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 IN SUPPORT OF THEIR RENEWED MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

Given the clear conflict between the terms of Executive Order 13,233 and the D.C. Circuit's decision in *Public Citizen v. Burke*, 843 F.2d 1473 (D.C. Cir. 1988), as well as the insubstantiality of the arguments supporting the Bush Order's provisions allowing assertion of privilege by former vice presidents and private representatives of deceased presidents, the government continues to urge this Court not to reach the merits of this case on grounds of standing or prudential ripeness. But the government does not contest that privilege reviews required by the Order continue to delay access to presidential and vice presidential records sought by plaintiffs and other members of the public, and the government's assertions that those delays are not "caused" by the unlawful features of the Order are strained and implausible. The government's further insistence that "prudential" concerns require this Court to avoid the merits of the issues is based on the false premise that the case presents difficult issues of separation of powers—a premise that the government's arguments on the merits utterly fail to bear out. The Bush Order has operated for over four years, with continuing, tangible effects on public access to

presidential records. The time is ripe for the Court to resolve the question of the Order's legality and to direct the Archivist that he may no longer comply with it in his administration of the Presidential Records Act.

ARGUMENT

I. Plaintiffs Have Suffered Injuries Directly Resulting from the Bush Order.

The government does not contest that reviews under the Bush Order have delayed release of Reagan-Bush and Bush-Quayle presidential and vice presidential records at both the Ronald Reagan and George Bush Presidential Libraries.[1] Nor does it dispute that those delays are continuing to occur as the Bush Order is applied on an ongoing basis to each release of records from those libraries and that, as a result, plaintiffs in this action are suffering delays in access to records they have specifically requested. By way of example only, review under the Bush Order of the approximately 57,000 pages of George H.W. Bush "P5" materials that were noticed for release last February upon expiration of the 12-year restriction period has not been completed as

[1] Indeed, with two exceptions, the government does not dispute any of the facts set forth in Plaintiffs' Statement of Undisputed Facts in Support of Their Renewed Motion for Summary Judgment on Count One of the Amended Complaint. In its response to the statement, the government complains that some of the facts are merely "background," and that citations are not included for the first several paragraphs of the statement. That, of course, is because the facts in those paragraphs were entirely drawn from previous statements that the government did not contest, the government's own status reports, and this Court's opinions. Despite its thorough familiarity with all the matters asserted, the government points to only two claimed errors in the statement of facts. First, it asserts that ¶ 19 of the statement incorrectly says that former President Reagan's family has participated in reviews of records under the Bush Order. What the statement actually says is that *representatives* of the former President and of his family have conducted the reviews. The statement that the representatives represent the family as well as the former President is based on § 10 of the Bush Order, which provides that a former president's family may participate in the designation of the former president's representative. Plaintiffs do not contend that the family members have taken part in the reviews. Second, the government says that the Fawcett Declaration does not support the statement in ¶ 21 that "substantial" parts of the delay in access to records are attributable to reviews under the Bush Order. The Fawcett Declaration says that reviews under the Order average about 170 days, or nearly six months. Fawcett Dec. ¶ 7.

of this writing, and about 25,000 pages of those records are still being withheld from release. *See* "Information on released [*sic*] of documents formerly withheld under Presidential Records Act restrictions P-2 and P-5," http://bushlibrary.tamu.edu/research/releaseddocuments.html (last visited January 12, 2006).

The government does not argue that such delays are not injury in fact. Indeed, a recent decision of the D.C. Circuit strongly supports the view that delay, if causally connected to a challenged action, satisfies the injury-in-fact requirement. *See Judicial Watch, Inc. v. U.S. Senate*, __ F.3d __, No. 04-5422, slip op. at 3-4 (D.C. Cir. Dec 23, 2005). The government accordingly concentrates on the issue of causation, but it ultimately fails to counter plaintiffs' showing that it is the unlawful features of the Bush Order that have caused their injuries. The causation inquiry, after all, requires only that the plaintiff show that his injury-in-fact is "fairly traceable to the challenged action." *Sabre, Inc. v. Department of Transportation*, 429 F.3d 1113, 1117 (D.C. Cir. 2005). That standard is met when "the challenged agency action authorizes the conduct that allegedly caused the plaintiff's injuries, if that conduct would allegedly be illegal otherwise." *Shays v. FEC*, 414 F.3d 76, 92-93 (D.C. Cir. 2005) (citation omitted).

