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DOCUMENT NO.	FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
001	Outline	Presidential Records Act [2 PAGES RELEASED IN WHOLE ON PRA RE-REVIEW 09/09/2025 JLS]	2	N.D.	

COLLECTION TITLE:
Counsel's Office, White House

SERIES:
Kavanaugh, Brett - Subject Files

FOLDER TITLE:
Binder - PRA (Presidential Records Act) [Binder 1]

FRC ID:
9596

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

P1 National Security Classified Information [(a)(1) of the PRA]
P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
P3 Release would violate a Federal statute [(a)(3) of the PRA]
P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [a)(5) of the PRA]
P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

Deed of Gift Restrictions

A. Closed by Executive Order 13526 governing access to national security information.
B. Closed by statute or by the agency which originated the document.
C. Closed in accordance with restrictions contained in donor's deed of gift.

Freedom of Information Act - [5 U.S.C. 552(b)]

b(1) National security classified information [(b)(1) of the FOIA]
b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

Records Not Subject to FOIA

Court Sealed - The document is withheld under a court seal and is not subject to the Freedom of Information Act.

This document was prepared on Tuesday, September 9, 2025

Withdrawn/Redacted Material
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SUPERSEDED

DOCUMENT NO.	FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
001	Outline	Presidential Records Act	2	N.D.	P5;

COLLECTION TITLE:
Counsel's Office, White House

SERIES:
Kavanaugh, Brett - Subject Files

FOLDER TITLE:
Binder - PRA (Presidential Records Act) [Binder 1]

FRC ID:
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PRESIDENTIAL

RECORDS

ACT

Presidential Records Act

- **President Bush's executive order will facilitate the expeditious release of Presidential records consistent with the Supreme Court's ruling that former Presidents retain the constitutional right to assert privileges.**

    - The order is working very well so far. Since it went into effect in November, all but 150 pages of the 68,000 pages of Reagan records currently sought by members of the public have been released to the public. (The remaining 150 pages are sensitive records related to appointments.) The representatives of President Reagan and President Bush completed their review and made their privilege decisions with respect to the 68,000 pages in only 90 days, which is very expeditious.

    - To the extent there are hypothetical concerns about how the President's order will work in the future, we should allow some time to see what happens. If there are undue delays or if a former President appears to be abusing his power -- neither of which is likely to happen -- it then may be appropriate for Congress to examine the issue.

- **The Supreme Court has held that *both* former and current Presidents retain the constitutional right to assert privileges over the records of the former President. The President's order establishes clear procedures to comply with that Supreme Court precedent.**

    - The order establishes procedures and time frames for former and current Presidents to review records of former Presidents and to make appropriate determinations *whether* to withhold or release privileged documents.

    - The President's order expressly states that it does not indicate whether and when a former President should assert privileges. The President's order is about procedure, not when -- if ever -- privilege should be asserted.

- **The primary criticism of the order has come from those who contend that *former* Presidents should not have the right to assert privileges over their records. But those critics ignore the fact that the Supreme Court has squarely held that former Presidents possess such constitutional rights. The proper target for the critics is the Supreme Court, not the President's executive order.**

    - The Supreme Court held (in 1977) that former Presidents retain the right to assert privileges over their records even after they have left office. The President's order simply establishes *procedures* for the former Presidents to protect and assert their rights if they so choose. It would be inappropriate and contrary to law for a current President to flout the Supreme Court by unilaterally overriding the

constitutional rights of a former President.

- Those requesters of records who contend that a former President has improperly asserted a privilege can file a complaint in court just as FOIA requesters do every day when an agency withholds records under an exemption.

- **The Act itself and its legislative history also expressly recognize that constitutional privileges remain available to former and current Presidents after expiration of the 12-year-period.**

  - The Act provides: "Nothing in this Act shall be construed to confirm, limit, or expand any constitutionally-based privilege which may be available to an incumbent *or former* President." That statutory provision was necessary, of course, to the Act's constitutionality.

  - Congress specifically contemplated that such constitutional privileges would be available and could be asserted after expiration of the 12-year period. At the time the Act was enacted, Senator Percy stated that if a President "believe[d] that the 12-year closure period does not suffice, that President could object to the release of some document in the 13th or 15th or 20th year." Cong. Record S36844 (Oct. 13, 1978).

- **The proposed order makes clear that, absent extraordinary and compelling circumstances, a current President will not seek to withhold records that a former President otherwise has authorized for disclosure.**

  - This is a significant pro-disclosure aspect of the President's executive order that critics of the order have all but ignored.

- **The critics have expressed fear that former Presidents will abuse their constitutional power and assert privileges improperly. That fear ignores history**.

  - Before this Act took effect, former Presidents generally released the majority of their records over time although they possessed full authority over their records.

  - The Act and the executive order give former Presidents *less* power to withhold records than they possessed before enactment of the Presidential Records Act. There is no reason to think or predict, therefore, that former Presidents would seize upon their authority to withhold only *privileged* records more aggressively than previous former Presidents seized upon their authority to withhold *all* records.

PRESIDENTIAL RECORDS ACT

TAB 1	44 U.S.C. § 2201-2207 (Presidential Records Act of 1978)
TAB 2	Executive Order 13233 (Further Implementation of the Presidential Records Act)
TAB 3	November 2, 2001 Letter from Alberto Gonzales to Chairman Horn
TAB 4	December 19, 2001 Letter from Alberto Gonzales to Chairman Horn
TAB 5	December 20, 2001 Washington Post Op-Ed by Alberto Gonzales
TAB 6	November 11, 2001 USA Today Op-Ed by Alberto Gonzales
TAB 7	Todd Gaziano's April 24, 2002 Testimony regarding H.R. 4187
TAB 8	Douglas Kmiec's April 21, 2002 Written Testimony regarding H.R. 4187
TAB 9	H.R. 4187

PRESIDENTIAL RECORDS
(44 U.S.C. Chapter 22)

Sec.
2201. Definitions.
2202. Ownership of Presidential records.
2203. Management and custody of Presidential records.
2204. Restrictions on access to Presidential records.
2205. Exceptions to restriction on access.[1]
2206. Regulations.
2207. Vice-Presidential records.

§ 2201. Definitions

As used in this chapter--

(1) The term "documentary material" means all books, correspondence, memorandums, documents, papers, pamphlets, works of art, models, pictures, photographs, plats, maps, films, and motion pictures, including, but not limited to, audio, audiovisual, or other electronic or mechanical recordations.

(2) The term "Presidential records" means documentary materials, or any reasonably segregable portion thereof, created or received by the President, his immediate staff, or a unit or individual of the Executive Office of the President whose function is to advise and assist the President, in the course of conducting 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. Such term--

(A) includes any documentary materials relating to the political activities of the President or members of his staff, but only if such activities relate to or have a direct effect upon the carrying out of constitutional, statutory, or other official or ceremonial duties of the President; but

(B) does not include any documentary materials that are (i) official records of an agency (as defined in section 552(e) of title 5, United States Code; (ii) personal records; (iii) stocks of publications and stationery; or (iv) extra copies of documents produced only for convenience of reference, when such copies are clearly so identified.

(3) The term "personal records" means all documentary materials, or any reasonably segregable portion thereof, of a purely private or nonpublic character which do not relate to or have an effect upon the carrying out of the constitutional, statutory, or other official or ceremonial duties of the President. Such term includes--

(A) diaries, journals, or other personal notes serving as the functional equivalent of a diary or journal which are not prepared or utilized for, or circulated or communicated in the course of, transacting Government business;

(B) materials relating to private political associations, and having no relation to or direct effect upon the carrying out of constitutional, statutory, or other official or ceremonial duties of the President; and

(C) materials relating exclusively to the President's own election to the office of the Presidency; and materials directly relating to the election of a particular individual or individuals to Federal, State, or local office, which have no relation to or direct effect upon the carrying out of constitutional, statutory, or other official or ceremonial duties of the President.

(4) The term "Archivist" means the Archivist of the United States.

(5) The term "former President", when used with respect to Presidential records, means the former President during whose term or terms of office such Presidential records were created.

§ 2202. Ownership of Presidential records

The United States shall reserve and retain complete ownership, possession, and control of Presidential records; and such records shall be administered in accordance with the provisions of this chapter.

§ 2203. Management and custody of Presidential records

(a) Through the implementation of records management controls and other necessary actions, the President shall take all such steps as may be necessary to assure that the activities, deliberations, decisions, and policies that reflect the performance of his constitutional, statutory, or other official or ceremonial duties are adequately documented and that such records are maintained as Presidential records pursuant to the requirements of this section and other provisions of law.

(b) Documentary materials produced or received by the President, his staff, or units or individuals in the Executive Office of the President the function of which is to advise and assist the President, shall, to the extent practicable, be categorized as Presidential records or personal records upon their creation or receipt and be filed separately.

[1] So in original. Does not conform to section catchline.

(c) During his term of office, the President may dispose of those of his Presidential records that no longer have administrative, historical, informational, or evidentiary value if--

(1) the President obtains the views, in writing, of the Archivist concerning the proposed disposal of such Presidential records; and

(2) the Archivist states that he does not intend to take any action under subsection (e) of this section.

(d) In the event the Archivist notifies the President under subsection (c) that he does intend to take action under subsection (e), the President may dispose of such Presidential records if copies of the disposal schedule are submitted to the appropriate Congressional Committees at least 60 calendar days of continuous session of Congress in advance of the proposed disposal date. For the purpose of this section, continuity of session is broken only by an adjournment of Congress sine die, and the days on which either House is not in session because of an adjournment of more than three days to a day certain are excluded in the computation of the days in which Congress is in continuous session.

(e) The Archivist shall request the advice of the Committee on Rules and Administration and the Committee on Governmental Affairs of the Senate and the Committee on House Oversight and the Committee on Government Operations of the House of Representatives with respect to any proposed disposal of Presidential records whenever he considers that--

(1) these particular records may be of special interest to the Congress; or

(2) consultation with the Congress regarding the disposal of these particular records is in the public interest.

(f)(1) Upon the conclusion of a President's term of office, or if a President serves consecutive terms upon the conclusion of the last term, the Archivist of the United States shall assume responsibility for the custody, control, and preservation of, and access to, the Presidential records of that President. The Archivist shall have an affirmative duty to make such records available to the public as rapidly and completely as possible consistent with the provisions of this Act.

(2) The Archivist shall deposit all such Presidential records in a Presidential archival depository or another archival facility operated by the United States. The Archivist is authorized to designate, after consultation with the former President, a director at each depository or facility, who shall be responsible for the care and preservation of such records.

