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' OPPOSITION TO MOTION TO DISMISS

INTRODUCTION

Even though Executive Order 13,233 (the "Bush Order") is the sole reason that Reagan presidential records required by law to be released on January 20, 2001, are still being withheld from the public more than a year later, the government's principal arguments against the plaintiffs legal challenge to the Bush Order boil down to the assertion that they filed their lawsuit too soon, and as a result the lawsuit is nonjusticiable because of lack of standing or ripeness. Ironically, the government also asserts that, if the case is not unripe, it is moot because it is too *late* to grant the plaintiffs' effective relief.

None of the government's justiciability arguments is well-founded. The government's claim of mootness is based on a misstatement of the facts. The Complaint's second claim for relief seeks the release of some 68,000 pages of Reagan presidential documents whose 12-year restriction period expired on January 20, 2001. The government says that claim is moot because 67,000 pages of those documents have now been released to the public. Even if that were true, it

would not render the claim moot, because even under the government's version of the facts, hundreds of pages remain off-limits, and the issues are in any event certain to recur. More importantly, the government's statement that virtually all the records have been released is simply not true: The Archives is in fact still withholding all the records, except for about 8,000 pages that were released in early January, even though the government's own submissions to this Court have now made clear that there is *no conceivable claim* that 59,000 of the 60,000 pages still outstanding could possibly be privileged. Far from demonstrating that the claim is moot, the government's submission confirms plaintiffs' claim that the Bush Order is responsible for denying them access to the Reagan records even though no lawful privilege has been asserted.

The government's other justiciability arguments are just as unfounded. The plaintiffs' Complaint contains properly pleaded allegations of "injury in fact" in the form of both delays in the release of documents and the imminent threat of the unlawful outright denial of access to materials when claims of privilege are made by former Presidents, Vice Presidents, and/or their "representatives" under the terms of the Bush Order. Moreover, as plaintiffs have alleged, these injuries are directly traceable to the Bush Order and will be completely redressed by the relief the plaintiffs seek. These allegations fully satisfy Article III's standing and ripeness requirements. The government's additional assertion that plaintiffs' claims fail to satisfy the "prudential ripeness" doctrine is answered, under the law of this Circuit, by the indisputable fact that the Complaint's claim that the Bush Order is unlawful on its face presents purely legal issues that will never be more fit for judicial resolution.

Finally, the government argues that plaintiffs' claims should be dismissed on the merits under Rule 12(b)(6) for failure to state a claim on which relief may be granted. The government's merits arguments rest primarily on a complete misreading of binding precedents of

this Circuit, most notably *Public Citizen v. Burke*, 843 F.2d 1473 (D.C. Cir. 1988). Although *Public Citizen v. Burke* definitively holds that a former President may not lawfully be given a veto power over the release of his materials through the mere assertion of a claim of executive privilege—precisely what the Bush Order purports to do—the government implausibly argues that the case "supports Defendants." Memorandum in Support of Defendant's Motion to Dismiss ("Govt. Mem.") 32. One need do no more than read the D.C. Circuit's opinion in *Public Citizen v. Burke* to recognize the untenability of the government's merits arguments. The facial inadequacy of those arguments undoubtedly explains the government's resort to contradictory justiciability arguments (the plaintiffs have sued both prematurely and too late) in order to avoid an adjudication of the lawfulness of the Bush Order.

ARGUMENT

I.
NONE OF PLAINTIFFS' CLAIMS IS MOOT.

We turn first to mootness because it best illustrates the lengths to which the government is willing to go to avoid a ruling on the merits. The government's mootness argument is based on a letter from White House Counsel Alberto Gonzales to NARA General Counsel Gary Stern, dated February 8, 2002 (not coincidentally, the stipulated date for the submission of the government's response to the Complaint as well as the plaintiffs' summary judgment motion). The letter informs NARA that the White House has completed review of approximately 59,000 of the 60,000 remaining pages of formerly restricted Reagan presidential records[1] and has determined that President Bush "will not assert a constitutionally based privilege over any of

[1] The 60,000 pages referred to in the letter represent the balance of the records that NARA continued to withhold following its release early this January of approximately 8,000 of the 68,000 pages of Reagan records whose restriction period expired in January 2001.

those approximately 59,000 records." Govt. Mem., Att. D. Based solely on this letter, the government contends that "Plaintiffs' claim for injunctive relief is moot to the extent it seeks production of the approximately 67,000 pages made public since this action was filed" and that "Plaintiffs' claim for release of these now-publicly-available records should be dismissed." Govt. Mem. 24, n. 18. Unfortunately, the government's assertion that all but 1,000 pages of the materials are now available to the public is not correct.

Of course, even if *all* of the formerly restricted Reagan records had now been released, that would not moot plaintiffs' first claim for relief, which challenges the Bush Order itself, for "even though a party may have obtained relief as to a *specific request* [for records], this will not moot a claim that an agency *policy or practice* will impair the party's lawful access to information in the future." *Payne Enterprises, Inc. v. United States*, 837 F.2d 486, 491 (D.C. Cir. 1988); *see also Better Government Association v. Department of State*, 780 F.2d 86, 90-92 (D.C. Cir. 1986). In any event, the government does not contend that *all* the records sought in the Complaint's second claim for relief have been made available: it says only that "the overwhelming bulk" of the documents have been opened. Govt. Mem. 24, n.18. Even if it were true that *most* of the documents plaintiffs seek had been released, that would not moot their claim that *all* of the documents must be opened, and hence would not provide a basis for dismissing either count of their Complaint.

But the gravest problem with the government's mootness argument is that the government's assertion that 67,000 pages of records have been "*made public since this action was filed*" and are "*now-publicly-available*," Govt. Mem. 24, n. 18 (emphasis added), is not true. The truth is that since the release of about 8,000 pages of records in early January, *no* additional records have been opened to the public, despite the White House's letter stating that President

Bush has no objection to the release of over 98% of the remaining documents. Indeed, a full month after the date of the White House letter, neither NARA nor the Reagan Library has even announced plans to open any more of the records. The reason is apparent: The White House's letter states that the President has no objection to the release of "approximately" 59,000 records, *but it doesn't tell the Archivist which records those are*. NARA has not released *any* of those records pending further instructions from the White House, which have apparently not been forthcoming. *See* Declaration of Bruce Craig, Ph.D. (Exhibit 1 hereto).

Thus, the government's assertion to this Court on February 8, 2002, that 67,000 pages of records had been released since this lawsuit was filed and were "now-publicly-available" was not true when it was made, and it is still not true a month later. While we assume that the error in the government's brief was inadvertent, it certainly provides no basis for dismissal of any part of plaintiffs' lawsuit as "moot."