Here, there is no doubt that it is the Bush Order that authorizes the extended privilege reviews that have led to the delays that have injured and continue to injure the plaintiffs. Moreover, plaintiffs claim that the very issuance of the Order was unlawful because the president lacks authority to supplant the Archivist's rulemaking authority under the PRA. Plaintiffs further contend that absent the president's unlawful action the Archivist's rules (which do not permit former officeholders to extend their reviews indefinitely) would govern. There is thus no question but that plaintiffs have shown that their demonstrable injuries are causally connected with their claim that the president lacked authority to issue the Order. Indeed, the government's

standing argument barely addresses this claim, other than to assert in passing that "because plaintiffs cannot demonstrate standing in regard to any of the E.O.'s individual parts, they just as clearly do not have standing to bring this broad facial challenge to the E.O. as a whole." Def. Reply/Opp. 4. But as the government itself has pointed out in this litigation, standing to assert each claim must be analyzed separately, *see Ripon Society v. National Republican Party*, 525 F.2d 567, 573 n.8 (D.C. Cir. 1975), and the government's causation objections to other claims (even if they were valid) cannot overcome the obvious causal link between the president's unauthorized issuance of the Order and the injuries plaintiffs have suffered as a result of reviews under the Order.

As for plaintiffs' claim that the Order unlawfully grants former officeholders unilateral authority to direct the Archivist to withhold records, the government contends that plaintiffs will not suffer injury causally related to the claim unless and until a former officeholder makes an *invalid* claim of privilege that results in the withholding of records. The government, however, conceives of the claim too narrowly. The claim of illegality is directed not merely at the requirement that the Archives accept all claims of privilege by a former officeholder, but simultaneously at the Order's prohibition of any release of records without the former officeholder's authorization—features of the Order that go hand in hand and are mutually reinforcing. By requiring the Archivist to await the former president's authorization before releasing records, the Order directly causes the delays that have injured plaintiffs—delays that, on average, now substantially exceed the 90-day minimum review period called for by the Order. *See* Fawcett Dec. ¶ 7 (review period currently averages 170 days). Thus, plaintiffs have already been injured and continue to suffer injury caused by this challenged feature of the Order, without

regard to whether particular records have been or are being withheld on the basis of an invalid claim of privilege.

In any event, although plaintiffs need not rely on it, the likelihood that records will be withheld based on an invalid claim of privilege is also significant enough to establish plaintiffs' standing. Contrary to the government's assertion, finding standing on this basis does not require the court to accept a "conspiracy theory" or attribute bad motives to former presidents and their representatives. Rather, it merely requires recognition of the obvious proposition that when the government authorizes private parties to engage in conduct that serves their self-interest, they are likely to do so. *See Shays v. FEC*, 414 F.3d at 90. Moreover, the history of this case demonstrates that an invalid or erroneous claim of privilege by a former president—even a former president acting in good faith—is not a mere theoretical possibility: Of the eleven documents that were withheld from plaintiffs based on a claim of privilege by former President Reagan's representative (with which President Bush initially "concurred" under the Executive Order), the claim with respect to two of the documents turned out to be unfounded once President Bush conducted an independent review, and it was only because President Reagan's representative was persuaded to withdraw the claim as to those documents that they were belatedly released. Otherwise, the Order would have required the Archivist to continue to withhold them despite the invalidity of the claim of privilege.[2] In light of this history, it is far from speculative the plaintiffs will in the future again face a denial of access to records resulting from an invalid claim of privilege by a former president. And unlike the plaintiff in *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983), who lacked standing because he could not demonstrate

[2] The withdrawal of the privilege claim had the convenient effect of allowing the government to maintain its position in this litigation that the unilateral veto afforded former presidents by the Order has not injured plaintiffs.

that he was likely to engage in conduct in the future that would subject him to another arrest involving excessive force, the plaintiffs here engage in a regular course of lawful conduct—requesting access to presidential records—that makes it highly likely that future invalid claims of privilege will injure them by denying them access to records.

Plaintiffs' challenges to the Order's provisions for privilege reviews and privilege claims by representatives of deceased presidents and by former vice presidents also readily satisfy the causation prong of the standing inquiry because the challenged features of the Order directly authorize the privilege reviews that give rise to the delays that have injured plaintiffs. Indeed, the government does not contest that the reviews by former vice presidents and representatives of former presidents are causally linked to the alleged injuries. Instead, the government asserts that the reviews themselves are not the result of the Order, but rather of a White House "policy" of seeking advice from former vice presidents and representatives of deceased presidents as part of its *own* privilege review.

