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NOTE: Out of Sight, but Not Out of Mind: How **Executive Order** 13,233 Expands Executive Privilege While Simultaneously Preventing Access to Presidential Records

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SUMMARY:

... On November 1, 2001, President George W. **Bush** issued **Executive Order** 13,233 (the "Order" or "**Bush's** Order"). ... Further, Reagan's Order required the Archivist to inform the former and current presidents of his intent to open records and "identify any specific materials, the disclosure of which he believes may raise a substantial question of Executive privilege. ... In this respect, family members of a former president, who themselves may never have held a government office, may delegate to an additional person who may never have served in the government, the power to prevent the Archivist, a current member of the executive branch, from granting public access to federal records. ... After the materials are reviewed, the former president may inform the current one whether public access to the documents is "authorized," or if he would like to exert a claim of executive privilege. ... They further permitted the Archivist to open a record to public access thirty days after a former president had been provided with notice of the decision that his claim of privilege was being denied. ... In the past, when a confrontation regarding executive privilege has emerged, the executive branch has provided access to some of the desired information or prepared a way to create safe viewing procedures. ...

TEXT:

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Behind closed doors, there is no guarantee that the most basic of individual freedoms will be preserved. And as we enter the 21st Century, the great fear we have for our democracy is the enveloping culture of government secrecy and the corresponding distrust of government

that follows.

- Senators Daniel Patrick Moynihan and Ron Wyden October 2000 ¹

Introduction

On November 1, 2001, President George W. **Bush** issued **Executive Order** 13,233 (the "Order" or "**Bush's** Order"). The Order allows a current or former president to block public access to the federal records created during his administration. In issuing the Order, President **Bush** revoked **Executive Order** 12,667 issued in 1989 by former President Ronald Reagan, and purported to implement the **Presidential Records Act** of 1978 (PRA). In so doing, President **Bush** continued a three-decade-long battle among the different branches of government over public access to federal documents.

The war over access to presidential records remains important today; the ability to view the records created during the business operations of this country is an important facet of our democracy. The public has a "right to know how its government operates." ² The power to read about, learn from, and critique the actions of past presidents and their staffs gives people confidence in the system to which they belong. Viewing historical records allows the public to inspect, question, and judge the efforts their government has undertaken and to trust the process in which decisions are made. When these records are blocked, hidden from public scrutiny, and factual information [***531**] is unavailable, people begin to doubt the decisions of not just former administrations, but current and future ones as well. In sum, a culture of secrecy is not conducive to an open society. ³

As discussed below, the current battle is essential to winning the war. **Executive Order** 13,233 fundamentally changes the public's ability to view official records. The Order shifts the burden of proof from the President to the person requesting information; extends the right to exert executive privilege to the Vice President, a former vice president, or a designated representative; contradicts regulations issued by the National Archives and Records Administration (NARA); and indefinitely seals records from the public. Although it was intended as an internal executive-branch management tool, the Order implicates and incites an interbranch controversy by both superseding and fundamentally altering previous congressional legislation and Supreme Court precedent.

Part I of this Note defines executive privilege, traces its creation, and examines how the different branches have interpreted it. Part II explores the context in which President **Bush** issued **Executive Order** 13,233. Part III describes how the Order changes and interacts with the previous law surrounding executive privilege, examines the process for gaining access to presidential records, and explains how the Order violates constitutional separation of powers principles. Finally, Part IV considers the possibility of both a legislative and judicial solution to the problem and analyzes why the nonexecutive branches are better suited to resolve the dispute.

I. Putting Executive Privilege in the Presidential Toolbox

A. What Is Executive Privilege?

Executive privilege is the right of the President and high-level executive branch officers to withhold information from Congress, the courts, and ultimately the public.

- Mark Rozell Executive Privilege and the Modern Presidents: In Nixon's Shadow ⁴ [***532**]
In its most basic form, "executive privilege" can be defined as a president's ability to withhold information from other branches of the government and from the American public. ⁵

Interestingly, the words "executive privilege" are not expressly mentioned anywhere in the Constitution, and the phrase is noticeably absent from Article II. This has led a few scholars to conclude that executive privilege is a "constitutional myth." The theory follows that because the Framers included a privilege under Article I, Section 5 for Congress to proceed in secret, the canon of *expressio unius* prevents the executive from acting in secret. ⁶ If the Framers had intended to grant this authority to the President, they would have explicitly stated so. ⁷ Nonetheless, even though the phrase "executive privilege" was not coined until President Eisenhower's Administration in 1958, every president since George Washington has practiced some form of "executive privilege." ⁸ For example, in 1852, President Fillmore asserted a claim of executive privilege to prevent the disclosure of his records pertaining to the King of Sandwich Islands' proposition to transfer the Sandwich Islands to the United States. ⁹ Similarly, in 1877, President Hayes blocked access to records that discussed the nomination of Theodore Roosevelt to the position of Port of New York Collector. ¹⁰ Moreover, since President Washington, presidents have maintained that they have the power to refuse requests for information. ¹¹ For example, President Cleveland refused to provide information about documents pertaining to the removal of various federal officials in 1886 by claiming privilege. ¹²

[*533] A claim of privilege may be exercised over any demand for executive-branch papers. ¹³ Nonetheless, because it serves to exempt the President from releasing records related to his Article II duties, a claim of privilege will usually be defeated by a request for access to information. The main exception to this principle deals with records that relate to "highly important Executive responsibilities involved in maintaining governmental operations," particularly military and diplomatic secrets. ¹⁴ For example, President Polk's claim of privilege over records concerning the Mexican President's 1848 return home was upheld to prevent "diplomatic embarrassment." ¹⁵ At times it may also extend to "an appropriate exercise of the executive's domestic decisional and policy making functions," ¹⁶ and/or conversations between top advisors, which may be privileged even if the President is not a party to them. ¹⁷

B. Why Does the President Need This Particular Tool?

It really reflects the very common sense principle that you couldn't conduct policy-making in the White House if every top aide to the President knew that his or her communications with the President or with each other could be revealed to the whole world at the drop of a hat. Nobody could make policy under that kind of circumstance.

- Kathleen Sullivan March 24, 1998 ¹⁸ The office of the presidency is unlike any other position in the federal government. The president was established as the head of the executive branch to provide "unity, responsibility, and accountability." ¹⁹ Accordingly, the presidency is the only position in the government that requires a twenty-four-hour-a-day, seven-day-a-week commitment. ²⁰ In that respect, the strained **[*534]** nature and time commitment involved creates a legitimate need for confidentiality. ²¹

In order to optimally perform his Article II duties, the President needs a degree of privacy to promote candid communication between top executive-branch officials. ²² This confidentiality and ability to have frank and honest conversations serves a "great public interest." ²³ As the Supreme Court opined, "human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process." ²⁴ Executive privilege also allows a president to ensure that military and strategic objectives are not undermined by the disclosure of information. ²⁵ For example, President Kennedy successfully defended a claim of privilege regarding his foreign policy both when his Military Supervisor was not required to provide testimony about the invasion of the Bay of Pigs and when his Secretary of

Defense did not have to testify about the Cold War policies of his administration. ²⁶

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C. Legislative Treatment and Interpretation of Executive Privilege

I realize that anyone saying a few kind words about Executive privilege after the events of the last few years is in a position somewhat akin to the man preaching the virtues of water after the Johnstown flood, or the utility of fire after the burning of Chicago. But fire and water are, for all that, essential elements of human existence. And Executive privilege is indispensable to the functioning of our system of checks and balances and separation of powers.

- Senate Testimony of Antonin Scalia October 23, 1975 ²⁷ Generally, Congress has a right to dispose of the property of the United States. ²⁸ At first observation, one would assume that presidential records that are "generated, created, produced or kept" by a government officer pursuant to the duties and obligations of his office would belong to the government and not to the individual himself. ²⁹ In contrast, presidential papers have historically been considered the personal property of the President who created them. ³⁰

[*536] Over the years Congress has undertaken various steps to establish public ownership of presidential papers, beginning with the creation of the National Archives in 1934. ³¹ Franklin Roosevelt was the first president to grant property rights over his papers to the government. ³² Other presidents were persuaded to follow Roosevelt's lead and give their administrative records to government-owned facilities through the enactment of the Presidential Libraries Act of 1955 (the "Libraries Act"). ³³ The Libraries Act was the first major congressional effort to deal with presidential records. Under the Libraries Act, if presidents decided to donate their papers to libraries, they could establish specific guidelines for access to and preservation of those papers. ³⁴ Presidents Carter, Eisenhower, Ford, Hoover, Johnson, Kennedy, and Truman donated portions of their records to the government to be placed in presidential libraries under this Act. ³⁵ Despite the participation of these presidents, donations under the Libraries Act were voluntary. Accordingly, unless a president chose to donate them to the United States, records created during a president's term in office remained in the control of that president when he left office. ³⁶ Because no congressional statute existed that attempted to reverse this historical custom, this practice served as a common barrier to prevent access to presidential papers. ³⁷

1. The Presidential Records and Materials Preservation Act.

The first time that ownership of presidential papers really came into dispute was during Watergate. There was a well-founded fear that the documents and recordings of President Nixon would be destroyed. On **[*537]** September 7, 1974, former President Nixon and Arthur Sampson, the General Services Administrator, entered into an agreement that provided for the presidential materials and tape recordings of the Nixon Administration to be "deposited temporarily" in an existing government facility. ³⁸ By that agreement, President Nixon would maintain custody over the presidential materials and the tapes would be destroyed after a specified period of time. ³⁹ Nixon further claimed that the documents created during his administration, particularly the tapes, were his property, and not the property of the American people. ⁴⁰

After Congress heard this, they moved to annul the agreement by passing the Presidential Records and Materials Preservation Act (PRMPA). ⁴¹ The PRMPA was passed with the immediate goal of preventing President Nixon from destroying his records. ⁴² Congress believed that the tapes and other records were too historically important to the nation to be

destroyed.⁴³ Accordingly, the PRMPA only made the Nixon administration's records the property of the government.⁴⁴ Moreover, the PRMPA was Congress's first post-Watergate attempt to fill the statutory silence regarding presidential papers and the first time Congress mandated that presidents cannot destroy them.⁴⁵

As discussed below, President Nixon brought a lawsuit with the hope of obtaining a declaration that the PRMPA was unconstitutional.⁴⁶ In 1977, the Court decided all claims against Nixon. In so doing, the Court upheld the PRMPA, and further determined that the Act nullified the Nixon-Sampson [*538] Agreement.⁴⁷ While the PRMPA mooted the question of whether or not the Nixon-Sampson Agreement was valid, it did not resolve all questions of ownership.⁴⁸ The PRMPA provided that the Administrator of General Services would take control over presidential papers and subsequently control access to them.⁴⁹ However, a footnote in the majority's opinion remarked that it remained "unsettled whether the materials in question are the property of [the former president] or of the Government."⁵⁰ With this note, the Court invited Congress to pass a statute that codified the historic custom of transferring presidential papers to the libraries through the Archivist.⁵¹

2. The **Presidential Records Act.**

In 1974, Congress created a National Study Commission on Records and Documents of Federal Officials as part of the PRMPA.⁵² The Commission was created to examine the questions and problems relating to the "control, disposition, and preservation of [the] records and documents produced by or on behalf of" government officials.⁵³ The **Presidential Records Act** of 1978 (PRA) was a culmination of the work produced by this Commission⁵⁴ and a response to the continued congressional fear that the public would not be granted access to the records of former President Nixon.⁵⁵ The PRA also served as a congressional response to the Court's footnote in the PRMPA litigation.⁵⁶

Heralded by historians as "one of the most important pieces of reform legislation passed in the aftermath of Watergate,"⁵⁷ it was created to establish public ownership of the documents and records of presidents and their staffs, and to establish fair and timely procedures to make these records available to [*539] the public and to preserve them for posterity.⁵⁸ As noted in the House Report of the Government Operation Committee:

The purpose of the [PRA] is (1) to establish the public ownership of records created by future presidents and their staffs in the course of discharging their official duties; and (2) to establish procedures governing the preservation and public availability of these records at the end of a presidential administration.⁵⁹

The Committee Report continued to state that the PRA was intended to

terminate the tradition of private ownership of presidential papers and the reliance on volunteerism to determine the fate of [the disposition of presidential papers. Moreover, the Act would preserve] the historical record of future presidencies ... and public access to the materials would be consistent with standards fixed in law.⁶⁰

The Act clearly states that beginning on January 20, 1981, all "records" created by the President are subject to the provisions found within the Act.⁶¹ That means that complete ownership, possession, and control over presidential records created after January 20, 1981 belong to the United States, and are to be administered by the Archivist according to 2202 of the Act.⁶²

Although the PRA affords access to federal documents, it also recognizes a need to limit that access. The PRA exhibited a legislative desire to balance the [*540] public's right to know with the privacy rights and confidentiality of the President and his staff. ⁶³ This was accomplished by allowing former presidents to prevent particular documents from being disclosed for up to twelve years after their term ends. ⁶⁴ Under the Act, the same process was true for vice-presidential records. ⁶⁵ Procedurally, access to any record that fell within one of six specified categories could be restricted for up to twelve years. ⁶⁶ However, before he left office, a president had to designate any record he wished to keep from the public as access-restricted under one of the following exemptions: national security, appointments to federal office, specifically exempt from disclosure by statute, trade secrets, clear invasion of his personal privacy, and "confidential communications requesting or submitting advice" to a president by his advisors. ⁶⁷ Archivists generally refer to documents classified in this last category as "P-5" records. ⁶⁸

Upon conclusion of the President's term in office, the Archivist was granted custody of his records. ⁶⁹ Unmodified by **Bush's** Order, 2203(f)(1) of the Act provides that the Archivist has an "affirmative duty to make such records available to the public as rapidly and completely as possible." With that in mind, the PRA does not require public access to documents for the first five years after a president leaves office. ⁷⁰ That period is given to the Archivist and NARA to organize and systematically begin archiving the records. ⁷¹ During the time a record is withheld, and after "consultation" with the former president, the Archivist makes a determination whether a particular record [*541] remains restricted. ⁷² If the former president does not agree with the Archivist's decision, 2204(e) allows the former president to challenge the decision in court. After the twelve years expires, all records become available for public access requests under the Freedom of Information Act (FOIA), just like the unrestricted records, unless a constitutionally based privilege exists. ⁷³

Under the PRA, the Archivist needs to inform the former president if "disclosure of particular documents may adversely affect any rights and privileges which the former president may have." ⁷⁴ A NARA regulation interpreted this section to require the Archivist to provide a thirty-day period for a former president to assert a privilege over the material. ⁷⁵ If a claim of privilege is asserted, the Archivist can reject it if both the former and incumbent presidents are informed when the records will be disclosed, and the archivist explains his reasoning in writing. ⁷⁶ The former president is then given an additional thirty days to seek judicial review of the decision to reject a claim of privilege. ⁷⁷ Further, NARA regulations require any letter sent to a former president regarding the release of his records to be provided to the current president as well. ⁷⁸

D. Judicial Treatment and Interpretation of Executive Privilege

The executive privilege is granted "for the benefit of the public, not of executives who may happen to then hold office."

