

Withdrawn/Redacted Material

The George W. Bush Library

DOCUMENT NO.	FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
001	Executive Order	Draft [5 PAGES RELEASED IN WHOLE ON PRA RE-REVIEW 09/08/2025 JLS]	5	10/02/2001	
002	Letter	Dear Judge Gonzales [1 PAGE RELEASED IN WHOLE ON PRA RE-REVIEW 09/08/2025 JLS] - To: Alberto R. Gonzales - From: John W. Carlin	1	10/01/2001	
003	Comments	NARA Comments [3 PAGES RELEASED IN WHOLE ON PRA RE-REVIEW 09/08/2025 JLS]	3	10/01/2001	
004	Executive Order	Draft [5 PAGES RELEASED IN WHOLE ON PRA RE-REVIEW 09/08/2025 JLS]	5	10/01/2001	

COLLECTION TITLE:

Counsel's Office, White House

SERIES:

Kavanaugh, Brett - Subject Files

FOLDER TITLE:

PRA (Presidential Records Act) - Draft EO (Executive Order)

FRC ID:

9800

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.

Withdrawn/Redacted Material

The George W. Bush Library

SUPERSEDED

DOCUMENT NO.	FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
001	Executive Order	Draft	5	10/02/2001	P5;
002	Letter	Dear Judge Gonzales - To: Alberto R. Gonzales - From: John W. Carlin	1	10/01/2001	P5;
003	Comments	NARA Comments	3	10/01/2001	P5;
004	Executive Order	Draft	5	10/01/2001	P5;

COLLECTION TITLE:

Counsel's Office, White House

SERIES:

Kavanaugh, Brett - Subject Files

FOLDER TITLE:

PRA (Presidential Records Act) - Draft EO (Executive Order)

FRC ID:

9800

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.

Mr. Lindsey:
New version. We'd
appreciate comments
this week. Thanks very much.
Brett Kavanaugh
202-456-7984

FAX to
Bruce Lindsey
FAX # 301-229-
6350

DRAFT
(October 2, 2001)

By virtue of the authority vested in me as President by the Constitution and laws of the United States of America, and in order to establish policies and procedures implementing section 2204(c) of title 44 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 *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977), 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.

Section 2. *Privileged Presidential Records.*

- (a) When the limitations on access imposed by section 2204(a) and 2204(b) have expired, section 2204(c) of title 44 directs that the Archivist administer Presidential records in accordance with section 552 of title 5, including by withholding 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) establishes that the former President or incumbent President may assert the constitutionally based privileges that exemption (b)(5) of section 552 ordinarily encompasses, including but not limited to privileges for records that reflect: military, diplomatic, or national security secrets and thereby fall within the state secrets privilege; official presidential communications and thereby fall within the presidential communications privilege; legal advice or legal work and thereby fall within the attorney-client or attorney work product privileges; or the deliberative processes of the President or his advisors and thereby fall within the deliberative process privilege.
- (b) In *Nixon v. Administrator of General Services*, the Supreme Court stated that "[u]nless [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. "Human experience," the Court has explained, "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.” *United States v. Nixon*, 418 U.S. 683, 705 (1974). The Court has concluded that “the importance of this confidentiality” for “high Government officials and those who advise and assist them” is “too plain to require further discussion,” and the Court has relied expressly on the precedent of the Constitutional Convention, which was conducted in “complete privacy” and the records of which were “sealed for more than 30 years after the Convention.” *United States v. Nixon*, 418 U.S. at 705 & n.15. Based on those principles and precedents, the Supreme Court has ruled that the constitutionally based privileges available to a President “survive[] the individual President’s tenure.” *Nixon v. Administrator of General Services*, 433 U.S. at 449. In so ruling, the Court expressly rejected the argument that “only an incumbent President can assert the privilege of the Presidency.” *Id.* at 448.

- (c) A party seeking to overcome the constitutionally based privileges that attach to Presidential records must establish a “demonstrated, specific need” for particular evidence. *See United States v. Nixon*, 418 U.S. at 713. Notwithstanding the privileges that attach to Presidential records, most former Presidents have balanced the need to encourage candor and protect confidentiality against the interests of history and, after what they determined to be an appropriate period of repose, have publicly released some otherwise privileged Presidential records. *See Nixon v. Administrator of General Services*, 433 U.S. at 450-51. The decisions by former Presidents to disclose particular privileged records have been made by the individual Presidents exercising their discretion and judgment. This Order grants former Presidents subject to the Presidential Records Act the authority, consistent with the Constitution and the Act, to exercise their discretion and judgment with respect to their privileged Presidential records. *See Sections 2(c)-8 infra.*
- (d) Consistent with the requirements of the Constitution and the Presidential Records Act, and informed by historical practice, the Archivist shall administer Presidential records under section 2204(c) of title 44 in the following manner after the limitations on access imposed by section 2204(a) and 2204(b) have expired:
 - 1. 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.
 - 2. After receiving the records he requests, the former President shall review those records as expeditiously as possible, and not longer than 90 days for requests that are not unduly burdensome. The Archivist shall not disclose the records during this period of review.