The government's argument is untenable. The declarations on which the government relies, supplied by a subordinate of the Archivist, describe only how the White House has operated under the Bush Order; they do not establish, or even suggest, that the claimed policy predated the Order or otherwise exists independently of it, nor do they indicate that the policy would continue to be followed if the Order were struck down.[3] Moreover, any suggestion that

[3] Ms. Fawcett's first declaration states that during the review period "under Executive Order 13233," "the incumbent waits for the decision and any comments from the former before undertaking and concluding its review," making clear that what she is describing is the president's implementation of the Order, not some policy that exists independently of the Order. Fawcett Dec. ¶ 7. Her second declaration similarly refers to "the notice process under Executive Order 13233." Second Fawcett Dec. ¶ 2. Neither declaration intimates that the policy described predated the Order or would continue to exist absent the Order. Indeed, Ms. Fawcett, as an Archives official, has no way of knowing what the president would do if the Order were not in effect.

the reviews by former vice presidents and representatives of deceased presidents are merely for the purpose of advising the White House in its own independent review fly in the face of the Order itself, which states clearly that the reviews are for the purpose of permitting former officeholders to "independently … assert constitutionally based privileges," Bush Order § 3(d)(1)(ii), not simply to advise the incumbent president. The Order's framework does not call for an independent privilege determination by the incumbent, but only a decision whether or not to "concur" in the decision of the former officeholder. *Id.* § 4.[4] Indeed, the Order does not even contemplate that the incumbent will always review records designated for release, but merely states that he "may" do so. *Id.* § 3(d). In short, what the Order authorizes are full-scale privilege reviews by representatives and former vice presidents, and the privilege reviews so authorized are caused by the Order for standing purposes. *See Shays*, 414 F.3d at 92-93.

At bottom, the government's argument is not really a causation argument, but one concerning redressability: The government's contention is that absent the Order, the White House will incorporate advisory reviews by former vice presidents and representatives of deceased presidents into its own review, producing the same delays as the Bush Order. In so arguing, however, the government seeks to place a greater burden of showing redressability on plaintiffs than precedent supports. In *Shays v. FEC*, for example, the D.C. Circuit held that "[w]here an agency rule causes the injury, as here, the redressability requirement may be satisfied by vacating the challenged rule." 414 F.3d at 95 (quoting *Ctr. for Energy & Econ. Dev. v. EPA*, 398 F.3d 653, 657 (D.C.Cir.2005)). So, too, here. Because the Bush Order caused the injury, the injury can be redressed by an order directing the Archivist to implement the PRA

[4] Oddly, the government asserts that plaintiffs have abandoned their challenge to this deference aspect of the Order. As explained further below, *see infra* n.9, that is not correct.

without regard to the Order's requirements concerning privilege reviews and claims by former vice presidents and representatives of deceased presidents. Speculation about what new or alternative policies the White House might adopt in that circumstance does not detract from the redressability of plaintiffs' injury. *Cf. Judicial Watch v. United States Senate*, slip op. at 4-5 (basing redressability analysis on relief sought by complaint).

Moreover, the suggestion that the White House could circumvent a favorable ruling for plaintiffs by finding another way to give former vice presidents and representatives of deceased presidents unlimited time to review records in some new "advisory" capacity overlooks that such a policy itself would face legal challenge if it involved unreasonable delays in access (in violation of the PRA's requirement that records be released "as rapidly as possible," 44 U.S.C. § 2203(f)(1)) or improper deference by the incumbent to the views of former officeholders as to questions of privilege (in violation of the holding of *Public Citizen v. Burke*, 843 F.2d at 1479). The possibility that the government may do something else that is unlawful does not make unlawful agency action unredressable.

II. The Prudential Ripeness Doctrine Does Not Bar Review.

The government argues that even if plaintiffs have standing, this Court should refrain from deciding their claims for prudential reasons in order to avoid difficult issues of separation of powers, which it claims this case implicates. According to the government, the court should await a "concrete factual context" involving specific privilege claims before deciding the issues plaintiffs raise. Def. Reply/Opp. 11.

If the government were correct, the D.C. Circuit would never have decided *Public Citizen v. Burke*, which, without consideration of any particular claims of privilege that were alleged to be invalid, addressed the purely legal question of the validity of a policy that gave a former

president unilateral authority to block releases of records by asserting privilege. Indeed, the prudential reasons for not proceeding here are far less weighty than they were in *Burke*, because *Burke* has already resolved the fundamental separation of powers questions at issue here adversely to the position currently taken by the government. *See infra* Part IV. In light of *Burke*'s clear teachings, plaintiffs' challenge to the veto authority the Bush Order confers on former officeholders does not pose any difficult questions of separation of powers, and prudential concerns thus do not require the Court to wait any longer before declaring it unlawful.