(3) The Archivist is authorized to dispose of such Presidential records which he has appraised and determined to have insufficient administrative, historical, informational, or evidentiary value to warrant their continued preservation. Notice of such disposal shall be published in the Federal Register at least 60 days in advance of the proposed disposal date. Publication of such notice shall constitute a final agency action for purposes of review under chapter 7 of title 5, United States Code.

§ 2204. Restrictions on access to Presidential records

(a) Prior to the conclusion of his term of office or last consecutive term of office, as the case may be, the President shall specify durations, not to exceed 12 years, for which access shall be restricted with respect to information, in a Presidential record, within one or more of the following categories:

(1) (A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) in fact properly classified pursuant to such Executive order;

(2) relating to appointments to Federal office;

(3) specifically exempted from disclosure by statute (other than sections 552 and 552b of title 5, United States Code, provided that such statute (A) requires that the material be withheld from the public in such a manner as to leave no discretion on the issue, or

(B) establishes particular criteria for withholding or refers to particular types of material to be withheld;

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) confidential communications requesting or submitting advice, between the President and his advisers, or between such advisers; or

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

(b)(1) Any Presidential record or reasonably segregable portion thereof containing information within a category restricted by the President under subsection (a) shall be so designated by the Archivist and access thereto shall be restricted until the earlier of--

(A)(i) the date on which the former President waives the restriction on disclosure of such record, or

(ii) the expiration of the duration specified under subsection (a) for the category of information on the basis of which access to such record has been restricted; or

(B) upon a determination by the Archivist that such record or reasonably segregable portion thereof, or of any significant element or aspect of the information contained in such record or reasonably segregable portion thereof, has been placed in the public domain through publication by the former President, or his agents.

(2) Any such record which does not contain information within a category restricted by the President under subsection (a), or contains information within such a category for which the duration of restricted access has expired, shall be exempt from the provisions of subsection (c) until the earlier of--

(A) the date which is 5 years after the date on which the Archivist obtains custody of such record pursuant to section 2203(d)(1); or

(B) the date on which the Archivist completes the processing and organization of such records or integral file segment thereof.

(3) During the period of restricted access specified pursuant to subsection (b)(1), the determination whether access to a Presidential record or reasonably segregable portion thereof shall be restricted shall be made by the Archivist, in his discretion, after consultation with the former President, and, during such period, such determinations shall not be subject to judicial review, except as provided in subsection (e) of this section. The Archivist shall establish procedures whereby any person denied access to a Presidential record because such record is restricted pursuant to a determination made under this paragraph, may file an administrative appeal of such determination. Such procedures shall provide for a written determination by the Archivist or his designee, within 30 working days after receipt of such an appeal, setting forth the basis for such determination.

(c)(1) Subject to the limitations on access imposed pursuant to subsections (a) and (b), Presidential records shall be administered in accordance with section 552 of title 5, United States Code, except that paragraph (b)(5) of that section shall not be available for purposes of withholding any Presidential record, and for the purposes of such section such records shall be deemed to be records of the National Archives and Records Administration. Access to such records shall be granted on nondiscriminatory terms.

(2) Nothing in this Act shall be construed to confirm, limit, or expand any constitutionally-based privilege which may be available to an incumbent or former President.

(d) Upon the death or disability of a President or former President, any discretion or authority the President or former President may have had under this chapter shall be exercised by the Archivist unless otherwise previously provided by the President or former President in a written notice to the Archivist.

(e) The United States District Court for the District of Columbia shall have jurisdiction over any action initiated by the former President asserting that a determination made by the Archivist violates the former President's rights or privileges.

§ 2205. Exceptions to restricted access

Notwithstanding any restrictions on access imposed pursuant to section 2204--

(1) the Archivist and persons employed by the National Archives and Records Administration who are engaged in the performance of normal archival work shall be permitted access to Presidential records in the custody of the Archivist;

(2) subject to any rights, defenses, or privileges which the United States or any agency or person may invoke, Presidential records shall be made available--

(A) pursuant to subpoena or other judicial process issued by a court of competent jurisdiction for the purposes of any civil or criminal investigation or proceeding;

(B) to an incumbent President if such records contain information that is needed for the conduct of current business of his office and that is not otherwise available; and

(C) to either House of Congress, or, to the extent of matter within its jurisdiction, to any committee or subcommittee thereof if such records contain information that is needed for the conduct of its business and that is not otherwise available; and

(3) the Presidential records of a former President shall be available to such former President or his designated representative.

§ 2206. Regulations

The Archivist shall promulgate in accordance with section 553 of title 5, United States Code, regulations necessary to carry out the provisions of this chapter. Such regulations shall include--

(1) provisions for advance public notice and description of any Presidential records scheduled for disposal pursuant to section 2203(f)(3);

(2) provisions for providing notice to the former President when materials to which access would otherwise be restricted pursuant to section 2204(a) are to be made available in accordance with section 2205(2);

(3) provisions for notice by the Archivist to the former President when the disclosure of particular documents may adversely affect any rights and privileges which the former President may have; and

(4) provisions for establishing procedures for consultation between the Archivist and appropriate Federal agencies regarding materials which may be subject to section 552(b)(7) of title 5, United States Code.

§ 2207. Vice-Presidential records

Vice-Presidential records shall be subject to the provisions of this chapter in the same manner as Presidential records. The duties and responsibilities of the Vice President, with respect to Vice-Presidential records, shall be the same as the duties and responsibilities of the President under this chapter with respect to Presidential records. The authority of the Archivist with respect to Vice-Presidential records shall be the same as the authority of the Archivist under this chapter with respect to Presidential records, except that the Archivist may, when the Archivist determines that it is in the public interest, enter into an agreement for the deposit of Vice-Presidential records in a non-Federal archival depository. Nothing in this chapter shall be construed to authorize the establishment of separate archival depositories for such Vice-Presidential records.

NATIONAL ARCHIVES TRUST FUND BOARD
(44 U.S.C. Chapter 23)

Sec.

2301. Establishment of Board; membership.
2302. Authority of the Board; seal; services; bylaws; rules; regulations; employees.
2303. Powers and obligations of Board; liability of members.
2304. Compensation of members; availability of trust funds for expenses of Board.
2305. Acceptance of gifts.
2306. Investment of funds.
2307. Trust Fund account; disbursements; sales of publications and releases.
2308. Tax exemption for gifts.

§ 2301. Establishment of Board; membership

The National Archives Trust Fund Board shall consist of the Archivist of the United States, as Chairman, and the Secretary of the Treasury and the Chairman of the National Endowment for the Humanities. Membership on the Board is not an office within the meaning of the statutes of the United States.

§ 2302. Authority of the Board; seal; services; bylaws; rules; regulations; employees

In carrying out the purposes of this chapter, the Board--

(1) may adopt an official seal, which shall be judicially noticed;

(2) may utilize on a reimbursable basis the services and personnel of the National Archives and Records Administration necessary (as determined by the Archivist) to assist the Board in the administration of the trust fund, and in the preparation and publication of special works and collections of sources and preparation, duplication, editing, and release of historical photographic materials and sound recordings, and may utilize on a reimbursable basis the services and personnel of other Federal agencies for such purposes;

(3) may adopt bylaws, rules, and regulations necessary for the administration of its functions under this chapter; and

(4) may, subject to the laws and regulations governing appointments in the civil service, appoint and fix the compensation of such personnel as may be necessary to carry out its functions.

§ 2303. Powers and obligations of the Board; liability of members

Except as otherwise provided by this chapter, the Board shall have all the usual powers and obligations of a trustee with respect to property and funds administered by it, but the members of the Board are not personally liable, except for malfeasance.

§ 2304. Compensation of members; availability of trust funds for expenses of the Board

Compensation may not be paid to the members of the Board for their services as members. Costs incurred by the Board in carrying out its duties under this chapter, including the obligations necessarily incurred by the members of the Board in the performance of their duties and the compensation of persons employed by the Board, shall be paid by the Archivist of the United States from trust funds available to the Board for this purpose. The Board, by resolution, may authorize the transfer of funds (including the principal or interest of a gift or bequest) to the National Archives and Records

FAS Note: See related White House correspondence concerning the withholding of Reagan Administration records here.

EXECUTIVE ORDER 13233

FURTHER IMPLEMENTATION OF THE PRESIDENTIAL RECORDS ACT

By the authority vested in me as President by the Constitution and the laws of the United States of America, and in order to establish policies and procedures implementing section 2204 of title 44 of the United States Code with respect to constitutionally based privileges, including those that apply to Presidential records reflecting military, diplomatic, or national security secrets, Presidential communications, legal advice, legal work, or the deliberative processes of the President and the President's advisors, and to do so in a manner consistent with the Supreme Court's decisions in *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977), and other cases, it is hereby ordered as follows:

Section 1. Definitions.

For purposes of this order:

(a) "Archivist" refers to the Archivist of the United States or his designee.

(b) "Presidential records" refers to those documentary materials maintained by the National Archives and Records Administration pursuant to the Presidential Records Act, 44 U.S.C. 2201-2207.

(c) "Former President" refers to the former President during whose term or terms of office particular Presidential records were created.

Sec. 2. Constitutional and Legal Background.

(a) For a period not to exceed 12 years after the conclusion of a Presidency, the Archivist administers records in accordance with the limitations on access imposed by section 2204 of title 44. After expiration of that period, section 2204(c) of title 44 directs that the Archivist administer Presidential records in accordance with section 552 of title 5, the Freedom of Information Act, including by withholding, as appropriate, records subject to exemptions (b)(1), (b)(2), (b)(3), (b)(4), (b)(6), (b)(7), (b)(8), and (b)(9) of section 552. Section 2204(c)(1) of title 44 provides that exemption (b)(5) of section 552 is not available to the Archivist as a basis for withholding records, but section 2204(c)(2) recognizes that the former President or the incumbent President may assert any constitutionally based privileges, including those ordinarily encompassed within exemption (b)(5) of section 552. The President's constitutionally based privileges subsume privileges for records that reflect: military, diplomatic, or national security

secrets (the state secrets privilege); communications of the President or his advisors (the presidential communications privilege); legal advice or legal work (the attorney-client or attorney work product privileges); and the deliberative processes of the President or his advisors (the deliberative process privilege).

(b) In *Nixon v. Administrator of General Services*, the Supreme Court set forth the constitutional basis for the President's privileges for confidential communications: "Unless [the President] can give his advisers some assurance of confidentiality, a President could not expect to receive the full and frank submissions of facts and opinions upon which effective discharge of his duties depends." 433 U.S. at 448-49. The Court cited the precedent of the Constitutional Convention, the records of which were "sealed for more than 30 years after the Convention." Id. at 447 n.11. Based on those precedents and principles, the Court ruled that constitutionally based privileges available to a President "survive[] the individual President's tenure." Id. at 449. The Court also held that a former President, although no longer a Government official, may assert constitutionally based privileges with respect to his Administration's Presidential records, and expressly rejected the argument that "only an incumbent President can assert the privilege of the Presidency." Id. at 448.