Indeed, far from rendering plaintiffs' request for release of the materials moot, the White House's action has removed any argument that plaintiffs should be denied the relief they seek as to those documents that the White House has determined are not privileged. Absent a claim of privilege from either the incumbent or the former President, the continued withholding of those documents, whose statutory restriction period expired nearly 14 months ago, lacks even a pretense of legal justification. The release of all those documents to which both the incumbent and former Presidents have disclaimed any assertion of privilege should be ordered forthwith.

II.

THE GOVERNMENT'S STANDING ARGUMENTS ARE MERITLESS.

A. The Plaintiffs Have Properly Alleged Injury.

The government's arguments concerning standing proceed from the incorrect premise that the only injury plaintiffs allege is "delay" in access to the 68,000 pages of Reagan presidential records so far identified whose restriction under the PRA expired in January 2001.[2] To be sure, plaintiffs have been and continue to be injured by the delays in opening records of the Reagan administration. However, contrary to the government's characterization, the plaintiffs' claims of injury are not based only on "delay," but on both the continuing unlawful *denial* of access that has already occurred, and the imminent unlawful *denial* of access to presidential and vice presidential records that will occur as the terms of the Bush Order giving former Presidents, Vice Presidents and their "representatives" veto power over public access are applied. Specifically, the plaintiffs allege: "The issuance and implementation of the Bush Order have harmed and will continue to harm the plaintiffs and their members by depriving them of access to presidential and vice presidential records and the ability to make use of those records for historical research." Complaint ¶ 63. Of course, on a motion to dismiss for lack of standing, the allegations of injury in a complaint must be credited to the same extent as other factual allegations under Rule 12(b). *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992);

[2] It must be emphasized that these 68,000 pages are not the *only* Reagan records that were subject to the so-called "P5" exemption for confidential advice that expired on January 20, 2001. They are simply the documents that had been identified and withheld on that basis in response to requests for access to Reagan records that had been processed by the Reagan Library as of that date. Since only a little more than 10% of the Reagan records have so far been processed for opening to the public, there are very likely tens of thousands more pages of documents that would have been subject to the P5 exemption had they been requested before January 20, 2001, and that will now be subject to the Bush Order despite the expiration of any statutory basis for withholding them.

Metropolitan Washington Airports Auth. v. Citizens for the Abatement of Aircraft Noise, 501 U.S. 252, 264-65 (1991). Thus, to the extent the government's standing arguments are premised on the notion that only "delays" that have so far occurred in opening the 68,000 pages of Reagan records are at issue, those arguments miss the mark.

There is no doubt, moreover, that plaintiffs' allegations of denial of information in which they have a demonstrated and particularized interest as historians, journalists, and public advocates state a claim of "injury" sufficient to satisfy Article III standards. The Supreme Court has repeatedly recognized that the denial of information or records that a person is statutorily entitled to receive is "a sufficiently distinct injury to provide standing to sue." *Public Citizen v. Department of Justice*, 491 U.S. 440, 449 (1989) (holding that the denial of Public Citizen's claimed entitlement to information under the Federal Advisory Committee Act gave it Article III standing). Similarly, in *FEC v. Akins*, 524 U.S. 11 (1998), the Supreme Court held that denial of information under the Federal Election Act was an injury sufficient to confer standing: "The 'injury-in-fact' that respondents have suffered consists of their inability to obtain information … that, on respondents' view of the law, the statute requires [to be] ma[d]e public." *Id.* at 21. The Court characterized that injury as "concrete and particular" and held that "a plaintiff suffers an 'injury in fact' when the plaintiff fails to obtain information which must be publicly disclosed pursuant to a statute." *Id; accord Cummock v. Gore*, 180 F.3d 282 (D.C. Cir. 1999).

Under these precedents, it is clear that both the delays in and denials of access to information that have already occurred and the further denials that the Bush Order threatens on an ongoing basis constitute "injury in fact" for purposes of Article III standing—a point the

government does not seriously contest. *See* Govt. Mem. 15.[3] Instead, the government contends that the injuries claimed do not meet the interrelated "causation" and "redressability" components of Article III standing, which require that "there be a causal connection between the injury and the conduct complained of" and that "it be likely … that the injury will be redressed by a favorable decision." *Bennett v. Spear*, 520 U.S. 154, 167 (1997). As we shall demonstrate, the government's causation and redressability arguments rest on both an incorrect understanding of the injuries alleged in the Complaint and a misconstruction of the governing legal principles.

B. The Plaintiffs' Injuries Are "Fairly Traceable" to the Bush Order.

Satisfaction of the "causation" component of Article III standing does not require establishing that the defendant's complained-of actions "are the very last step in the chain of causation" of the plaintiffs' injuries. *Id.* at 169. It is enough that the injuries be "fairly traceable" to the defendant's conduct. *Id.* at 167. This requirement is satisfied where an action "alters the legal regime to which the … agency is subject" and thus permits the injury to occur. *Id.* at 169. Put another way, the causation requirement is satisfied when the "challenged agency action authorizes the conduct that allegedly caused the plaintiffs' injuries." *Animal Legal*

[3] In a footnote, the government questions whether "delay, standing alone, can constitute injury," but it assumes for purposes of this motion that it can. Govt. Mem. 15, n. 11. The government's doubts on this issue are not relevant, for, as explained above, plaintiffs do not complain of mere delays. In any event, the government's doubts are unfounded. If denial of access to information constitutes an injury, that injury cannot be erased simply by recharacterizing the denial of access as "delay" in the provision of information that may someday be provided. If a plaintiff is entitled to records or information *now*, postponing access to some unspecified future time necessarily constitutes injury. Not surprisingly, therefore, the federal courts of appeals have routinely held that delays in the provision of records constitute redressable injuries. *See, e.g.*, *Byrd v. EPA*, 174 F.3d 239 (D.C. Cir. 1999); *Payne Enterprises v. United States*, 837 U.S. at 491; *Long v. IRS*, 693 F.2d 907 (9th Cir. 1982). If this were not so, the plaintiffs in *Natural Resources Defense Council v. Department of Energy*, No. 01-2545 (D.D.C. February 21, 2002), in which a Judge of this Court recently ordered the administration to accelerate the "glacial pace" of its response to FOIA requests for information regarding Vice President Cheney's Energy Task Force, would have lacked Article III standing.

Defense Fund v. Glickman, 154 F.3d 426, 440 (D.C. Cir. 1998) (en banc). Under this standard, it is clear that the plaintiffs' injuries are "fairly traceable" to the Bush Order.