- In re Subpoena to Nixon ⁷⁹

1. The Nixon cases.

In 1974, the Senate Committee on Presidential Campaign Activities brought a lawsuit in the District Court for the District of Columbia seeking a declaration that a subpoena to compel disclosure of the Watergate tapes was valid. ⁸⁰ Additionally, they sought an order compelling President Nixon's [*542] compliance. ⁸¹ The lawsuit was dismissed for lack of subject matter jurisdiction, and Congress subsequently passed legislation that specifically gave the D.C. District Court jurisdiction to enforce the Committee's subpoenas. ⁸² Although it did not recognize executive privilege per se, the court acknowledged an executive privilege-type

claim to guard Nixon's original tapes from the Senate Committee subpoena. ⁸³ The claim was analogous to discussion between a congressman and his aides under the Speech and Debate Clause, and to those between judges and their law clerks. ⁸⁴ Nonetheless, this privilege was recognized only on the facts of the case, and the court ruled that the privilege, as exercised here, outweighed the public need for the tapes. ⁸⁵

United States v. Nixon. Two months after Senate Select Committee on Presidential Campaign Activities v. Nixon, United States v. Nixon ⁸⁶ was decided. In perhaps the most influential Supreme Court case on executive privilege, the Court unanimously held that the President had a constitutional right to withhold certain information from other branches and from the public. Although it was ultimately rejected, it was the first time that the Court formally recognized an assertion of executive privilege. ⁸⁷ Rather than citing the Constitution, the Court used *McCulloch v. Maryland* to hold that the privilege existed by analogy to the express powers of Congress, and found that the privilege was based in the "supremacy of each branch within its own assigned area of constitutional duties." ⁸⁸

[*543] In so doing, the Court noted that each branch's interpretation of the Constitution would initially be afforded great respect. Therefore, when the President is performing an act under his Article II powers, the judiciary will give a claim of privilege related to that act the utmost deference. ⁸⁹ The belief is that the privilege is "fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution." ⁹⁰ However, despite the deference given to the President, it is "emphatically the province and duty of the judicial department to say what the law is." ⁹¹ Therefore, even though Nixon argued that separation of powers principles precluded review of his claim of privilege, ⁹² the judiciary has the last word when interpreting the Constitution.

The Court further held that "neither the doctrine of separation of powers, nor the need for confidentiality of high-level communications without more, can sustain an absolute unqualified Presidential privilege of immunity from judicial process under all circumstances." ⁹³ The Court found that a president's general interest in confidentiality is not as strong as a claim for a need to protect military, diplomatic, or national security secrets. ⁹⁴ For that reason, since 1974, the President has, in effect, operated under a qualified executive privilege. ⁹⁵

Nixon v. Administrator of General Services. ⁹⁶ President Nixon challenged the constitutionality of the PRMPA. ⁹⁷ As noted above, the PRMPA provided that the Administrator of the General Services would promulgate regulations for access to Nixon's records. ⁹⁸ The Court held that the PRMPA did not violate separation of powers principles for two reasons: First, the materials **[*544]** remained in control of the Administrator, an executive-branch employee; and second, it did not violate any confidentiality concerns because Congress intended merely to preserve an accurate record for reasonable historical and governmental purposes. ⁹⁹

In addition, the case highlighted four important aspects of executive privilege. First, while it recognized that a former president has the authority to claim privilege, it denied Nixon's claim that the current administration has to rubber-stamp a former president's claim of privilege. ¹⁰⁰ Second, the Court established that the privilege erodes over time, and that once a president leaves office, the public need for access becomes stronger. ¹⁰¹ In so doing, the Court established that a former president's claim has less weight than an incumbent's claim because "there has never been an expectation that the confidences of the Executive Office are absolute and unyielding." ¹⁰² Further, an incumbent President is the best person to judge when disclosure of a record would negatively affect his ability to receive forthright advice. ¹⁰³ Finally, in upholding the PRMPA, the Court reaffirmed Congress's authority to regulate ownership of and access to presidential records. ¹⁰⁴

2. Post-Watergate cases.

Two additional cases elaborate on the Administrator doctrine in the context of the Nixon records legislation. ¹⁰⁵ First, in *Nixon v. Freeman*, the court considered President Nixon's challenge to an NARA regulation granting members of the public access to tapes that contained conversations between Nixon and his advisors without showing a "particularized need" for such access. ¹⁰⁶ In rejecting this challenge, the court held that such a showing was not a prerequisite to access. ¹⁰⁷ Indeed, the court held that the burden rested on [*545] the former president to seek judicial review of an administrative rejection of a claim of privilege. ¹⁰⁸

The second case, *Public Citizen v. Burke*, found a directive from the Office of Legal Counsel to the Archivist to be unlawful. ¹⁰⁹ The directive mandated that the Archivist withhold materials that a former president claimed as privileged and required anyone who wanted access to those materials to go to court. ¹¹⁰ The court found that the "archivist could not shirk his responsibility" to rule on a former president's claim of privilege. ¹¹¹ If a statute required materials to be released, the Archivist had to follow the law. Indeed, the court saw no reason to "constitutionally compel[]" the Archivist, an appointee of the incumbent president, to grant the former president's claim "any more deference ... than would be [given to] the incumbent President." ¹¹² The court also noted that its decision in *Freeman* had already rejected the argument that the Constitution did not permit the Archivist to reject a former president's assertion of privilege. ¹¹³

In addition to *Freeman* and *Burke*, other recent cases have upheld, reaffirmed, and, in a few instances, extended the Court's previous holdings. For example, *In re Grand Jury Proceedings* affirmed the principle that when the President asserts a privilege, there is a presumption in favor of that privilege. ¹¹⁴ However, the court clarified that the mere assertion of executive privilege is insufficient to bring communications not directly involving the President within the scope of executive privilege. ¹¹⁵ The broadest form of executive privilege was recognized in *In re Sealed Case*. ¹¹⁶ Documents requested or obtained by top advisors, not just by the President himself, were considered to be covered under the privilege. ¹¹⁷ Thus, the President did not have to personally participate in a communication for it to be privileged. ¹¹⁸

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E. Executive Treatment and Interpretation of Executive Privilege

When information which properly belongs to the public is systematically withheld by those in power, the people soon become ignorant of their own affairs, distrustful of those who manage them, and - eventually - incapable of determining their own destinies.

- President Richard M. Nixon March 8, 1972 ¹¹⁹ After Watergate, most presidents rarely asserted executive privilege. Presidents Ford, Carter, and H.W. **Bush** each invoked the privilege only once, and President Reagan invoked the privilege only three times. ¹²⁰

1. **Executive Order** 12,667 - presidential records.

Four days before former President Reagan left office, he issued **Executive Order** 12,667 ("Reagan's Order"). ¹²¹ Although it was issued so close to the end of his term in office, his staff had studied the law for almost the entire eight years of his presidency. ¹²² Reagan's Order established the procedures for asserting a privilege claim against the release of records. It also created notification procedures that required the National Archives to give thirty days notice to both the current and former presidents prior to releasing previously exempted records. ¹²³ Further, Reagan's Order required the Archivist to inform [*547] the former and current presidents of his intent to open records and "identify any specific

materials, the disclosure of which he believes may raise a substantial question of Executive privilege." ¹²⁴

2. **Executive Order** 13,233 - further implementation of the **Presidential Records Act**.

On November 1, 2001, President George W. **Bush** issued **Executive Order** 13,233 entitled "Further Implementation of the **Presidential Records Act**." ¹²⁵ The Order begins with President **Bush's** interpretation of the scope of the executive privilege for the President and Vice President, as well as for former presidents and vice presidents. In describing the constitutionally protected executive privilege, the **Bush** Order includes P-5 papers, the state secrets privilege, as well as the common law attorney-client, work-product, and deliberative-process privileges. ¹²⁶

The Order purports to clarify the amount of time a president or former president has to review a record. Section 3(b) requires a former president to review records "as expeditiously as possible, and for no longer than [ninety] days for requests that are not unduly burdensome." It continues to state that if a request for a time extension is received, the Archivist may not grant public access to the records, regardless of the reasonableness of the request. ¹²⁷ Section 3(d) provides the current president with an unlimited amount of time to review a request for access to any presidential material under the PRA, regardless of whether or not the review occurs concurrently with or subsequently to a former president's review.

After the current president reviews the records, he decides whether he agrees with the former president's decision to "request withholding of or authorize access to the records." ¹²⁸ Absent "compelling circumstances," the current president will support a former president's claim if, when, and wherever that claim is challenged. ¹²⁹ Section 11 provides that both the incumbent vice president and former vice presidents shall have the same claims, rights, and privileges under the Order and the PRA that are given to the current and former presidents.

Under the **Bush** Order, the Archivist must deny access to any privileged record until both presidents agree to release the records or until a final, **[*548]** nonappealable court order requires their release. ¹³⁰ The incumbent president has the authority to block records even if the former president wants them released. ¹³¹ It further provides that the Archivist must withhold the records of a president if a former president makes a claim, even if the incumbent president and the Archivist disagree. ¹³² The Order also requires individuals seeking access to demonstrate a particularized and specific need for the information. ¹³³

II. The Context and Driving Force Behind the Order

I have repeatedly seen an erosion of the powers and the ability of the president ... to do his job We are weaker today as an institution because of the unwise compromises that have been made over the last 30 to 35 years.

- Vice President Richard Cheney January 27, 2002 ¹³⁴ The Reagan White House was the first administration to come under the jurisdiction of the PRA. ¹³⁵ When President Reagan and Vice President **Bush** left office, they invoked the twelve-year restriction for all P-5 records. ¹³⁶ At the completion of their term of office, on January 20, 1989, approximately 44 million pages of documents were transferred to the custody of the Archivist. ¹³⁷ These papers were housed at the Reagan Presidential Library in Simi Valley, California. Vice President **Bush's** records were later moved to the George **Bush** Presidential Library in College Station, Texas. ¹³⁸ During the twelve-year **[*549]** period from when Reagan left office to when his papers were to be released, NARA granted access to approximately four million pages of documents. ¹³⁹ FOIA exemptions incorporated in the PRA permitted an additional 113,200 pages of documents to continue to be withheld. ¹⁴⁰

The twelve-year period under the PRA for Reagan-era documents expired in January 2001. Consistent with the PRA, as interpreted through Reagan's **Executive Order**, the Archivist provided thirty days' notice to the White House and the Office of President Reagan that previously privileged Reagan papers were going to be released. ¹⁴¹ All of Reagan's records had been prepared, sorted, filed, and examined for national-security consideration by NARA. ¹⁴² Sixty-eight thousand pages of records were classified as P-5 documents. ¹⁴³ Joanne Drake, President Reagan's representative, stated that Reagan's Administration did not desire to claim privilege on any of the withheld records, and that it had no problem with all of them being released to the public. ¹⁴⁴ Nonetheless, the White House asked for three extensions to review these papers. ¹⁴⁵ According to John Carlin, the National Archivist, none of the P-5 documents in question were ever examined by White House officials. ¹⁴⁶ On November 1, President **Bush** signed the new **Executive Order**, mooting his previous requests.

The blocked Reagan documents are believed to include policy decision memorandums, briefing papers, and correspondence of former White House advisors. ¹⁴⁷ As a result, numerous commentators have speculated that the Order was issued out of concern for the involvement of current **Bush** advisors who worked under President Reagan. ¹⁴⁸ These advisors include Secretary of **[*550]** State Colin Powell, Defense Secretary Donald Rumsfeld, Budget Director Mitchell Daniels Jr., White House Chief of Staff Andrew Card, Elliott Abrams, John Negroponte, and Otto Reich. ¹⁴⁹ Additionally, there have been suggestions that the Order was designed to protect both the vice-presidential and presidential papers of George H.W. **Bush**, the current President's father. ¹⁵⁰

In addition to accusing the President of having a "secrecy fetish," ¹⁵¹ it has also been implied that the Order is more forward-looking and reflects a desire to indefinitely seal off his Vice President's papers. ¹⁵² This speculation has surfaced largely based on the White House's refusal to release records from the Energy Task Force, chaired by Vice President Cheney, that shaped the Administration's energy policy. ¹⁵³ In fact, the White House's refusal to release **[*551]** information about the Energy Task Force has become a central issue in additional litigation, recently brought by Judicial Watch and the Sierra Club. These two private organizations are attempting to obtain information about whether the Vice President was improperly influenced during the creation of the **Bush** Administration's energy policy. ¹⁵⁴ The White House, along with Vice President Cheney, has argued in papers filed with the U.S. District Court for the District of the District of Columbia that the President's ability to obtain confidential advice would be interfered with if the Vice President and other top aides were required to disclose the requested documents or write answers to interrogatories presented during the discovery phase of the current suit. ¹⁵⁵

United States District Judge Emmet Sullivan recently advised the Justice Department that specific reasons to prevent access to Task Force papers must be delineated, e.g., claiming executive privilege alone would not suffice to prevent disclosure of the names of the Task Force participants, the length of the Task Force, and the Vice President's role in the Task Force. ¹⁵⁶ Moreover, in addition to the private lawsuit, members of Congress have sought information regarding the Task Force to no avail. For more than a year, Representatives Dingell and Waxman have been attempting to discover "who attended the task force meetings, who were the professional staff, who did the task force members meet with, and what costs were incurred in the process." ¹⁵⁷ The congressional requests for information have also been denied and judicial intervention is being pursued. ¹⁵⁸

White House counsel Alberto Gonzales and White House spokesman Ari Fleischer have both denied that the recent **Executive Order** was crafted to prevent records from the Task Force or names of advisors who served under both Reagan and **Bush** from being publicized. Moreover, they have specifically denied that the intent behind the Order was to prevent any embarrassment to either current employees or the President's father. ¹⁵⁹ **[*552]** Nonetheless, White House officials have affirmatively acknowledged that the Order was

intended to stop the release of these Reagan-era records. ¹⁶⁰

III. The Interaction of **Bush's** Order with Previous Interpretations of Executive Privilege and Access to Presidential Materials

The bottom line is that the new order appears to violate not only the spirit but also the letter of the **Presidential Record Act**.