(c) The Supreme Court has held that a party seeking to overcome the constitutionally based privileges that apply to Presidential records must establish at least a "demonstrated, specific need" for particular records, a standard that turns on the nature of the proceeding and the importance of the information to that proceeding. See *United States v. Nixon*, 418 U.S. 683, 713 (1974). Notwithstanding the constitutionally based privileges that apply to Presidential records, many former Presidents have authorized access, after what they considered an appropriate period of repose, to those records or categories of records (including otherwise privileged records) to which the former Presidents or their representatives in their discretion decided to authorize access. See *Nixon v. Administrator of General Services*, 433 U.S. at 450-51.

Sec. 3. Procedure for Administering Privileged Presidential Records.

Consistent with the requirements of the Constitution and the Presidential Records Act, the Archivist shall administer Presidential records under section 2204(c) of title 44 in the following manner:

(a) At an appropriate time after the Archivist receives a request for access to Presidential records under section 2204(c)(1), the Archivist shall provide notice to the former President and the incumbent President and, as soon as practicable, shall provide the former President and the incumbent President copies of any records that the former President and the incumbent President request to review.

(b) After receiving the records he requests, the former President shall review those records as expeditiously as possible, and for no longer than 90 days for requests that are not unduly burdensome. The Archivist shall not permit access to the records by a requester during this period of review or when requested by the former President to extend the time for review.

(c) After review of the records in question, or of any other potentially privileged records

reviewed by the former President, the former President shall indicate to the Archivist whether the former President requests withholding of or authorizes access to any privileged records.

(d) Concurrent with or after the former President's review of the records, the incumbent President or his designee may also review the records in question, or may utilize whatever other procedures the incumbent President deems appropriate to decide whether to concur in the former President's decision to request withholding of or authorize access to the records.

(1) When the former President has requested withholding of the records:

(i) If under the standard set forth in section 4 below, the incumbent President concurs in the former President's decision to request withholding of records as privileged, the incumbent President shall so inform the former President and the Archivist. The Archivist shall not permit access to those records by a requester unless and until the incumbent President advises the Archivist that the former President and the incumbent President agree to authorize access to the records or until so ordered by a final and nonappealable court order.

(ii) If under the standard set forth in section 4 below, the incumbent President does not concur in the former President's decision to request withholding of the records as privileged, the incumbent President shall so inform the former President and the Archivist. Because the former President independently retains the right to assert constitutionally based privileges, the Archivist shall not permit access to the records by a requester unless and until the incumbent President advises the Archivist that the former President and the incumbent President agree to authorize access to the records or until so ordered by a final and nonappealable court order.

(2) When the former President has authorized access to the records:

(i) If under the standard set forth in section 4 below, the incumbent President concurs in the former President's decision to authorize access to the records, the Archivist shall permit access to the records by the requester.

(ii) If under the standard set forth in section 4 below, the incumbent President does not concur in the former President's decision to authorize access to the records, the incumbent President may independently order the Archivist to withhold privileged records. In that instance, the Archivist shall not permit access to the records by a requester unless and until the incumbent President advises the Archivist that the former President and the incumbent President agree to authorize access to the records or until so ordered by a final and nonappealable court order.

Sec. 4. Concurrence by Incumbent President.

Absent compelling circumstances, the incumbent President will concur in the privilege decision of the former President in response to a request for access under section 2204(c)

(1). When the incumbent President concurs in the decision of the former President to request withholding of records within the scope of a constitutionally based privilege, the incumbent President will support that privilege claim in any forum in which the privilege claim is challenged.

Sec. 5. Incumbent President's Right to Obtain Access.

This order does not expand or limit the incumbent President's right to obtain access to the records of a former President pursuant to section 2205(2)(B).

Sec. 6. Right of Congress and Courts to Obtain Access.

This order does not expand or limit the rights of a court, House of Congress, or authorized committee or subcommittee of Congress to obtain access to the records of a former President pursuant to section 2205(2)(A) or section 2205(2)(C). With respect to such requests, the former President shall review the records in question and, within 21 days of receiving notice from the Archivist, indicate to the Archivist his decision with respect to any privilege. The incumbent President shall indicate his decision with respect to any privilege within 21 days after the former President has indicated his decision. Those periods may be extended by the former President or the incumbent President for requests that are burdensome. The Archivist shall not permit access to the records unless and until the incumbent President advises the Archivist that the former President and the incumbent President agree to authorize access to the records or until so ordered by a final and nonappealable court order.

Sec. 7. No Effect on Right to Withhold Records.

This order does not limit the former President's or the incumbent President's right to withhold records on any ground supplied by the Constitution, statute, or regulation.

Sec. 8. Withholding of Privileged Records During 12-Year Period.

In the period not to exceed 12 years after the conclusion of a Presidency during which section 2204(a) and section 2204(b) of title 44 apply, a former President or the incumbent President may request withholding of any privileged records not already protected from disclosure under section 2204. If the former President or the incumbent President so requests, the Archivist shall not permit access to any such privileged records unless and until the incumbent President advises the Archivist that the former President and the incumbent President agree to authorize access to the records or until so ordered by a final and nonappealable court order.

Sec. 9. Establishment of Procedures.

This order is not intended to indicate whether and under what circumstances a former President should assert or waive any privilege. The order is intended to establish procedures for former and incumbent Presidents to make privilege determinations.

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 representative 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 privileges.

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. 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.

(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.

Sec. 12. Judicial Review.

This order is intended to improve the internal management of the executive branch and is not intended to create any right or benefit, substantive or procedural, enforceable at law by a party, other than a former President or his designated representative, against the United States, its agencies, its officers, or any person.

Sec. 13. Revocation.

Executive Order 12667 of January 18, 1989, is revoked.

GEORGE W. BUSH

THE WHITE HOUSE,
November 1, 2001.

THE WHITE HOUSE

WASHINGTON

November 2, 2001

Dear Chairman Horn:

I have learned that on November 6 the House Subcommittee on Government Efficiency, Financial Management, and Intergovernmental Relations will hold its previously postponed hearing on the Presidential Records Act. In advance of that hearing, we wanted to inform you of a recent development.

President Bush yesterday signed an executive order implementing section 2204(c) of the Presidential Records Act, the provision of the Act that states: "Nothing in this Act shall be construed to confirm, limit, or expand any constitutionally-based privilege which may be available to an incumbent or former President." That statutory provision is necessary, of course, to the Act's constitutionality, for the Supreme Court held in 1977 that both former and current Presidents retain the constitutional right to assert privileges over the records of a former President, including after expiration of a 12-year period of presumptive non-disclosure. *See Nixon v. Administrator of General Services*, 433 U.S. 425 (1977). Furthermore, Congress contemplated that such constitutional privileges would be available and could be asserted, even after expiration of the 12-year period: At the time the Act was enacted, Senator Percy stated that if a President "believe[d] that the 12-year closure period does not suffice, that President could object to the release of some document in the 13th or 15th or 20th year." Cong. Record S36844 (Oct. 13, 1978).

The Act and its legislative history, as well as the Supreme Court's decision in *Nixon v. Administrator of General Services*, obviously necessitate procedures for former and current Presidents to review Presidential records of a former President and, if they choose, to assert constitutional privileges. President Bush's order responds to that need by establishing clear and sensible procedures for former and current Presidents to exercise their rights and responsibilities in a timely manner. The order replaces an earlier executive order (Executive Order 12667 of January 18, 1989) that had established some skeletal procedures for assertion of privileges over Presidential records and had provided that the *current* President would have the primary responsibility for asserting privileges over the records of a former President. President Bush's new order supercedes that prior order both to set forth clearer procedures and to establish, consistent with the Supreme Court's decision in *Nixon v. Administrator of General Services* and with what the Administration believes to be sound policy and procedure, that *former* Presidents are to have the primary responsibility for asserting privileges over their records. Indeed, section 4 of President Bush's order, which is its most critical component, provides that the current President will defer, absent compelling circumstances, to the decisions of the former President regarding the former President's records. In sum, therefore, the new executive order grants the current President *less* relative authority over the records of a former President than did the prior executive order. We believe this point is critical to a proper understanding of the executive order, and has been largely overlooked in public commentary thus far.

In addition, President Bush's order does not purport to guide former Presidents as to their privilege assertions. Section 9 of the order provides that the order does not purport to indicate "whether and under what circumstances a former President should assert or waive any privilege." Indeed, it would have been improper, if not illegal, for President Bush to attempt to limit or override the constitutional rights and privileges of former Presidents -- rights that have been guaranteed by the Supreme Court. But it also bears mention that Section 2 of the order refers to the historical practice before enactment of the Presidential Records Act by which former Presidents, over time, have released a vast majority of their records even though under no legal obligation to do so. We anticipate that this historical practice will continue. At a minimum, contrary to the claims of some commentators, there is no logical basis for assuming that former Presidents will exercise their constitutional and statutory authority to seek withholding of *privileged* records more aggressively than earlier Presidents -- from President Washington to President Carter -- exercised their plenary and far broader authority to withhold *all* records.

Finally, you should know that the Administration consulted extensively with the National Archives and Records Administration, the Department of Justice, and former Presidents' representatives before President Bush issued this order. We benefited greatly from that consultation.

Please do not hesitate to contact me if you have any questions about the order.

Sincerely,

Alberto R. Gonzales
Counsel to the President

The Honorable Steve Horn
United States House of Representatives
Washington, DC 20515

cc: The Honorable Janice Schakowsky

THE WHITE HOUSE

WASHINGTON

December 19, 2001

The Honorable Steve Horn
Chairman
Subcommittee on Government Efficiency, Financial Management and Intergovernmental Relations
Committee on Government Reform
United States House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

Thank you very much for providing me your thoughts and insights about the President's recent Executive Order No. 13233, dated November 1, 2001, implementing the Presidential Records Act, 44 U.S.C. § 2001 *et seq*. Our discussion identified several areas where some outside parties have mistakenly described the Order, and I therefore wanted to take this opportunity to further explain certain aspects of the Order for the benefit of you and your colleagues and to reiterate the position of the Administration. As you know, there is litigation currently pending, and I concur with the Department of Justice that, in light of the pending litigation, the Department cannot appropriately respond to all of the Subcommittee's specific follow-up questions at this time, but we also believe this summary will be of assistance to the Subcommittee (and to the full Committee as well).