3. 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 or authorizes disclosure of privileged records that fall within the state secrets, presidential communications, attorney-client, attorney work product, deliberative process, or other constitutionally based privileges.
4. After the former President has reviewed the records and indicated whether he requests withholding or authorizes disclosure of records that fall within the state secrets, presidential communications, attorney-client, attorney work product, deliberative process, or other constitutionally based privileges, the incumbent President may also review the records in question, or may utilize whatever other procedures he deems appropriate, to decide whether to oppose the former President's decision.
 - (i) If the incumbent President does not oppose the former President's decision to request withholding of records as privileged, the incumbent President shall so inform the Archivist and the former President. The Archivist shall not disclose those records to a requester unless and until an incumbent President advises the Archivist that the incumbent President and the former President agree to disclosure of the records or until so ordered by a court.
 - (ii) If the incumbent President opposes the former President's decision to request withholding of the records as privileged, the incumbent President shall so inform the Archivist and the former President. Because the former President independently retains the right to assert constitutionally based privileges, the Archivist shall not disclose the records to a requester unless and until an incumbent President advises the Archivist that the incumbent President and the former President agree to disclosure of the records or until so ordered by a court.
 - (iii) If the incumbent President does not oppose the former President's decision to authorize disclosure of records, the Archivist shall disclose the records to the requester.
 - (iv) If the incumbent President opposes the former President's decision to authorize disclosure of the records, the incumbent President may independently order the Archivist to withhold privileged records that fall within the state secrets, presidential communications, attorney-client, attorney work product, deliberative process, or other constitutionally based privileges. In that instance, the Archivist shall not disclose the records to a requester unless and until an incumbent President advises the Archivist that the

incumbent President and the former President agree to disclosure of the records or until so ordered by a court.

- Section 3. Absent compelling circumstances, the incumbent President will not oppose the privilege decision of the former President to request withholding or authorize release of privileged records in response to a request for access under section 2204(c)(1). Furthermore, absent such compelling circumstances, the incumbent President will support the former President's decision to withhold records within the scope of a constitutionally based privilege in any forum in which the former President's privilege claim is challenged.
- Section 4. This Order does not expand or limit an incumbent President's right to obtain records of a former President pursuant to section 2205(2)(B).
- Section 5. This Order does not expand or limit the rights of a court, House of Congress, or authorized committee or subcommittee of Congress to obtain 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 expeditiously review the records in question and, within 20 days of receiving notice from the Archivist, indicate his decision with respect to any privilege. The incumbent President shall indicate his decision with respect to any privilege within 20 days after the former President has indicated his decision. Those periods may be extended for requests that are burdensome. The Archivist shall not release the records unless both the former President and the incumbent President authorize release or until so ordered by a court.
- Section 6. This Order does not limit the former President's or an incumbent President's right to withhold records on any ground supplied by the Constitution, statute, or regulation.
- Section 7. This Order is not intended to indicate whether and under what circumstances an incumbent or former President should assert or waive any privilege. The Order is intended only to establish procedures for former and incumbent Presidents to make those determinations.
- Section 8. The former President may designate a representative (or series or group of alternative representatives, as the President in his discretion may determine) to act on his behalf for purposes of the Act and this Order. Upon the death 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, the family of the former President may designate a representative to act on the President's behalf for purposes of the Act and this Order, including with respect to the assertion of constitutionally based privileges.

- Section 9. This Order is intended only 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 against the United States, its agencies, its officers, or any person.
- Section 10. Executive Order 12667, issued January 18, 1989, is revoked to the extent it applied after the limitations on access imposed by section 2204(a) and 2204(b) have expired.



National Archives & Records Administration

to: Brett Kavanaugh
fax #: 202-456-1647
re: Comments on Draft EO
date: 10/01/2001
pages: 10 Pages (including cover sheet).

