizen v. Burke*, the effect of this action is to transfer to the courts the task of determining in the first instance whether it is actually lawful to withhold the records (that is, whether the constitutional claim of privilege is meritorious).

Put another way, *Public Citizen v. Burke* leaves no room for any contention that the Constitution requires that documents be withheld simply because a former President has asserted privilege and the incumbent President has concluded only that there are no "compelling circumstances" that warrant their disclosure. And again, if the Constitution does not require that they be withheld, the statute commands that the Archivist release them.

[8] The government has acknowledged that the President's "concurrence" was based on the "compelling circumstances" standard of Section 4 of the Executive Order. *See* Def. Opp. to Plaintiffs' Supp. Mem. in Response to the Court's Order of May 24, 2004, at 2-3 (conceding ripeness of plaintiffs' challenge to the "compelling circumstance" standard); *id.* at 6-7 (same).

IV.
GIVEN THE EROSION OF THE PRIVILEGE OVER TIME, THESE DOCUMENTS ARE NO LONGER PROTECTED AGAINST RELEASE TO THE PUBLIC.

Based on the descriptions of them provided by the Archives, the documents at issue in this case appear to be memoranda that formed a small part of the policy deliberations of the Reagan White House concerning a number of mostly quite discrete matters (litigation over the President's AIDS Commission, Mrs. Reagan's use of military aircraft, whether to appeal a particular district court opinion, whether to assert executive privilege as to documents relating to then-Associate Justice Rehnquist), a few generic subjects (international economics, planning for 1987, and executive privilege), and one matter of significant public notoriety (Iran/Contra). What they all have in common is age: The most recent document dates from December 1988, and the oldest from November 1982, making them all about 16 to 22 years old. Another common feature of the documents is that myriad other documents of the same vintage, by the same authors or persons of comparable status within the Reagan White House, and addressing the same issues or issues of comparable significance and controversy, have been released to the public since the expiration of the PRA's 12-year restriction period.

Even if the flaws of Executive Order 13,233 are put entirely aside, the assertion of privilege as to these documents does not suffice to block their release to the public under the terms of the PRA. The privilege for presidential communications erodes with the passage of time because of the shared expectation that such materials will be released to the public once some years have passed after the President's departure from office. Whatever merit a claim of privilege as to these particular documents might have had in 1988, the constitutional imperative of protecting the candor of communications between a President and his close advisers does not require that they be singled out for withholding many years later, after any reasonable

expectation that they would remain confidential has ended and thousands of pages of other confidential documents of similar nature have been released.

A. Controlling Case Law Establishes That the Privilege Erodes Over Time and Cannot Bar Access to These Records After a Lapse of More Than 15 Years.

The constitutionally based privilege protecting confidential communications between the President and his close advisers, first recognized in *United States v. Nixon*, rests on "the necessity for protection of the public interest in candid, objective, and even blunt or harsh opinions in Presidential decision making. A President and those who assist him must be free to explore alternatives in the process of shaping policies and to do so in a way many would be unwilling to express except privately." *United States v. Nixon*, 418 U.S. at 708. But the protection of that interest, important as it is, does not require that communications remain secret indefinitely, nor do Presidents and their advisers expect that they will. As the Supreme Court explained in *Nixon v. Administrator*:

> An absolute barrier to all outside disclosure is not practically or constitutionally necessary. … [T]here has never been an expectation that the confidences of the Executive Office are absolute and unyielding. All former Presidents from President Hoover to President Johnson have deposited their papers in Presidential libraries … for governmental preservation and eventual disclosure. … The expectation of confidentiality of executive communications thus has always been limited and subject to erosion over time after an administration leaves office.

433 U.S. at 450-51.

Although the Court in *Nixon v. Administrator* was not required to determine how much time had to pass before a claim of privilege would no longer suffice to bar public access to materials of historical interest, the Court noted that the practices of the then-existing presidential libraries (which were created on the basis of donation of materials by former Presidents, with restrictions on access imposed by deed of gift) were instructive. The Court emphasized that "[i]n each of the Presidential libraries, provision has been made for the removal of … restrictions with

the passage of time," *id.* at 450 n.12, and it pointed out that in the libraries of President Nixon's two immediate predecessors, Kennedy and Johnson, very few non-national security related restrictions on access remained: Thus, less than 14 years after the end of the Kennedy Administration, the Kennedy Library had processed 85 percent of its material, of which "only 0.6 percent [was] under donor (as distinguished from security-related) restriction." *Id*. In the Johnson Library, less than nine years after President Johnson had left office, "review of nonclassified materials [was] virtually complete, and more than 99% of all nonsecurity classified materials [was] unrestricted." *Id.* These examples make clear that what the Court in *Nixon v. Administrator* had in mind when it referred to the erosion of the privilege over time were periods of time of from nine to 14 years — less than the time that has elapsed here since the end of the Reagan Administration, and significantly less than the age of the documents themselves.

