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' REPLY MEMORANDUM IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

The government's opposition to our motion for summary judgment fails to come to grips with the fundamental substantive flaws in the Bush Order. Indeed, the government itself dooms the Bush Order by conceding that the veto power it grants former Presidents, Vice Presidents, and their representatives is not required by the constitutional executive privilege. Govt. Opp. 2, 16-17. That being so, the Order cannot stand in the face of the PRA's direction that records be released unless they are subject to a constitutionally based privilege. The remainder of the government's arguments are merely vain efforts to avoid this inescapable conclusion.

ARGUMENT

I.
THE GOVERNMENT'S JUSTICIABILITY ARGUMENTS ARE MERITLESS.

The justiciability analysis in the government's opposition to our summary judgment motion adds nothing to that in its motion to dismiss, which we have answered fully. Only a few comments need be made here.

First, the government continues to assert that plaintiffs' request for release of all of the withheld Reagan records is "largely" moot, because all but 150 pages of those records have now been released.[1] Govt. Opp. 8. The government further insists that plaintiffs' request will be "fully moot" as soon as the White House decides which of the 150 remaining pages to release, and which to withhold on grounds of privilege. *Id.*

In fact, until *all* of the 150 pages are released, the plaintiffs' claim for release of the Reagan materials will not be moot, and the government's speculation that it will "soon" be moot is irrelevant: A case is either moot or not. Nor will the claim necessarily become moot when the White House decides which of the 150 pages it intends to instruct the Archives to withhold on grounds of executive privilege. As long as *any* pages are held back, the claim for their release remains alive. An assertion of privilege as to some of the documents will place in issue the legal validity of the claim of privilege.

As for the government's ripeness and standing arguments, the government rests its opposition primarily on the argument that the features of the Order that the plaintiffs challenge have not yet injured them. There are at least three flaws in the government's argument.

First, it misconceives the scope of plaintiffs' challenge to the Order. Plaintiffs seek summary judgment not only on their claims that specific features of the Bush Order are unlawful, but also on their claim that the Order as a whole is unauthorized. The government does not contest that the Order has in fact denied plaintiffs access to records. Thus, the challenge to the Order necessarily satisfies constitutional standing and ripeness requirements.

[1] At the time the government filed its opposition, approximately 8,000 of the 68,000 pages had been released, and almost 60,000 more had been approved for release by the White House but not yet released. After plaintiffs pointed out in their opposition to the government's motion to dismiss that the documents remained under wraps, the Archives eventually opened to the public those that the White House had approved, leaving only the 150 pages remaining.

Second, as explained in our opposition to the government's motion to dismiss, a party need not stand idle and sustain injury to satisfy constitutional ripeness and standing requirements. Plaintiffs may rely on the certainty that they will be injured when the provisions of the Order granting former Presidents, Vice Presidents, and their representatives the power to veto releases of documents are invoked. Contrary to the government's assertion that plaintiffs do not allege that they will suffer injury from the invocation of these provisions of the Order (Govt. Opp. 6), the Complaint alleges precisely such injury. Complaint ¶ 63.

Third, the undisputed facts demonstrate that the specific features of the Order on which plaintiffs seek summary judgment have *already* injured them. The terms of the Bush Order that empower a former President to veto releases of documents and that forbid releases without the former President's "authorization" have injured plaintiffs by foreclosing access to the records between the time the Order was issued and the time "authorization" was provided in late November. (*See* Govt. Mem. in Support of Mot. to Dismiss, Att. A.) That is, the provisions of the Order giving veto power to a former President were responsible for approximately one month of the time plaintiffs had to wait to obtain access.[2] The Order's provision delegating authority to designated representatives of a disabled or deceased former President has also injured the plaintiffs. Absent that provision, the Reagan records would not have had to undergo the additional month of review by former President Reagan's representative before they could be cleared for release. Similarly, by forbidding release of records without a former Vice President's authorization, the Order is now impeding access to vice presidential records at the Bush Presidential Library. (Statement of Undisputed Facts, ¶ 5.)

[2] This delay was over and above the time already provided for in the Archives' regulations to permit former Presidents to assert any challenges to the release of records, for that time period had already long expired by the time the Executive Order was issued.