Similarly, plaintiffs' challenges to the provisions concerning former vice presidents and representatives of deceased presidents do not pose issues that the Court should strain to avoid. The government's token defense of the Bush Order's provisions regarding former vice presidents and representatives of deceased presidents (Def. Reply/Opp. 23-25) fails to bear out its characterization of those issues as "separation-of-powers issues relating to the highest level of government and the President's constitutional authority to protect the autonomy of his office." Def. Reply/Opp. 10. The government nowhere makes the case that a vice presidential privilege, or a rule allowing private representatives of dead officeholders to invoke privilege, is essential to the autonomy of the executive branch. Indeed, the government declines even to argue that a vice presidential privilege exists (*see* Def. Reply/Opp. 25), and it does not assert that the Constitution *requires* allowing invocation of privilege by representatives of deceased presidents. *See* Def. Reply/Opp. 23-24. Nor do the government's sparse merits arguments on these issues explain how or why the "factual context" that they claim is necessary to resolution of these issues would be relevant. *Compare* Def. Reply/Opp. 11 *with* Def. Reply/Opp. 23-25.

In short, this case demonstrates that not all separation of powers questions are difficult. The insubstantial arguments for the government's position on former vice presidents and

representatives of deceased presidents are not weighty enough to justify the indefinite delays that plaintiffs and others who seek access to presidential records under the PRA suffer as a result of privilege reviews that would no longer be necessary if the Court reached the merits of these issues. Prudential considerations therefore should not deter the Court from addressing the merits and, after over four years of the Order's operation, putting an end to it.

Ultimately, the government's standing and ripeness arguments, together, would have the effect of insulating the Bush Order from any effective judicial review. Under virtually any imaginable circumstances, the government would assert that delay in access or even outright withholding of records was not attributable to the Order but to the president's independent privilege review or assertion of privilege. Precluding review of the Order's operation, however, would not only be inconsistent with the D.C. Circuit's review of a similar policy, under similar circumstances, in *Public Citizen v. Burke*, but would allow an unlawful policy that has already been in operation for four years to continue indefinitely, in derogation of the requirements of the PRA. This Court should not allow the government to achieve that result by hiding behind distorted versions of justiciability doctrines.

III. The President Lacks Authority to "Implement" the PRA in a Way That Bypasses the Act's Delegation of Rulemaking Authority to the Archivist and Conflicts with the Rules Issued Under That Authority.

The PRA delegates authority to devise standards implementing the Act to the Archivist, and further provides that that authority must be exercised through the notice-and-comment rulemaking process established by the Administrative Procedure Act, 5 U.S.C. § 553(b). *See* 44 U.S.C. § 2206. The government does not appear to argue that the president has some general authority to bypass or override rulemaking requirements by resorting to the fiat of an executive order. It argues, however, that he has not done so in this case because the Archivist's authority is

limited to "regulations necessary to carry out the provisions of [the PRA]," *id.*, and, according to the government, the Bush Order is not necessary to carry out the Act's provisions because it addresses only "the invocation or waiver of *constitutionally-based executive privileges*," a subject the government asserts that the Act does not address. Def. Reply/Opp. 14.

The government's position is, for starters, contradicted by the very language the government quotes from the introductory paragraph to the Bush Order, which states that the purpose of the Order is "to establish policies and procedures *implementing section 2204 of title 44 of the United States Code* with respect to constitutionally based privileges" (emphasis added). The implementation of the PRA is precisely the subject-matter over which Congress delegated rulemaking authority to the Archivist. Indeed, "implement," the word used in the Order, is a synonym for "carry out," the word used by Congress to define the authority delegated to the Archivist. *See Webster's Third New International Dictionary (Unabridged)* 1134 (1961) (defining "implement" as "to carry out"). Thus, in issuing an Order to "implement" the Act, the president was purporting to exercise precisely the authority the Congress delegated to the Archivist subject to the APA's notice-and-comment rulemaking requirements.

The government's assertion that the PRA does not address the subject of constitutionally based privileges, and that an Order addressing that subject must therefore be outside the scope of the authority delegated to the Archivist, is also wrong. The PRA addresses constitutionally based privileges explicitly, both by stating that it is not intended to limit (or expand) their scope, 44 U.S.C. § 2204(c)(2), and by providing that the rules to be promulgated by the Archivist must allow for the assertion by a former president of "any rights or privileges which the former President may have," 44 U.S.C. § 2206(4), a phrase that plainly includes the constitutionally based privileges referred to in § 2204(c)(2). The Bush Order itself recognizes that the PRA is

hardly "silent" on the question of constitutionally based privileges: According to the Order, 44 U.S.C. § 2204(c)(2) "recognizes that the former President or the incumbent President may assert any constitutionally based privileges, including those ordinarily encompassed within [FOIA exemption (b)(5)]." Bush Order § 2(a).[5] Consistent with this view of the Act, the Bush Order's first paragraph specifically states that the Order implements 44 U.S.C. § 2204.

The notion that the Bush Order does not address matters within the Archivist's rulemaking authority under § 2206 thus cannot be squared with the plain language of the PRA or the Bush Order. Moreover, the Archivist has exercised that authority by promulgating rules applicable to the assertion of rights and privileges by former presidents, *see* 36 C.F.R. § 1270.46, further underscoring, by administrative construction, that the scope of the Act's delegation of rulemaking authority encompasses the handling of claims of privilege by former presidents.