To the extent that the plaintiffs' Complaint challenges the Bush Order's provisions for unlimited "review" of presidential records both by the incumbent President and by former Presidents, Vice Presidents, and their representatives, the government effectively concedes that the injury the plaintiffs have suffered through the resulting denial of access (or delay in providing access) to the 68,000 pages of Reagan records is "fairly traceable" to those provisions. Govt. Mem. 16, n.13. Indeed, it is quite evident that by "authoriz[ing]" the denial of access pending the review by the former and incumbent officeholders, the Bush Order has caused the complained-of injury. *ALDF v. Glickman*, 154 F.3d at 440.

It is equally apparent that the other provisions challenged by the plaintiffs—in particular, the provisions (1) granting former Presidents the power to veto any release of their materials by claiming privilege or simply withholding authorization for release, (2) granting similar power to former Vice Presidents, and (3) extending the authority to assert privilege (or authorize releases) to designated "representatives" of deceased or incompetent former Presidents and Vice Presidents—are the causes of the injuries alleged by the plaintiffs within the meaning of Article III. The principal injuries attributable to these provisions are the impending *denials* of access that are certain to occur when these provisions are invoked through claims of privilege by former Presidents, Vice Presidents, and their representatives, as well as the *delays* in providing access that have occurred and will continue to occur while former officeholders or their representatives consider whether to authorize the release of records. These injuries will result directly from the Bush Order, for it is only by virtue of the Order that assertions of privilege by former Presidents, Vice Presidents, and their representatives will lead to the automatic withholding of records even

when the Archivist and the incumbent President do not conclude that the claim is valid. As in *ALDF v. Glickman*, it is the Bush Order that "authorizes" the injurious result of denial of access upon the invocation of these provisions of the Order.

The government's "causation" argument with respect to these provisions of the Order is not really that the injuries complained of are not "fairly traceable" to the challenged provisions, but simply that those provisions have not *yet* caused injury, because there has not yet been a claim of privilege by a former officeholder or representative. This is not really a "causation" argument, but fundamentally a *ripeness* argument, or, what amounts to the same thing, an argument that the injury is not sufficiently "imminent" to confer standing.[4] The imminence or ripeness requirements of Article III relate to the *timing* of an alleged injury; the causation requirement, by contrast, looks at whether the alleged injury is or will be the result of the challenged action of the defendant, without regard to whether the injury has already occurred or is anticipated in the future. Where, as here, an anticipated injury is traceable to the challenged action, it satisfies the causation requirement even though it has not yet occurred. *See, e.g.*, *Department of Commerce v. House of Representatives*, 525 U.S. 316, 332 (1999) (causation requirement satisfied by a "'traceable' connection" between the use of sampling techniques by the Census Bureau and the anticipated future injury of the loss of a seat in the House of Representatives); *Bennett v. Spear*, 520 U.S. at 169-71 (anticipated future injury of reduction of water allocations to plaintiffs was "fairly traceable" to biological opinion under Endangered Species Act); *Mountain States Legal Defense Foundation v. Glickman*, 92 F.3d 1228, 1235 (D.C.

[4] As the D.C. Circuit has explained, the "imminence" component of standing is identical to the Article III ripeness requirement: "[I]f a threatened injury is sufficiently 'imminent' to establish standing, the constitutional requirements of the ripeness doctrine will necessarily be satisfied." *NTEU v. United States*, 101 F.3d 1423, 1428 (D.C. Cir. 1996).

Cir. 1996) (plaintiffs sufficiently alleged causal connection between Forest Service's challenged action and risk of future injury from forest fire); *American Friends Service Committee v. Webster*, 720 F.2d 29, 47 n. 24 (D.C. Cir. 1983) (causation requirement satisfied by plaintiffs' allegation that FBI and National Archives policies would, in the future, result in the denial of access to materials the plaintiffs expected to request). The government's simplistic argument that plaintiffs' claims do not satisfy the causation requirement simply because some of the threatened injuries have not yet occurred must therefore be rejected.

C. The Relief Sought Would Redress the Injuries Alleged.

To establish redressability, a plaintiff need show only a "substantial likelihood that the requested relief … will redress the alleged injury." *Department of Commerce v. House of Representatives*, 525 U.S. at 332. Relief that would direct an agency to take some action that it has unlawfully withheld to the plaintiffs' detriment, or require the agency to cease some unlawful, injurious action, necessarily satisfies this requirement: "It can scarcely be doubted that, for a plaintiff who is injured or faces the threat of future injury due to illegal conduct ongoing at the time of suit, a sanction that effectively abates that conduct and prevents its recurrence provides a form of redress." *Friends of the Earth, Inc. v. Laidlaw Environmental Services*, 528 U.S. 167, 185-86 (2000).

Applying these standards, it is patent that the relief plaintiffs seek in this case would effectively redress their injuries. To the extent that the plaintiffs complain of the continued withholding of the bulk of the 68,000 pages of formerly restricted Reagan presidential records, the relief they seek—an order directing the Archivist to open those records to the public—would straightforwardly redress the precise injury claimed. Similarly, to the extent that the plaintiffs complain of the injury they will suffer when records are automatically withheld by the Archivist

at the direction of a former President, a former Vice President, or a "representative" of a former officeholder, the relief they seek will directly prevent the threatened injury by compelling the Archivist not to comply with the terms of the Bush Order that direct him to withhold materials without regard to the validity of a claim of privilege.

It is, of course, possible that, if the relief requested is granted, the Archivist might still, in the lawful exercise of his functions, determine that particular materials are in fact privileged and should be withheld. However, the fact that a lawful exercise of discretion might in some cases yield the same result as an unlawful blanket rule does not mean that enjoining the blanket rule will not redress the plaintiffs' alleged injury. As the Supreme Court explained in *FEC v. Akins*:

> Of course, … it is possible that even had the FEC agreed with respondents' view of the law, it would still have decided in the exercise of its discretion not to require [production of] the information [sought by respondents]. … But that fact does not destroy Article III "causation," for we cannot know that the FEC would have exercised its … discretion in this way. Agencies often have discretion about whether to take a particular action. Yet those adversely affected by a discretionary agency decision generally have standing to complain that the agency based its decision upon an improper legal ground. … If a reviewing court agrees that the agency misinterpreted the law, it will set aside the agency's action … — even though the agency … might later, in the exercise of its lawful discretion, reach the same result for a different reason. … Thus respondents' "injury in fact" is "fairly traceable" to the FEC's decision …, even though the FEC might reach the same result exercising its discretionary powers lawfully. For similar reasons, the courts in this case can "redress" respondents' "injury in fact."