- Rep. Doug Ose (R-Cal.) November 6, 2001 ¹⁶¹ When it is exercised properly, the executive privilege is a legitimate power that is essential to the proper functioning of the executive branch. ¹⁶² The Framers placed all of the Article II powers in only one person "for the very reason that he might maintain secrecy in executive operations." ¹⁶³ As such, in order to be effective, a president must have some form of executive privilege that extends once he leaves office. ¹⁶⁴ In fact, as the "temporary custodian of an institution," ¹⁶⁵ a president must be able to withhold information if making it public would hurt his ability to faithfully execute the law. ¹⁶⁶ Nonetheless, these interests diminish over time and **Bush's** Order contradicts the established practice and policy of the executive and legislative branches.

In responding to criticism, the White House has urged that **Executive Order** 13,233 does nothing that **Executive Order** 12,667 did not do. According to President **Bush**, certain documents "are privileged and protected, and [should] remain protected and privileged." ¹⁶⁷ The White House has pronounced that the **Executive Order** merely creates a "more orderly process" to execute and implement the PRA ¹⁶⁸ by establishing a "fair and reasonable" process to **[*553]** determine what records should remain secret and which should be publicly accessible. ¹⁶⁹ Moreover, according to Peter Shane, the PRA did not address two procedural issues: First, there was no administrative process to follow if the Archivist and either a former or incumbent president disagreed about whether the record should be released; and second, there was no procedure for an incumbent president to review a former president's records to decide whether to independently claim privilege. ¹⁷⁰ As a result, the Administration argues that the President was merely filling in these gaps. By providing an orderly process, the Order helps the Archivist manage requests for access to millions of pages of presidential papers. ¹⁷¹

Unfortunately, when President **Bush** issued **Executive Order** 13,233 he did more than just fill any gaps present under the PRA; he fundamentally altered the concept of executive privilege as applied to presidential and vice-presidential papers. In addition to revoking Reagan's Order, ¹⁷² **Bush's** Order also substantially changed the substance of six areas of the PRA. The major changes include the following: the creation of a vice-presidential privilege, the extension of the privilege to a representative of the former office holder, the creation of a double veto, a change in the time allotted for record review, an expansion of the types of records covered, and a shift in who bears the burden of proving privilege. Moreover, the Order contradicts the procedure created under NARA regulations issued pursuant to 2206 of the PRA.

A. The Creation of a Vice-Presidential Privilege

The biggest expansion of law under the **Executive Order** is the extension of **executive** privilege to the Vice President over his own papers. ¹⁷³ Since 1969, **[*554]** the policy of the executive branch has required the President himself to assert executive privilege. ¹⁷⁴ Recent claims have demonstrated a change in this policy and courts have upheld certain extensions in who may claim privilege. ¹⁷⁵ In *In re Sealed Case* ("Espy" or the "Espy Case"), the D.C. Circuit recently decided "how far down the line ... the presidential privilege extends." ¹⁷⁶ In deciding whether the President's ability to perform his constitutional duties would be restricted if the communications privilege required direct presidential involvement with a

record or document for it to be kept secret, the court interpreted Nixon as imposing a balancing test between the public interest in disclosure and the President's interest in confidentiality. ¹⁷⁷

The court concluded that the presidential communications privilege could extend to advisors so long as their records were within the scope of their advisory roles as related to the performance of an executive function under the Constitution. ¹⁷⁸ Because the Vice President acts as a top advisor, vice-presidential communications would be protected under the Espy Case. Moreover, the PRA itself included vice-presidential records in its coverage. ¹⁷⁹ In this respect, White House counsel Alberto Gonzales contends that the Order "simply implemented an orderly process to deal with this information," rather than creating a new vice-presidential privilege. ¹⁸⁰

Yet **Bush's** Order is unambiguous in granting a former Vice President the authority to claim a vice-presidential privilege. ¹⁸¹ While the President would have the authority to claim a privilege over a record of the Vice President, no precedent prior to this Order exists that expands to the Vice President a right to claim independently a privilege regardless of whether the President exerted one. ¹⁸² Further, the right to invoke a privilege is not provided to a former vice [*555] president under the PRA or under Espy. Nonetheless, under the Order, a vice president (or former vice president) could block the Archivist from granting public access over records until they authorized release or a final nonappealable court order mandated it. ¹⁸³

B. The Designation of a Representative

In addition to granting a vice-presidential privilege, **Bush's** Order also grants the right to appoint a designated "representative" in the event that the involved office holder dies or becomes incapacitated. ¹⁸⁴ This representative may be selected not only by a former president or vice president, but also by members of their respective families. Under the Order, any claim of privilege that a representative makes is to be treated exactly as if the former president himself made it. In this respect, family members of a former president, who themselves may never have held a government office, may delegate to an additional person who may never have served in the government, the power to prevent the Archivist, a current member of the executive branch, from granting public access to federal records. ¹⁸⁵

Designedly, this was the exact type of delegation of power *Public Citizen v. Burke* found unacceptable. ¹⁸⁶ Additionally, Administrator held that the confidential presidential communications privilege did not belong to the President individually. As such, it is not a personal property right of a former president. Rather, it is "the privilege of the Presidency," because it serves the [*556] needs of the executive branch. ¹⁸⁷ Moreover, private citizens are not usually granted the authority to claim executive privilege. ¹⁸⁸ Individuals are empowered to use it for the government branch they once commanded, but it cannot be dispensed or handed over to other people. ¹⁸⁹ In contradiction to the decisions of the Supreme Court and the D.C. Circuit, **Bush's** Order does just that by granting a designated representative the power to exercise indefinitely the executive privilege.

C. The Establishment of a Double Veto

After the materials are reviewed, the former president may inform the current one whether public access to the documents is "authorized," or if he would like to exert a claim of executive privilege. If a privilege is claimed, "absent compelling circumstances," the incumbent must honor and support it, regardless of whether he agrees with the assertion. ¹⁹⁰ In sum, whether a claim of privilege is justified, a former president can veto the decision of the Archivist to release it simply by claiming a privilege. The veto power granted to former presidents contradicts the law as it stood before **Bush's** Order and limits the Archivist's ability to carry out his job under the PRA. ¹⁹¹ Previously, the Archivist could release the

papers if he believed an improper privilege was being asserted or a constitutional basis preventing release did not really exist.¹⁹² Moreover, under existing law, it is not possible for a former president [***557**] to permanently block the release of his papers. Yet the Order provides for this by requiring the authorization of a former president before a document may be released.¹⁹³

In effect, **Bush** created a double veto with this Order. The incumbent president cannot override a former president's decision to keep the records private,¹⁹⁴ nor can a former president supersede the incumbent president's decision.¹⁹⁵ If the current and former presidents disagree, the former president's claim would stand, "because the former President independently retains the right to assert constitutionally based privileges."¹⁹⁶ Additionally, the records will remain sealed if the incumbent president claims privilege, even where the former president did not. In effect, both presidents have the equivalent of a veto over a decision by the Archivist to release the papers.¹⁹⁷

D. The Extension of Time Allotted for Review

The Order extends the time period allowed for a former president to review records from thirty days to ninety days. In addition, it requires the Archivist to deny access to records if he receives a request for an extension from a former president "regardless of whether the ... request is reasonable."¹⁹⁸ The PRA does not allow records to be restricted after the conclusion of the allotted twelve year period. Furthermore, the Order affords the current president an unlimited amount of time to review any record that is subjected to a request for [***558**] access under the PRA either concurrently with or after the former president reviews the records.¹⁹⁹ This provision makes it possible for records to remain indefinitely under review, for if a president is still reviewing the documents, they cannot be released. In essence, there is no longer a time limit on how long a president may seal his papers.²⁰⁰

E. The Expansion of Records Covered

After the twelve years has expired, the PRA only recognizes privileges specifically enumerated in FOIA.²⁰¹ Reagan's Order recognized three exceptions to making a record publicly available: national security, law enforcement, and the deliberative processes of the executive branch.²⁰² **Bush's** Order eliminates the law enforcement privilege. However, it adds a claim of privilege for attorney-client communications and attorney work-product.²⁰³ It also extends the state-secrets and communications-with-advisors privileges to after the elapsed time frame.²⁰⁴

F. The Shift in the Burden of Seeking Relief

Previously, the Archivist was not required to automatically accept a claim of privilege over materials. Under Reagan's interpretation of the PRA, if a former president disagreed with the Archivist, the burden to seek judicial review was on the former president. During that process, he needed to demonstrate why the Archivist's decision to release the document was wrong and why the privilege was necessary.²⁰⁵ Under **Bush's** Order, the member of the public who seeks access to the record must bring a lawsuit.²⁰⁶

In addition, the PRA makes presidential records available under FOIA standards after the twelve-year period has expired. Although FOIA requests do not trump a constitutionally based privilege, FOIA standards do not require a [***559**] showing of need to gain access to a document.²⁰⁷ In contrast, the **Bush** Order requires a citizen who is trying to overcome the "constitutionally based privilege" to establish at least a "demonstrated, specific need" for that particular record.²⁰⁸ This means that if a member of the public, a student, researcher, historian, or concerned citizen, would like to access a privileged document, they retain a very expensive and time consuming right to litigate to see whether they will be granted access.²⁰⁹ Historians (or other citizens who seek access) should not have to retain an attorney to sue

for access to the records created by their government before they even know what information is contained in particular documents, assuming they know of its existence in the first place. ²¹⁰ Academics who "pour through thousands of pages of documents to piece together the story of what happened with past administrations" should not be victimized, financially burdened, and essentially be informed that they have to put their livelihood on hold until they meet the newly created burden of proof. ²¹¹

G. The Conflicts with NARA Regulations

Section 2206 of the PRA authorized NARA to promulgate regulations to accomplish the provisions of the Act. **Bush's** Order contradicts the regulations that NARA had issued under this authority. ²¹² NARA's regulations allowed the Archivist to determine that a questioned record should be disclosed, even if **[*560]** a former president tried to prevent disclosure by claiming privilege. ²¹³ They further permitted the Archivist to open a record to public access thirty days after a former president had been provided with notice of the decision that his claim of privilege was being denied. ²¹⁴ These regulations were promulgated under the Administrative Procedure Act and subject to the proper time periods for notice and comment. ²¹⁵ Yet the Order effectively moots these regulatory provisions.

H. These Changes Violate Separation of Powers Principles

White House counsel Alberto Gonzales, the person primarily responsible for drafting the Order, thought it was merely providing a "safety valve." ²¹⁶ While it gave the former president the primary responsibility regarding the presidential records that used to belong to him, it made the incumbent president a "backstop." ²¹⁷ Gonzales later commented that the current president would "be in a better position" to decide whether documents of a former president actually jeopardize national security. ²¹⁸ Under this theory, the volatile nature of current world events leads one to the conclusion that former presidents, who had been out of office for twelve years, might not have any idea about the possible national security implications involved.

As a policy matter, Gonzales may be right. However, from a separation of powers standpoint, as a member of the executive branch, he is not the person who should be making that decision. The executive should not be legislating. Nor should he be able to take action that is directly against the express will and intent of Congress. For three decades Congress and the judiciary have attempted to make presidential records available to the public. An **executive order** cannot and should not be able to effectively reverse an act of Congress or contradict the Supreme Court's interpretation of a constitutional privilege. The congressional intent behind the PRA was clearly expressed: presidential records were to be made available after a twelve-year period. ²¹⁹ The President should not be able to unilaterally overturn the will of the people as expressed by Congress. ²²⁰

[*561] There should be no "lingering uncertainty" surrounding the issue of whether, and to what extent, an **executive order** can supersede or reverse a statute enacted by Congress. ²²¹ The D.C. Circuit has repeatedly held that "an **executive order** cannot supersede a statute." ²²² Although an **executive order** should be granted the same authority as a statute enacted by Congress if it is lawfully issued, the President cannot disregard the constitutional separation of powers in an effort to overturn the PRA in a quick and easy manner. ²²³

Further, despite the repeated assurances from the White House that the Order was created to maintain national security and ensure that it would not be compromised, ²²⁴ the PRA itself provided for a national-security exception and allowed the President and Archivist to withhold certain papers from release even after the twelve-year period had passed. ²²⁵ Moreover, the orderly process that **Bush** established is "far more complex, cumbersome and restrictive" than the process outlined in the PRA. ²²⁶ Had the PRA been followed, rather than "further implemented," claims of executive privilege would have more legitimacy to them. Following

the process established by an act of Congress prevents a "veil of secrecy" and lends legitimacy to any recognized need to keep papers private. ²²⁷ The idea that a president may prevent access to his papers "strikes at the core of our democratic principles, especially accountability in government." ²²⁸ But the idea that an executive can implement an order that so starkly conflicts with congressional legislation and judicial intent strikes harder.

[*562]

IV. The Legislative and Judicial Branches Are Equipped with the Tools and Currently Have the Opportunity to Resolve the Dispute

A government's legitimacy is based on the trust of its people, and when decisions are made on behalf of the American people, citizens eventually have to be able to see the process of how those decisions came to be.

- Bruce Lindsey, Deputy White House Counsel under former President Clinton Letter to the White House ²²⁹ The Constitution provides each branch with separateness and autonomy, but also interdependence and reciprocity. ²³⁰ The ability to claim executive privilege is crucial to the functioning of our system of checks, balances, and separation of powers. ²³¹ Although it cannot and should not always be limited, an exercise of executive privilege should be examined, checked, and observed by other branches who possess an equal regard for the people and for the Constitution. ²³² The need for governmental accountability through public access to the records of our leaders has to be balanced with the recognized need to withhold information from public review. ²³³ Each branch has a distinct role in relationship to this Order and who should ultimately be responsible for deciding about access to these papers. Both the legislative and judicial branches currently have an opportunity to correct the unconstitutionality of **Bush's** Order. These opportunities must be seized upon, and separation of powers restored.

A. An Appropriate Legislative Solution Is Underway

The goal of the law is the orderly and systematic release of records - not the indefinite suppression of these historically important documents.