Given that the Order's subject matter clearly falls within the scope of the Archivist's delegated—and exercised—authority to carry out the PRA's provisions through lawfully promulgated regulations, the government's assertion that the president nonetheless had authority to issue his own standards to implement the Act necessarily rests on its contention that the president has inherent authority to promulgate standards to implement the constitutionally based privilege, and that the other branches of government cannot constitutionally "preempt the President's authority to implement procedures governing executive privilege" or otherwise "interfere" with that supposed authority. Def. Reply/Opp. 15. But the government's theory that the other branches may not regulate the manner in which the constitutionally based presidential

[5] This Court's September 24, 2005, Memorandum Opinion (at 23) reflects the same understanding.

privilege is asserted is directly contrary to governing precedents concerning both separation of powers in general and the privilege in particular.

To begin with, the government's premise that because the privilege belongs to the president, only the president may devise procedures to "implement" it reflects the rigid notion "that the Constitution contemplates a complete division of authority between the three branches," which the Supreme Court has emphatically rejected. *Nixon v. Administrator of General Services,* 433 U.S. 425, 443 (1977). Under the flexible approach adopted in *Nixon v. Administrator* (and repeatedly reaffirmed by the Court in such cases as *Mistretta v. United States*, 488 U.S. 361, 380 (1989), and *Morrison v. Olson*, 487 U.S. 654, 693 (1988)), congressional or judicial regulation of the manner in which the privilege is asserted would violate separation of powers principles only if "it prevent[ed] the Executive Branch from accomplishing its constitutionally assigned functions." *Nixon v. Administrator*, 433 U.S. at 443. There can be no suggestion that a statute that expressly refuses to limit the scope of the constitutionally based privilege and specifically requires that the Archivist provide by regulation for the assertion of that privilege prevents the president or the executive branch from accomplishing their constitutionally assigned functions.

Moreover, the other branches have long exercised authority with respect to assertions of constitutionally based presidential privilege. The judicial branch has defined not only the scope of the privilege, *see United States v. Nixon*, 418 U.S. 683 (1974), but also how and by whom it may be asserted, *see In re Sealed Case*, 121 F.3d 729, 740-42, 744 n.16 (D.C. Cir. 1997). In addition, both the Supreme Court and the D.C. Circuit have affirmed congressional authority to enact legislation that, like the PRA, delegates to the Archivist the authority to regulate the manner in which claims of privilege may be asserted with respect to presidential records. In *Nixon v. Administrator*, the Supreme Court rejected claims that legislation governing access to

the Nixon presidential materials violated separation of powers and/or the presidential privilege, resting its approval of the legislation on the law's delegation of authority to the Archives to promulgate regulations that both protected the former president's opportunity to assert "any constitutionally based right or privilege" and "guarded against disclosures barred by any defenses or privileges available to [the former president] or the Executive Branch." 433 U.S. at 444; *see also id.* at 450 ("[T]here is no reason to believe that the restriction on public access ultimately established by regulation will not be adequate to preserve executive confidentiality."). Similarly, the D.C. Circuit in *Nixon v. Freeman*, 670 F.2d 346 (D.C. Cir. 1982), held that regulations promulgated by NARA under the Nixon legislation to govern assertions of privilege by former President Nixon were valid as long as they provided the former president "a meaningful opportunity to contest disclosure" on the basis of the privilege. *Id.* at 359.

Congress has also exercised authority to regulate the manner in which the presidential privilege and other constitutionally and common-law based executive privileges must be asserted with respect to those executive branch records that qualify as agency records under the Freedom of Information Act. *See, e.g.*, *Lardner v. United States Dept. of Justice*, 2005 WL 758267 (D.D.C. March 31, 2005) (considering manner in which claims that records are protected by the presidential privilege must be asserted in FOIA litigation). As the Supreme Court put it in *Nixon v. Administrator*, "there is abundant statutory precedent for the regulation and mandatory disclosure of documents in the possession of the Executive Branch. … Such regulation of material generated in the Executive Branch has never been considered invalid as an invasion of its autonomy." 433 U.S. at 445.