At the outset, we are well aware that historians and academics have publicly suggested that the Act requires release of all Presidential records, *including otherwise privileged records*, after expiration of the statutory 12-year period. As you know, that suggestion is simply incorrect. In fact, among other exemptions, the Act expressly provides that former and current Presidents retain the right to assert constitutional privileges over Presidential records, including after the 12-year period has elapsed, a point that is reflected in the Act's legislative history as well.

A few of the Order's critics have stated that the Order itself precludes the release of Presidential records. That, too, is inaccurate. The Order merely sets up appropriate procedures for review of documents and for privilege determinations to be made. The Order expressly refrains from indicating whether and under what circumstances privileges should be asserted.

Many have complained that a *former* President should have no right to assert privileges over his records. That criticism blatantly ignores the law. The Supreme Court, in its landmark 1977 *Nixon v. GSA* decision written by Justice Brennan, definitively held that the Constitution guarantees former Presidents the right to assert privileges over their records if they so choose.

In that regard, it may be that much of the criticism of the Order is, at root, misdirected criticism of that Supreme Court decision, as well as of the Act's express preservation of the former President's right to assert privilege. Given that the Order is expressly designed to implement and abide by the Supreme Court's dictates, and by the Act's preservation of the former President's authority, we are disappointed that much of the public commentary on the Order never mentions the Court's ruling or that provision of the Act.

The fact that the Order sets up procedures for *former* Presidents to assert their constitutionally guaranteed privileges does not mean, moreover, that former Presidents will improperly assert such privileges. History proves as much. Even before the Act was enacted, at a time when former Presidents enjoyed complete control over the disposition of their Presidential records, most former Presidents authorized release over time of the vast majority of their records even though they were under no legal obligation to release *any* records. Those who visit the Kennedy Library or the Ford Library or the Carter Library, for example, know the rich and valuable array of historical materials that are available. There is no basis for presuming that former Presidents subject to the Act will exercise their constitutional and statutory authority to seek withholding of *privileged* records inappropriately or more aggressively than earlier Presidents -- from President Washington to President Carter -- exercised their plenary and far broader authority to withhold *all* records.

Let me turn next to some specific areas that may benefit from further explanation.

First, some have suggested that the Order somehow alters the scope of "constitutionally based privileges" by expressly identifying attorney-client and work product protections as subsumed within executive privilege. As we have previously explained to you, the Order simply reiterates the longstanding position of the Executive Branch that the interests implicated under the common law by the attorney-client and work product protections are also subsumed by executive privilege. We understand that some commentators may disagree with the Executive Branch's traditional legal analysis on that point. But the Order does not purport to resolve that debate because the Order cannot and does not alter the scope of constitutionally based privileges. For example, if a former President seeks to withhold particular records by asserting a privilege that the courts subsequently determine not to be constitutionally based, then the courts will order disclosure of those records -- regardless whether that privilege was or was not identified in the Order as being within the scope of executive privilege.

Second, some have asked about the legal effect of section 6 of the Order on the return dates set forth in congressional subpoenas. Section 6 is not intended to change the law in any way with respect to the legal effectiveness of subpoena return dates, the practice of the Executive and Legislative Branches to engage in an accommodation process regarding Legislative Branch requests for privileged Executive Branch information, or the period of time that the Constitution requires a former or current President be afforded in order to consider whether to assert a constitutionally based privilege.

Section 6 merely sets forth the time periods that will generally apply to the reviews undertaken by a former and current President in response to congressional requests for such records. Of course, the time in which the Executive Branch will respond to a congressional request for information is a matter that is appropriate for discussion between the two branches.

Third, some have suggested that the Order requires a requester of Presidential records to make some showing of "need" in order to request Presidential records. That also is incorrect. A requester need not make any showing of need to submit a request for Presidential records. If a former President asserts a privilege in response to a request, and the requester chooses to challenge that privilege claim in court, the requester *only then* must satisfy whatever standards the courts have established for executive privilege cases. The President's Order, of course, could not and does not affect the standards the courts have established with respect to executive privilege claims. In any event, the important

point for present purposes is that a requester need not make any showing of need when submitting a request for records.

There also have been some questions raised about the fact that an unsuccessful requester must initiate litigation against a former President who asserts a privilege, rather than requiring the former President who asserts a privilege to sue the current President's Administration to block release. Even assuming arguendo that it is constitutionally permissible to force a former President, in effect, to sue the current President when asserting his constitutional privileges, we do not think such a procedure constitutionally appropriate or sound policy. The Supreme Court has held that former Presidents have the constitutional right to assert privileges over their records. If such a privilege is asserted, we believe it most appropriate for the requester who disagrees with the privilege assertion to proceed to court -- just as the requester would do in ordinary Freedom of Information Act (FOIA) litigation -- rather than requiring the former President to take the extraordinary and jarring public step of suing the current President's Administration. In our view, the alternative procedure contained in Executive Order 12667, dated January 18, 1989, would confuse the public and burden the former President's exercise of his constitutionally guaranteed rights in a manner inconsistent with the spirit, if not the letter, of the Supreme Court's decision guaranteeing the former President's rights.

As a practical matter, moreover, it is no more difficult for a requester to file suit when a former President asserts a privilege than for an unsuccessful requester to file an ordinary FOIA suit, which happens routinely. Because this procedure is so common in the FOIA setting, we think it an entirely appropriate model for these purposes, particularly given the countervailing considerations we have identified. That is especially true given that the Act incorporates certain other aspects of FOIA, such as the FOIA exemptions themselves.

We hope these comments are of assistance to you and your colleagues. As I said, respectfully, the President's Order is faithful to the Act and to the Supreme Court's case law.

Mr. Chairman, thank you for your careful attention and devotion to these important issues. We look forward to working together with you on this and other issues in the future.

Sincerely,

/s/ Gonzales

Alberto R. Gonzales
Counsel to the President

cc: The Honorable Janice D. Schakowsky
The Honorable Dan Burton
The Honorable Henry Waxman

washingtonpost.com

Freedom, Openness And Presidential Papers

By Alberto R. Gonzales

Thursday, December 20, 2001; Page A43

Recently President Bush signed an executive order to further implement the 1978 Presidential Records Act, the law that establishes a process for reviewing and releasing documents of former presidents. This order ensures expeditious disclosure of documents to provide historians, scholars and the public valuable insights into the way our government works.

Freedom and openness are at the core of our government. The president's order was crafted to provide as much information as possible to the public while also respecting the constitutional rights of former presidents.

For months skeptics have questioned President Bush's motives in establishing these sensible procedures. The order, they said, was an affront to open government and would put procedural roadblocks in the way of disclosure of important historical information. The critics were wrong.

Today, consistent with the president's order, the National Archives and Records Administration will inform the public that thousands of pages of records belonging to former president Reagan are available for release. These documents represent all that have been reviewed by the administration after receipt from the Reagan Library -- and this is only one of what will be many routine releases of records belonging to former presidents, including otherwise privileged records.

Today's action shows that President Bush's executive order can and will work as intended -- to facilitate appropriate and expeditious public release of presidential records consistent with the Constitution and the act.

At times, certain documents may still be so sensitive that they must remain confidential. In some cases, release of documents could jeopardize our national security, and while the pursuit of history is invaluable to our society, it should not endanger American lives. Nor should it deprive a president of candid advice while making crucial decisions.

Recognizing this, the Presidential Records Act expressly provides that former and current presidents retain the right to assert available privileges over presidential records after the act's 12-year period of presumed non-disclosure expires. While the executive order says nothing about whether and under what circumstances a privilege should be asserted, it does recognize a role for former presidents.

Some have been critical of the order's inclusion of former presidents in this process, but former presidents have the right to assert executive privilege based on both Supreme Court precedent and the Presidential Records Act itself. The act would be deemed unconstitutional if it did not allow them to assert available privileges.

Before the act became law, former chief executives enjoyed complete control over their presidential records. But even without a legal requirement, former presidents have chosen to provide their papers

for historical study.

President Bush expects that this tradition will continue. The value of presidential records and the principles of openness and access that their release represents are respected by him and are no doubt just as important to the former presidents whose papers will be subject to the Presidential Records Act.

There is no fair or logical basis for presuming that former presidents subject to the act will exercise their constitutional and statutory authority to seek withholding of privileged records more aggressively than have earlier presidents. We are confident that, over time, the vast majority of presidential records -- including many otherwise privileged records -- will be made available to the public.

The executive order states that "absent compelling circumstances" the current president will defer to the decision of the former president to authorize release of records. This provision largely removes a sitting president as a potential impediment to release of a former president's records. Given that over time former presidents have authorized release of the vast majority of their records, it is clear President Bush intended the order to facilitate the expeditious release of such records.

If a former president should choose to assert privilege over a sensitive record, a requester may challenge the privilege claim in court. Such proceedings are routine when there is disagreement about the release of executive branch records under the Freedom of Information Act. Some have argued that the burden should lie with the former president in disputes over disclosure. But this would create the awkward situation of a former president's being forced to sue the current one -- a suggestion that is neither constitutionally proper nor sound policy.

The writer is counsel to the president.

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Editorial/Opinion

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11/11/2001 - Updated 11:31 PM ET

Protect sensitive documents

By Alberto R. Gonzales

President Bush's recent executive order establishes sensible procedures for making public the records of former presidents. The order fulfills the president's statutory obligation to implement the Presidential Records Act, as well as his obligations under a 1977 Supreme Court ruling that held that former presidents continue to have the right to assert privileges over their records even after their term has ended.

Neither Bush nor Congress has the power or authority to ignore that Supreme Court ruling. Bush's order, therefore, allows a former president to assert privileges to protect sensitive documents, such as records that could impact national security.

It is clear that virtually all criticism of Bush's order is actually criticism of the Supreme Court decision guaranteeing the rights of former presidents to assert privileges over their records.

The Presidential Records Act fails to establish a procedure for former presidents to assert their constitutionally guaranteed privilege. President Bush's order provides such procedures and sets a reasonable time frame for review of records and assertion of privileges.

Importantly, the executive order does not expand or encourage the assertion of any privilege available to the former president.

Under Bush's order, a large portion of presidential records — for example, those not covered by privilege — will be released no later than 12 years after a president's term is over, as established by the Presidential Records Act.

In addition, history has proved that most former presidents release the vast majority of even their privileged documents.

Before the Presidential Records Act took effect in 1981, former presidents were under no legal obligation to disclose any records. But those who visit the libraries of Presidents Kennedy, Ford or Carter know the valuable array of historical materials that are available. Bush's executive order preserves this rich tradition.