The D.C. Circuit similarly addressed the erosion of the privilege over time in another Nixon case, *Nixon v. Freeman*, 670 F.2d 346 (D.C. Cir. 1982). There the issue was the lawfulness of Archives regulations providing for public access to tapes of President Nixon's White House conversations — communications that by their nature consisted very largely of confidential policy-related discussions with advisers. Former President Nixon argued that granting public access to such conversations without requiring that listeners make a particularized showing of need would violate the privilege, and he urged as well that access should be restricted for a fixed period of 25 years. The court, emphasizing that the privilege "is not a fixed and permanent one, but erodes with the passage of time," *id.* at 356, rejected these arguments. The court based its decision in significant part on its observation that "[a]lthough there is no fixed number of years that can measure the duration of the privilege, it is significant that no public access will occur until at least *eight years* after the event disclosed." *Id.* (emphasis

added). Notably, the most recent documents at issue in this case are almost twice as old as the Nixon tapes were when the D.C. Circuit concluded that the passage of eight years was sufficient to give the interest in public access greater weight than the former President's concerns about privilege.

B. The Presidential Records Act Reflects a Congressional Judgment that 12 Years Is Enough to Protect the Interests in Confidentiality and Candor That the Privilege Protects.

Nixon v. Administrator and *Nixon v. Freeman* are the principal judicial precedents that address the issue of erosion of the privilege with the passage of time. An equally important guidepost, however, is the congressional judgment reflected in the PRA's 12-year restriction period. As explained above, the PRA permits an outgoing President to impose a blanket 12-year ban on access to advisory communications, but provides that after the 12-year period ends, the FOIA exemptions ordinarily available for privileged communications are inapplicable. As the Act's legislative history makes clear, these provisions reflected Congress' considered judgment about the amount of time needed to allow protection of the candor of communications within the White House while at the same time permitting timely public access to materials of great public interest. The House Report on the legislation that became the PRA described both the considerations that led to the imposition of a limited restriction period and the hearing process that informed Congress' deliberations:

> At issue was balancing ready availability of the records against the prospect that premature disclosure might have a "chilling effect" on Presidents and the frankness of advice they could expect from their staffs. Although the chill concept was acknowledged to be a subjective one, with few specifics to point to, it was generally felt that failure to recognize its possibility might eventually diminish the completeness of the written record created and left by Chief Executives.
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> On the other hand, it was felt important that once having declared the President's papers to be Government records, they be governed to the extent feasible by the same

> statutory standards controlling Cabinet members' records and all other Government records. Consistency in application of the rules seemed critical.
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> The majority of the witnesses urged recognition of some period of time after a President leaves office to control access — but to do so in a manner that would not show favoritism to particular Government insiders or scholars. It was urged as well that due consideration be given to the expectation of confidentiality of Executive communications to avoid the prospect of a constitutional infirmity.
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> Some form of statutory access provisions, rather than leaving the choice entirely up to the former President, was considered necessary to shield the Archivist from unnecessary pressure. The Archivist, it was felt, would be susceptible to possible pressure from the incumbent President to release embarrassing and inappropriate materials concerning a predecessor or rival, and from the predecessor to withhold materials when no sound policy reason for doing so would be evident. The unlimited right to restrict access would also allow the outgoing President to close availability entirely during a set period; to permit trusted researchers to view the materials to the exclusion of others; and set mandatory restrictions which would be akin to assertions of privilege over the materials against the public.
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> The hearing record and subsequent communications indicated that 16 of the 18 witnesses felt that a period of 10 years or less in which the President could assert some restrictions would be sufficient to accommodate these policy and legal concerns.

H.R. Rep. No. 95-1487, at 8-9 (reprinted in 1978 U.S.C.C.A.N. 5732, 5739-40). In light of these considerations, Congress arrived at the statutory restriction period in "an attempt to formulate a statutory access policy which balances the objectives of assuring early public availability with the concern that the premature disclosure of sensitive presidential records will eventually result in less candid advice being placed on paper and a depleted historical record. The President was thus given this authority not because of any right he had in the data, but to accommodate the practical concerns about possible chill on advice." *Id.* at 14-15 (1978 U.S.C.C.A.N. at 5745-46).[9]

[9] In enacting the statute, Congress extended the 10-year restriction period in the bill reported by the House Committee to 12 years to provide an additional measure of protection.