Thus, contrary to the government's assertion, there is nothing even arguably unconstitutional about Congress's choice to require that procedures for the assertion of privilege

by former presidents be established by regulations promulgated by the Archivist under the APA rather than standards established by executive fiat. Nor is there anything unclear about Congress's specification of notice-and-comment rulemaking as the means for establishing standards implementing the Act. The government cites no precedents holding that, where authority has been delegated to an agency to promulgate rules subject to the APA, the president can override Congress's action by directing the agency to comply with standards prescribed by presidential fiat instead of regulations properly promulgated under the authority delegated to the agency by Congress.[6]

The government's contention that the Order does not in fact conflict with the regulations promulgated by the Archivist under the PRA (*see* Def. Reply/Opp. 20-22)—contradicting its previous admission that the Bush Order takes a "different approach" from the regulations[7]—is wrong in key respects. First, the Archivist's regulations provide that he may make records public on as little as 30 days' notice to a former president (36 C.F.R. § 1270.46(d)) and that even if more time is given for the former president's review, it is the *Archivist* who determines the date on which the records will be disclosed (36 C.F.R. § 1270.46(b)(iv)). The Bush Order, by contrast, provides that no less than 90 days' notice is required, and it empowers the former president to extend the time of release unilaterally either by requesting an extension (a "request"

[6] Instead, the government simply relies on two cases holding that the president is not himself subject to the APA in the absence of clear legislation making the APA applicable to his actions. Def. Reply/Opp. 16 (citing *Franklin v. Massachusetts*, 505 U.S. 788, 801 (1992), and *Armstrong v. Bush*, 924 F.2d 282, 289 (D.C. Cir. 1991)). But holding that the APA does not apply to the president directly is a far cry from holding that the president can bypass the application of the APA to subordinate agencies by issuing executive orders that supplant authority delegated to the agencies to promulgate regulations subject to APA requirements.

[7] Def. Mem. of Points & Auth. in Support of their Mot. to Dism. Plaintiffs' Claims in Count 1 of the Amended Complaint 27.

the Archivist is required to honor, *see* Bush Order § 3(b)) or simply by not authorizing release of the records within the allotted time, thus preventing the Archivist from proceeding with the release. *See* Bush Order §§ 3(c), (d) (Archivist may not release records unless "authorized" by former officeholder).

Second, the Archivist's regulations explicitly provide that the Archivist may decide to disclose presidential records notwithstanding a former president's claim of privilege. 36 C.F.R. § 1270.46(c). The Bush Order expressly denies the Archivist authority to release records when a former president has made a claim of privilege or has declined to "authorize" release. Bush Order § 3(d). Although a more direct conflict between the regulations and the Order is hard to imagine, the government asserts that there really is no contradiction, because the regulations cannot be construed to give the Archivist discretion to overrule a former president's claim of privilege against the wishes of the incumbent president, and the Order is thus simply an exercise of the incumbent's authority to direct the Archivist in the performance of his duties under his regulations. Def. Reply/Opp. 21.

It may well be that an incumbent president could properly direct the Archivist to honor a particular claim of privilege by a former president (although *Public Citizen v. Burke* holds that such a direction would only be lawful if it were based on the incumbent's conclusion that the claim of privilege was legally proper and sustainable, *see* 843 F.2d at 1479). But that is not what the Order does. Rather, in the face of a regulation that gives the agency authority either to accept or reject a claim of privilege, the Order directs the Archivist to accept *all* claims of privilege, even in circumstances where the incumbent has concluded that he cannot concur that the claim is proper. That is not a direction to the Archivist about how to carry out his regulations; it is a direction that he violate them. The government can cite no authority for the proposition that the

president can order his subordinates to violate their own duly promulgated regulations. The reason is clear: It has long been settled that such an order is unlawful. *See United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 266, 267 (1954).

If either the PRA or the Archivist's regulations were unconstitutional, or the terms of the Bush Order were somehow constitutionally required to protect the executive branch's performance of its constitutional functions, the president might have some residual authority to promulgate the Order notwithstanding the PRA's delegation of rulemaking authority to the Archivist and the Archivist's exercise of that authority. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 640 (1952) (Jackson, J., concurring). But the government does not argue that the challenged features of the Bush Order are constitutionally compelled. Indeed, the government has conceded that the Order merely reflects the current administration's view of appropriate "policy."[8] The incumbent president's policy preferences, however, do not provide authority to override either the PRA's directive that the Act be implemented through rulemaking under the APA or the lawful regulations that have resulted from the rulemaking process.

IV. The Government's Defense of the Veto the Order Grants to Former Officeholders Is Contrary to Binding Precedent.

The government does not deny that by providing (1) that the incumbent will concur in a former president's assertion of privilege absent extraordinary circumstances, (2) that even absent such concurrence, the Archivist may not release records as to which a former president has made a claim of privilege, and (3) that affirmative authorization by a former officeholder is required for the release of any records under the PRA, the Bush Order effectively grants a former president a veto power over the release of records. The government further concedes that the

[8] Def. Mem. of Points & Auth. in Support of their Mot. to Dism. Plaintiffs' Claims in Count 1 of the Amended Complaint 27.