Alberto R. Gonzales is counsel to President Bush.

TESTIMONY OF

TODD F. GAZIANO

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BEFORE THE UNITED STATES HOUSE OF REPRESENTATIVES

COMMITTEE ON GOVERNMENT REFORM

SUBCOMMITTEE ON GOVERNMENT EFFICIENCY,
FINANCIAL MANAGEMENT AND INTERGOVERNMENTAL RELATIONS

REGARDING

H.R. 4187, THE "PRESIDENTIAL RECORDS ACT AMENDMENTS OF 2002" AND OTHER PROCEDURES FOR THE INVOCATION OF EXECUTIVE PRIVILEGE

24 APRIL 2002

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Thank you, Chairman Horn and Members of the Subcommittee, for inviting me to testify today on H.R. 4187. I will also be testifying more broadly on the procedures for the invocation of executive privilege under the Presidential Records Act and the resolution of those claims. As a former chief counsel of another subcommittee of the Government Reform Committee, I know that the Members of this Subcommittee, particularly its Chairman, are genuinely interested in hearing all relevant views and are open to them. That is fortunate for me, because I must reluctantly disagree with my friends who are testifying today and express my grave doubts about the constitutionality of H.R. 4187, the "Presidential Records Act Amendments of 2002."

For the record, I am a Senior Fellow in Legal Studies and Director of the Center for Legal and Judicial Studies at The Heritage Foundation, a nonpartisan research and educational organization. I am a graduate of the University of Chicago Law School and a former law clerk to the U.S. Fifth Circuit Court of Appeals. Of special relevance today, I also served in the U.S. Department of Justice, Office of Legal Counsel (OLC), during separate periods in the Reagan, Bush, and Clinton Administrations, where I provided constitutional advice to the White House and four Attorneys General. Among its duties, OLC helps draft the President's executive orders and is primarily responsible for advising him on matters relating to executive privilege.

The Most Open Branch

Let me begin with an important observation about the relative openness of the three branches of government with regard to internal, deliberative documents. This observation runs counter to the impression several historians have conveyed in their testimony at previous hearings before this Subcommittee and full Committee. All three branches create and make available some public documents that announce proposed actions and final decisions, and these documents often contain an explanation for the proposed or final action. For example, courts issue legal opinions that explain the rationale for their decisions. Executive branch agencies publish proposed regulations with an explanation of why they are being proposed and final regulations with a statement of how public comments were taken into account. Congressional committees publish committee reports with the committees' recommendations or conclusions, and most legislative acts are public.

But the executive is by far the most open of the federal branches in terms of the release of internal, deliberative documents—and almost every other kind of document. When President Lyndon Johnson signed the Freedom of Information Act, he granted broad access to most executive branch documents. That Act was significantly strengthened and made judicially enforceable in 1974. *See* 5 U.S.C. 552. Even without being asked, executive agencies routinely release countless documents and raw data, ranging from weather reports to crime statistics and from hearing records to tide charts.

With regard to presidential documents, the Supreme Court ruled in 1977 that most presidential papers are the personal property of each President. When President Carter signed the Presidential Records Act of 1978 (PRA), he made the presidential papers of all future Presidents public documents. Pub. L. 95-591, § 2(a) (further references are to the amended statute at 44 U.S.C. 2201-2207). As a result, all presidential documents from President Reagan's administration onward will eventually be released to the public. The PRA provides that a President may restrict access to certain types of sensitive presidential records for up to 12 years. § 2204. After that, the majority of presidential documents are subject to release if a request is made. Some documents containing national security secrets may remain exempt from disclosure at that time, but are subject to eventual release after being declassified under national security rules. Even documents which are subject to a valid claim of privilege will eventually be released, generally no later than thirty years after they were created.

Moreover, the President does not have the final say over whether his claim of privilege is valid or whether it will prevail over a given requester. His claim of executive privilege is presumptively valid, as it must be, but it may be overridden by a court with proper jurisdiction. In *United States* v. *Nixon*, 418 U.S. 683, 713 (1974), the Supreme Court held that a party seeking to overcome a constitutionally based privilege must first establish a "specific need" for the particular records at issue. That may turn on the nature of the proceeding or request and the importance of that information to the proceeding or other use. If such a showing is made, the court will weigh the President's interest in maintaining the confidentiality of the particular documents against the asserted need of the requester.

Thus, a special prosecutor or a congressional committee with subpoena power might well be able to overcome a weak claim of executive privilege if it is shown that specific documents are relevant and important to an official investigation. By contrast, a broad fishing expedition launched by a voyeur or conspiracy theorist would be insufficient. Nevertheless, the Supreme Court has explained that the executive branch's interest in confidentiality wanes continually with the passage of time. After thirty years or so, such an interest might be easily defeated by a routine inquiry. In sum, every presidential document eventually will be released, and even in the short run, the President does not have the final word over the confidentiality of documents he claims are privileged.

The Most Dangerous Branch

In contrast, almost no documents maintained by individual Members of Congress, even those created with public funds, are subject to public release, and very few are released without the voluntary assent of the Member. If *The New York Times* wanted a copy of the internal memos that Senate staff wrote to Senators about some momentous public issue, it has no legal means to obtain them (even if the documents are more than twelve years old). If historians or members of the press wanted a copy of a Representative's confidential calendar or if they wanted a copy of staff notes taken when particular interest groups met with the Member, they would have no legal recourse to get them. With enactment of new campaign finance legislation, a majority of both houses of Congress seem to have accepted the argument (mistaken, in my view) that the potential for special interest groups to corrupt Members of Congress is great. Yet, the public has no enforceable right to examine correspondence between such special interest groups and Members of Congress. No matter how historically relevant or vital that information might be to an informed public, it's our tough luck because no law or court can force their release (absent special circumstances such as a properly constituted criminal investigation).

Many of us also would be quite interested in reading the memoranda that Supreme Court law clerks write to the justices that employ them. Historians and legal scholars would find memoranda one justice sent to another to be particularly valuable, even if the memos were about cases decided a decade or more ago. But none of us has any legally enforceable right to such memoranda, notwithstanding that these documents were produced with public funds and involve decisions that have a tremendous impact on our lives. Even fifty years after a given case is decided, the heirs of a deceased justice have complete control over his or her official court papers. We get to see only what they want us to see.

I am not surprised that you have chosen to keep your internal staff documents and at least some of your communications with your colleagues confidential. My testimony today is in support of your private communications and strategy sessions. I don't think it would be prudent for you to force your fellow Members of Congress to release such documents. Although it would keep us better informed about your individual decision-making processes and what influenced your decisions, it would not serve the overall public interest. The most probing legislative analysis is crystallized in writing, and good note-taking is essential to almost any productive office. I don't want to inhibit your staff from giving you valuable and candid written advice, and I don't want to chill communications between you and your constituents or interest groups, whether they are "special" or not. But if Congress did force the release of such

information, at least that would not violate the constitutional separation of powers. Congress probably can inflict such wounds upon itself.

Yet, the constitutional separation of powers does impose limits on Congress's attempts to invade or interfere with the private sphere of the other two co-equal branches. The separation of powers is not an amorphous, unwritten aspect of the Constitution. It is contained in the structure of our written Constitution and in many explicit provisions of the Constitution, including the vesting clauses of Articles I, II, and III. As the framers made clear, its ultimate purpose is to protect individual liberty by preventing any one branch, or two branches together, from usurping authority and prerogatives that were granted to another branch. James Madison lamented that the separation of powers had broken down at the state level, and that the price of failure at the federal level was nothing less than tyranny. *Federalist Nos. 47-48.* It is easy for one branch to discount the harm that flows from the violation of this principle, but the separation of powers itself was designed to counter this bias. Indeed, the framers observed that the legislative branch was throughout history "the most dangerous branch," and they tried to strengthen the President's hand by creating an office with "Energy in the Executive." *Federalist Nos. 48* and *70*, respectively.

Executive Privilege and the Separation of Powers

Such refinements in separation of powers design take many forms and are among the most important innovations of the U.S. Constitution. The Supreme Court of the United States correctly recognized that constitutionally based privileges, including the executive privilege, are necessarily rooted in the separation of powers. Just as Congress may not order justices of the Supreme Court to release drafts of their opinions (even after they have been superseded by a published opinion), there are limits to how far Congress may invade the deliberative process and national security decisions of the President and his senior staff.

The Presidential Records Act makes no attempt to expand or contract claims of executive privilege. Instead, it recognizes in subsection 2204(c)(2), and elsewhere, that Presidents will assert executive privilege with regard to some documents that are otherwise subject to release under the PRA. That subsection provides that "[n]othing in [the PRA] shall be construed to confirm, limit, or expand any constitutionally-based privilege which may be available to an incumbent or former President."

As Congress knew, the Supreme Court ruled in *Nixon* v. *Administrator of General Services*, 433 U.S. 425, 449 (1977), that some constitutionally based privileges "survive[] the individual President's tenure." Thus, former President Richard Nixon could continue to exercise executive privilege with regard to documents from his administration. That decision also set forth the constitutional basis for including confidential communications within the privilege. "Unless [a President] can give his advisers some assurance of confidentiality, a President could not expect to receive the full and frank submissions of facts and opinions upon which effective discharge of his duties depend." *Id.* at 448-49.

The Supreme Court cited the practice of the Framers during the Constitutional Convention, who ensured that the records of the Convention would be "sealed for more than 30 years." *Id.* at 447 n.11. The Framers did this for two reasons: (1) to promote vigorous and candid debate at the Convention, and (2) to permit the participants to present a unified front in support of the final product. A modern President has the same need to ensure confidential communications, especially among his senior advisors and cabinet officers. To get unvarnished advice, he must give assurances that the advice will remain confidential for some reasonable length of time. For success in his administration, he must also ensure that the vigorous debate we want to take place on important matters does not leak out prematurely and undermine the implementation of what is ultimately decided.

Several historians who have testified before this Committee or commented publicly on E.O. 13233 have expressed skepticism about the proposition that presidential advisers would either trim their advice out of fear of criticism or grandstand with an eye toward history. The historian-objectors' view conflicts with the well-known principle of human behavior embodied in the Hawthorne Effect: the mere act of examining someone alters his character or behavior. The historians' statements also have a self-contradictory quality, for they appear simultaneously to assert that the public remains tremendously interested in such confidential communications twelve or more years after the events have transpired but that none of the participants would ever bear that in mind. Has no high-ranking public official ever maintained a diary with the thought of using it for a memoir?