- Reps. Henry Waxman (D-Cal.) and Janice Schakowsky (D-Ill.) November 6, 2001 ²³⁴
[*563] The same disdain for the Order articulated in op-ed pages throughout the country's newspapers was expressed on the Hill by Congress. Both Republicans and Democrats have criticized the Order. ²³⁵ On November 6, 2001, a few days after the Order was signed, the Subcommittee on Government Efficiency, Financial Management and Intergovernmental Relations held an oversight hearing on "The Implementation of the **Presidential Records Act** of 1978." In gathering information, the Subcommittee listened to testimony and had the opportunity to question witnesses ranging from the Honorable John Carlin, the United States Archivist, and M. Edward Whelan III, an Acting Assistant Attorney General to historians and professors specializing in executive privilege and access to federal records. ²³⁶

Congressman Stephen Horn opened the hearing with a quote from James Madison: "A popular Government without popular information or the means of acquiring it, is but a Prologue to a Farce or a Tragedy or perhaps both. Knowledge will forever govern ignorance, and a people who mean to be their own Governors, must arm themselves with the power knowledge gives." ²³⁷ After introductory remarks, the Subcommittee continued to examine the implementation of the PRA as it related to the public's right to acquire information from the government. According to Representative Horn, the PRA conclusively established "the

principle that the records of a president relating to his official duties belong to the American people." ²³⁸ At the time of the hearing, Reagan-era records had already been delayed nine months beyond the release date envisioned by the PRA, and there was "no clear end in sight." ²³⁹

After the hearing, members of the House of Representatives promptly urged the President to reverse course, rescind the Order, and immediately "begin a dialogue with Congress and the public to determine the need for clarification of this law." ²⁴⁰ In a letter to President **Bush**, these members noted [***564**] that parts of the Order "clearly violate the intent of the law" and "attempt[] to rewrite the [PRA]." ²⁴¹

Six months later, on April 11, 2002, twenty-two Congressmen introduced the "**Presidential Records Act** Amendments of 2002," House Bill 4187. In its current form, the bill would nullify **Bush's** Order and codify aspects of the procedures for expedited release as delineated in Reagan's Order. ²⁴² Since it was introduced in April, an additional twenty-two Congressmen have cosponsored the bill, which has subsequently been referred to the House Committee on Government Reform for further action. ²⁴³ Specifically, section 2 of the proposed legislation proposes to alter the requirements of releasing allegedly privileged presidential papers. ²⁴⁴ Further, the Amendments would add section 2208 to the PRA that would require the Archivist to disclose the record twenty days after providing notice of disclosure to the public, the former president, and the incumbent president. Moreover, the new section would allow the Archivist to release the record unless a court order, resulting from the actions of the former president, blocked the release. ²⁴⁵ The proposed Amendments to the PRA would remedy the negative changes **Bush's** Order created and "would eliminate this return to a state of affairs the Congress ended in the 1970s." ²⁴⁶

Executive privilege is not an unlimited power and the will of the executive should not be able to govern access to the historical records of our nation. ²⁴⁷ Congress "has the right, and often the duty" not only to challenge an assertion of privilege, ²⁴⁸ but also to determine who has access to, and what procedures govern, the handling of presidential papers. ²⁴⁹ Those decisions should not be [***565**] created or abridged by an **executive order**. ²⁵⁰ Congress had decided how access should be governed and granted to the people; the Order changed that procedure. Although only a few hearings have been held, if necessary, Congress should overturn the Order by either passing House Bill 4187 or enacting additional legislation that reaffirms the PRA.

B. Judicial Intervention Provides a Possible Solution

It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule, to particular cases must of necessity expand and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.

- In re Subpoena to Nixon ²⁵¹ Theoretically, the judicial branch is institutionally disinterested and insulated from everyday political considerations. ²⁵² As a neutral forum, it is able to protect both the principle of executive privilege and to resolve fairly any disagreements over that principle. ²⁵³ While judicial intervention is neither desirable nor practical for every situation, at times it is necessary. The availability of a civil proceeding in a district court ensures that fair safeguards exist to weigh the legitimate constitutional interests of one branch against public requests for access to information created by that branch. ²⁵⁴ United [***566**] States v. Nixon and its progeny demonstrated the judiciary's ability to stand as a workable check on any abuse of executive privilege. ²⁵⁵ As this litigation reveals, "the President occupies a unique position in the constitutional scheme." ²⁵⁶ As a result, a claim of privilege is given strong deference, with the understanding that the Supreme Court (along with the lower courts if applicable) is the ultimate arbiter of any privilege claim. ²⁵⁷

On November 28, 2001, the American Historical Association, Hugh Graham, Stanley Kutler, the National Security Archive, the Organization of American Historians, Public Citizen, Inc., and the Reporters Committee for Freedom of the Press brought a lawsuit against NARA and John Carlin, Archivist of the United States.²⁵⁸ This coalition of historians and journalists (many of whom testified at the congressional hearing discussed above) seeks a declaratory judgment ordering the defendants to both disregard **Executive Order 13,233** when administering the PRA and to release the 68,000 pages of Reagan-era records that are in NARA's custody and "are being withheld in violation of the PRA."²⁵⁹ In sum, they are seeking a court order to annul **Bush's** Order and compel the release of Reagan-era records.²⁶⁰

NARA filed a motion to dismiss the lawsuit on February 8, 2002. In essence, the government believes that the suit is moot because that same day the White House authorized NARA to release 59,000 pages of the remaining records.²⁶¹ However, according to Public Citizen, those records remain unavailable and NARA has not made any plans to release them. Moreover, Public Citizen argues that even if these particular records are released, the Order will be used to withhold other presidential records and therefore, the issue of the Order's legality remains valid.²⁶² On March 7, 2002, White House counsel submitted a brief to the court that declared that the current administration authorizes all but 150 pages of records to be released to the **[*567]** public "at the earliest practicable time."²⁶³ As of the date of this Note, none of the additional records had been released.

Some scholars have argued that political negotiation is the most effective way to resolve differences among the different branches of the government. They further contend that negotiation should be preferred over judicial resolution.²⁶⁴ Yet if political compromise fails to "adequately safeguard the separation of national powers," litigation in a federal court is a particularly attractive arena in which to solve the problem.²⁶⁵ The Framers of the Constitution never envisioned a "watertight" division of functions, and the judiciary has the authority to judge the constitutionality of executive acts.²⁶⁶ Especially when the President takes official action under Article II, the judiciary has the power to decide whether those actions were within the authority of the law.²⁶⁷ If the political compromise does not work here, the current litigation against NARA presents the courts with an opportunity to hold the executive accountable for his actions.

Conclusion

There needs to be balance when it comes to freedom of information laws ... There are some things that, when I discuss in the privacy of the Oval Office or national security matters, that just should not be in the national arena. On the other hand, my Administration will cooperate fully with Freedom of Information requests if it doesn't jeopardize national security, for example.

- President George W. **Bush** April 5, 2001²⁶⁸ Executive privilege will never be a "popular constitutional principle, or even one well understood by the general public."²⁶⁹ In fact, today, it is hard to mention executive privilege without images of Watergate surfacing.²⁷⁰ **[*568]** Regardless of the legitimacy of one's motives, and especially in the post-Watergate-era, a president who asserts a privilege will suffer politically; the American public will presume it is intended to cover up corruption.²⁷¹ It is precisely because executive privilege is such a necessary, but controversial, tool that the process of who gets to decide, and what constitutes privilege, is so fundamental. A claim of privilege needs to be open to a challenge and balanced against the need for access to that information.²⁷² Arguably, the best way to strike this balance is "through a political process of give, take, and, ultimately, compromise."²⁷³

In the past, when a confrontation regarding executive privilege has emerged, the executive branch has provided access to some of the desired information or prepared a way to create safe viewing procedures.²⁷⁴ This is precisely what is currently happening with the Reagan/**Bush** records in question: political compromise. After responding to some of the criticisms that surfaced, the White House released a batch of approximately 8000 of the P-5 papers on January 3, 2002.²⁷⁵ These papers were released in accordance with **Executive Order** 13,233 (meaning that both representatives of former President Reagan and President **Bush** had examined them and neither opted to assert a constitutionally based privilege).²⁷⁶ Further, on July 19, 2002, an additional 150 pages of presidential records and forty pages of former Vice President **Bush's** records were authorized to be released by the White House. These records were some of the approximately 880 pages of vice-presidential records scheduled for release under the PRA in January, 2001.²⁷⁷ Additionally, the current litigation prompted the White House to agree to the release of all but 150 pages of records. Nonetheless, despite these recent releases, over the past few months, Public Citizen has learned of an additional 1654 pages that **[*569]** are being withheld.²⁷⁸ Moreover, the Order cannot simply be forgotten with the authorization of access to these particular P-5 documents.

The papers of President Reagan will set the precedent for all future presidential (and vice-presidential) papers. Merely because a compromise may work with the facts at hand, we cannot assume that compromise will work four years from now, or four years from then. As a result, what happens to the process in this situation will set the precedent for all future claims of privilege. If the Order is not overturned or clarified here, the Archivist will continue to follow it and implement its changes when dealing with the records of future administrations.

The most important question today is who gets to establish the limits placed on executive privilege.²⁷⁹ Public access and ownership of presidential and vice-presidential papers are important principles of our democracy. It may currently be impossible to scrutinize and examine certain presidential records, but the ability to hold the government accountable for its actions is a basic tenet of our democracy. We cannot, during the Information Revolution, go back to a time when records were personally owned, destroyed, or even burnt to prevent disclosure of documents harmful to a former president's public image.²⁸⁰ Preventing executive action by secrecy and thereby restoring citizens' trust in their government is an important step to ensuring this era does not return.²⁸¹ The great fear that Senators Moynihan and Wyden wrote about can be disbanded.

Through the PRA, Congress shifted ownership and authority over records from the President himself to the government and, in the end, to citizens.²⁸² This process of release was subjected to legislative review and scrutiny through the enactment of the PRA.²⁸³ It was interpreted and affirmed by the Supreme Court in the Nixon cases and their progeny. By issuing **Executive Order** 13,233, President **Bush** side-stepped the other branches and shifted the power, authority, and control of records back to the President.²⁸⁴

[*570] The Order is already being tested in the courts, and both Republican and Democratic Congressmen have called on the President to withdraw it. Be it through the current litigation or by congressional action, separation of powers must be restored and the power of each branch checked. The current Administration argues that the Order is merely implementing a process. Unfortunately, they are wrong. Instead, by issuing the **Order, the executive** branch has exceeded its authority and demonstrated a desire to override the congressional and judicial interpretations of a constitutionally based privilege. As such, one of two things should happen: Either Congress should enact legislation that overrides the Order and reaffirms the PRA, or the courts should use the NARA litigation to find the Order unconstitutional. Either way, **Executive Order** 13,233 should not remain the law of the land.²⁸⁵ The legislative and judicial branches of government both have the opportunity to prevent presidential records from remaining out of sight. Nothing can prevent them from remaining

on one's mind.

FOOTNOTES:

†n1. John Dean, Hiding Past and Present Presidencies: The Problems with **Bush's Executive Order** Burying Presidential Records, FindLaw's Legal Commentary (Nov. 9, 2001), at <http://writ.findlaw.com/dean/20011109.html> (quoting Senators Daniel Patrick Moynihan & Ron Wyden, 106th Cong., Secrecy in International and Domestic Policy Making: The Case for More Sunshine, at <http://www.fas.org/sgp/library/wyden.html> (Oct. 2000)).

†n2. Secrecy and the **Bush** Administration: Hearing on H.R. 4187 Before the House Comm. on Gov't Reform, 107th Cong. (2002) (statement of Rep. Henry Waxman, Ranking Minority Member, House Comm. on Gov't Reform).

†n3. Brief of the Association of American Publishers, Inc., American Booksellers Foundation for Free Expression, American Society of Newspaper Editors, Association of American University Presses, Freedom to Read Foundation, Pen American Center, Society of American Historians, Society of Professional Journalists, the Author's Guild, Inc., and the Publishers Marketing Association as Amici Curiae in Support of Plaintiffs' Motion for Summary Judgment and in Opposition to Defendants' Motion to Dismiss at 3, *Am. Historical Ass'n v. Nat'l Archives & Records Admin.*, No. 1:01CV02447 (D.D.C.) [hereinafter Amici Brief] ("Indefinite suppression of essential portions of the historical record is fundamentally incompatible with the proper functioning of an open, democratic society in which the public good is entrusted to the informed deliberations of its citizens.").

†n4. Mark J. Rozell, Executive Privilege and the Modern Presidents: In Nixon's Shadow, 83 *Minn. L. Rev.* 1069, 1069 (1999).

†n5. Iain R. McPhie, Introduction to Symposium: Executive Privilege and the Clinton Presidency, 8 *Wm. & Mary Bill Rts. J.* 535, 535 (2000).

†n6. See U.S. Const. art. I, 5, cl. 3 ("Each House shall keep a Journal of its Proceedings, and from time to time, publish the same, excepting such Parts as may in their Judgment require Secrecy"); see also K.A. McNeely-Johnson, *United States v. Nixon*, Twenty Years After: The Good, the Bad and the Ugly - an Exploration of Executive Privilege, 14 *N. Ill. U. L. Rev.* 251, 254 (1993); Mark J. Rozell, Restoring Balance to the Debate over Executive Privilege: A Response to Berger, 8 *Wm. & Mary Bill Rts. J.* 541, 543-44 (2000).

†n7. For an in-depth response to this argument, see Mark J. Rozell, Executive Privilege: The Dilemma of Secrecy and Democratic Accountability 21-61 (1994).

†n8. Neil Kinkopf, Executive Privilege: The Clinton Administration in the Courts, 8 *Wm. & Mary Bill Rts. J.* 631, 631 (2000); Rozell, *supra* note 6, at 552.

†n9. *Nixon v. Sirica*, 487 F.2d 700, 732 n.9 (D.C. Cir. 1973).

†n10. *Id.*

†n11. Randall K. Miller, *Congressional Inquests: Suffocating the Constitutional Prerogative of Executive Privilege*, 81 Minn. L. Rev. 631, 632 (1997). For a good description of early presidential privilege and the foundation that Washington provided for future presidents to build upon, see McNeely-Johnson, *supra* note 6, at 254-59 (documenting both examples of President George Washington's use of executive privilege, and demonstrating that *Marbury v. Madison* itself was an executive privilege case); Rozell, *supra* note 4, at 1070.

†n12. *Sirica*, 487 F.2d at 732 n.9.

†n13. 37A Am. Jur. 2d Freedom of Information Acts 32 (1994).