D.C. Circuit held in *Public Citizen v. Burke* that a former president does not have the authority to command the Archivist to deny access to presidential records merely by invoking privilege. Def. Reply/Opp. 16. Nonetheless, the government asserts that even though the Archivist cannot himself lawfully accede to every invocation of privilege by a former president, the incumbent president can lawfully *order* him to do so. *See id.* ("The issue in this case is whether the *incumbent* President can command his constitutional inferior (the Archivist) to withhold presidential records based on the invocation of privilege by a former President pending the adjudication of this issue by a court of competent jurisdiction.").

The government's proposition that agency action that would otherwise be unlawful becomes lawful when the president orders the agency to take it is, needless to say, not supported by citation to *any* authority. Although the government attempts to distinguish the cases on which plaintiffs rely (*see* Def. Reply/Opp. 16-20), it does not even purport to cite any authority for its novel assertion that a presidential directive can legitimize otherwise unlawful agency action. The government's argument recalls former President Nixon's assertion in the David Frost interviews: "When the president does it, that means that it is not illegal." Shapiro, *The Oxford Dictionary of American Legal Quotations* 342 (1993).

The government's position, however, is not merely unsupported; it was directly and expressly rejected in *Public Citizen v. Burke*. There, the court explicitly stated that it would violate the *incumbent president's* constitutional duty to "take care that the laws be faithfully executed" if the executive branch were to accept all claims of privilege by a former president and leave it to the judiciary to decide whether those claims were in fact legally valid. 843 F.2d at 1479. Having no answer to this part of *Public Citizen v. Burke*'s reasoning, the government simply ignores it. But the government's unwillingness to address this aspect of *Burke* cannot

obscure that by "command[ing] his constitutional inferior (the Archivist) to withhold records based on the invocation of privilege by a fomer President pending … adjudication … by a court" (Def. Reply/Opp. 16), the president has done exactly what the court in *Burke* held would violate his duty to uphold the law.

Burke is equally fatal to the Bush Order's policy of "deference" to a former president's invocation of privilege. The court in *Burke* expressly held that an incumbent president is not "constitutionally compelled" to afford deference to a former president's assertion of privilege. 843 F.2d at 1479. If that is the case, it necessarily follows that the incumbent president may not, consistent with the PRA, direct the Archivist to withhold records from release to the public based on a policy of such deference, because the PRA commands that materials be promptly released unless they are subject to a *valid* claim of constitutional privilege. Indeed, a policy of granting deference that is not itself constitutionally compelled would result in an expansion of the constitutionally based privilege, contrary to the command of the PRA. *See* 44 U.S.C. § 2204(c)(2).[9]

The government asserts that the requirement that the incumbent president and the Archivist accede to claims of privilege by a former president is "appropriate[e]" because "it can reasonably be presumed that a former President will have better insight than the Archivist into

[9] Plaintiffs are unable to understand the government's assertion that they have abandoned their claim that the deference embodied in the Bush Order's concurrence standard is unlawful. *See* Def. Reply/Opp. 1. Plaintiffs' memorandum supporting their renewed summary judgment motion expressly argued that "[b]oth by requiring the executive branch to defer to claims of privilege by a former president and by forbidding any releases of materials without the express authorization of a former president, the Bush Order violates not only the PRA, but also the obligation of the executive branch to 'take Care that the Laws be faithfully executed' as required by Article II, section 3 of the Constitution." Pl. Mem. of Points & Auth. in Support of Their Renewed Mot. for Summary Judgment & in Opp. to Def. Renewed Mot. to Dism. 27; *see also id.* at 28, 34-35.

whether the executive function would be harmed if certain presidential papers were publicly released." Def. Reply/Opp. 20. Again, however, the government's argument is directly foreclosed by *Burke*, in which the court saw "no reason" why the Archivist owed any more deference to a former president's claim of privilege than did the incumbent. 843 F.2d at 1479. Indeed, the court characterized any "discomfort with the role that the Archivist would play" in ruling on a former president's privilege claims as reflecting mere "notions of lèse majesté." *Id.*

Finally, the government asserts that this court must sustain the veto power granted by the Bush Order because it "clearly cannot *presume* that the unilateral assertion of privilege will be *per se* invalid, as plaintiffs ask." Def. Reply/Opp. 20. But plaintiffs' position is not that a former president's assertion of privilege is per se invalid; it is, rather, that a blanket policy of *accepting* such an assertion of privilege (whether valid or not) is unlawful. That is exactly what *Burke* held.

V. The Government Provides No Support for Permitting Purported Representatives of Deceased Presidents to Assert the Privilege.