Thus, the 12-year statutory period itself reflects Congress' judgment about the period of time records must be restricted in order to serve precisely the interests that the constitutional privilege exists to protect. Of course, Congress did not purport to place a limit on any constitutional privilege that might exist (*see id.* at 14 (1978 U.S.C.C.A.N. at 5745)), and by stating that it did not "confirm, limit, or expand" any privilege that might survive the 12-year period, Congress in effect provided a safety valve in the event that a former President might persuade the Archivist or a reviewing court that the constitutional privilege prevented disclosure of particular materials after expiration of the 12-year period. Nonetheless, in light of Congress' undoubted power to regulate and provide for public disclosure of executive branch records — including presidential records, *see Nixon v. Administrator*, 433 U.S. at 441-46 — Congress' judgment that a 12-year restriction period is sufficient to avoid the same chilling effect that the constitutional privilege is intended to prevent is entitled to considerable deference. *See Nixon v. Freeman*, 670 F.2d at 356 n.13 (finding it "instructive" that Congress had concluded that 10-12 years was sufficient to protect privileged communications).

The PRA's 12-year restriction period is relevant in another respect as well. To the extent that the privilege exists to create an expectation of confidentiality that will foster needed candor within the White House, the expectations of advisers in the Reagan White House, and in subsequent administrations, were presumably shaped by the PRA's 12-year restriction period. The possibility that individual communications will be singled out for protection beyond that period, by contrast, likely has little effect on the willingness of advisers to offer blunt and unvarnished advice. Granting protection to advisory communications beyond the statutory 12-year period provides *more* confidentiality than presidential advisers reasonably expect, and thus does nothing to advance the ends that the constitutional privilege promotes.

C. Affording Protection to a Handful of Arbitrarily Selected Documents When Thousands of Similar Documents Have Been Disclosed Does Not Serve the Interests the Constitutional Privilege Is Intended to Advance.

Perhaps the best indication that a claim of privilege as to these documents can no longer overcome the public interest in access to them is the public release of tens of thousands of similar documents since the expiration of the 12-year restriction period. As of January 20, 2001, the Reagan Library had opened over four million pages of records, of which about 70,000 pages containing confidential communications between and among the President and his advisers had been restricted from access under 44 U.S.C. § 2204(a)(5).[10] Of those 70,000 pages of records, all but 74 pages — about .1% — have now been opened to the public.

Most of the almost 70,000 pages of formerly restricted documents that have now been opened have been indexed, document-by-document, by the Archives, and the indices are available on the internet.[11] As the indices make clear, the materials released consist of a vast number of internal White House memoranda addressing the whole range of issues addressed by the Reagan Administration during its eight years in office, including topics of tremendous controversy, such as the Supreme Court nomination of Robert Bork.[12] The documents released include many items written by the authors of the 11 documents that have been withheld. For

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[10] The approximately 70,000 pages include the approximately 68,000 pages that the Archives originally noticed for release in 2001 and the 1,654 pages that it later revealed had been held back at the request of President Reagan's representative.

[11] The index for the 8,000-some pages opened in January 2002 can be found at www.reagan.utexas.edu/p5inv010302.htm; the indices for the 59,850 pages released in March 2002 are at www.reagan.utexas.edu/p5inv031502.htm; and the index for the 150 pages released in July 2002 is at www.reagan.utexas.edu/p5inv071902.htm (all last visited August 17, 2004).

[12] Memoranda concerning the Bork confirmation fight were among those released on July 19, 2002, including, for example, document number 7275, described as a memorandum from D'Souza to Bauer, dated October 14, 1987, entitled "Life after Bork." *See* www.reagan.utexas.edu/openedp5/P5%20Documents%20Opened%207_19_02_1Page8.html.

example, the March 15, 2002, release of over 59,000 pages of documents included materials from the office files of Donald Regan, Peter Wallison, Arthur B. Culvahouse, Jr., and H.P. Goldfield, as well as office files from the White House Counsel's Office.[13] In addition, documents written by Cabinet Secretary Alfred Kingon were included in both the January 2002 and March 2002 releases.

The nearly 70,000 pages released include many documents concerning subjects very similar to those of the 11 documents withheld. For example, the publicly available Reagan records include a number of memoranda from Alfred Kingon to Donald Regan on subjects comparable to the document on "International Economic Issues" that has been withheld. These include a March 1985 memorandum regarding "review of economic affairs discussion,"[14] a January 1986 memorandum on "improving trade strategy,"[15] and a January 1985 memorandum entitled "Policy Update/Strategic Planning."[16] Similarly, the Wallison files released in March 2002 contain what appears to be a copy of the December 8, 1986, "Talking Points on Iran/Contra Affairs" that is the third of the items for which the Reagan representative has claimed privilege.[17]

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[13] The Staff Member and Office files opened on March 2, 2002, are listed in a "pdf" document at www.reagan.utexas.edu/openedp5/open%20docs%2015mar02.pdf. The Regan files opened are listed at p. 168 of that document; the Wallison files at p. 214, the Culvahouse files at p. 29, the Goldfield files at p. 75, and the Counsel's Office files at p. 22.