†n14. McNeely-Johnson, *supra* note 6, at 253 (quoting Black's Law Dictionary 569 (6th ed. 1990)).

†n15. Saikrishna Bangalore Prakash, *A Critical Comment on the Constitutionality of Executive Privilege*, 83 Minn. L. Rev. 1143, 1143 n.2 (1999) (citing Rozell, *supra* note 7, at 40-41).

†n16. McNeely-Johnson, *supra* note 6, at 253 (quoting Black's Law Dictionary, *supra* note 14, at 569).

†n17. It is clearly established by the courts that "the President's senior advisers are protected by the President's own communicative privilege, and that's because he's got to be able to have his advisers talk to one another once they step outside the Oval Office about what they're going to tell the President to do." Kathleen Sullivan, on *The NewsHour* with Jim Lehrer: *Executive Decisions* (PBS television broadcast, Mar. 24, 1998).

†n18. *Id.*

†n19. Louis Fisher, *Invoking Executive Privilege: Navigating Ticklish Political Waters*, 8 Wm. & Mary Bill Rts. J. 583, 605 (2000).

†n20. Neal Kumar Katyal, *The Public and Private Lives of Presidents*, 8 Wm. & Mary Bill Rts. J. 677, 678 (2000).

†n21. The Implementation of the **Presidential Records Act** of 1978: Oversight Hearing Before the House Subcomm. on Gov't Efficiency, Fin. Mgmt. & Intergovernmental Relations, 107th Cong. (2001) (statement of Mark J. Rozell, Professor, Catholic University of America) [hereinafter Rozell Subcomm. Testimony]; 37A Am. Jur. 2d Freedom of Information Acts 32 (1994).

†n22. Katyal, *supra* note 20, at 688 ("[Executive privilege] ensures that the advice the President receives is candid and frank.").

†n23. *In re Grand Jury Proceedings*, 5 F. Supp. 2d 21, 25 (D.D.C. 1998) (quoting *In re Sealed Case*, 121 F.3d 729, 742 (D.C. Cir. 1997) (asserting that the "great public interest" served is that a President can better perform his duties if he has the best and most candid advice available to him)); *Nixon v. Sirica*, 487 F.2d 700, 717 (D.C. Cir. 1973).

†n24. *United States v. Nixon*, 418 U.S. 683, 705 (1974); see Rozell, *supra* note 4, at 1122 (discussing the impact of *In re Sealed Case* on the confidential communications privilege). In holding that Presidents have the right to confidential, frank advice, the Court extended executive privilege to top advisors. By emphasizing that policy discussion and deliberation should occur without the fear that every word uttered would be exposed to the public, the President will be given the best advice possible. *Id.*

†n25. Katyal, *supra* note 20, at 688; see also discussion of *United States v. Nixon*, *infra* Part I.D.1.

†n26. Mark P. Doherty, *Executive Privilege or Punishment? The Need To Define Legitimate Invocations and Conflict Resolution Techniques*, 19 N. Ill. U. L. Rev. 801, 824-25 (1999).

†n27. This testimony was given when now-Justice Scalia was an Assistant Attorney General for the Office of Legal Counsel. Dawn Johnsen, *Executive Privilege Since United States v. Nixon: Issues of Motivation and Accommodation*, 83 Minn. L. Rev. 1127, 1140 n.28 (1999) (quoting *Executive Privilege - Secrecy in Government: Hearings on S. 2170, S. 2378, and S. 2420 Before the Subcomm. on Intergovernmental Relations of the S. Comm. on Gov't Operations*, 94th Cong. 125 (1975) (statement of Antonin Scalia, Assistant Attorney General, Office of Legal Counsel)).

†n28. U. S. Const. art. IV, 3, cl. 2 (providing that only Congress can dispose of property belonging to the United States).

†n29. See H.R. Rep. No. 95-1487, at 8 (1978), reprinted in 1978 U.S.C.C.A.N. 5732, 5739 (noting that the majority of witnesses who testified at a 1978 hearing before the House Subcommittee on Government Information and Individual Rights agreed that the records created during an official act should remain the property of the government).

†n30. The belief that presidential records remain personal property has existed since the very beginning, when President Washington maintained possession of his papers when he left office and later left them to his nephew in his will. Amici Brief, *supra* note 3, at 8-9. Additionally, the records of the Lincoln administration were not made available until 1949. The Importance of Access to Presidential Records: The Views of Historians: Hearing Before the House Comm. on Gov't Reform, 107th Cong. (2002) (statement of Richard Reeves, Author of Books Examining the Nixon and Kennedy Administrations) [hereinafter Reeves Subcomm. Testimony]. Moreover, with personal ownership came the ability to destroy one's property. Former Presidents, and sometimes their spouses or heirs, have demonstrated a willingness to destroy their presidential papers in an effort to maintain an unblemished public persona. See Amici Brief, *supra* note 3, at 6 (giving the example of former President Harding, whose wife had a majority of his papers burnt to protect her husband's name and avoid disclosure of materials relating to the Teapot Domes Scandal). The Amici Brief further notes that Presidents Arthur, Coolidge, Fillmore, Grant, Harding, Harrison, Pierce, Taylor, Tyler, and Van Buren all had presidential records destroyed. *Id.* The willingness of Presidents to destroy their records dates to more recent times as well. For example, the staff of former President George H.W. **Bush** intended to delete or otherwise destroy various types of electronic documents that related to the Gulf War, the Iran-Contra investigation, and aspects of his 1992 campaign against Bill Clinton. *Id.* at 6-7. Even if they did not destroy their records, presidents have been suspected of falsifying privilege claims to protect their image. See *id.* at 5 (noting the tendency of public officials to make false claims of privilege, and using the Pentagon Papers to demonstrate the inability of certain claims to be upheld after careful examination).

†n31. Amici Brief, *supra* note 3, at 1.

†n32. See *id.* at 9 (noting that "Roosevelt was the first President "to demonstrate that Presidential papers are indeed "the people's record" and the people's claim upon them is paramount." (quoting H.G. Jones, *The Records of a Nation: Their Management, Preservation and Use* 155 (1969))).

†n33. Presidential Libraries Act of 1955, Pub. L. No. 373, 69 Stat. 695 (1955) (current version at 44 U.S.C.A. 2101, 2107-2108 (West 2002)).

†n34. See *id.*; H.R. Rep. No. 95-1487, at 5 (1978), reprinted in 1978 U.S.C.C.A.N. 5732, 5736.

†n35. Amici Brief, *supra* note 3, at 10 (citing The Records of Federal Officials: A Selection of Materials From the National Study Commission of Records and Documents of Federal Officials 16 (Anna Kasten Nelson ed., 1978)).

†n36. Memorandum of Points and Authorities in Support of Plaintiffs' Motion For Summary Judgment, *Am. Historical Ass'n v. Nat'l Archives & Records Admin.*, No. 1:01CV02447 (D.D.C.) [hereinafter AHA Memo of Points].

†n37. 37A Am. Jur. 2d Freedom of Information Acts 32 (1994).

†n38. *Nixon v. Sampson*, 389 F. Supp. 107, 123-24 (D.D.C. 1975).

†n39. *Id.* at 124.

†n40. Carl M. Cannon, For the Record, *Nat'l J.*, Jan. 12, 2002.

†n41. Pub. L. No. 93-526, 88 Stat. 1695-1698 (1974) (codified at 44 U.S.C. 2107 (1974)). The Act was signed by President Ford on December 19, 1974.

†n42. See *Sampson*, 389 F. Supp. at 124 n.40 (noting that congressional intent was clear). Specifically, "this legislation would nullify the Nixon-Sampson Agreement of September 7, 1974, and would provide that the Federal Government retain custody of the Nixon tapes and Presidential materials." *Id.* (quoting H.R. Rep. No. 93-1507, at 4 (1974)); see H.R. Rep. No. 95-1487, at 5 (1978), reprinted in 1978 U.S.C.C.A.N. 5732, 5736 ("Congress objected to the agreement and abrogated it by passing the [PRMPA]."); Bill Summary & Status for the 93d Cong. H.R. 16948, available at <http://thomas.loc.gov/cgi-bin/bdquery/D?d093:1:/temp/<diff>bdyXEk:@@L<abval1>/bss/d093query.html<abval1>> (last visited Oct. 16, 2002) (summarizing the Act as directing the General Services Administrator to maintain any tape recording involving former President Nixon that was recorded at the White House during his Presidency); Bill Summary & Status for the 93d Cong. S. 4016, Pub. L. 93-526, available at <http://thomas.loc.gov/cgi-bin/bdquery/D?d093:1:/temp/<diff>bdH7jg:@@L<abval1>/bss/d093query.html<abval1>> (last visited Oct. 16, 2002) (same).

†n43. Cannon, *supra* note 40.

†n44. But see Amici Brief, *supra* note 3, at 12 (arguing that although only President Nixon's records were brought into question under the PRMPA, in passing the Act, Congress was "concerned with broader principles of public access to presidential materials and the need to minimize the potential for future abuses").

†n45. 37A Am. Jur. 2d Freedom of Information Acts 32-33 (1994).

†n46. See discussion *infra* Part I.D.1.

†n47. See discussion *infra* Part I.D.1.

†n48. *Nixon v. Sampson*, 389 F. Supp. 107, 124 (D.D.C. 1975).

†n49. 37A Am. Jur. 2d Freedom of Information Acts 33 (1994).

†n50. *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 475 n.39 (1977).

†n51. Cannon, *supra* note 40.

†n52. 44 U.S.C.A. 3316 (West 2002).

†n53. Bill Summary & Status for the 93d Cong. S. 4016, Pub. L. 93-526, available at <http://thomas.loc.gov/cgi-bin/bdquery/z?d093:SN04016:@@@DTOM:/bss/d093query.html> (last visited Sept. 1, 2002).

†n54. 37A Am. Jur. 2d Freedom of Information Acts 34 (1994); 1978 U.S.C.C.A.N. 5732, 5739 (noting that the Commission "strongly recommended legislation to settle the ownership question in favor of the public").

†n55. Steven L. Hensen, Editorial, **Bush's** Order on Access to Presidential Papers Turns

Existing Law on Its Head, News & Observer, Dec. 27, 2001.

†n56. Cannon, *supra* note 40.

†n57. The Importance of Access to Presidential Records: The Views of Historians, Hearing Before the House Comm. on Gov't Reform, 107th Cong. (2002) (statement of Joan Hoff, Director of the Contemporary History Institute at Ohio University) [hereinafter Hoff Testimony].

†n58. The Implementation of the **Presidential Records Act** of 1978: Oversight Hearing Before the House Subcomm. on Gov't Efficiency, Fin. Mgmt. & Intergovernmental Relations, 107th Cong. (2001) (statement of The Honorable John W. Carlin, Archivist of the United States) [hereinafter Carlin Subcomm. Testimony]; H.R. Rep. No. 95-1487, reprinted in 1978 U.S.C.C.A.N. 5732 ("[The PRA] declares presidential records to be government property and provides that immediately upon the conclusion of a president's tenure in office these records are transferred to the custody of the archivist [who is] given the responsibility for the placement of the records in a presidential library."). Moreover, public access to federal documents is generally covered by the Freedom of Information Act (FOIA). However, the Supreme Court held that FOIA does not apply to the Office of the President. Kinkopf, *supra* note 8, at 653.

†n59. 1978 U.S.C.C.A.N. 5732, 5733.

†n60. *Id.*

†n61. 44 U.S.C.A. 2201 (West 2002). A presidential record was something that related to "activities which relate to or have an effect upon the carrying out of the constitutional, statutory, or other official or ceremonial duties of the President." *Id.*

†n62. *Id.* 2202; see 37A Am. Jur. 2d Freedom of Information Acts 34 (1994); Amici Brief, *supra* note 3, at 13 ("Congress shifted control over public access to presidential papers from former Presidents to independent, professional archivists, and through the archivists, to the public."). As early as the 1960s, two prominent author/archivists claimed that the papers belonged to the public. Julian Boyd contended that "the records of the office of the President belong to the people who created that office. They cannot be given away by one who happens to be its incumbent." Steven L. Hensen, The President's Papers Are the People's Business, Wash. Post, Dec. 16, 2001, at B1. H.G. Jones agreed by noting that Franklin Roosevelt authoritatively established the people's ownership over the President's papers. Jones commented, "The prerogative assumed by his predecessors in asserting private title was in fact only a lingering vestige of the attributes of monarchy, not an appropriate or compatible concept of archival policy for the head of a democratic state to adopt." *Id.*

†n63. Carlin Subcomm. Testimony, *supra* note 58.

†n64. The Act also prevents the President from disposing of any material that he believes has no "historical or other informational value" while he is office, unless the Archivist expressly grants permission to do so. See *Nixon v. Freeman*, 670 F.2d 346, 348 n.2 (D.C. Cir. 1982) (citing 2203(c)).

†n65. 44 U.S.C.A. 2207 (West 2002).

†n66. The Implementation of the **Presidential Records Act** of 1978: Oversight Hearing Before the House Subcomm. on Gov't Efficiency, Fin. Mgmt. & Intergovernmental Relations, 107th Cong. (2001) (statement of Peter M. Shane, Professor, University of Pittsburgh and Carnegie Mellon University) [hereinafter Shane Subcomm. Testimony]. The report from the House Committee on Government Operations, the committee that recommended the bill that became the PRA, noted that committee witnesses believed that "'a period of 10 years or less in which the President could assert some restrictions would be sufficient to accommodate ... policy and legal concerns.'" *Freeman*, 670 F.2d at 356 n.13 (quoting H.R. Rep. No. 95-1487, at 8 (1978), reprinted in 1978 U.S.C.C.A.N. 5732, 5740).

†n67. 44 U.S.C.A. 2204(a)(1)-(6) (West 2002).

†n68. The Implementation of the **Presidential Records Act** of 1978: Oversight Hearing Before the House Subcomm. on Gov't Efficiency, Fin. Mgmt. & Intergovernmental Relations, 107th Cong. (2001) (witness questioning); Cannon, *supra* note 40.

†n69. According to the Archivist, it instructs that the presidential records of an administration be transferred to the "legal and physical custody of the National Archives and Records Administration immediately upon the end of the president's last term of office." Carlin Subcomm. Testimony, *supra* note 58.

†n70. 44 U.S.C.A. 2204(b)(2)(A).

†n71. Carlin Subcomm. Testimony, *supra* note 58.