Brett, attached is a letter to the Judge from the Archivist, along with comments and some suggested changes to the Draft E.O. I am happy to discuss with you at your convenience. Thanks.

From the desk of...

Gary M. Stern
General Counsel
NARA
8601 Adelphi Road
College Park, MD 20740-6001
Telephone: 301-713-6025, ext. 251
Fax: 301-713-6040
Email: garym.stern@nara.gov

National Archives at College Park



8601 Adelphi Road College Park, Maryland 20740-6001

OCT - 1 2001

The Honorable Alberto R. Gonzales
Counsel to the President
The White House
Washington, DC 20500

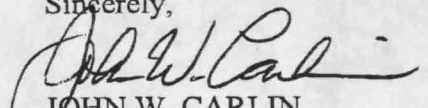
Dear Judge Gonzales:

I appreciate the opportunity to comment on the proposed Executive Order on Presidential Records. I do have some concerns as reflected in the comments set forth in the attached by NARA's General Counsel, Gary M. Stern. Generally, I feel the current Executive Order (EO 12667), with some modifications, can adequately protect the former and incumbent's right to claim executive privilege on Presidential records proposed for opening after the 12-year restricted period under the Presidential Records Act (PRA). It is my belief that the claims of privilege after the 12-year period should not be substantially expanded beyond the legislative intent of Congress. However, I do think it is appropriate for the incumbent and former President to provide us with substantial guidance in identifying those claims of privilege the former and/or the incumbent would choose to raise.

As the officer of the government who is entrusted with the "responsibility for the custody, control, and preservation of, and access to, the Presidential records" of former presidents covered by sections 2201-2207 of the PRA, I take seriously the charge that I have an "affirmative duty to make [Presidential] records available to the public as rapidly and completely as possible consistent with the provisions of [the Presidential Records Act]" (2203(f)(1)). The proposed Executive Order provides an ambiguous process for review of the records and notification of the former and incumbent Presidents. While our understanding from oral conversations between NARA's General Counsel and Associate White House Counsel Brett Kavanaugh is that there is much flexibility in the implementation of the Executive Order, I remain concerned that, as written, it will prove cumbersome and restrictive.

I also understand from my General Counsel that there are other options under consideration. Because of the crucial and precedential nature of this issue and because of our experience in dealing with access to Presidential records, I hope you will continue to share ideas and options with us, and provide us with an opportunity to review the final proposal before it is issued. I am available at your convenience to discuss this matter further and look forward to continuing to work together to resolve these important concerns.

Sincerely,


JOHN W. CARLIN
Archivist of the United States

PRIVILEGED: ATTORNEY WORK PRODUCT/ATTORNEY CLIENT

NARA Comments on 10/01/01 Draft E.O.

As more fully discussed in the August 16, 2001, memo from the NARA General Counsel to the Archivist of the United States, NARA continues to believe that the mandate and intent of the Presidential Records Act (PRA) can best be achieved through the basic structure of the current Executive Order 12667, subject to certain modifications.

NARA is concerned that the approach that is articulated in the Draft E.O. would still constitute a major shift from the original intent of the PRA. NARA believes that in enacting the Presidential Records Act (PRA), Congress intended to establish differential treatment over the long term protection of and access to Presidential records, as opposed to all other federal records, for which the FOIA (b)(5) exemption does apply. By removing the authority to withhold Presidential records under (b)(5) after the expiration of the PRA exemption 5, section 2204(a)(5) of title 44 ("P5"), the PRA deliberately established a *presumption* that, after the end of the 12 year period, any records that would have or could have been covered by those two exemptions should be available, subject, of course, to any constitutionally based privilege of the former or incumbent Presidents. But NARA believes that Congress further intended that any such privilege should be used on limited and document-by-document basis, and did not intend that former and incumbent Presidents would use Executive privilege broadly to withhold policy documents.

NARA is very concerned about the potential implications that the Draft E.O. could have on the processing of records by the Presidential Libraries. Depending on how the E.O. is implemented on behalf of former and incumbent Presidents, NARA may be required to prepare extremely detailed notifications, describing thousands of records at the document level, as compared to the current process of describing records at the file or series level. As drafted, the E.O. could apply to all of the exemptions, not just records formerly withheld under P5, as well as to records that former Presidents had previously eased under P5. These changes would be very restrictive and burdensome on the library staff, and would cause further delay in the opening of records.