524 U.S. at 25; *accord Public Citizen v. Department of Justice*, 491 U.S. at 449.

This Court's decision in *Public Citizen v. Carlin*, 2 F. Supp. 2d 1, 7 (D.D.C. 1997), *rev'd on other grounds*, 184 F.3d 900 (D.C. Cir. 1999), similarly confirms that plaintiffs' claims here satisfy the redressability requirement. There, Public Citizen and other plaintiffs sued the Archivist for a determination that the promulgation of a "general record schedule" authorizing the destruction of certain electronic documents was unlawful. They premised their standing on the likelihood that documents they would seek in the future under FOIA would be destroyed

under the challenged record schedule. Although it was possible that declaring the schedule unlawful might not prevent destruction of the records because the Archivist might approve destruction through another procedure that the plaintiffs conceded would be lawful, the Court held that Article III's redressability requirement was satisfied because an order enjoining the allegedly unlawful policy would remedy the injury alleged by the plaintiffs:

> It is important to recognize that plaintiffs are not challenging the destruction of electronic records *per se*. Plaintiffs acknowledge that if GRS 20 is struck down, the Archivist may still approve individual agency schedules authorizing the destruction of electronic mail and word processing documents; they concede that some destruction of electronic records certainly will be necessary and practical. Plaintiffs only challenge the use of a General Record Schedule to schedule the destruction of electronic records, without distinguishing valuable electronic records from useless ones. Thus, it is likely that a decision striking down GRS 20 would, in fact, fully address the plaintiffs' alleged injury.

2 F. Supp. 2d at 7.[5]

The same is true here. Plaintiffs do not deny the possibility that there might be some materials as to which a former President could assert a valid claim of privilege. Even so, a policy that requires the Archivist to obey *any* such claim of privilege, without distinguishing valid ones from invalid ones, will unlawfully deny plaintiffs access to materials that they have a legal entitlement to see. Just as in *FEC v. Akins*, *Public Citizen v. Department of Justice*, and *Public Citizen v. Carlin*, an order preventing the Archivist from implementing the unlawful provisions of the Bush Order would fully redress the claimed injury.

Despite the evident redressability of the plaintiffs' injuries, the government advances two theories that it claims require a holding of non-redressability here. First, the government asserts

[5] Although the D.C. Circuit later reversed *Public Citizen v. Carlin* on the merits, holding that the Archives' policy was permissible (*see* 184 F.3d 900), its decision necessarily presupposed the correctness of the District Court's standing analysis; otherwise, there would have been no "case or controversy," and the Court of Appeals could not have decided the merits. *See Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83 (1998).

that relief directed at the Archivist and NARA alone (as opposed to President Bush) cannot redress the plaintiffs' injuries, because the defendants cannot be ordered to release records of former Presidents and Vice Presidents before the *incumbent* President has determined whether to invoke privilege as to them. Second, the government argues that the relief sought by the plaintiffs will not redress their injuries because even if the unlawful provisions of the Bush Order are invalidated, the same delays in access to presidential records might occur under the terms of a prior executive order issued by President Reagan, E.O. 12,667, 54 Fed. Reg. 3403 (Jan. 16, 1989), which the Bush Order revoked.

Both of the government's redressability arguments are meritless. The government's contention that an order directed only at NARA and the Archivist cannot redress the plaintiffs' injuries runs squarely into the principle, which the government itself acknowledges, that relief against an unlawful presidential order can be obtained by a lawsuit aimed at the officials who must carry it out. *Franklin v. Massachusetts*, 505 U.S. 788, 796 (1992); *Swan v. Clinton*, 100 F.3d 973, 979 (D.C. Cir. 1996); *Chamber of Commerce v. Reich*, 74 F.3d 1322, 1328 (D.C. Cir. 1996). There is no question but that an order requiring NARA and the Archivist to release the withheld Reagan materials would *in fact* redress the injury of the ongoing delay in their release pursuant to the Bush Order. The government is really only arguing that plaintiffs are not legally *entitled* to such an order on the merits—that is, the government argues that the Court *should not* redress their injuries, not that the relief they seek *would not* redress the injuries. *See* Govt. Mem. 19-20. But the argument that the Court should not redress the plaintiffs' injuries goes to the merits, not to standing, for the mere contention that there is "a garden-variety substantive defect

in plaintiffs' claim," even if it were correct, would not "defea[t] redressability." *Mountain States Legal Foundation v. Glickman*, 92 F.3d at 1234.[6]

The government's second redressability argument—that if the Bush Order is enjoined, the prior Reagan Order will be reinstated and the same delays will occur—is equally meritless. First, simply as a factual matter, it is not correct that the relief the plaintiffs seek will somehow automatically reinstate the Reagan Order. President Bush has revoked the Reagan Order, and plaintiffs have not challenged that action. Indeed, this Court likely could not order reinstatement of the Reagan Order even if plaintiffs asked them to: Only a President can issue an executive order. Thus, absent the unlawful terms of the Bush Order, the processing of presidential materials under the PRA will be governed by the Archives' duly promulgated regulations, not the now-defunct Reagan Order.

---

[6] Even as a claim of a substantive defect in the plaintiffs' claim, the government's contention fails. It is premised on the notion that the Archivist can *never* release (or be ordered by a court to release) documents of a former President or Vice President before the incumbent (or the White House staff) has reviewed them and determined not to assert privilege. NARA, however, constantly releases papers and other records of former Presidents from both pre-PRA and post-PRA presidential libraries without *any* review by the White House. Except for the 8,000 pages released this past January after review under the Bush Order, the over 4 million documents released to date from the Reagan Library were released without page-by-page review by the White House to ensure that no privileged materials were included. Similarly, the Nixon tapes, which contain the most sensitive conversations between the President and his aides, have been released pursuant to an agreed court order in *Kutler v. Carlin*, No. 92-0662-NHJ (D.D.C.), without White House review for executive privilege. Although the Nixon materials are not covered by the PRA, they are no more or less subject to potential assertions of privilege by the incumbent than materials covered by the PRA. Indeed, *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977), which forms the theoretical basis of the government's argument that the incumbent has the power to assert privilege as to materials of a former President, directly concerned the Nixon materials.

In any event, the plaintiffs in this case do not seek an order that requires NARA to release materials before the White House has had an adequate opportunity to review them. Fourteen months is much more than enough time for the President to determine whether to assert privilege as to the Reagan documents, and no legitimate interest of the Presidency would be infringed by an order requiring NARA to release those materials now given the White House's failure to assert privilege as to any of them in that time.

Second, even if the Reagan Order were reinstated, the possibility that its terms, which purported to permit "extensions" of time for review of materials by the incumbent President, could themselves be abused to facilitate unreasonable and unlawful denials of access to the records of former Presidents (*see* Govt. Mem. 21) does not make the injuries resulting from the Reagan Order unredressable. The government's argument amounts merely to the assertion that unlawful government action can be deemed unredressable simply because if it is enjoined, the government may do something else that is unlawful. That is not the law. *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). As the D.C. Circuit has held, the causation and redressability requirements of the standing doctrine do not require (or permit) the Court simply to compare challenged agency action to the status quo ante and deny standing if restoration of the status quo would permit some alternative form of unlawful action:

> The proper comparison for determining causation is not between what the agency did and the status quo before the agency acted. Rather, the proper comparison is between what the agency did and what the plaintiffs allege the agency should have done under the statute.