[14] *See* www.reagan.utexas.edu/openedp5/Open%20docs-Subject%20File%2015mar02_1Page189.html.

[15] *See* www.reagan.utexas.edu/openedp5/Open%20docs-Subject%20File%2015mar02_1Page521.html.

[16] *See* www.reagan.utexas.edu/openedp5/open%20docs%2015mar02.pdf, at p. 168.

[17] *See* www.reagan.utexas.edu/openedp5/open%20docs%2015mar02.pdf, at p. 165 (listing a document described as "memo Wallison to Gibson re Iran/Contra talking pts 2 12/8/86"). It is remarkable that, after months of review, the incumbent President rubber-stamped

Moreover, the documents released contain a number of items discussing legal issues relating to the President's Commission on AIDS, the subject of one of the withheld documents.[18] And even where there is not an exact match between the subjects of the withheld documents and documents that have been opened, there are close analogs. For example, two of the withheld documents concern executive privilege. The documents that have been released include extensive legal discussions of another executive prerogative, the veto power.[19] Two other documents that have been withheld concern whether to appeal a particular district court decision; similarly, the documents released contain communications about other litigation of interest to the Administration.[20]

In short, the tiny handful of documents withheld do not appear meaningfully different from the many thousands of documents that have been released that involve the same presidential advisers (or ones of equal rank) and the same issues (or issues of equal or greater consequence). Certainly neither White House nor the defendants have not asserted that they are materially different. If enough time has passed to permit the release of the documents that have been released without harm to the candor of presidential advisers, there is little reason to think that the office of the Presidency will by harmed by the release of the 11 documents that have

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the Reagan representative's assertion of privilege as to the Wallison Iran/Contra talking points when another copy of the same document was publicly released with the President's express authorization under Executive Order 13,233 more than two years ago. The "concurrence" in the claim of privilege under these circumstances belies any suggestion that the incumbent's review under the Executive Order was truly independent.

[18] *See* www.reagan.utexas.edu/openedp5/open%20docs%2015mar02.pdf, at p. 23.

[19] *See* www.reagan.utexas.edu/openedp5/open%20docs%2015mar02.pdf, at p. 22.

[20] *See* www.reagan.utexas.edu/openedp5/open%20docs%2015mar02.pdf, at pp. 17, 19 (memoranda concerning *Barnes v. Klein* "pocket veto" litigation).

been withheld. Where the government has engaged in "cherry-picking" by withholding materials that are not meaningfully distinct from those that have been released, a court is entitled to doubt whether the withheld information "would actually inhibit candor in the decision-making process if made available to the public." *Army Times Publishing Co. v. Department of the Air Force*, 998 F.2d 1067, 1072 (D.C. Cir. 1993). The notion that there will be any marginal benefit to the Presidency from withholding 74 out of 70,000 pages of confidential memoranda is thoroughly unconvincing. Indeed, it is fanciful to think that presidential advisers will be stimulated to greater bluntness and candor by a one in one thousand chance that, after 12 years have passed, their memoranda may be arbitrarily singled out from withholding while the great mass of similar communications are released to the public. Such long odds may be appealing to committed lottery players, but they are hardly likely to have much effect on presidential advisers weighing what to say to the President or their colleagues.

Again, the bottom-line issue in this case is whether a statutory command that materials be disclosed has been trumped by a constitutional imperative that they be withheld. The prospect that damage of constitutional dimension will be done to the office of the Presidency by the release of a tiny number of documents after the passage of more than 15 years since the President left office, and after tens of thousands of confidential advisory memoranda from his Administration have already been released, is remote indeed. Under the circumstances of this case, the congressional policy requiring release of presidential materials that are of historical value to the public "as rapidly and completely as possible," 44 U.S.C. § 2203(f)(1), must take

precedence over the assertion of a qualified privilege that becomes ever weaker with the passage of time, and the court should order release of the documents.[21]

CONCLUSION

For the foregoing reasons, the Court should grant plaintiff Public Citizen's Motion for Summary Judgment on Count Two of the Amended Complaint and enter an injunction requiring defendants to release to Public Citizen the 74 pages of Reagan records that are currently being withheld on the basis of an assertion of privilege under Executive Order 13,233.

Respectfully submitted,

/S/

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[21] Should the court have any doubt about whether the documents remain entitled to protection of the privilege at this late date, it may conduct an in camera review to inform its balancing of the interest in public access against the asserted harm to the Presidency that release of the documents supposedly would entail. *Cf. In re Sealed Case*, 121 F.3d at 729.