These self-interested historians imply that they are the only ones who would be conscious enough of an historic moment to think about how future generations would react to it. Yet, the careers and reputations of government officials often extend beyond twelve years, and they are very conscious of this. The automatic release of deliberative documents, even after twelve years, would undoubtedly affect the advice a President receives when he most desperately needs frank advice: when the stakes are momentous and when the matter being debated is highly sensitive or subject to disagreement.

Even if the historian-objectors (who may represent a small subset of all historians) are correct, their argument should be addressed to the Supreme Court. It is the Supreme Court that held the executive privilege extends to confidential communications and deliberative documents. It was the Court that decided (correctly, in my view) that this was necessary to ensure candid and complete deliberations. The objectors' ire is misdirected at the President.

Executive Order 13233

President George W. Bush is the first President who has had to implement certain aspects of the PRA because he is the first President in office twelve years after the conclusion of the first administration (President Reagan's) covered by the PRA. Last fall, President George W. Bush issued Executive Order No. 13233 to establish neutral procedures for the incumbent and former Presidents to review documents subject to release and invoke constitutionally based privileges. The bulk of E.O. 13233 is not only lawful and prudent, but it is—with minor exceptions—practically the only way to implement the PRA consistent with the incumbent and former Presidents' constitutional obligations.

E.O. 13233 identifies several types of documents subject to constitutionally based privilege (state secrets, presidential communications, deliberative process documents). These are often thought of as subsets of the executive privilege. Separate laws govern the release of state secrets and national security information, and there is not much dispute that access to these documents should remain restricted. Some have argued, however, that all such documents are in fact removed by the Archivist before a request under the PRA is processed. With all due respect to the staff of the Archivist and the Archivist himself, the incumbent and former Presidents have an independent duty to ensure that no classified documents that would harm national security are released. And, in at least some cases, the incumbent and former Presidents' access to other national security information would put them in a much better position to know whether a particular document implicates our national security or not.

Most of the outside criticism focuses on a former President's invocation of privilege with respect to documents that contain confidential communications or that reflect high-level, executive branch deliberations. But it is even more important for a former President to review these types of documents. It is possible, even likely, that only he is aware of the sensitive nature of many presidential documents from his administration. The incumbent President might be from another party and be unfamiliar with the relationships between the advisors and other officers in the former President's administration more than twelve years past. Moreover, the former President may have a direct recollection of the particular debate or

discussion that the documents reflects. He may even remember specific requests for confidentiality or other reasons why the documents reveal a sensitive communication or deliberation.

The Supreme Court was not troubled that a former President might, in some cases, invoke executive privilege to protect former administration officials from embarrassment. Indeed, it is the former President's obligation to shield officials from embarrassment (with regard to confidential communications or high-level deliberations) if he thinks that course is necessary to preserve a confidential atmosphere within which future Presidents can receive complete and frank advice when they need it.

Accordingly, E.O. 13233 establishes procedures for the incumbent and former Presidents to review all documents that are being sought under the PRA for potentially privileged documents. The review period for a request made by a non-governmental party is up to 90 days, but it may be extended if the request is "unduly burdensome." E.O. 13222, § 3(b). The review period for a request originating from Congress or the Courts is 21 days, but it too may be extended if the request is "burdensome." *Id.*, § 6. In the executive order, President Bush also instructs the Archivist to withhold all documents that either the incumbent or former President assert are privileged. *Id.*, § 3(d). Finally, the executive order states that "[a]bsent compelling circumstances, the incumbent President will concur in the privilege decision of the former President" to release documents under the PRA. *Id.*, § 4.

Executive Order 13233 and D.C. Circuit Law

A witness at the Subcommittee's earlier hearing asserted that *Public Citizen* v. *Burke*, 843 F.2d 1473 (D.C. Cir. 1988), was inconsistent with a former President's exercise of executive privilege in E.O. 13233, but that is not correct. In *Burke*, the D.C. Circuit Court struck down a Justice Department directive that was similar in some respects to E.O. 13233, § 3(d), but distinguishable in two other critical respects. The Justice Department directive instructed the Archivist to defer to any claim of privilege asserted by former President Nixon. In *Nixon* v. *Administrator of General Services*, the Supreme Court made clear that a former President could continue to assert executive privilege over documents from his administration, but that case did not consider a possible clash with the incumbent President. What if the incumbent President disagreed with a former President's privilege claim and instructed the Archivist not to honor the position of the former President? The D.C. Circuit believed that the Archivist's obligation to the incumbent President was paramount, and that he need not defer to a former President's claim if he concluded it was not proper.

Although I think the D.C. Circuit may have erred in *Burke*, E.O. 13233 is nevertheless fully consistent with it. The D.C. Circuit may have erred because the Archivist probably does have a responsibility to treat a former President's privilege claims as presumptively valid (pending resolution by a court), even if the incumbent President disagrees. That said, the D.C. Circuit was principally concerned about the Archivist's duty if he received conflicting instructions from the former President and the incumbent President. The Justice Department directive did not come from President Reagan himself; so a hypothetical conflict was possible.

In contrast, E.O. 13233 is an order from the incumbent President to the Archivist, instructing the Archivist to honor any privilege claim by a former President unless and until it is withdrawn or overturned by a court with proper jurisdiction. The executive order further states that "the incumbent President will support that privilege claim [by the former President] in any forum in which the privilege is challenged." § 4. To the extent that *Burke* rested on the Archivist's obligation to the incumbent President, that obligation is clear in E.O. 13233. Under E.O. 13233, the Archivist never has to take orders from a former President, but he does have to follow orders from the incumbent President. In effect, President George W. Bush has announced to the Archivist in advance that he will ratify and enforce a former President's claim of privilege whenever it is asserted. The result is that the Archivist is acting under the combined constitutional

authority of the former President (who clearly retains some constitutional authority as against outside parties) and the incumbent President. *Burke* has nothing to say about that situation.

Analysis of H.R. 4187

With the preceding framework in mind, there are several provisions of H.R. 4187 that appear to be flatly unconstitutional and others that raise serious constitutional concerns. These defects tend to compound each other, so that taken together, they render the entire bill even more clearly unconstitutional. The four most serious problems are analyzed below.

Subsection (c): Nullifying a Former President's Executive Privilege Authority

Subsection (c) of the proposed new section 2208 of title 44 is the most constitutionally problematic. The historian-objectors before this Committee and Subcommittee have expressed particular angst that the Supreme Court has allowed former Presidents to continue to invoke executive privilege with regard to documents from their administrations. Subsection (c) provides that a former President's assertion of such privilege is good for only twenty days. After that period, the Archivist of the United States must release the documents unless the former President has already secured a court order barring the release.

Subsection (c), if it were constitutional, would effectively nullify a former President's right to assert executive privilege over documents from his administration. It would convert an executive privilege that is presumptively valid and can only be overturned by an affirmative court order into a right to delay the release for twenty days. The President's opportunity to seek court action does not cure the constitutional defect, because Congress simply has no power to take an exclusive presidential power and condition it on the assent of another branch. That is a basic tenet of separation of powers doctrine. It should be self-evident that a power which flows from the separation of powers (the executive privilege) cannot be conditioned on approval from the courts (subsection (c)).

Subsection (c) may be predicated on the belief that the former President is in a better position to bear the cost of litigation than the requester. There are four logical responses to this notion. First, it is not true with regard to large media corporations. Second, Congress could subsidize such litigation, but since it failed to do so, it makes more sense for the person who seeks to profit by such information to bear the cost of litigation—regardless of relative wealth. Third, the former President already must devote substantial amounts of time to reviewing burdensome document requests for potentially privileged documents; he should not also have to bear the burden of initiating litigation when a requester might be satisfied with the balance of what is released. Fourth, and most important, a policy concern—no matter how well founded—cannot trump a constitutional right.

Subsection (a)(3): Inadequate and Inflexible Deadlines

When the President is exercising a power derived from the Constitution, as opposed to a statutory power, Congress has very limited authority to micromanage the timing of his actions. Congress could not pass a law requiring the President to make a pardon decision within 20 days after receipt of any such request from the Department of Justice. Nor could Congress require a President to decide whether to sign a treaty within 20 days of any international treaty convention. Many other examples are equally illustrative of the basic point: if the President derives a particular power from the Constitution and there is no time limit on the exercise of that power in the Constitution (such as the veto power), Congress cannot impose one on his exercise of that power.

Nevertheless, subsection (a)(3) purports to grant the incumbent President and former President only 20 days, with the possibility of a 20-day extension, within which to assert any constitutionally based

privilege claims. It does not matter what number of documents is being requested by an outside party or group of parties—be they 1,000 or 100,000. It does not matter that the President may be engaged in prosecuting a war or responding to a terrorist attack. It does not matter whether the former President is recovering from a stroke or is traveling on an important diplomatic mission. Moreover, subsection (a)(4) requires that the incumbent or former President personally sign every claim of privilege, so they might feel it necessary to personally review each potentially privileged document.

An inflexible 20-40 day time frame for the review of thousands of documents and the invocation of privilege is imprudent to say the least. To the extent that it significantly burdens the President's ability to exercise his executive privilege power and perform other vital obligations of his office, subsection (a)(3) is constitutionally dubious.

Several years ago, Congress extended the time President Clinton and future Presidents would have to fill vacancies in Senate-confirmed offices with acting appointments from 120 to 210 days, and that period can be further extended. 5 U.S.C. 3345-49. E.O. 13233 provides for an initial 21- or 90-day review period, with the possibility of an extension. By comparison to the Vacancies Act, the President's proposed time frame for review of PRA documents is positively speedy. I see no reason to interfere with this scheme, particularly for documents that are already twelve years or more old.

If there were a vital need to place some outer limit on the President's initial review of documents, I think the most Congress could do is to authorize some sort of court supervision if the President failed to act within a reasonable length of time (say, 180 days). Such a proceeding might be analogous to a mandamus action to force an agency to rule on a petition under 5 U.S.C. 553(e). Since a proper court can overrule a claim of executive privilege, it might (with appropriate legislation) be able to force a President to make a decision that will trigger the potential litigation. Such a process is also more likely to be upheld by the Supreme Court because the lower court will have had the opportunity to consider the special facts and circumstances of each request and the length of delay.

Making the Archivist Superior to the President

Several provisions of H.R. 4187 violate a separate aspect of Article II and separation of powers doctrine when they attempt to make the Archivist the President's superior. The Constitution provides that "*[t]he* executive Power shall be vested in a President," not *some* of it. Art. II, § 1, cl. 1 (emphasis added). The Framers debated and rejected the creation of a plural executive in favor of a unitary executive. Their conscious design was to vest "the execution of [the laws in] a single hand." *Federalist No. 37*. The Supreme Court properly held that this requires the President's control over all officers who exercise significant executive power. *Myers* v. *United States*, 272 U.S. 52 (1926).