Animal Legal Defense Fund v. Glickman, 154 F.3d at 441. By the same token, it follows that the proper comparison for redressability purposes is not between the challenged action and the status quo ante, but between the challenged action and what the plaintiffs ask the court to order the agency to do. Here, plaintiffs do not ask the Court to reinstate the Reagan Order or to permit continuing unlawful delays in access to presidential records; they seek an order requiring release of the Reagan records and ongoing enforcement of the PRA without regard to the unlawful terms of the Bush Order. That relief (and only that relief) can fully redress their injuries.

Finally, both of the government's redressability arguments are also flawed in that they assume that the only injuries the plaintiffs claim are the "delays" that have so far occurred in the release of the Reagan materials, which, the government asserts, are solely attributable to the *incumbent's* review of the records. As explained above, however, plaintiffs' injuries include not only those delays, but also the denials of access that will occur upon invocation of the veto authority granted to former Presidents, Vice Presidents, and their representatives by the Bush Order. Even if the government were correct (which it is not) in asserting that the Court cannot order release of any of the Reagan documents before the *incumbent* has completed review of all of them, and that the same "delays" in the incumbent's review of records would occur regardless of a court order invalidating the Bush Order, this Court could still remedy the injuries resulting from the veto power afforded *former* officeholders and their representatives by directing the Archivist and NARA not to comply with the provisions of the Bush Order that create that veto power (and the delays attributable to the former officeholders' decision whether to exercise it). The government's arguments do not address the redressability of those injuries and thus, even if taken at face value, do not establish lack of Article III standing in this case.

III.
THE ISSUES ARE RIPE FOR REVIEW.

The government's remaining justiciability argument is that the plaintiffs' claims satisfy neither the Article III ripeness requirement nor the "prudential ripeness" doctrine, because no claim of privilege under the Order has yet been made. According to the government, because the plaintiffs' claims of injury from the provisions of the Bush Order that grant former Presidents, Vice Presidents, and their representatives the power to veto releases of records depend on a future contingency—i.e., an assertion of privilege—it necessarily follows that their claims fail to satisfy the Article III ripeness requirement.

It is important to note at the outset what the government does *not* assert. It does not contend that there is any uncertainty as to whether the Bush Order is currently in force, whether NARA and the Archivist will abide by its terms, or what its terms require.[7] In other words, the government accepts that, as plaintiffs allege, the Bush Order does in fact grant former Presidents, Vice Presidents, and their representatives a unilateral veto over releases of their materials by the Archivist, and that the Archivist will obey such a directive when it is given. Nonetheless, the government says, this Court must wait until a claim of privilege has been made, and the plaintiffs must actually suffer the unlawful injury threatened by the Bush Order, before the Court can adjudicate the facial validity of the Order.

The government's contention that the plaintiffs' challenges must be dismissed as unripe because the plaintiffs have not yet suffered all the injuries of which they complain is not supported by the law. Indeed, the law is replete with examples of cases where laws, regulations, and policies that authorize unlawful actions, create the risk of future injuries, or merely remove legal barriers to future injuries, are reviewed before the authority they confer is exercised and/or while contingencies yet remain as to whether the injuries they threaten will occur. *See, e.g.*, *Department of Commerce v. House of Representatives*, 525 U.S. at 331-32 (reviewing Census Bureau policy that threatened plaintiff State with loss of a seat in Congress); *Bennett v. Spear*, 520 U.S. at 168-69 (reviewing agency action that threatened to reduce water allocations to plaintiff farmers); *Buckley v. Valeo*, 424 U.S. 1, 117 (1976) (reviewing challenges to constitutionality of FEC before agency had taken any actions that injured plaintiffs); *Tozzi v.*

[7] This case is thus totally unlike *City of Williams v. Dombeck*, 151 F. Supp. 9 (D.D.C. 2001), in which this Court held that plaintiffs who sought to challenge a development that could not and would not occur because the zoning regulations that would have permitted it had not gone into effect did not have a ripe claim.

Department of Health & Human Servs., 271 F.3d 301, 310 (D.C. Cir. 2001) (reviewing designation of substance as a carcinogen where granting relief would make resulting future injuries to plaintiffs that manufactured that substance "less likely"); *Wyoming Outdoor Council v. Forest Service*, 165 F.3d 43, 51 (D.C. Cir. 1999) (reviewing agency action that removed barriers to issuance of oil and gas leases and thus threatened injury, even though no leases had been issued); *George E. Warren Corp. v. EPA*, 159 F.3d 616, 621-22 (D.C. Cir. 1998) (permitting challenge to remedial provisions of Clean Air Act regulations even though provisions had not been and might never be implemented); *Mountain States Legal Foundation v. Glickman*, 92 F.3d at 1232-35 (reviewing challenge to Forest Service action based on possibility it would lead to future logging cutbacks and increased risk of forest fires); *Action for Children's Television v. FCC*, 59 F.3d 1249, 1258 (D.C. Cir. 1995) (rejecting argument that court must wait for delay to occur before hearing claim that agency policy results in undue delay).

The teaching of these cases is that Article III's intertwined ripeness and standing requirements do not compel a court to wait for injury to occur before reviewing a claim that an agency's regulations, policies, or other actions threaten to injure a plaintiff: As long as the injury is not speculative, remote, conjectural or hypothetical, but is sufficiently concrete, imminent, and impending, Article III's requirements are satisfied. *See, e.g.*, *Mountain States Legal Foundation v. Glickman*, 92 F.3d at 1232. Here, there is nothing speculative or hypothetical about the prospect that the Archivist will withhold materials upon an assertion of privilege by a former President, Vice President, or a representative of a former officeholder: The Bush Order expressly requires such withholding.

For just these reasons, courts in this Circuit have consistently permitted plaintiffs to challenge agency policies permitting the denial of access to information before denials of access

occur, even though actual injury may still be contingent on invocation or application of the policies to particular documents or requests for documents. *See, e.g.*, *Public Citizen v. Burke*, 843 F.2d 1473 (D.C. Cir. 1988); *Better Government Association v. Department of State*, 780 F.2d at 92 (adjudicating challenge to lawfulness of policy concerning FOIA fee waivers in advance of its application to particular requests); *American Friends Service Committee v. Webster*, 720 F.2d at 46-47 n. 24 (reviewing FBI document destruction policy that threatened plaintiffs with future inability to obtain documents they expected to request); *Public Citizen v. Carlin*, 2 F. Supp. at 6 (reviewing Archives policy based on showing that "plaintiffs will be directly affected" and "face a real risk that records will not be available to them"). Plaintiffs' challenge to the legitimacy of the Bush Order poses a constitutionally ripe case or controversy in precisely the same way: The Order creates a real and present threat to plaintiffs' access to presidential records.