†n72. *Nixon v. Freeman*, 670 F.2d 346, 348 n.2 (D.C. Cir. 1982) (citing 44 U.S.C.A. 2204(b)(3)).

†n73. 44 U.S.C.A. 2204(c)(1); Carlin Subcomm. Testimony, *supra* note 58 (summarizing 2204(b)(2), (c)(1)).

†n74. 44 U.S.C.A. 2206(3) (West 2002).

†n75. See Brief for the American Historical Association at 8, *Am. Historical Ass'n v. Nat'l Archives & Records Admin.*, No. 1:01CV02447 (D.D.C.) [hereinafter AHA Brief] (citing 36 C.F.R. 1270.46(a), (b), (d)).

†n76. 36 C.F.R. 1270.50(c) (as referenced in AHA Brief, *supra* note 75, at 8).

†n77. *Id.* 1270.46(c), (d) (as referenced in AHA Brief, *supra* note 75, at 8).

†n78. *Id.* 1270.46(e).

†n79. *In re Subpoena to Nixon*, 360 F. Supp. 1, 5 n.8 (D.D.C. 1973) (quoting *Kaiser Aluminum & Chem. Corp. v. United States*, 157 F. Supp. 939, 944 (Ct. Cl. 1958)).

†n80. *Senate Select Comm. on Presidential Campaign Activities v. Nixon*, 498 F.2d 725 (D.C. Cir. 1974); Miller, *supra* note 11, at 650.

†n81. Miller, *supra* note 11, at 651.

†n82. *Id.*

†n83. Peter M. Shane, *Legal Disagreement and Negotiation in a Government of Laws: The Case of Executive Privilege Claims Against Congress*, 71 *Minn. L. Rev.* 461, 473 (1987).

†n84. *Senate Select Comm.*, 498 F.2d at 728.

†n85. See Shane, *supra* note 83, at 473-74 (noting that the special context of this case resulted from a "cumulative" need for the subpoenaed tapes by the Senate Committee on Presidential Campaign Activities because the House Judiciary Committee already had access to the tapes). In finding for President Nixon, the district court utilized a balancing test that "weighed the public interests protected by the President's claim of privilege against the public interests that would be served by disclosure in a particular case." Senate Select Comm., 498 F.2d at 725 (citing *Nixon v. Sirica*, 487 F.2d 700 (D.C. Cir. 1973)); see also Kinkopf, *supra* note 8, at 655 n.16 (quoting Senate Select Comm., 498 F.2d at 731). Senate Select Comm. applied a presumption of privilege when claimed by the President unless Congress demonstrated that the requested evidence was critical to its function. *Id.*

†n86. 418 U.S. 683 (1974).

†n87. For a good discussion of the doctrinal and policy-related problems with *United States v. Nixon*, see Michael Stokes Paulsen, *Nixon Now: The Courts and the Presidency After Twenty-Five Years*, 83 Minn. L. Rev. 1337 (1999).

†n88. *United States v. Nixon*, 418 U.S. at 706 n.16; Shane, *supra* note 83, at 471-72 (noting the need for protection of communications between high government officials and those who advise and assist them in the performance of their manifold duties).

†n89. *United States v. Nixon*, 418 U.S. at 685.

†n90. *Id.* at 708.

†n91. *Id.* at 703 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)); see Myint Zan, *The Three Nixon Cases and Their Parallels in Malaysia*, 13 St. Thomas L. Rev. 743, 745 (2001) (discussing *United States v. Nixon* in depth and noting that the judiciary categorically decides the President's entitlement to executive privilege).

†n92. See also Marc R. Salans, *Independent Counsel: The Separation of Powers and the Separation of Politics from the Administration of Justice*, 56 Geo. Wash. L. Rev. 900 (1988) (noting how *United States v. Nixon* demonstrated the functional approach to separation of powers).

†n93. *United States v. Nixon*, 418 U.S. at 706.

†n94. Id. at 706; see also 37A Am. Jur. 2d Freedom of Information Acts 32 (1994).

†n95. On August 8, 1974, 16 days after *United States v. Nixon* was decided, President Nixon became the first president to resign from office. In describing the effects and consequences of the Supreme Court's decision on the presidency, Nixon wrote that "this decision ... was widely heralded as one of the Court's finest hours." Yet he lamented, "While I understood the reason for the decision, I thought that the United States had lost. I thought the Presidency itself was a casualty of this ruling." Richard Nixon, *RN: The Memoirs of Richard Nixon* 1051 (1978).

†n96. *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425 (1977).

†n97. See discussion *supra* Part I.C.1.

†n98. *Zan*, *supra* note 91, at 755.

†n99. 1978 U.S.C.C.A.N. 5732, 5737; *Zan*, *supra* note 91, at 755.

†n100. *Adm'r of Gen. Servs.*, 433 U.S. at 448-49; The Implementation of the **Presidential Records Act** of 1978: Oversight Hearing Before the House Subcomm. on Gov't Efficiency, Fin. Mgmt. & Intergovernmental Relations, 107th Cong. (2001) (statement of Scott L. Nelson, Attorney, Public Citizen Litigation Group) [hereinafter Nelson Subcomm. Testimony].

†n101. *Adm'r of Gen. Servs.*, 433 U.S. at 451; Nelson Subcomm. Testimony, *supra* note 100; AHA Memo of Points, *supra* note 36.

†n102. *Adm'r of Gen. Servs.*, 433 U.S. at 450.

†n103. *Nixon v. Freeman*, 670 F.2d 346, 356 (D.C. Cir. 1982) (citing *Adm'r of Gen. Servs.*, 433 U.S. at 449). *Freeman* further notes that "although a former President may assert the privilege, the incumbent's failure to mount a similar challenge at the time Mr. Nixon brought this suit weakens the force of the former President's claim." *Id.* (citing *Adm'r of Gen. Servs.*, 433 U.S. at 449).

†n104. *Adm'r of Gen. Servs.*, 433 U.S. at 445-46.

†n105. AHA Memo of Points, *supra* note 36.

†n106. *Freeman*, 670 F.2d at 359.

†n107. AHA Memo of Points, *supra* note 36 (quoting *Freeman*, 670 F.2d at 356). In fact, the *Freeman* court observed that the public would not have access to the tapes for at least eight years after the President had left office. *Id.*

†n108. *Freeman*, 670 F.2d at 356-59; see also AHA Memo of Points, *supra* note 36.

†n109. *Public Citizen v. Burke*, 843 F.2d 1473 (D.C. Cir. 1988).

†n110. Nelson Subcomm. Testimony, *supra* note 100 (describing the holding of *Public Citizen v. Burke*).

†n111. *Burke*, 843 F.2d at 1473; Nelson Subcomm. Testimony, *supra* note 100.

†n112. *Burke*, 843 F.2d at 1479.

†n113. See *id.* at 1480; AHA Memo of Points, *supra* note 36. *Burke* noted, "Clearly in *Freeman* we saw no constitutional anomaly in the prospect of the Archivist rejecting a challenge by Mr. Nixon based on executive privilege." 843 F.2d at 1480.

†n114. 5 F. Supp. 2d 21, 27 (D.D.C. 1998).

†n115. *Id.*

†n116. 121 F.3d 729 (D.C. Cir. 1997).

†n117. Shane Subcomm. Testimony, *supra* note 66 (noting that these documents are

"protected only if created in the course of preparing advice for the President, only if they concern official governmental operations calling ultimately for the President's decision making, and only if the advisers ... involved are senior. But, once those conditions are met, a document may be privileged even if the President never saw it." (citing *In re Sealed Case*, 121 F.3d 729)).

✦n118. *In re Sealed Case*, 121 F.3d at 752.

✦n119. Rozell, *supra* note 6, at 549 (citing David Wise, *The Politics of Lying: Government Deception, Secrecy, and Power* 339 (1978) (quoting President Richard M. Nixon)). This remark was made three months prior to the Watergate break-in. *Id.*

✦n120. McPhie, *supra* note 5, at 536. By contrast, President Clinton invoked executive privilege numerous times. *Id.*; see also Katyal, *supra* note 20, at 677. President Clinton "had not been shy in invoking the privilege at various points to block disclosure of material, including material relating to the Travel Office Investigation, the inquiry into wrongdoing by former Agriculture Secretary Mike Espy, a memorandum by the FBI Director that was critical of the Clinton Administration's drug control efforts ... information on U.S. Policy towards Haiti ... [and] in the [Monica] Lewinsky matter." *Id.* at 684-85 (footnotes omitted). Professor Katyal further commented that the use of privilege claims on matters like the investigation surrounding Monica Lewinsky weakens a president's ability to claim privilege when public matters are significant. *Id.* at 684-85, 690.

✦n121. Exec. Order No. 12,667, 54 C.F.R. 3403 (1989) [hereinafter Reagan's Order]; Cannon, *supra* note 40.

✦n122. Analysis: Why Does **Bush** Want to Bury Presidential Records?, *Baltimore Chron.*, Jan. 2, 2002, available at <http://baltimorechronicle.com/prespapers<uscore>jan02.shtml>. At the time, although pale in comparison to the criticism **Bush's** Order has attracted, Reagan's Order was also subjected to criticism. See, e.g., M.B. Schnapper, *The Great Communicator's Final Word*, *Legal Times*, July 17, 1989, at 13 (providing an in-depth critique of Reagan's Order and noting that it "is, in effect, a means of prolonging de facto secrecy powers [Reagan] enjoyed during his Oval Office years").

✦n123. John W. Carlin, *Nat'l Archives & Records Admin., Opening the Reagan Records* (2001), available at <http://www.nara.gov/nara/vision/reagan<uscore>records/opening<uscore>reagan<uscore>rec>

✦n124. Reagan's Order, *supra* note 121, 2(a).

†n125. Exec. Order No. 13,233, 66 Fed. Reg. 56025 (Nov. 1, 2001) [hereinafter **Bush's Order**].

†n126. AHA Memo of Points, *supra* note 36 (citing **Bush's Order**, *supra* note 125, 2(a)).

†n127. **Bush's Order**, *supra* note 125, 3(b).

†n128. *Id.* 3(d).

†n129. *Id.* 4.

†n130. *Id.* 3.

†n131. Philip Taylor, **Bush** Blocks Release of Reagan White House Papers, News Media Update, Nov. 5, 2001, available at <http://www.rcfp.org/news/2001/1105execor.html>.

†n132. Nelson Subcomm. Testimony, *supra* note 100.

†n133. *Id.*; **Bush's Order**, *supra* note 125, 2(c).

†n134. The quoted statement was made in response to a request for access to the documents of the Energy Task Force that the Vice President had chaired. Dana Milbank, Cheney Refuses Records' Release: Energy Showdown with GAO Looms, Wash. Post, Jan. 28, 2002, at A1 (noting that Cheney is attempting to restore presidential power that has not been seen since before Watergate).

†n135. Section 3 of Pub. L. No. 95-591, 92 Stat. 2528 (1978), states: "This Act shall be effective with respect to any Presidential records ... created during a term of office of the President beginning on or after January 20, 1981."

†n136. Plaintiffs' Statement of Undisputed Facts in Support of Motion for Summary Judgment, Am. Historical Ass'n v. Nat'l Archives & Records Admin., No. 1:01CV02447 (D.D.C.), available at <http://www.citizen.org/litigation/briefs/FOIAGovtSec/articles.cfm>?

ID=7161 [hereinafter Plaintiffs' Statement] (quoting John Carlin's statement "Opening the Reagan Records").

†n137. Id.

†n138. Id. Because the Reagan White House was the first administration, the first vice president to be extended the privilege was George H.W. **Bush**. Thus, H.W. **Bush's** 1981-1989 vice-presidential papers are on the exact same path as Reagan's presidential papers.

†n139. AHA Brief, *supra* note 75, at 10.

†n140. Plaintiffs' Statement, *supra* note 136.

†n141. Id.; Philip Taylor, White House Delays Release of Reagan Papers for Third Time, News Media Update, Sept. 7, 2001, available at <http://www.rcfp.org/news/2001/0907reagan.html>.

†n142. Stanley I. Kutler, Classified!; George W. Uses 9/11 as a Pretext to Reverse the Will of Congress and Wall Off Presidential Records, Chi. Trib., Jan. 2, 2002, at C1.

†n143. Cannon, *supra* note 40.

†n144. Letter from Scott L. Nelson, Public Citizen Litigation Group, to Gary M. Stern General Counsel, National Archives and Records Administration (Mar. 11, 2001) (on file with author).

†n145. The first request was received in March and asked for a June 21st deadline; then in June for an August 31st deadline; and a letter dated August 31 asked for a third extension, but not a specific deadline. Taylor, *supra* note 141.

†n146. Philip Taylor, House Subcommittee Reviews **Bush** Edict on Reagan Records, News Media Update, Nov. 6, 2001, available at <http://www.rcfp.org/news/2001/1106execut.html>.

†n147. Elisabeth Bumiller, **Bush** Keeps a Grip on Presidential Papers, N.Y. Times, Nov. 1, 2001, at A22.

†n148. See The Importance of Access to Presidential Records: The Views of Historians: Hearing Before the House Comm. on Gov't Reform, 107th Cong. (2002) (statement of Stanley Kutler, Professor, University of Wisconsin Law School) ("Speculation is rampant that **Bush** also is eager to protect Reagan aides who now are prominent in his Administration."); Eric Alterman, Freedom Is History (and Vice Versa), Nation, Dec. 10, 2001 (noting that "the secrecy it enshrines can only invite future Watergate-or Iran/contra-style abuses"); Cannon, supra note 40 (noting that "many of the nation's presidential scholars openly speculated that the **Bush** White House was protecting its top aides - many of whom served in the Reagan Administration - from embarrassing disclosures"); Hensen, supra note 62 ("This has led to speculation that the administration is trying to shield members of **Bush's** own administration, as well as his father, from a variety of uncomfortable revelations, including possible connections to the Iran-contra scandal."); Mark J. Bresky LaGrange, Hiding Something, Mr. **Bush?**, Plain Dealer, Nov. 21, 2001 (commenting that President **Bush** might be afraid that his father was "in the loop when it came to Iran-contra"); Dean, supra note 1; The Imperial Presidency, Email Activist, at <http://www.theemailactivist.org/imperial.htm> (last visited Oct. 30, 2002) ("The **Bush** White House is brimming with officials from the Reagan and **Bush** I administrations, and those men certainly don't want their pasts revealed while they're in office. Their papers undoubtedly hold secrets about the Iran-Contra affair, for example."); Sarah Left, **Bush** Blocks Public Access to White House Papers, Guardian, Nov. 2, 2001, available at <http://www.guardian.co.uk/bush/story/0,7369,586470,00.html>; Taylor, supra note 131.