However, NARA recognizes that it might be appropriate to modify E.O. 12667: (1) to make clearer that the Archivist shall not disclose any records that a former President requests be withheld for a constitutionally-based privilege (section 4(a)); and (2) to extend the presumptive time periods for review of potentially privileged records, *e.g.*, from 30 to 45 days, successively, for the former and incumbent Presidents, and allow former Presidents the authority to extend the time, if necessary (section 2(b)).

As described in more detail below, NARA has two primary concerns with the Draft E.O.: (1) there is no explicit language to support a narrower application of the very broad authority to withhold records that is established by the draft; and (2) assertions of executive privilege should not be made, in perpetuity, after the death of a former President by his family and/or designated representative.

With respect to the Draft E.O., to the extent that a new E.O. is contemplated, attached are suggested changes, along with the following specific comments and concerns:

PRIVILEGED: ATTORNEY WORK PRODUCT/ATTORNEY CLIENT

1. NARA recognizes that the Draft E.O. intends "only to establish procedures the former and incumbent Presidents to make . . . determinations" on constitutionally-based privileges, and does not necessarily dictate that such privileges will be applied as broadly as described in the draft, nor preclude former and incumbent Presidents from applying such privileges more narrowly. However, because there is nothing in the Draft E.O. to prevent or even counsel against the broadest application, NARA is concerned that the language of a new E.O. could lead to overbroad application of privileges. Accordingly, we would recommend that the introductory paragraph also reference the PRA's statutory mandate "to make [Presidential] records available to the public as rapidly and completely as possible." 44 U.S.C. 2203(f)(1).
2. Section 2, Heading: The fundamental concern that the Draft E.O. is trying to address is the ability to continue to withhold, after the end of the 12 year period, records that were being withheld during and up to the end of the 12 year period under P5. Accordingly, the focus of the Draft E.O. should be on PRA exemption P5, *i.e.*, "records that formerly had been covered by paragraph (a)(5) section 2204 of title 44," rather than on FOIA exemption (b)(5), *i.e.*, "records otherwise covered by paragraph (b)(5) of section 552 of title 5." Because former Presidents have narrowed the application of P5 during the 12 year period, the Draft E.O. should make the status quo at the end of the 12 year period the starting point for which records should be reviewed for privilege. (Section 5 of the Draft E.O. still makes clear that privilege could be asserted over any other record.)
3. Section 2(a): NARA believes that it is unnecessary to reference the state secrets privilege with respect to withholding records formerly covered by P5 or otherwise covered by (b)(5). Any records that would be subject to the state secrets privilege are adequately protected under the continuing application of FOIA exemptions (b)(1) and (b)(3). In addition, the Supreme Court in *Nixon v. Administrator of General Services* noted that only the incumbent President may assert the state secrets privilege. 433 U.S. 425, 440 (1977).
4. Section 2(b): Any reference to the Supreme Court's recognition in *Nixon v. Administrator of General Services* that a former President can continue to assert executive privilege should also acknowledge the Court's equally important recognition that the privilege and the need to assert it is "limited and subject to erosion over time after an administration leaves office."
5. NARA also recommends that the reference to *Armstrong v. Bush* be deleted, and believes that reliance on the district court language in *Armstrong v. Bush* is misplaced. In the first place, it appears that the district court was merely summarizing the holding in *Nixon v. Administrator of General Services*, in which case it is not clear on what basis the district court discerned from *Nixon* that there is "an expectation of permanent confidentiality." 721 F. Supp. 343, 350 (D.D.C. 1989) (emphasis added). As noted above, the Supreme Court clearly stated that "[t]he expectation of confidentiality of executive communications . . . has always been limited and subject to erosion over time after an administration leaves office." In addition, the district court's discussion of this issue was in the context of holding that records management actions of the President under the PRA are subject to judicial review, a holding that was demonstrably reversed by the Court of Appeals. *Armstrong v. Bush*, 924 F.2d 282 (D.C. Cir. 1991). Finally, we are not aware that other courts have opined on the issue of permanent confidentiality or have cited to the district court language in *Armstrong*.

PRIVILEGED: ATTORNEY WORK PRODUCT/ATTORNEY CLIENT

6. Section 2(c)(1): Consistent with longstanding practice, the notice to the former and incumbent Presidents for FOIA requests should be made only after NARA has searched for, identified, and reviewed the records responsive to the request, and not when the request is "received."

Also, while NARA will provide copies of any and all records to the former and incumbent Presidents upon request, NARA does not want to needlessly make and send copies of large volumes of records without a specific request to do so. Guidelines for when and where NARA should send records and what amount can be established by the parties.