Moreover, the government's basic assertion that plaintiffs have not suffered and will not suffer injury from the challenged provisions of the Bush Order until a claim of privilege is made and documents have been withheld as a result is not even correct. For example, plaintiffs have already been and continue to be injured by the provisions of the Order granting former Vice Presidents the power to veto or, conversely, "authorize," access to their documents, because materials plaintiffs have requested from the Bush Library have been withheld pending application of the Bush Order, including the requirement of "authorization" of access by the former Vice President. *See* Plaintiffs' Statement of Undisputed Facts in Support of Motion for Summary Judgment ¶ 5, Exh. 11. The government's own submission demonstrates that plaintiffs have similarly been injured by the provisions of the Bush Order that purport to allow "representatives" of disabled former Presidents to assert privilege or authorize access in the

former Presidents' name: Review by former President Reagan's "representative" added a full month to the ongoing delay in release of the 68,000 pages of records between the time the Bush Order was issued and the time the representative authorized public access on November 29, 2001. In sum, plaintiffs' claims satisfy the constitutional component of the ripeness doctrine because they allege actual and impending injuries that are neither speculative nor hypothetical.

The government also contends, however, that even if the constitutional ripeness requirement is satisfied, the prudential ripeness doctrine still requires dismissal of this action because, according to the government, deferring review will involve no hardship to the plaintiffs. The government's contention, however, is untenable under the law of this Circuit. The Court of Appeals has repeatedly held that as long as constitutional ripeness requirements are met, a case that involves a purely legal challenge to government action *necessarily* satisfies the prudential ripeness standard, because no further factual development will render the action any more fit for review, regardless of whether deferring review will cause "hardship" to the plaintiffs. *Rio Grande Pipeline Co. v. FERC*, 178 F.3d 533, 540-41 (D.C. Cir. 1999); *accord Public Citizen v. Department of State*, 276 F.3d 634 (D.C. Cir. 2002); *George E. Warren Corp. v. EPA*, 159 F.3d at 621-22; *NRDC v. EPA*, 22 F.3d 1125, 1133 (D.C. Cir. 1994); *Payne Enterprises v. U.S.*, 837 F.2d at 491-93. The government cannot assert that plaintiffs' challenges to the Bush Order present anything but purely legal issues. Moreover, the plaintiffs' challenge to the facial validity of the Bush Order presents a dispute that is "'concrete and final' … since there no longer exists the possibility that further agency action will alter the claim in any fashion." *Wyoming Outdoor Council v. Forest Service*, 165 F.3d at 51. Thus, the legal dispute is fit for adjudication now because the issues posed "can never get any riper." *Id.*

IV.
THE COMPLAINT STATES A CLAIM UNDER RULE 12(b)(6) BECAUSE EACH OF THE CHALLENGED FEATURES OF THE BUSH ORDER IS FACIALLY UNLAWFUL.

Following its litany of justiciability arguments, the government briefly argues that the plaintiffs' claims should be dismissed on the merits for failure to state a claim under Rule 12(b)(6), on the ground that the Bush Order is a "lawful exercise of presidential authority." Govt. Mem. 26.[8] The government's arguments are, for the most part, fully anticipated and addressed in the memorandum supporting the plaintiffs' motion for summary judgment, which demonstrates that the Bush Order is facially unlawful. We will not repeat all those arguments here, but a few points responsive to the government's assertions deserve additional emphasis.

A. The Bush Order Is Neither an Exercise of Inherent Presidential Authority under the Constitution Nor an Exercise of Powers Delegated by Congress.

The government concedes that under *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952), the President's power to issue the Bush Order must stem either from the Constitution itself or from an act of Congress. Govt. Mem. 27. The government's arguments, however, fail to demonstrate that either source of authority supports the Bush Order. The

[8] The government also makes one additional "jurisdictional" argument: It asserts that plaintiffs' request for an injunction compelling release of the Reagan records must be dismissed because it is really a request for a writ of mandamus, and, according to the government, the Court lacks jurisdiction to issue such a writ because the Archivist's duty to release the materials is not nondiscretionary. Although the Complaint invokes the mandamus statute as an alternative basis for the relief sought, the principal basis it invokes is 5 U.S.C. § 706, the section of the APA that authorizes the Court to "compel agency unlawfully withheld" and to "set aside" unlawful agency action. The government cites no authority holding that a request for affirmative relief under the APA must satisfy the requirements of the mandamus statute, because there is none. *Swan v. Clinton*, 100 F.3d 973 (D.C. Cir. 1996), on which the government relies, does not address the issue, apparently because relief under the APA was not sought in that case. In any event, even if it were necessary to rely on the mandamus statute here, its requirements are satisfied, because the Archivist has no discretion to withhold the materials plaintiffs seek (particularly those to which both the former President and the incumbent have disavowed any claim of privilege).

government contends that "authority to establish policies and procedures governing the assertion of constitutionally-based privileges derives from, and is a necessary corollary of, the President's Article II power to assert constitutional privilege in the first instance." Govt. Mem. 27. But that argument is contradicted by *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977), as well as *Nixon v. Freeman*, 670 F.2d 346 (D.C. Cir. 1982), and *Public Citizen v. Burke*, 843 F.2d 1473 (D.C. Cir. 1988), which together conclusively establish that Congress may regulate the manner in which privilege claims affecting the records of former Presidents will be resolved.

The government next suggests that Congress, in the PRA, has implicitly delegated to the President authority to establish, by executive order, procedures concerning the assertion of privilege claims. This argument is refuted by the PRA itself, because the statute expressly delegates regulatory authority on this subject to the Archivist, and requires that exercise of this delegated power conform to the formalities required by the notice-and-comment rulemaking process under the Administrative Procedure Act. 44 U.S.C. § 2206. More importantly, by providing that presidential records containing communications under the President and his advisers *must* be made public after 12 years unless they are subject to a constitutionally based privilege, and by forbidding any expansion of the scope of constitutionally based privileges (*see* 44 U.S.C. §§ 2204(a)(5), (c)(1) & (c)(2)), the PRA expressly *denies* the President authority to direct the Archivist to withhold records that are not subject to a *legitimate* claim of privilege.