Subsection (a)(3)(B) requires the Archivist to deny the President an additional 20 days to review the requested documents unless *the Archivist* determines that "such an extension is necessary to allow an adequate review of the record." Imagine the following letter to the President from the Archivist: "Sorry Mr. President, but I just can't determine in good faith that an extension is 'necessary,' given that the confidential calendar you sent over for next week includes a golf outing, a fundraising banquet, and a trip to Europe (again!). Better luck next time."

Subsection (a)(4) requires the President to communicate his claim of executive privilege to the Archivist in a particular way, the failure of which purports to require the Archivist to treat the President's claim as invalid. Congress could not pass a law telling the President he must communicate all military orders in triplicate, using only approved congressional memo pads. The President may communicate his orders to his subordinates any way he wishes, orally or in writing, in polite terms or peppered with

profanity. But according to subsection (a)(4), if the President does not dot all "i"s and cross all "t"s, the Archivist must treat his command to withhold the documents as a nullity.

Morrison v. *Olson*, 487 U.S. 654 (1988) muddies the constitutional waters somewhat, because it created an exception to the rule in *Myers* for independent counsel under the now expired Ethics in Government Act. (Other exceptions for "independent" commissions are distinguishable because the Court concluded they do not exercise executive authority.) Many constitutional scholars who once defended *Morrison* have ceased to do so in recent years, and perhaps the Court would rule differently today. But surely even the *Morrison* Court would not sanction so basic a violation of the unitary executive doctrine in order to further the comparatively unimportant interest identified in H.R. 4187.

Attempting to Overrule E.O. 13233

A President may issue an executive order or other directive to implement any of the powers properly conferred to him. *See generally* Todd Gaziano, Legal Memorandum No. 2, "The Use and Abuse of Executive Orders and Other Presidential Directives," The Heritage Foundation, Feb. 21, 2001 (available at http://www.heritage.org/library/legalmemo/lm2.html). Congress's power to modify or overrule a presidential directive depends on the font of the President's authority over the subject matter of the directive. *See id.* at 4; *Youngstown Sheet & Tube* v. *Sawyer*, 343 U.S. 579 (1952) (the "Steel Seizure Case"). The President has express and implied powers conferred to him by the Constitution (*e.g.*, the pardon power), powers that are shared with Congress under the Constitution (*e.g.*, war powers), and powers that are conferred exclusively by statute (*e.g.*, appropriations).

Congress has broad discretion to restrict or overrule presidential executive orders that are based solely on a statutorily conferred power, although there still are some limits to the congressional micro-management of the President's execution of the laws. In other words, the greater power does not always include all lesser controls. *See INS* v. *Chadha*, 462 U.S. 919 (1983).

Congress has some power to regulate executive directives based on shared constitutional powers, but it would depend on the facts, circumstances, and clauses at issue. With regard to the war powers, Congress may condition when and how the President shall call up reserves to serve in the armed forces of the United Sates, but as explained above, it could not dictate how the President communicates his tactical commands to troops on the field of battle.

With regard to powers conferred solely on the President by the Constitution, Congress has practically no authority to interfere with the President's management directives. The President may issue secret pardons or he may pardon whole categories of individuals in an executive order, as President Andrew Johnson did with regard to former confederate soldiers. *See* Legal Memorandum No. 2, *supra* at 11 (noting that the Supreme Court upheld President Johnson's blanket pardon).

Section 3 of H.R. 4187 states that E.O. 13233 "shall have no force and effect." Although E.O. 13233 relates to the implementation of the PRA, at its core, it establishes procedures for the invocation of presidential powers (executive privilege claims) that Congress cannot alter. It is axiomatic that the President's authority to implement his constitutional powers is "vested in [him] by the Constitution." *See* E.O. 13233, Preamble. Thus, E.O. 13233 contains the President's public statement regarding how he will exercise his constitutional power (and respect the constitutional power of former Presidents) within the framework of the PRA. It also contains his instructions to the Archivist in such matters.

H.R. 4187 does not amend the framework of the PRA that is within Congress's power, but it is an attempt to modify, condition, and partially nullify incumbent and former Presidents' constitutional powers. In these respects, H.R. 4187 would be void even if it were passed. *See generally* Statement of Antonin

Scalia, [then] Assistant Attorney General, Office of Legal Counsel, on S. 2170, the Congressional Right to Information Act, Before the Subcommittee on Intergovernmental Relations, Committee on Government Operations, United States Senate, Oct. 23, 1975 (explaining that Congress lacks the power to establish procedures that the President would have to use when invoking executive privilege). In sum, it is H.R. 4187 that "shall have no force and effect," not E.O. 13233.

The Combined Defects of H.R. 4187

The combined defects of H.R. 4187 render it even more constitutionally questionable, in part because each defect compounds the rest. A 20-40 day initial review period is an even greater burden on a former President if he must also secure a court order within the next 20 days to enforce his privilege claims. Congress's attempt to elevate the Archivist over the President (with regard to constitutionally based privilege claims) is based on the mistaken premise that Congress can overrule a presidential management directive.

I have no doubt that this Subcommittee and full Committee have proceeded with their oversight and legislative hearings in good faith. But a President has a responsibility to vigorously resist any erosion in the power of his Office. Separation of powers principles require no less. If I were still in the Office of Legal Counsel, I would strongly urge the President to veto any legislation similar to H.R. 4187. I think the Department of Justice under any President would take the same position.

Conclusion

My belief that H.R. 4187 is unconstitutional does not mean that the Subcommittee's hearings have served no constructive purpose. By highlighting the concerns of historians, journalists, and others regarding the time in which the President reviews documents subject to release under the PRA, I hope you have helped convince the White House to speed up its review process (although waging war is cause for some delay). But my sincere and respectful advice to this Subcommittee is that further progress must be based on a polite exchange with the White House rather than legislation that purports to dictate terms to the President.

If the Subcommittee continues pursuing H.R. 4187 or similar legislation, it will engage in a futile act that will waste its time, and possibly that of the President and the courts. But if the Subcommittee properly engages the White House on this issue, I am confident that the White House will reach an appropriate accommodation regarding the Subcommittee's concerns.

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Douglas W. Kmiec
Dean & St. Thomas More Professor

April 21, 2002

The Honorable Stephen Horn
Congress of the United States
House of Representatives
Committee on Government Reform
2157 Rayburn House Office Building
Washington, DC 20515-6143

Re: H.R. 4187

Dear Congressman Horn:

Thank you for inviting me to participate in the hearing on H.R. 4187, the Presidential Records Act Amendments of 2002.

I regret that a prior commitment to participate in another program out of state makes it impossible for me to attend your deliberations on the 24th of April, but I wanted to share a few thoughts by letter in the event they are helpful.

First, I want to commend you and the committee for inquiring into the proper relationship between the prerogatives of the Presidency and public disclosure. History depends upon an accurate accounting of public decision, and history can only be well written if the relevant materials are available. Of course, our nation does not only live in the past, it has an obligation to the present, so there is a corresponding duty to ensure that the Office of the Presidency can function both in these times of war, as well as in times of peace.

While I believe your proposal is well-intended, in my judgment, it strikes an incorrect and constitutionally questionable balance. The Presidential Records Act of 1978 was, in itself, a dramatic step toward the opening of public documents. Prior to the Act, presidents owned their papers outright. This was something well accepted by our founders. It was Justice Story, after all, who opined that George Washington owned his presidential papers and could bequeath them to his estate or grant a copyright in them to others.

In the wake of Watergate, and its unfortunate and indefensible abuse of public power, Congress reset that balance. In doing so, Congress was careful not to undermine the constitutional responsibilities of the Presidency, both by allowing the restriction of access to executive documents for up to 12 years, and by explicitly providing that "nothing in the Act shall be construed to confirm, limit, or expand any constitutionally-based privilege which may be available to an incumbent or former president."

Without those carefully stated words, the 1978 Act would have been open to serious constitutional doubt. While President Nixon's particular privilege claim was not sustained, *United States v. Nixon* 418 U.S. 683 (1974) recognized the unmistakable constitutional origin of executive privilege and that the need "to protect military, diplomatic, or sensitive national security secrets" might even trump the need for presidential materials in a criminal trial. More generally, the Court specified that "there is a legitimate governmental interest in the confidentiality of communications between high Government officials, e. g., those who advise the President, and that '(h)uman 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.'" 418 U.S., at 705. Indeed, the opinion noted that Government confidentiality has been a concern from the time of the Constitutional Convention in 1787, as these seminal meetings were conducted in private, 1 M. Farrand, The Records of the Federal Convention of 1787, pp. xi-xxv (1911). The records were also sealed for more than 30 years after the Convention. See 3 Stat. 475, 15th Cong., 1st Sess., Res. 8 (1818). See generally Charles Warren, *The Making of the Constitution* 134-139 (1937).

Subsequently the Court elaborated in *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977), that executive privilege extends to both incumbent and former presidents. Unless the President can give his advisers some assurance of confidentiality, a President could not expect to receive the full and frank submissions of facts and opinions upon which effective discharge of his duties depends. Said the Court adopting the words of the Solicitor General; "The confidentiality necessary to this exchange cannot be measured by the few months or years between the submission of the information and the end of the President's tenure; the privilege is not for the benefit of the President as an individual, but for the benefit of the Republic. Therefore the privilege survives the individual President's tenure."

As Assistant Attorney General for the Office of Legal Counsel to President Reagan, it was my responsibility to review for form and legality Executive Order 12667. That Executive Order implemented the 1978 Act by directing the Archivist to fully honor an incumbent President's assertion of privilege, but left to the Archivist's discretion, and subject to court order, whether or not to honor a claim of a former president. It was not clear to me why the White House in 1989 preferred to differentiate incumbent and former president privilege claims. While this differentiation was not mandated by the 1978 Act or judicial precedent, it did not slight constitutional requirement so long as it was understood that the Archivist would not disclose documents until after a time sufficient was allowed to the former president to litigate any privilege claim.

A more prudent course is to treat the privilege claims of incumbent and former presidents as equivalent. Such equivalency better recognizes that the privilege is not a personal one, but one intended within the constitutional design to protect the Office of the Presidency, especially as it relates to state secrets, open law enforcement files, and the deliberative process of the President, which of course, extends to communications with the Vice-President, the cabinet, and other high ranking advisors. This more prudent course was the one adopted by President George W. Bush in Executive Order 13233 signed on November 1, 2001. Under the Bush Executive Order, a claim of privilege by either the incumbent or a former president preserves the confidentiality of the material unless the parties seeking disclosure receive a final court order confirming a demonstrated need for the document's release.