The government's principal argument for permitting private representatives of deceased presidents to assert the privilege is that "the public's interest in the assertion of privilege on behalf of a former President may well endure beyond his lifetime or capacity to act." Def. Reply/Opp. 23. But that is not the issue. The question is who may assert the privilege after the death of a former president. The answer, supplied by the reasoning of *Nixon v. Administrator*, is the incumbent president, who is the principal caretaker of the privilege and who "is vitally concerned with and in the best position to assess the present and future needs of the Executive Branch, and to support invocation of the privilege accordingly." 433 U.S. at 449.

The government cites no precedent in any context for the assertion of a privilege of the United States government by someone who neither is an officer of the United States, nor ever

held the office to which the privilege belongs. As the D.C. Circuit explained in *In re Sealed Case*, 121 F.3d at 745 n.16, the precedents of the Supreme Court and the D.C. Circuit involving presidential privilege have involved claims of privilege personally authorized by the incumbent or former president. Although the court noted the possibility that a member of the president's staff might be able to invoke the privilege, it nowhere suggested that invocation of the privilege could be extended to private persons other than the former president. The Supreme Court in *Nixon v. Administrator* found it a close question whether even the former president himself could assert the privilege. *See* 433 U.S. at 448-49. The notion that the Court would have accepted that the privilege could be handed down in perpetuity to private "representatives" of a deceased president is, to say the least, hard to credit.

In any event, even the government does not suggest that the Constitution *requires* permitting private representatives of deceased presidents to claim the privilege. And if the Archives is not constitutionally compelled to accept a claim of privilege from a private person purporting to represent a dead president, then the PRA does not *permit* the withholding of records based on such a claim, because the Act requires release of records after the 12-year restriction period expires unless they are either subject to a statutory restriction or their release would violate the Constitution.

VI. The Government Provides No Defense of the Supposed "Vice Presidential" Privilege.

The government does not argue that a vice presidential privilege exists. It merely argues that because the vice president is a "constitutional officer specifically referred to in Article II, there are reasons to suggest that such a privilege *should* exist"—though it does not say what those "reasons" might be. Def. Reply/Opp. 25. Certainly being referred to in Article II is not enough to give rise to a constitutional privilege, for Article II also refers to "all other Officers of

the United States," (U.S. Const., Art. II, § 2), and no one would suggest that all other officers of the United States possess a constitutional privilege. The fact of the matter is that the constitutional privilege of the president is based not on the president's being "referred to" in Article II, but on the "nature of [the] enumerated powers" granted the president by Article II. *United States v. Nixon*, 418 U.S. at 705. The government does not explain how the extremely limited powers of the vice president under the Constitution could give rise to a constitutionally based vice presidential privilege.

The government appears to contend that it does not matter whether there is a basis for recognizing a vice presidential privilege because the Bush Order only permits former vice presidents to "assert any constitutional privileges they 'may' be entitled to invoke." Def. Reply/Opp. 25. Vice presidents, the government insists, should not be "disabled from arguing that such a privilege exists." *Id.*

Of course a former vice president is free to *argue* whatever he wants. But it is disingenuous to assert that the Bush Order simply permits former vice presidents to make *arguments*. Rather, it empowers them to direct the Archivist not to release their records (even if the incumbent president disagrees), and to hold up any release of those records until they have authorized release following a full-scale privilege review.

The question thus presented is whether the president can direct the Archivist to withhold records based on a former vice president's interest in asserting a privilege *that the president does not even claim exists*. If there is no such privilege, such a directive cannot be justified in the face of a statute that directs that records be made public "as rapidly as possible," 44 U.S.C. § 2203(f)(1), subject only to statutory restrictions and constitutionally valid privileges. 44 U.S.C. § 2204(c).

VII. The Delays Attributable to the Bush Order Are Unlawful.

The government does not contest that reviews under the Bush Order have resulted in delays in access to records, and it does not argue that the features of the Order that have that effect are constitutionally compelled. Indeed, it has conceded that reviews conducted according to the Archives' regulations, which would govern absent the Order, would be lawful.[10] To the extent that the delays occasioned by the Order are not required to protect the constitutionally based privilege, therefore, they violate the Act's requirement that records be released "as rapidly as possible." 44 U.S.C. § 2203(f)(1). Contrary to the government's assertion, arriving at this conclusion does not require the Court to "devise its own time table to be imposed on Executive officials." Def. Reply/Opp. 26. The Court need only direct the Archives to comply with its own lawful regulations rather than the Bush Order. Such an order would not "inevitably give rise to separation-of-powers concerns." Def. Reply/Opp. 26. It would merely vindicate the requirements of the law as already implemented through regulations issued by the executive branch official to whom that responsibility has been delegated.

[10] Def. Mem. of Points & Auth. in Support of their Mot. to Dism. Plaintiffs' Claims in Count 1 of the Amended Complaint 27.

CONCLUSION

For the foregoing reasons, the plaintiffs' motion for summary judgment should be granted.

Respectfully submitted,

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