B. The Government's Assertion that Former and Incumbent Presidents Must Be Allowed Unlimited Review Time Is Incorrect.

The government attempts to demonstrate that plaintiffs' challenge to the provisions of the Bush Order that give former and incumbent Presidents *unlimited* time to review presidential records must be dismissed because the Constitution requires that they receive *adequate* opportunity to review materials in order to determine whether to assert a claim of privilege. The

government's argument is simply a non sequitur: "Adequate" time is not synonymous with "unlimited" time, and the provision of unlimited time to review can be squared neither with the PRA's requirement that records be made "available to the public as rapidly and completely as possible consistent with the provisions of this Act," 44 U.S.C. § 2203(f)(1), nor with the lawfully promulgated NARA regulations that limit a former President's time for review, 36 C.F.R. § 1270.46. Moreover, the government's assertion that the White House must be given the opportunity to review, page-by-page, *every page of material of a former President or Vice President that NARA proposes to release* is incredible. Given the millions of pages of material in the Presidential libraries, accepting the government's position would either turn the White House into a full-time document-reviewing arm of the Presidential libraries system or would cause releases of materials from the libraries to grind to a halt. Neither can possibly be what Congress intended in the PRA, and neither is required by the Constitution.

C. The Veto Power the Bush Order Gives Former Presidents Cannot Be Squared with Precedents Binding on this Court.

The government does not contest that the Bush Order purports to require withholding of materials as to which a former President has asserted privilege even when the Archivist (and the incumbent President) conclude that the assertion of privilege is legally unwarranted. Thus, in effect, the Bush Order commands the Archivist to violate the law by withholding material that is not subject to a valid, constitutionally based privilege. The government asserts that the plaintiffs' challenge to the unlawful veto power the Order gives a former President is based "solely" on *Public Citizen v. Burke* (Govt. Mem. 32)—as if having "only" one dispositive, binding precedent were not enough. But in fact, as demonstrated in our summary judgment memorandum, our challenge rests squarely not only on *Public Citizen v. Burke*, but also on

Nixon v. Administrator of General Services, *Nixon v. Freeman*, and *American Historical Association v. Peterson*, 876 F. Supp. 1300 (D.D.C. 1995).

Moreover, the government's effort to argue that *Public Citizen v. Burke* actually supports the Bush Order is so astonishing as to suggest that the Justice Department must possess a copy of the opinion different from the one published in Volume 843 of the Federal Reporter, Second Series. *Public Citizen v. Burke* held that a directive purporting to give a former President veto authority over the Archivist's release of materials simply by asserting privilege was unlawful. Contrary to the government's assertion, *Public Citizen v. Burke* did not "necessarily conclude" the directive at issue "was constitutionally *permissible*." Govt. Mem. 32. Rather, the Court in *Public Citizen v. Burke* explicitly stated that requiring the Archivist to bow to a former President's assertion of privilege, without making an independent judgment as to its merits, could not be squared with the Executive Branch's constitutional responsibility to "take Care that the Laws be faithfully executed." 843 F.2d at 1479.

As for the government's contention that the PRA, unlike the Nixon materials legislation that was at issue in *Public Citizen v. Burke*, contains no provision "which arguably could impose a duty on the Archivist to evaluate claims of privilege," Govt. Mem. 33, it, too, is wrong. The PRA requires the Archivist to make public, upon request, materials reflecting confidential discussions among the former President and his advisers once the 12-year statutory restriction period has expired. This requirement is subject to one statutory caveat: The PRA states that it does not "limit"—or "expand"—any "constitutionally-based" claim of privilege of a former President. 44 U.S.C. § 2204(c)(2). The plain import of this provision is the same as the provision in the Nixon legislation giving the former President the opportunity to "assert" any "privilege" that would limit public access. Under the PRA, a former President must be permitted

to assert a claim of privilege, and if the claim is *valid*, privileged materials must be withheld; otherwise, the constitutional privilege would be "limited." At the same time, materials not legitimately privileged must be released; otherwise, the constitutional privilege would be "expanded." Thus, the PRA, just like the Nixon legislation construed in *Public Citizen v. Burke*, requires the Archivist to evaluate a former President's assertions of privilege independently, and does not permit the Executive Branch to rubber-stamp or "defer" to such claims.

Finally, the government's assertion that "it would be anomalous, to say the least" to require sitting Executive Branch officials to judge the privilege claims of a former President (Govt. Mem. 34) flies directly in the face of *Public Citizen v. Burke*, which squarely held that there is "*no constitutional anomaly* in the prospect of the Archivist rejecting a challenge by [a former President] based on executive privilege." 843 F.2d at 1480 (emphasis added).

In sum, the government completely fails to distinguish *Public Citizen v. Burke*, let alone to enlist it in support of the Bush Order's grant of veto power to former Presidents. The government's arguments on this issue cannot justify dismissing plaintiffs' Complaint for failure to state a claim.

D. The Government's Defense of the Delegation of Presidential Authority to "Representatives" Is Unsuccessful

The government argues that plaintiffs have failed to state a claim that the Bush Order's delegation of the executive privilege to private citizens designated as the "representatives" of former Presidents or their families is unlawful, but the government identifies no legal precedent that has permitted the exercise of the President's privilege by anyone other than the sitting President or a former President personally. The government contends that the heirs of former Presidents controlled access to presidential materials under the pre-PRA regime in which presidential papers were the private property of the former Presidents (Govt. Mem. 35), but the

control they exercised was based solely on their property rights, not on any notion of executive privilege. *See Nixon v. United States*, 978 F.2d 1269 (D.C. Cir. 1992). The Supreme Court's opinion in *Nixon v. Administrator of General Services* makes clear that the right to exercise the privilege is entirely separate from the ownership of the physical documents: Regardless of who had title to the documents, the Court emphasized, the privilege itself belonged to the Presidency. 433 U.S. at 448, 449.

By contrast, under the Bush Order, the power to assert the Presidency's privilege as to Reagan presidential documents has been delegated to someone named Joanne Drake. *See* Govt. Mem., Att. A. Because Ms. Drake has never held the Office of President of the United States, she can have no better claim than the Archivist, this Court, or any other U.S. citizen to judge whether the needs of that Office require withholding particular presidential materials from the public. Giving her, or any other individual so designated, the power to direct the Archivist to deny public access to materials otherwise publicly available under the PRA cannot be squared with the law, which recognizes that the privilege exists to protect the Presidency, not the personal interests of former Presidents, their families, or their associates.

E. The Order's De Facto Recognition of a Vice Presidential Privilege Is Unlawful.

The government does not contest plaintiffs' contention that, as a matter of law, no vice presidential privilege exists. Nonetheless, the government argues that plaintiffs' challenge to § 11 of the Bush Order, which applies the terms of the Order fully to assertions of privilege by former Vice Presidents, should be dismissed because the Order does not actually recognize any vice presidential privilege, but, the government claims, merely provides the means for asserting one if it happens to exist. Govt. Mem. 36-37.