While it is possible to construe the Bush Executive Order as more restrictive, in operation it need not be. In fact, where a former president opts for release (which as a practical matter is more often than not after twelve years), the Order provides an incumbent concession that "absent compelling circumstances, the incumbent President will concur in the privilege decision of the former President." In such circumstance, the Bush Order can be reasonably read as creating a presumption of disclosure of former presidential documents, unless there is compelling reason – from the vantage point of the incumbent and the present exigencies of the Office – to withhold materials. This presumption of disclosure in the Bush Order was not present in that signed by President Reagan. Perhaps, it is in exchange for this deference to public release, that when a former president does assert a privilege under the Bush order, "the incumbent President will support that privilege claim in any forum in which the privilege claim is challenged." This pledge to defend is constitutionally sensible, equitable, and responsive to the needs of a presidency that at the moment faces unparalleled challenges to maintaining the safety and security of the Nation.

Regrettably, I do not find the same sense of constitutional prudence in H.R. 4187. First, it would seem that rather than striving for balance, the proposed amendment is designed to weaken the Presidential Office without deference to the constitutional importance of maintaining the integrity of privileged material. For example, the proposal resurrects the unwarranted differentiation of privilege claims, treating those asserted by a former president as implicitly less worthy of respect. In this regard, a former president is once again put in the awkward position of suing his successor, unless his successor incumbent concurs in the nonrelease. Even more troubling, the assertion of privilege claims by either an incumbent or former president is made subject to predicate requirements that require the identification of the specific record, the specific grounds of the claim, and the circulation of this information to members of Congress, the person seeking the record, and the general public. While it might be theoretically possible to write such claims obliquely without disclosing privileged material, in some cases, especially as they relate to military and law enforcement matters, that would be impossible. It would also appear that some of the time periods for review of material have been narrowed from the 1978 Act, and given the substantial volume of some disclosure claims, this in itself would likely prove constitutionally troublesome. Finally, the above changes aggravate some of the lingering constitutional doubts related to the 1978 Act – specifically, the fact that the proposed amendment effectively denies the validity of a constitutionally based privilege, whether made by an incumbent or former president, when the information is sought pursuant to 44 U.S.C. 2205(2) (A) (criminal matters) or (C) (committee requests).

We know this is a delicate moment in our Nation's history. Our Constitution and its separation of powers has served us well. Respectfully, I do not believe the H.R. 4187 fully observes this important constitutional doctrine, and I urge the committee not to pursue the changes it proposes.

Sincerely,

Douglas W. Kmiec
Dean & St. Thomas More Professor

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A more prudent course is to treat the privilege claims of incumbent and former presidents as equivalent. Such equivalency better recognizes that the privilege is not a personal one, but one intended within the constitutional design to protect the Office of the Presidency, especially as it relates to state secrets, open law enforcement files, and the deliberative process of the President, which of course, extends to communications with the Vice-President, the cabinet, and other high ranking advisors. This more prudent course was the one adopted by President George W. Bush in Executive Order 13233 signed on November 1, 2001. Under the Bush Executive Order, a claim of privilege by either the incumbent or a former president preserves the confidentiality of the material unless the parties seeking disclosure receive a final court order confirming a demonstrated need for the document's release.

While it is possible to construe the Bush Executive Order as more restrictive, in operation it need not be. In fact, where a former president opts for release (which as a practical matter is more often than not after twelve years), the Order provides an incumbent concession that "absent compelling circumstances, the incumbent President will concur in the privilege decision of the former President." In such circumstance, the Bush Order can be reasonably read as creating a presumption of disclosure of former presidential documents, unless there is compelling reason – from the vantage point of the incumbent and the present exigencies of the Office – to withhold materials. This presumption of disclosure in the Bush Order was not present in that signed by President Reagan. Perhaps, it is in exchange for this deference to public release, that when a former president does assert a privilege under the Bush order, "the incumbent President will support that privilege claim in any forum in which the privilege claim is challenged." This pledge to defend is constitutionally sensible, equitable, and responsive to the needs of a presidency that at the moment faces unparalleled challenges to maintaining the safety and security of the Nation.

Regrettably, I do not find the same sense of constitutional prudence in H.R. 4187. First, it would seem that rather than striving for balance, the proposed amendment is designed to weaken the Presidential Office without deference to the constitutional importance of maintaining the integrity of privileged material. For example, the proposal resurrects the unwarranted differentiation of privilege claims, treating those asserted by a former president as implicitly less worthy of respect. In this regard, a former president is once again put in the awkward position of suing his successor, unless his successor incumbent concurs in the nonrelease. Even more troubling, the assertion of privilege claims by either an incumbent or former president is made subject to predicate requirements that require the identification of the specific record, the specific grounds of the claim, and the circulation of this information to members of Congress, the person seeking the record, and the general public. While it might be theoretically possible to write such claims obliquely without disclosing privileged material, in some cases, especially as they relate to military and law enforcement matters, that would be impossible. It would also appear that some of the time periods for review of material have been narrowed from the 1978 Act, and given the substantial volume of some disclosure claims, this in itself would likely prove constitutionally troublesome. Finally, the above changes aggravate some of the lingering constitutional doubts related to the 1978 Act – specifically, the fact that the proposed amendment effectively denies the validity of a constitutionally based privilege, whether made by an incumbent or former president, when the information is sought pursuant to 44 U.S.C. 2205(2) (A) (criminal matters) or (C) (committee requests).

We know this is a delicate moment in our Nation's history. Our Constitution and its separation of powers has served us well. Respectfully, I do not believe the H.R. 4187 fully observes this important constitutional doctrine, and I urge the committee not to pursue the changes it proposes.

Sincerely,

Douglas W. Kmiec
Dean & St. Thomas More Professor

107th CONGRESS

2d Session

H. R. 4187

To amend chapter 22 of title 44, United States Code, popularly known as the Presidential Records Act, to establish procedures for the consideration of claims of constitutionally based privilege against disclosure of Presidential records.

IN THE HOUSE OF REPRESENTATIVES

APRIL 11, 2002

Mr. HORN (for himself, Ms. SCHAKOWSKY, Mr. BURTON of Indiana, Mr. WAXMAN, Mr. OSE, Mr. FRANK, Mr. MCDERMOTT, Mr. UDALL of Colorado, Mr. BENTSEN, Mr. ALLEN, Mr. BLAGOJEVICH, Mr. CLAY, Mr. CUMMINGS, Mr. DAVIS of Illinois, Mr. KUCINICH, Mr. LANTOS, Mr. LYNCH, Mrs. MALONEY of New York, Ms. NORTON, Mr. OWENS, Mr. TOWNS, Mr. LATOURETTE, and Mr. BAIRD) introduced the following bill; which was referred to the Committee on Government Reform

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A BILL

To amend chapter 22 of title 44, United States Code, popularly known as the Presidential Records Act, to establish procedures for the consideration of claims of constitutionally based privilege against disclosure of Presidential records.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the `Presidential Records Act Amendments of 2002'.

SEC. 2. PROCEDURES FOR CONSIDERATION OF CLAIMS OF CONSTITUTIONALLY BASED PRIVILEGE AGAINST DISCLOSURE.

(a) IN GENERAL- Chapter 22 of title 44, United States Code, is amended by adding at the end the following:

`Sec. 2208. Claims of constitutionally based privilege against disclosure

`(a)(1) When the Archivist determines under this chapter to make available to the public any Presidential record that has not previously been made available to the public, the Archivist

shall--

`(A) promptly provide notice of such determination to--

`(i) the former President during whose term of office the record was created; and

`(ii) the incumbent President; and

`(B) make the notice available to the public.

`(2) The notice under paragraph (1)--

`(A) shall be in writing; and

`(B) shall include such information as may be prescribed in regulations issued by the Archivist.

`(3)(A) Upon the expiration of 20 days (excepting Saturdays, Sundays, and legal public holidays) following provision of notice under paragraph (1)(A), the Archivist shall make available to the public the record covered by the notice, except any record (or reasonably segregable part of a record) with respect to which the Archivist receives from a former President or the incumbent President a claim of constitutionally based privilege against disclosure that meets the requirements of paragraph (4).

`(B) The Archivist may extend the 20-day period for not more than 20 additional days (excepting Saturdays, Sundays, and legal public holidays) if the Archivist determines, based on a showing by the former President or the incumbent President, that such an extension is necessary to allow an adequate review of the record.

`(4) A claim of constitutionally based privilege against disclosure meets the requirements of this paragraph if it--

`(A) is in writing;

`(B) specifies the record (or reasonably segregable portion of a record) to which the claim applies;

`(C) is signed by the former President or incumbent President making the claim; and

`(D) states the nature of the privilege and the specific grounds for the claim.

`(b) The Archivist shall provide a copy of each claim of constitutionally based privilege against disclosure of a Presidential record--

`(1) to the person seeking the record, if any;

`(2) to the chairman and ranking minority member of each of the Committee on Government Reform of the House of Representatives and the Committee on Governmental Affairs of the Senate; and

`(3) upon request, to any member of the public.

`(c)(1) The Archivist shall not release a Presidential record that is subject to a privilege claim submitted by a former President until the expiration of the 20-day period (excluding Saturdays, Sundays, and legal public holidays) beginning on the date the Archivist receives the claim.

`(2) Upon the expiration of such period the Archivist shall make the record publicly available unless otherwise directed by a court order in an action initiated by the former President under section 2204(e).

`(d)(1) The Archivist shall not release a Presidential record that is subject to a privilege claim submitted by the incumbent President unless--

`(A) the incumbent President withdraws the privilege claim; or

`(B) the Archivist is otherwise directed by a final court order that is not subject to appeal.

`(2) This subsection shall not apply with respect to any Presidential record required to be made available under section 2205(2)(A) or (C).

`(e) The Archivist shall adjust any otherwise applicable time period under this section as necessary to comply with the return date of any congressional subpena, judicial subpena, or judicial process.'.

(b) CONFORMING AMENDMENTS- (1) Section 2204(d) of title 44, United States Code, is amended by inserting `, except section 2208,' after `chapter'.

(2) Section 2207 of title 44, United States Code, is amended in the second sentence by inserting `, except section 2208,' after `chapter'.

(c) CLERICAL AMENDMENT- The table of sections at the beginning of chapter 22 of title 44, United States Code, is amended by adding at the end the following:

`2208. Claims of constitutionally based privilege against disclosure.'.

SEC. 3. EXECUTIVE ORDER OF NOVEMBER 1, 2001.

Executive Order number 13233, dated November 1, 2001 (66 Fed. Reg. 56025), shall have no force or effect.

END