7. Section 2(c)(2): Consistent with the statutory mandate to make records available to the public as rapidly and completely as possible, NARA recommends that the presumptive review period for the former President be limited initially to 45 days, with the authority to extend the time period for unduly burdensome requests or other appropriate reasons. Because the incumbent President will engage in a second round review (under section 2(c)(4)), which could take even longer than an additional 45 days, the overall time period for review represents a significant increase over the current 30 day presumption. In addition, the Draft E.O. should contain language to encourage collaboration between the Archivist and the former President that allows for even quicker review to the extent practicable.
8. Section 2(c)(4): NARA recommends including a presumptive time period for review by the incumbent President of 45 days, which follows after the review by the former President. In addition, the Draft E.O. should contain language to encourage collaboration between the Archivist and the incumbent President that allows for even quicker review to the extent practicable. NARA also recommends that the incumbent President consider a presumptive end date, not to exceed 25 years, for any records withheld, as discussed in paragraph 7, above.
9. Section 2(c)(4)(ii): NARA is concerned that a requirement to withhold records on a claim of privilege by a former President when the incumbent President opposes such a claim may be inconsistent with the decision in *Public Citizen v. Burke*, 843 F.2d 1473 (D.C. Cir. 1988).
10. Section 7: Consistent with the concerns noted above in paragraph 1, NARA recommends that language be included in this section that encourages disclosure to the maximum extent possible.
11. Section 8: NARA strongly recommends that this section not be included as part of any proposed Executive Order at this time. NARA is not at all clear as to the constitutional or legal authority that would allow the heirs of a former President, or their representatives, to assert the U.S. Government's constitutionally-based privileges in perpetuity. For example, this section may be inconsistent with section 2204(d) of the PRA, which requires that the President or former President designate a representative while living, in writing. Before such a position were to be adopted, NARA recommends that the issue be thoroughly reviewed by the Attorney General and the Office of Legal Counsel, following an opportunity for input from all relevant parties.

DRAFT
(October 1, 2001)

By virtue of the authority vested in me as President by the Constitution and laws of the United States of America, and in order to establish policies and procedures implementing section 2204(c) of title 44 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 Archivist's "affirmative duty to make [Presidential] records available to the public as rapidly and completely as possible consistent with the provisions of [chapter 22 of title 44]," 44 U.S.C. 2203(f)(1), and with *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977), 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.

Section 2. *Presidential Records formerly covered by section 2204(a)(5) of title 44 ~~Otherwise Subject to Section 552(b)(5) of Title 5.~~*

- (a) When the limitations on access imposed by section 2204(a) and 2204(b) have expired, section 2204(c) of title 44 directs that the Archivist administer Presidential records in accordance with section 552 of title 5, including by withholding 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) establishes that the former President or incumbent President may assert the constitutionally based privileges that formerly had been covered by section 2204(a)(5) of title 44 and that exemption (b)(5) of section 552 ordinarily encompasses, including but not limited to privileges for records that reflect: ~~military, diplomatic, or national security secrets and thereby fall within the state secrets privilege,~~ official presidential communications and thereby fall within the presidential communications privilege, legal advice or legal work and thereby fall within the attorney-client or attorney work product privileges, or the deliberative processes of the President or his advisors and thereby fall within the deliberative process privilege.
- (b) ~~Absent~~ Consistent with the kind of demonstrated, specific need for particular evidence that can arise in criminal proceedings, ~~courts have recognized that "the~~

~~expectation of permanent confidentiality is central to the President's performance of his duties; were that expectation compromised, perhaps by premature disclosure of privileged information, the process of presidential decisionmaking would suffer.~~ *Armstrong v. Bush*, 721 F. Supp. 343, 350 (D.D.C. 1989). ~~The the~~ Supreme Court explained in *Nixon v. Administrator of General Services* that "[u]nless [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 Supreme Court therefore ruled that the constitutionally based privileges available to a President "survive[] the individual President's tenure." 433 U.S. at 449. Furthermore, the Court expressly rejected the argument that "only an incumbent President can assert the privilege of the Presidency." 433 U.S. at 448. **The Court also stated that the "expectation of confidentiality of executive communications thus has always been limited and subject to erosion over time after an administration leaves office." *Id.* at 451.**