Given the satisfaction of Article III standing and ripeness requirements, the government's prudential ripeness argument need not detain the Court. The government concedes that the issues raised in the motion for summary judgment are purely legal. It nonetheless argues that withholding review of them will not cause significant "hardship" to plaintiffs. The government's argument not only overlooks the practical barrier to access to records that the Bush Order poses on an ongoing basis, but also ignores the law in this Circuit that the "hardship" prong of the prudential ripeness standard need not even be considered in cases presenting purely legal issues. *See, e.g., Rio Grande Pipeline Co. v. FERC,* 178 F.3d 533, 540-41 (D.C. Cir. 1999).

II.
THE GOVERNMENT'S ARGUMENTS ABOUT THE SCOPE OF THE RELIEF PLAINTIFFS SEEK ARE UNFOUNDED.

Before addressing the government's merits arguments, it is necessary to clear up certain misconceptions in the government's opposition about the nature of the relief plaintiffs seek.

First, the government asserts that our summary judgment motion reveals that the plaintiffs are not challenging certain provisions in the Bush Order that the Complaint placed in issue (for example, the provisions giving the incumbent President unlimited review time, and the provision purporting to define the scope of the constitutional executive privilege to include nonconstitutional privileges). Govt. Opp. 1. The government misunderstands the significance of the summary judgment motion. All it indicates is that we are not now seeking *summary judgment* based on the unlawfulness of those specific features of the Order. Since the theories advanced in the summary judgment motion support all the *relief* plaintiffs seek, plaintiffs need not argue all of the theories advanced in the Complaint to obtain summary judgment.

Second, the government contends that our summary judgment motion has abandoned the Complaint's prayer for an injunction requiring the release of all of the Reagan documents that

have been withheld based on the Order. Govt. Opp. 8. Again, the government misreads the motion. The motion specifically seeks an injunction "requiring [defendants] to open Reagan presidential records and Bush vice presidential records without regard to the terms of the Executive Order 13,233." Plaintiffs' Motion for Summary Judgment, at 1. Because the only basis for the continued withholding of the still-unreleased Reagan records is the Bush Order, this request necessarily encompasses the release of the particular documents that are being withheld.

The government further contends that the scope of the injunctive relief sought in the motion for summary judgment—requiring the defendants to administer the PRA and the Reagan and Bush records without regard to the Bush Order—is not supported by the motion for summary judgment, because, according to them, the motion does not assert that *all* of the provisions of the Order are unlawful. But the government again overlooks that the summary judgment motion, in addition to contending that particular features of the Order are unlawful, also contends that the Order as a whole is unauthorized. *See* Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Summary Judgment, at 21-26. That claim plainly supports the scope of the relief requested.

Finally, the government argues that the plaintiffs are not entitled to the injunctive relief sought in their summary judgment motion because the terms of the injunction differ slightly from the relief prayed for in the Complaint. The government cites Federal Rule of Civil Procedure 8(a)(3) as well as a solitary district court decision from Ohio, *Davis v. Sun Oil Co.*, 953 F. Supp. 890 (S.D. Ohio 1996). *Davis* denied recovery of restitution to a plaintiff who had not sought it in his Complaint, on the purported ground that "[n]o provision of [the Federal Rules of Civil Procedure] or any case law extant authorizes a person to request a form of relief in a motion for summary judgment, different from that requested in his [complaint]." *Id.* at 892.