In fact, it is the government that "misunderstands the nature of the provision" (Govt. Mem. 36) regarding vice presidential privilege in the Bush Order. To be sure, the Bush Order does not say that it creates a constitutional vice presidential privilege—which, of course, the President has no power to do, by executive order or otherwise. The legal flaw in the Bush Order is not that it "creates" such a privilege, but that it directs the Archivist to honor a claim of vice presidential privilege *as if such a privilege exists*, when, in fact, it does not. Thus, the Bush Order commands the Archivist to withhold documents from the public upon the assertion by a former Vice President of a vice presidential privilege, effectively treating those documents as if they were subject to a valid, constitutionally based claim of privilege, when in fact they are not privileged at all. In short, the Bush Order directs the Archivist to violate the law by withholding from the public nonprivileged records. Given the government's effective concession that there is no vice presidential privilege, it has no answer to this point.

F. The Bush Order Improperly Directs the Archivist to Treat Claims of Non-Constitutional Privileges as if They Were Claims of a Constitutionally Based Executive Privilege.

The government contends that the Complaint should be dismissed to the extent it challenges the preamble to the Bush Order, which states that a number of common-law privileges, such as the attorney-client privilege and work product privilege, are included in the constitutionally based executive privilege of the President. The government correctly argues that the Bush Order does not, and indeed cannot, "expand" the scope of the constitutional privilege. Govt. Mem. 37. What the government fails to recognize, however, is that, as with the "vice presidential" privilege, what the Bush Order does is direct the Archivist to treat claims of nonconstitutional privileges as if they were claims of constitutional privilege. By stating at the outset that the President's constitutionally based privileges include the common-law attorney-

client and work-product privilege, and then by directing the Archivist to withhold documents from the public whenever a former President asserts such a privilege, the Order has the effect of instructing the Archivist to withhold materials, in violation of the PRA, even when only a common-law privilege is asserted by the former President.

The government's further argument that common-law privileges may in some circumstances overlap with constitutionally based privileges is no answer to this point.[9] The Bush Order does not simply say that in some instances, a particular communication may fall within the scope of both a common-law privilege and a constitutional privilege. Rather, it equates the two privileges, and unlawfully instructs the Archivist to treat all claims of common-law attorney-client, work product, and deliberative process privilege by a former President as if they were constitutionally based. None of the government's arguments justifies this feature of the Order, and hence none can serve as the basis for dismissal of this aspect of the Complaint for failure to state a claim.

G. The Bush Order Cannot Override NARA Regulations.

Finally, the government asserts that any claim of conflict between the Bush Order and regulations lawfully promulgated by NARA pursuant to the PRA must be dismissed, because the President is free to override by executive order any regulation promulgated by an Executive Branch official who is subject to his supervision. Needless to say, there is no authority for the government's argument, and the one case the government cites is completely off-point.

[9] It should also be noted that although the cases the government cites on page 38 of its memorandum may provide some inferential support for the notion that common-law privileges and constitutionally based ones may in some cases overlap, what the cases primarily emphasize is the distinctness of the common-law and constitutionally based privileges. This is particularly true of *In re Lindsey*, 158 F.3d 1263 (D.C. Cir. 1998), which is best read as suggesting that the President's attorney-client privilege is *exclusively* common-law in nature.

As discussed above, the government has conceded that the Supreme Court's decision in *Youngstown Sheet & Tube* is the most definitive statement of the law concerning the President's power to issue executive orders. Among the lessons of *Youngstown* is that, as Justice Jackson put it in his influential concurrence, the President's power to issue an executive order is at its "lowest ebb" when Congress has enacted legislation that directly addresses the subject at hand. 343 U.S. at 637. Thus, when Congress has delegated regulatory authority on a particular subject to an administrative agency, and placed substantive and procedural limits on the exercise of that authority, the President is disabled from overriding those substantive and procedural limits through the fiat of an executive order. *See, e.g., Chamber of Commerce v. Reich*, 74 F.3d 1322, 1338 (D.C. Cir.), *modified on other grounds*, 83 F.3d 439 (D.C. Cir. 1996). It follows that where, as here, Congress has delegated regulatory authority to the Archivist, to be exercised only in conformity with the notice-and-comment provisions of the APA, and where the Archivist has exercised that authority and issued regulations that have the force of law, the President cannot, unilaterally and without compliance with the APA, replace the agency's regulatory scheme with one of his own choosing, regardless of whether he otherwise possesses authority to direct the Archivist in performance of his duties.

The government's contrary argument is based on language torn out of context from *Carlisle Tire & Rubber Co. v. U.S. Customs Service*, 663 F.2d 210, 217-18 (D.C. Cir. 1980). *Carlisle* was a case involving exemption 1 of the FOIA, under which the determinative issue is whether documents are "specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and … are in fact properly classified pursuant to such Executive order." 5 U.S.C. § 552(b)(1). Thus, the FOIA is that rare statute that expressly incorporates the terms of executive orders. In that context, the D.C. Circuit

in *Carlisle* held that where confidentiality was dictated by the terms of the relevant executive order on national security classification, and where the FOIA expressly made the terms of the executive order determinative, the court could not give effect to a regulation that conflicted with the executive order. (This was particularly so given that the regulation was intended to implement the executive order.)

Of course, where a statute expressly states that the terms of an executive order are dispositive, the executive order will necessarily govern over any conflicting agency regulations. That is all *Carlisle* holds. Nothing in *Carlisle* suggests that where, as here, Congress has delegated rulemaking authority to an agency to be exercised subject to the APA, the President can unilaterally promulgate his own inconsistent rules without complying with the APA. Rather, lawfully promulgated regulations remain legally binding regardless of the contrary directions of the President, and may only be amended or rescinded as authorized by law. *See, e.g., Nader v. Bork*, 366 F. Supp. 104 (D.D.C. 1973) (declaring the firing of Watergate Special Prosecutor Archibald Cox at the direction of the President to be unlawful under Justice Department regulations); *see also United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 265-68 (1954) (holding that an Executive Branch official may not order his subordinates to violate lawfully promulgated regulations). Whatever authority a President may have with respect to the supervision of subordinate Executive Branch officials, that power may not lawfully be exercised in a manner inconsistent with substantive and procedural requirements of law, including requirements imposed by the APA. *See Portland Audubon Society v. Endangered Species Committee*, 984 F.2d 1534, 1543-48 (9th Cir. 1993); *Sierra Club v. Costle*, 657 F.2d 298, 407-08 (D.C. Cir. 1981).

CONCLUSION

For the foregoing reasons, the government's motion to dismiss the Complaint on justiciability grounds and on the merits must be denied.

Respectfully submitted,

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

Attorneys for Plaintiffs

March 8, 2002