†n149. Alterman, supra note 148; Taylor, supra note 131.

†n150. Kutler, supra note 142 ("Whatever 'secrets' Reagan may have had are safe; more important, perhaps, Reagan's vice president can rest easy.").

†n151. Id. (quoting the Los Angeles Times).

†n152. See Dean, supra note 1 (commenting that granting this power to vice presidents "may only feed suspicion that Dick Cheney's role is more Presidential than may be appropriate to his office"). Current battles over access to Vice President Cheney's papers have added fuel to this argument and make it appear as if the Order was designed to prevent future access to the current administration's records. See The History of Congressional Access to Deliberative Justice Department Documents: Hearing Before the House Comm. on Gov't Reform, 107th Cong. (2002) (discussing the President's claim of privilege over Justice Department documents regarding organized crime investigations in the 1960s and 1970s, as well as a new Justice Department policy preventing congressional access to deliberative Justice Department documents); see also The Imperial Presidency, supra note 148 (quoting Hugh Graham) ("The executive branch is moving heavily into the nether world of dirty tricks ... there is going to be much to hide."); Charles Lane, A Washington Battle Often Fought Before: Familiar Issues Underlie GAO-White House Dispute, Wash. Post, Jan. 30, 2002, at A6 (noting the implications for "the balance of power" that result from the White House's refusal to release information because of the President's "need for unvarnished confidential advice").

†n153. See Hearing on Secrecy and the **Bush** Administration, Comm. on Gov't Reform, 107th Cong. (2002) (statement of the Hon. Henry A. Waxman); Laurie Kellman, White House Warned over Documents, St. Paul Pioneer Press, Aug. 3, 2002.

†n154. Press Release, Judicial Watch, Vice President in Contempt of Energy Task Force Court Order (Sept. 4, 2002), available at <http://www.judicialwatch.org/2429.shtml>.

†n155. Pete Yost, Cheney Won't Release Energy Papers, Las Vegas Sun, Sept. 4, 2002, available at <http://www.lasvegassun.com/sunbin/stories/bw-wh/2002/sep/04/090407006.html>.

†n156. See Kellman, *supra* note 153 (quoting Judge Sullivan) ("Simply citing special presidential privileges or the Constitution would not be enough to keep those records from public view."); Judicial Watch, *supra* note 154.

†n157. Secrecy and the **Bush** Administration, *supra* note 2.

†n158. *Id.*

†n159. Taylor, *supra* note 131. During a press briefing Ari Fleischer was asked if the **executive order** "gives you an out to screen information which could be embarrassing or otherwise simply unpleasant?" He replied that records may still have security implications for the nation that a former president may not know about. As a precaution, the current administration has the right to review it. Press Briefing by Ari Fleischer, The White House, Office of the Press Secretary (Nov. 1, 2001).

†n160. Hensen, *supra* note 62.

†n161. The Implementation of the **Presidential Records Act** of 1978: Oversight Hearing Before the House Subcomm. on Gov't Efficiency, Fin. Mgmt. & Intergovernmental Rel. of the House Comm. on Gov't Reform, 107th Cong. (2001).

†n162. Kinkopf, *supra* note 8, at 634; Rozell, *supra* note 6, at 542.

†n163. See Miller, *supra* note 11, at 641 (quoting Ass'n of Am. Physicians & Surgeons v. Clinton, 997 F.2d 898, 909 (D.C. Cir. 1993) (referring to the President's Article II right to confidential communications)).

†n164. Protection for Government Information, in 1 Charles H. Koch, *Administrative Law & Practice* 3.38 (2d ed. 1997).

†n165. Miller, *supra* note 11, at 631 (quoting former President Ronald Reagan).

†n166. Viet D. Dinh, *Executive Privilege: The Dilemma of Secrecy and Democratic Accountability* by Mark J. Rozell, 13 *Const. Comment.* 346, 350 (1996) (book review).

†n167. Press Availability with President **Bush**, The White House, Office of the Press Secretary (Nov. 2, 2001).

†n168. Press Briefing by Ari Fleischer, *supra* note 159; The Implementation of the **Presidential Records Act** of 1978: Oversight Hearing Before the House Subcomm. on Gov't Efficiency, Fin. Mgmt. & Intergovernmental Rel. of the House Comm. on Gov't Reform, 107th Cong. (2001) (statement of M. Edward Whelan III, Acting Assistant Attorney General, Office of Legal Counsel, Department of Justice) [hereinafter Whelan Subcomm. Testimony]. The "**executive order**" is designed to set forth the procedures, to fill gaps, to implement the **Presidential Records Act**. It is not designed, and does not, in any respect override any of the provisions of that act." *Id.*

†n169. Press Availability with President **Bush**, *supra* note 167.

†n170. Shane Subcomm. Testimony, *supra* note 66.

†n171. Bumiller, *supra* note 147, at A22.

†n172. See Dean, *supra* note 125.

†n173. **Bush's** Order, 11 states:

Sec. 11. Vice Presidential Records.

(a) Pursuant to section 2207 of title 44 of the United States Code, the **Presidential Records Act** applies to the executive records of the Vice President [sic]. Subject to subsections (b) and (c), this order shall also apply with respect to any such records that are subject to any constitutionally based privilege that the former Vice President may be entitled to invoke, but in the administration of this order with respect to such records, references in this order to a former President shall be deemed also to be references to the relevant former Vice President.

(b) Subsection (a) shall not be deemed to authorize a Vice President or former Vice President to invoke any constitutional privilege of a President or former President except as authorized by that President or former President [sic].

(c) Nothing in this section shall be construed to grant, limit, or otherwise affect any privilege of a President, Vice President, former President, or former Vice President.

†n174. Miller, *supra* note 11, at 642 n.53.

†n175. For example, the Supreme Court held that the state-secrets privilege may be asserted by a head of an executive department in *United States v. Reynolds*, 345 U.S. 1 (1953).

†n176. 121 F.3d 729, 742 (D.C. Cir. 1997).

†n177. Kinkopf, *supra* note 8, at 637-38.

†n178. *Id.*

†n179. 44 U.S.C.A. 2207 (West 2002).

†n180. Mike Allen & George Lardner Jr., A Veto over Presidential Papers: Order Lets Sitting or Former President Block Release, *Wash. Post*, Nov. 2, 2001, at A1.

✦n181. See AHA Memo of Points, *supra* note 36 (noting that it is clear that a vice-presidential privilege is being created because the Order "simultaneously forbids a former Vice President [from] invoking "any constitutional privilege of a President or former President except as authorized by that President or former President").

✦n182. Therefore, when the Vice President is acting as an advisor, the President could claim a privilege over any document created in the Vice President's advisory role. Shane, *supra* note 83, at 461; see *Nixon v. Fitzgerald*, 457 U.S. 731, 749 (1982) (noting that the President is unique in this respect); see also H.R. Rep. No. 95-1487, reprinted in 1978 U.S.C.C.A.N. 5732, 5735 (noting that the PRA originally intended to "provide[] for the similar treatment of vice-presidential records"; allowing vice-presidential records to be covered, but remaining silent on the ability of the Vice President to assert the privilege himself).

✦n183. See AHA Brief, *supra* note 75, at 16.

✦n184. Section 10 of **Bush's** Order, *supra* note 125, states:

Sec. 10. Designation of Representative.

The former President may designate a representative (or series or group of alternative representatives, as the former President in his discretion may determine) to act on his behalf for purposes of the **Presidential Records Act** and this order. Upon the death or disability of a former President, the former President's designated representative shall act on his behalf for purposes of the Act and this order, including with respect to the assertion of constitutionally based privileges. In the absence of any designated rep-resentative [sic] after the former President's death or disability, the family of the former President may designate a representative (or series or group of alternative representatives, as they in their discretion may determine) to act on the former President's behalf for purposes of the Act and this order, including with respect to the assertion of constitutionally based privi-leges [sic].

✦n185. Further, this person will never have taken the oath of office to uphold the Constitution or know why the material should be privileged in the first place. See also AHA Memo of Points, *supra* note 36.

✦n186. See discussion *supra* Part I.D.2; see also AHA Memo of Points, *supra* note 36 (quoting *Public Citizen v. Burke*, 843 F.2d at 1480, as saying, "If, whenever [the former president] asserts executive privilege, the Archivist in effect loses jurisdiction over his

responsibilities to effect disclosure, the former President has gained power to withdraw from the Archivist some indefinite portion of the responsibilities that Congress delegated to him.").

†n187. *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 448-49 (1977).

†n188. See Amici Brief, *supra* note 3, at 24-25 ("Executive privilege is neither descendible nor transferrable [sic] and thus cannot be delegated to heirs and designated representatives, as the **Bush** Order contemplates."). In their brief, Amici also quote the following cases for the proposition that the power to assert executive privilege is only granted to government officials: *United States v. Reynolds*, 345 U.S. 1, 7-8 (1953) ("The privilege belongs to the Government and must be asserted by it; it can neither be claimed nor waived by a private party."); *Carl Zeiss Siftung v. V.E.B. Carl Zeiss, Jena*, 40 F.R.D. 318, 326 n.33 (D.C. Cir. 1966) (commenting that while *Reynolds* revolved around military secrets, "subsequent decisions have uniformly applied the guidelines it expressed irrespective of the particular kind of executive claim advanced."). Amici Brief, *supra* note 3, at 24.

†n189. *Cannon*, *supra* note 40; see Shane Subcomm. Testimony, *supra* note 66 (noting that "executive privilege is intended to protect the presidency, it's not a privilege to protect particular individuals in their individual capacity as incumbent president of their individual capacity as past president, it's intended to protect the office"); AHA Memo of Points, *supra* note 36 (noting that the family of a former President has no legitimate interest or claim to executive privilege). Under the PRA, the Archivist had exclusive control over access to presidential records. 44 U.S.C.A. 2203(f)(1) (West 2002). According to the amicus brief, the PRA leaves "no room for any government official to [confer] control of Presidential records [on] any person or entity other than the U.S." Amici Brief, *supra* note 3, at 22 (quoting *Am. Historical Ass'n v. Peterson*, 876 F. Supp. 1300, 1319 (D.D.C. 1995)).

†n190. *Cannon*, *supra* note 40.

†n191. Amici Brief, *supra* note 3, at 22.

†n192. See **Bush's** Order, *supra* note 125, 3(d); Amici Brief, *supra* note 3, at 3. In so doing, the Order forces the Archivist to violate his or her statutory duty of releasing papers as quickly as possible. See Amici Brief, *supra* note 3, at 21 (quoting 44 U.S.C. 2204).

†n193. Under Reagan's Order, if a former president claimed privilege, the Order mandated that the Archivist observe the incumbent president's decision on whether to respect his predecessor's privilege claim. See Shane Subcomm. Testimony, *supra* note 66.

†n194. See Allen & Lardner, *supra* note 180 (noting that the PRA placed presidential records in the public domain and the Order ensures that records will remain out of the public domain even if the sitting president disagrees with a former president's claim of privilege or the vice versa is true).

†n195. Left, *supra* note 148; see also James D. Griffith, Editorial, *Chi. Sun-Times*, Jan. 21, 2002, at 24 (noting that "making release of presidential records subject to concurrence of the former and sitting presidents [] in effect [creates] a double veto" and abrogates the PRA).

†n196. **Bush's** Order, *supra* note 125, 3(d)(1)(ii); see also Amici Brief, *supra* note 3, at 21 (noting that under the PRA, "the government 'shall reserve and retain complete ... control of Presidential records.' 44 U.S.C. 2202. It may preserve the right to assert constitutionally based privileges, but it forecloses any other means of delay by private citizens (including former Presidents)."); cf. *id.* at 22 (noting that a former president should not have any more authority to block access to his records once he has left office than he does to "'authorize access' to the Lincoln Bedroom, Yosemite National Park, or any other property belonging to the federal government").

†n197. Cannon, *supra* note 40; see also The Implementation of the **Presidential Records Act** of 1978: Oversight Hearing Before the House Subcomm. on Gov't Efficiency, Fin. Mgmt. & Intergovernmental Relations, 107th Cong. (2001) (statement of Representative Stephen Horn, Chair, House Subcomm. Gov't Efficiency, Fin. Mgmt. & Intergovernmental Relations) [hereinafter Horn Subcomm. Testimony] (noting that "it also gives the former and incumbent presidents veto power over the release of the records.").

†n198. **Bush's** Order, *supra* note 125, 3(b).

†n199. *Id.* 3(d).

†n200. Kutler, *supra* note 142. Whelan Subcomm. Testimony, *supra* note 168. In defending this provision, Whelan referred to comments made by Senator Percy during the debate over the enactment of the PRA. According to Whelan, Senator Percy explained that a president who believes that the 12-year period is not enough "could object to the release of some document in the 13th or 15th or 20th year." However, there was also discussion of a 10-year period being sufficient. See *supra* note 66.

†n201. Under the PRA, a document may be access-restricted if it falls under FOIA exemption 1, 3, 4, or 6. 44 U.S.C.A. 2204 (West 2002); 37A Am. Jur. 2d Freedom of Information Acts 34 (1994).

†n202. Reagan's Order, supra note 121, 1(g).

†n203. **Bush's** Order, supra note 125, 2(a).

†n204. Id.

†n205. Cannon, supra note 40; AHA Memo of Points, supra note 36.

†n206. Cannon, supra note 40.

†n207. Allen & Lardner, supra note 180.

†n208. **Bush's** Order, supra note 125, 2(b).

†n209. Kutler, supra note 142. White House counsel Alberto Gonzales acknowledged that a challenge in court to a decision to keep a document secret might take years. Allen & Lardner, supra note 180. In addition to shifting the economic burden to researchers, failing to make these papers public "imposes an enormous burden on the process of writing and analyzing history and public policy." According to the American Library's Association (ALA), failing to provide public access to these papers would prevent significant numbers of biographical and historical works from existing. In their March 2002 press release, ALA noted that had **Bush's** Order been in effect in the last twenty years, almost fifty such works would not have been possible, including recent publications focusing on Lyndon Johnson, Abraham Lincoln, Harry Truman, Jimmy Carter, and on such national topics as Watergate and the Vietnam War. Moreover, the press release noted that authors currently writing about major events of the Reagan/**Bush** era, such as the Iran-Contra Affair, may not finish or could suffer from misinformation without access to information and documents from the Office of the President and Vice President. Press Release, Am. Library Ass'n, ALA Raises Red Flag on Recent **Bush Executive Order: Order** 13233 effectively invalidates **Presidential Records Act** (Mar. 1, 2002) (on file with author).