The district court in *Davis* was flatly wrong, for both the Federal Rules of Civil Procedure and a host of "extant case law" expressly authorize (and indeed *require*) a Court to grant relief not explicitly prayed for in a complaint whenever the plaintiff demonstrates, in a motion for summary judgment or otherwise, that he is entitled to it. Rule 54(c) unambiguously provides that, except in cases of default judgment, "every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, *even if the party has not demanded such relief in the party's pleadings*" (emphasis added). The D.C. Circuit has repeatedly held that the Rule means what it says, and that a plaintiff is not limited to the forms of relief requested in the complaint: "Once jurisdiction is established and a claim is heard, Rule 54(c) permits the court to consider relief not specifically pleaded." *Dellums v. NRC*, 863 F.2d 968, 975 n.8 (D.C. Cir. 1988); *see also Scheduled Airline Traffic Offices, Inc. v. Department of Defense*, 87 F.3d 1356, 1358-59 (D.C. Cir. 1996); *Oil, Chemical & Atomic Workers Int'l Union v. Zegeer*, 768 F.2d 1480, 1487 n.13 (D.C. Cir. 1985); *Doe v. Harris*, 696 F.2d 109, 114 n.8 (D.C. Cir. 1982); *Hoston v. Silbert*, 681 F.2d 876, 878 n.3 (D.C. Cir. 1982); *Pickus v. U.S. Board of Parole*, 507 F.2d 1107, 1110 (D.C. Cir. 1974); *Fielding v. Brebbia*, 399 F.2d 1003, 1006 n.7 (D.C. Cir. 1968); 10 Wright, Miller & Kane, *Federal Practice & Procedure* § 2664 (3d ed. 1998).

Davis is not even good law in its home district, for the Sixth Circuit rejected *Davis*' precise holding when it held in *United States v. Universal Management Services, Inc.*, 191 F.3d 750, 760 n.7 (6th Cir. 1999), that Rule 54(c) "allows a district court to order restitution in an appropriate case even when it has not been requested in the Complaint." Remarkably, while relying on a district court opinion that has been rejected even in its home circuit, the government does not bother to cite the governing Rule of Civil Procedure or the authoritative precedents

from *this* Circuit that doom its argument. Unfortunately, the same fast-and-loose approach toward precedent pervades the government's merits arguments as well.

III.

THE BUSH ORDER UNLAWFULLY GRANTS FORMER PRESIDENTS VETO POWER OVER RELEASES OF THEIR RECORDS

The government's opposition continues to rest on a fundamental misconstruction of *Public Citizen v. Burke*, 843 F.2d 1473 (D.C. Cir. 1988), but the government makes one important concession—namely, that *Public Citizen v. Burke* establishes that the constitutional executive privilege does not *require* giving a former President the power to veto releases of documents by the Archivist. Govt. Opp. 2, 16-17. This concession is itself sufficient to condemn the Bush Order, for the terms of the PRA unambiguously require the Archivist to release presidential records once their statutory restriction expires, *except* to the extent that withholding them is *required* by a constitutionally based privilege. 44 U.S.C. §§ 2204(a)-(c). The government's concession that the constitutional privilege does not require giving the former President the veto power provided by the Bush Order thus leads inescapably to the conclusion that the Order directs the Archivist to withhold records under circumstances where the constitutional privilege does *not* require withholding. In other words, the Order directs the Archivist to violate the terms of the PRA. Unless the Constitution requires such a directive—which the government concedes it does not—the Bush Order must therefore be unlawful.

The government's argument that *Burke* "necessarily determined" that a procedure such as the Bush Order would be constitutionally *permissible* (Govt. Opp. 17), though not constitutionally compelled, is thus irrelevant. It is also wrong. The government's argument boils down to the assertion that by deciding that a statute forbids some action, a court necessarily holds that the Constitution permits it—an argument at odds with logic and the ordinary practice

of not deciding constitutional questions when a nonconstitutional ground of decision is available. *See Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 346 (1936) (Brandeis, J., concurring). Moreover, the government's argument ignores the language of *Public Citizen v. Burke*, which expressly states that when a statute, such as the Nixon materials legislation or the PRA, provides that records must be released unless they are privileged, the Executive Branch cannot constitutionally abdicate its responsibility to decide the privilege issue. 843 F.2d at 1479.

The government's attempt to distinguish *AHA v. Peterson*, 876 F. Supp. 1300 (D.D.C. 1995), also falls flat. *Peterson* held that an agreement that purported to give a former President control over access to his materials violated the PRA. The government does not contest the correctness of the *Peterson* holding, but it argues that *Peterson* is inapplicable here because in this case the Archivist did not *agree* to cede control to the former President; rather, he was *directed* to do so by the incumbent President. (Govt. Opp. 18.) Because the President "has the constitutional power to direct the Archivist" (*Burke*, 843 F.2d at 1478), the government contends that this difference renders *Peterson* inapplicable.

To be sure, the President may have some constitutional power to direct the Archivist in the lawful performance of his functions, but even the government does not contend that he can direct the Archivist *to violate the law*. *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804). If it is unlawful for the Archivist to cede control over access to a former President, as *Peterson* holds, it cannot become lawful simply because the President orders the Archivist to do it.

Probably the government's most surprising assertion is its statement that in granting former Presidents veto power over releases of their records, the Bush Order is "no different from the procedure approved by the D.C. Circuit in [*Nixon v.*] *Freeman*[, 670 F.2d 346 (D.C. Cir. 1982)]." Govt. Opp. 19. The procedure approved in *Freeman* was that if the former President

made a claim of privilege, the Archivist would rule on it. If the Archivist rejected the claim of privilege, the materials would be released to the public *unless* the former President promptly sought judicial review, in which case the release would be stayed to avoid mooting the issue. *Freeman*, 670 F.2d at 356. By contrast, under the Bush Order the procedure is that if a former President makes a claim of privilege, the Archivist is forbidden to rule on the claim, and *must* withhold the records in question regardless of whether judicial review is sought. In other words, under the procedure in *Freeman*, the consequence of an invalid claim of privilege was *disclosure* absent a court challenge. Under the Bush Order, the consequence of an invalid claim of privilege is *withholding* of materials absent a (successful) court challenge. Far from being "no different" from the procedure in *Freeman*, the procedure under the Bush Order is its *polar opposite*.

Finally, the government argues that the Bush Order is no different from the Freedom of Information Act, which imposes on persons requesting documents the burden of going to court to seek access. Govt. Opp. 20. The analogy is flawed. The FOIA does indeed impose on requesters the burden of going to court when an agency has considered and denied a request for access. There is nothing unlawful about that. If, however, the President were to direct an agency to deny all requests for access whenever a third party requested the agency to do so, without determining whether there was a lawful basis for withholding the requested materials, that directive would clearly be unlawful: It would compel agencies to deny access even where, had they considered the issue, they would have found the request for access justified.[3] That is exactly what the Bush Order does with respect to presidential records.

[3] *Cf. Better Government Association v. Department of State*, 780 F.2d 86 (D.C. Cir. 1986) (agency may not adopt blanket rules denying access to which requesters are entitled).

IV.
THE BUSH ORDER IS UNAUTHORIZED

The government's arguments that the Bush Order is a legitimate exercise of presidential authority largely fall with its concession that the terms of the Order are not constitutionally compelled. If that is the case, there can be no justification for an Order that directs the Archivist to withhold documents under circumstances where legislation passed by Congress requires that they be released. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-38 (1952) (Jackson, J., concurring) (President's power is at "lowest ebb" in such circumstances).

The government, however, argues that the PRA's "silence" about the matters covered by the Order is an implicit delegation of power to the President to regulate unilaterally through executive order. But the PRA is not silent. First, as a substantive matter, it provides that the Archivist is to release records, and permits withholding them only on the basis of statutory exceptions or constitutionally based privileges. This is not an implicit delegation to the President to direct that they be withheld in other circumstances. Second, procedurally, the PRA is not silent, either: To the extent it delegates power regarding the procedures necessary to carry out the Act, it delegates that power to the Archivist to regulate through the notice-and-comment procedures of the PRA. 44 U.S.C. § 2206. And, as the government concedes, the resulting regulations are inconsistent with the Bush Order. Govt. Opp. 14-15.

The government relies on the President's supposed inherent authority to direct his subordinates to override both the delegation of regulatory authority and the resulting regulations. But the President's authority to direct subordinates does not extend to directing them to violate statutory requirements imposed by Congress on the regulatory process. *See NRDC v. EPA*, 683 F.2d 752, 765 (3d Cir. 1982); *Environmental Defense Fund v. Thomas*, 627 F. Supp. 566 (D.D.C.

1986). Nor does that authority permit him simply to abrogate lawfully promulgated regulations without compliance with the APA. *See, e.g., Nader v. Bork*, 366 F. Supp. 104 (D.D.C. 1973).