†n210. Hoff Testimony, supra note 57, at 2-3 (further noting that "research is already too expensive and time consuming for most academics, especially graduate students, and this provision would simply discourage many from working in presidential papers").

†n211. Secrecy and the **Bush** Administration, supra note 2.

†n212. Reagan's Order also expanded on the regulations issued by NARA, but the provisions in his Order did not change NARA's regulations. Horn Subcomm. Testimony, *supra* note 197.

†n213. 36 C.F.R. 1270.46(c).

†n214. *Id.* 1270.46(d).

†n215. 5 U.S.C.A. 551-559 (West 2002).

†n216. Kutler, *supra* note 142.

†n217. Bumiller, *supra* note 147.

†n218. Allen & Lardner, *supra* note 180.

†n219. Horn Subcomm. Testimony, *supra* note 197.

†n220. See Hensen, *supra* note 62. Steven Hensen, President of the Society of American Archivists, asserted that the Order does not implement the PRA; rather it "abrogates the core principles of the act and violates both its spirit and letter." *Id.*; see also Kutler, *supra* note 142 (noting that "the **executive order** constitutes nothing less than a wholesale emasculation of the **Presidential Records Act** of 1978"); Dean, *supra* note 1 (commenting that President **Bush** has exceeded his executive powers under the PRA). Dean notes further that "in issuing the Order, the President has pushed his lawmaking powers beyond their limits." *Id.*

†n221. Hensen, *supra* note 55.

†n222. *Marks v. CIA*, 590 F.2d 997, 1003 (D.C. Cir. 1978); *Am. Fed. of Gov't Employees v. Freeman*, 498 F. Supp. 651, 658 (D.D.C. 1980) ("An **Executive Order** cannot overturn an act of Congress.").

†n223. *Freeman*, 498 F. Supp. at 658; see also *id.* at 658 n.14 ("It is to be noted, however,

that an **Executive Order** cannot supersede a statute.") (citing Marks, 590 F.2d 997); Amici Brief, supra note 3, at 19 n.11 ("The **Bush** Order may be a more convenient method of overturning the PRA than asking Congress to write a new law would be, but it is not a constitutionally permissible one. At virtually every turn, it subverts the PRA's core purpose of providing more - not less - public access to presidential records.").

†n224. Taylor, supra note 131.

†n225. **Bush's** Order would not provide additional national security or privacy protection. See The Importance of Access to Presidential Records: The Views of Historians: Hearing Before the House Comm. on Government Reform, 107th Cong. (2002) (statement of Robert Dallek, Author of Books Examining the Johnson, Roosevelt, and other Administrations) [hereinafter Dallek Subcomm. Testimony] ("In my 30 years of work in presidential libraries, I have never heard of a breach of national security by premature release of presidential documents.").

†n226. Dean, supra note 1.

†n227. Greg Burnham, **Executive Order** 13233 & the Undermining of the US Constitution, Rense.com, Nov. 8, 2001, at <http://www.rense.com/general16/nunder.htm>.

†n228. Rozell Subcomm. Testimony, supra note 21.

†n229. Allen & Lardner, supra note 180; see also The Imperial Presidency, supra note 148 (noting that the quoted language is "a very polite way of saying that **Bush** is eliminating the people's right to know what is being done by their own elected officials.").

†n230. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952).

†n231. Johnsen, supra note 27, at 1140.

†n232. Rozell, supra note 6, at 580.

†n233. See Rozell Subcomm. Testimony, supra note 21 ("There has to be a balancing test with regard to different needs."); see also Joan Ryan, Editorial, Of Checks and Balances and Government Secrecy, S.F. Chron., Jan. 8, 2002, at A19 ("If we cannot hold government

accountable, we have no chance at all of keeping its exercise of power in check.").

✦n234. Letter from Henry Waxman and Janice Schakowsky, Committee on Government Reform, U.S. House of Representatives, to President George W. **Bush**, White House (Nov. 6, 2001), available at <http://www.fas.org/sgp/news/2001/11/pra<uscore>let.html>.

✦n235. See Cannon, *supra* note 40 (quoting Representative Henry Waxman (D-CA) as saying the Order reminded him of attempts to create an "imperial presidency" and quoting Representative Dan Burton (R-IN) telling Department of Justice lawyers sent to testify on the Hill that they "are making a big mistake!").

✦n236. Witnesses included John Carlin, Archivist of the United States; M. Edward Whelan III, Acting Assistant Attorney General, Office of Legal Counsel; Anna Nelson, Professor, American University; Mark J. Rozell, Professor, Catholic University of America; Peter M. Shane, Professor, University of Pittsburgh and Carnegie Mellon University; Scott L. Nelson, Attorney, Public Citizen Litigation Group. The Implementation of the **Presidential Records Act** of 1978: Oversight Hearing Before the House Subcomm. on Gov't Efficiency, Fin. Mgmt. & Intergovernmental Rel. of the House Comm. on Gov't Reform, 107th Cong. (2001).

✦n237. Horn Subcomm. Testimony, *supra* note 197. This statement was contained in a letter written by James Madison that commented in part on George Washington's disdain of Congress's desire to examine presidential records regarding early wars on the Indian frontier. Reeves Subcomm. Testimony, *supra* note 30, at 1.

✦n238. Horn Subcomm. Testimony, *supra* note 197.

✦n239. *Id.*

✦n240. Waxman and Schakowsky, *supra* note 234; see Secrecy and the **Bush** Administration, *supra* note 2 ("The President tries to turn the law upside down, making it more difficult to get access to presidential records."); see also George Lardner Jr., **Bush** Urged to Rescind Order on Presidential Materials, *Wash. Post*, Nov. 7, 2001, at A27 (noting that Rep. Horn "pointedly urged" the White House to repeal the Order).

✦n241. Press Release, Representatives Henry Waxman and Janice Schakowsky, House Comm. on Gov't Reform (Nov. 6, 2001).

✦n242. Section 3 of the proposed bill states in its entirety: "**Executive Order** number

13233, dated November 1, 2001 (66 Fed. Reg. 56025), shall have no force or effect." See **Presidential Records Act** Amendments of 2002, H.R. 4187H, 107th Cong. 2d; Secrecy and the **Bush** Administration, *supra* note 2.

†n243. See Bill Summary & Status for the 107th Cong. H.R. 4187, available at <http://thomas.loc.gov/cgi-bin/bdquery/D?d107:1:/temp/<diff>bd6b5n:@@@L&summ2=m&<abval1>/bss/d107query.html<abval1>> (last visited Oct. 24, 2002).

†n244. See *id.* (summarizing the proposed Amendments).

†n245. See H.R. 4187, 107th Cong. 2d Sess. (2002).

†n246. Dallek Subcomm. Testimony, *supra* note 225.

†n247. Hensen, *supra* note 55.

†n248. Rozell, *supra* note 6, at 567.

†n249. The Property Clause of the U.S. Constitution grants Congress the authority to "dispose of and make all needful Rules and Regulations respecting the ... Property belonging to the United States." U.S. Const. art. IV, 3, cl. 2. This Clause has been judicially upheld and Congress's authority to dispose of government property is well settled. See *Alabama v. Texas*, 347 U.S. 272, 273 (1954) (quoting *United States v. Gratiot*, 39 U.S. (14 Pet.) 526, 537 (1840)); *Edwards v. Carter*, 580 F.2d 1055, 1056-57 (D.C. Cir. 1978) (per curiam) (noting that through legislation, Congress may dispose of the property of the United States); *id.* at 1067 (MacKinnon, J., dissenting) ("The power of Congress to dispose of any kind of property belonging to the United States "is vested in Congress Without limitation." (quoting *Gratiot*, 39 U.S. (14 Pet.) at 537)); cf. *Lidas, Inc. v. United States*, No. CV-98-4503-DT, 1999 U.S. Dist. LEXIS 2198, at 12-13 (C.D. Cal. Feb. 5, 1999) (interpreting *Edwards v. Carter* as holding that the property power under Article IV is not the exclusive power of Congress, as the property of the United States may be disposed of by a treaty). The present situation is distinguishable, however, because *Edwards* involved the transfer of physical property to another country.

†n250. Rozell Subcomm. Testimony, *supra* note 21.

†n251. 360 F. Supp. 1, 6 (D.D.C. 1973) (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137,

177 (1803)).

✦n252. Kinkopf, *supra* note 8, at 646 ("The federal Judiciary is not a political branch. The judicial branch is designed to be insulated from politics in order "to secure a steady, upright, and impartial administration of the laws." (quoting *The Federalist* No. 78 (Alexander Hamilton))); Shane, *supra* note 83, at 499.

✦n253. Miller, *supra* note 11, at 679-80.

✦n254. Rozell, *supra* note 7, at 152-53. For a discussion of why litigation is not the best method for solving interbranch conflicts regarding executive privilege, see Akhil Reed Amar, *Nixon's Shadow*, 83 Minn. L. Rev. 1405, 1405 (1999) (discussing why Nixon was wrongly decided and commenting "The King was dead! Long live ... the Court."); Jonathan L. Entin, *Executive Privilege and Interbranch Comity After Clinton*, 8 Wm. & Mary Bill Rts. J. 657 (2000); cf. Amar, *supra*, at 1416 (discussing the impact of *Clinton v. Jones*, 520 U.S. 681 (1997), and commenting on a suggestion that one should "trust us federal judges ... to sensitively manage lawsuits against the President"). Professor Amar further notes that Clinton-era privilege cases support the view that "judges are presumptively good, and presidents - and presidential privileges - are presumptively bad." *Id.*

✦n255. Rozell, *supra* note 6, at 576.

✦n256. *Nixon v. Fitzgerald*, 457 U.S. 731, 749 (1982).

✦n257. See Shane, *supra* note 83, at 473-75.

✦n258. AHA Brief, *supra* note 75.

✦n259. *Id.* at 2.

✦n260. Public Citizen Press Room, *National Archives Still Withholding Nearly 60,000 Pages of Reagan Presidential Records Despite Bush Authorization for Their Release* (Mar. 11, 2002), available at <http://www.citizen.org/pressroom/print%3Cuscore%3Erelease.cfm?ID=1050>.

✦n261. *Id.*; Public Citizen Press Room, *Lawsuit Prompts White House to Release Reagan-Bush Records* (July 19, 2002), available at <http://www.citizen.org/pressroom/>

print<uscore>release.cfm?ID=1158 ("The White House desperately wants to avoid having a court decide whether its **executive order** is lawful, so it has made every effort to dodge the issue." (quoting Public Citizen attorney, Scott L. Nelson)).

†n262. Public Citizen Press Room, *supra* note 261.

†n263. Letter from Scott L. Nelson, *supra* note 144.

†n264. Miller, *supra* note 11, at 633-34.

†n265. *Id.* at 679.

†n266. *In re Subpoena to Nixon*, 360 F. Supp. 1, 8-9 (D.D.C. 1973).

†n267. Katyal, *supra* note 20, at 680.

†n268. This was President **Bush's** response when asked for "a sense of the fundamental message that [he] will send to [his] Administration as it makes decisions on whether to open or close access to ... information." Cannon, *supra* note 40.

†n269. Johnsen, *supra* note 27, at 1140.

†n270. Miller, *supra* note 11, at 638. Recent editorials have revealed that the media perceives assertions of executive privilege as "spurious." *Id.* at 671; see, e.g., Hoff Testimony, *supra* note 57, at 2 ("When, on November 1, 2001, President **Bush** signed E.O. 13233 it represented a step backward with respect to holding government officials accountable - the very issue that was at the heart of Watergate."); Cannon, *supra* note 40 ("With a stroke of the pen on November 1, President **Bush** stabbed history in the back and blocked Americans' right to know how Presidents [and Vice Presidents] have made decisions ... ending more than 30 years of increasing openness in government." (quoting Richard Reeves, biographer of Nixon and John F. Kennedy)).

†n271. Miller, *supra* note 11, at 670-73; see also Johnsen, *supra* note 27, at 1139.

†n272. Rozell, *supra* note 6, at 542.

†n273. Dinh, *supra* note 166, at 347.

†n274. Miller, *supra* note 11, at 649.

†n275. Cannon, *supra* note 40.

†n276. U.S. Newswire, *Previously Withheld Reagan Presidential Materials to Be Released*, Jan. 3. (Dec. 20, 2001), available at <http://www.usnews.com/topnews/temp/1220-112.html>.

†n277. This particular set of records focused on federal appointments during the Reagan administration. U.S. Newswire, *Additional Reagan and Bush Records to Be Released by the National Archives* (Dec. 20, 2001), available at <http://www.usnewswire.com/topnews/prime/0719-116.html>; Public Citizen Press Room, *supra* note 261. After the latest release of papers, approximately 12.5% (5.5 million pages out of 43.8 million total) of the presidential records of the Reagan Administration have been made available to the public. Additionally, approximately 1.5% (61,000 pages of 5 million total) of former Vice President **Bush's** records have been made available. *Id.*

†n278. Public Citizen Press Room, *supra* note 261.

†n279. Rozell Subcomm. Testimony, *supra* note 21.

†n280. See Amici Brief, *supra* note 3, at 26 ("The **Bush** Order is nothing less than a brazen attempt to nullify the PRA and resurrect the system of presidential control that failed for nearly 200 years to protect the public interest in an unexpurgated historical record."); Dallek Subcomm. Testimony, *supra* note 225 ("If Mr. **Bush's** Order is left standing, I believe it will return us to the era when presidents owned and controlled access to the documentary record generated during their administrations.").

†n281. See Dallek Subcomm. Testimony, *supra* note 225 ("Secrecy, carried too far, becomes a means by which the executive branch dissembles its purposes, buries its mistakes, manipulates its citizens, escapes its accountability and [sic] maximizes its power." (citation omitted)).

✚n282. Allen & Lardner, *supra* note 180 (quoting Thomas Blanton, the Executive Director of the National Security Archive).

✚n283. Hensen, *supra* note 62.

✚n284. See Taylor, *supra* note 131 ("Basically, they are attempting to do what Nixon failed to do and that is take complete control over access to the papers forever." (quoting Hugh Graham, presidential historian at Vanderbilt University)).

✚n285. See generally Dean, *supra* note 1 (suggesting that either the courts will overturn the Order or Congress will act to sanction the PRA).

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