V.
THE GOVERNMENT'S ARGUMENTS FAIL TO JUSTIFY PLACING THE PRESIDENT'S PRIVILEGE IN PRIVATE HANDS.

The government cites *no* authority that permits anyone other than an incumbent or former President to assert the constitutional privilege for confidential presidential communications. Although the government correctly points out that the privilege differs from the state secrets privilege in that the former President as well as the incumbent can assert it (*see Nixon v. Administrator of General Services*, 433 U.S. 425, 448 (1977)), it has never been held that it may be invoked by private citizens who have never occupied the Office of the President. *See In re Sealed Case*, 121 F.3d 729, 745 n.16 (D.C. Cir. 1997). None of the government's arguments for extending the power to assert the privilege to private persons who purport to represent deceased or disabled Presidents or their heirs is persuasive.

The government contends, citing *Swidler & Berlin v. United States*, 524 U.S. 399 (1998), that the privilege does not die with the former President. That may well be so, but whether the privilege *survives* is a different matter from *who may assert it*. The reasons that support the survival of the privilege do not similarly support the suggestion that it is heritable as if it were private property. Rather, to the extent the privilege survives the death (or disability) of a former President, it may properly be exercised, if at all, by the incumbent President, who is its primary custodian. *See Nixon v. Administrator*, 433 U.S. at 448-49.

As for the government's assertion that presidential papers were historically subject to the control of a President's heirs, no more need be said than that their control was based on property

rights, not on constitutional privilege. *See Nixon v. United States*, 978 F.2d 1269 (D.C. Cir. 1992). The two concepts are entirely distinct.

The government also contends that regulations governing the Nixon materials permit President Nixon's heirs to assert constitutional privileges on his behalf. The government's description of the regulations, however, is misleading. The regulations in fact permit "any person," including Mr. Nixon's heirs, to make a claim of "a legal or constitutional right or privilege which would prevent or limit public access" to the Nixon materials. 36 C.F.R. § 1275.44. Under these provisions, Mr. Nixon's heirs may certainly assert their own rights and privileges (including, for example, the right to have returned to them any of the Nixon presidential materials that were personal or private, as required by the Nixon materials legislation). The regulations do *not* say, however, that Mr. Nixon's heirs can assert *Mr. Nixon's* constitutional rights or privileges, and they certainly do not say that Mr. Nixon's heirs have standing to make a claim of executive privilege. Indeed, to our knowledge, no claim of executive privilege by Mr. Nixon's heirs has ever been recognized as valid by the Archivist. The Bush Order stands in sharp contrast to the Nixon regulations not only in expressly providing that a representative of a deceased or disabled President can assert executive privilege, but also in providing that any such claim is *binding* on the Archivist.

VI.
THE GOVERNMENT PROVIDES NO MEANINGFUL DEFENSE OF THE BUSH ORDER'S PROVISIONS REGARDING VICE PRESIDENTIAL PRIVILEGE.

The government does not argue that there is a constitutional vice presidential privilege. *See* Govt. Opp. 23. Indeed, the government does not point to even the slightest shred of support for the existence of such a privilege. Even so, the government contends that the Bush Order's

provision for the assertion of vice presidential privilege is lawful because it merely "preserves [the] opportunity for Vice Presidents" to "argu[e] that such a privilege exists." Govt. Opp. 23.

The government's characterization of the Order is not credible. The Order quite obviously gives a former Vice President much more than an "opportunity" to make an "argument." Rather, the Order *requires* the Archivist to withhold materials from the public upon the mere assertion of the nonexistent vice presidential privilege, and, indeed, prevents the Archivist from releasing any vice presidential materials to the public under the PRA without the "authorization" of the former Vice President. The Order thus violates the provisions of the PRA that require the release of vice presidential materials following the expiration of the 12-year restriction period absent a constitutionally based privilege that would prevent their release.

CONCLUSION

For the foregoing reasons, as well as those set forth in our opening memorandum and in our opposition to the government's motion to dismiss the Complaint, plaintiffs' motion for summary judgment should be granted.

Respectfully submitted,

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