- (c) When the limitations on access imposed by section 2204(a) and 2204(b) have expired and the Archivist is thereby administering Presidential records in accordance with sections 2204(c) of title 44, the Archivist shall administer Presidential records as follows:
1. ~~When the Archivist receives~~ **Prior to disclosing records in response to a** request for access to Presidential records under section 2204(c)(1), the Archivist shall provide notice to the former President and the incumbent and, as soon as practicable, shall provide the former President and the incumbent President copies of **any of the records in question or of those records that the** former President and the incumbent President request to review.
 2. After receiving the records he requests, the former President shall review those records within a reasonable time, generally not to exceed ~~90-45~~ days for requests that are not unduly burdensome. The Archivist shall not disclose the records during this period of review. **The Archivist shall work with the former President or the designated representative of the former President to complete reviews in a shorter time period, where practicable.**
 3. 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 or authorizes disclosure of privileged records that fall within the state secrets, presidential communications, attorney-client, attorney work product, deliberative process, or other constitutionally based privileges.
 4. After the former President has reviewed the records and indicated whether he requests withholding or authorizes disclosure of records that fall within the state secrets, presidential communications, attorney-client, attorney work

product, deliberative process, or other constitutionally based privileges, the incumbent President may also, within a reasonable time, generally not to exceed 45 days for requests that are not unduly burdensome, review the records in question, or may utilize whatever procedures he deems appropriate, to decide whether to oppose the former President's decision. The Archivist shall work with the incumbent President to complete reviews in a shorter time period, where practicable.

- (i) If the incumbent President does not oppose the former President's decision to request withholding of records as privileged, the incumbent President shall so inform the Archivist and the former President. The Archivist shall not disclose those records to a requester unless and until an incumbent President advises the Archivist that the incumbent President and the former President agree to disclosure of the records or until so ordered by a court.
- (ii) If the incumbent President opposes the former President's decision to request withholding of the records as privileged, the incumbent President shall so inform the Archivist and the former President. Because the former President independently retains the right to assert constitutionally based privileges, the Archivist shall not disclose the records to a requester unless and until an incumbent President advises the Archivist that the incumbent President and the former President agree to disclosure of the records or until so ordered by a court.
- (iii) If the incumbent President does not oppose the former President's decision to authorize disclosure of records, the Archivist shall disclose the records to the requester.
- (iv) If the incumbent President opposes the former President's decision to authorize disclosure of the records, the incumbent President may independently order the Archivist to withhold privileged records that fall within the state secrets, presidential communications, attorney-client, attorney work product, deliberative process, or other constitutionally based privileges. In that instance, the Archivist shall not disclose the records to a requester unless and until an incumbent President advises the Archivist that the incumbent President and the former President agree to disclosure of the records or until so ordered by a court.

Section 3. Absent compelling circumstances, the incumbent President will not oppose the privilege decision of the former President to request withholding or authorize release of privileged records in response to a request for access under section 2204(c)(1). Furthermore, absent such compelling circumstances, the incumbent President will support the former President's decision in any forum in which the

privilege claim is challenged. *See Nixon v. Administrator of General Services*, 433 U.S. at 449.

- Section 4. This Order does not expand or limit an incumbent President's right to obtain records of a former President pursuant to section 2205(2)(B).
- Section 5. This Order does not expand or limit the rights of a court, House of Congress, or authorized committee or subcommittee of Congress to obtain 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 expeditiously review the records in question and, within 20 days of receiving notice from the Archives, indicate his decision with respect to privilege. The incumbent President shall indicate his decision with respect to privilege within 10 days after the former President has indicated his decision. Those periods may be extended for requests that are burdensome. The Archivist shall not release the records unless both the former President and the incumbent President authorize release.
- Section 6. This Order does not limit the former President's or an incumbent President's right to withhold records on any ground supplied by the Constitution, statute, or regulation.
- Section 7. This Order is not intended to indicate whether and under what circumstances an incumbent or former President should assert or waive any privilege. The Order is intended only to establish procedures for former and incumbent Presidents to make those determinations. **The incumbent and former Presidents are encouraged to work with the Archivist to develop guidelines to assist in the implementation of this Order in a manner that supports the Archivist's "affirmative" statutory "duty to make such records available to the public as rapidly and completely as possible."**
- Section 8. The former President may designate a representative to act on his behalf for purposes of the Act and this Order. ~~Upon the death of a former President, a representative whom the former President designated 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 a designated representative after the former President's death, the family of the former President may designate a representative to act on the President's behalf for purposes of the Act and this Order, including with respect to the assertion of constitutionally based privileges.~~
- Section 9. This Order is intended only 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 against the United States, its agencies, its officers, or any person.

Section 10. Executive Order 12667, issued January 18, 1989, is revoked to the extent it applied after the limitations on access imposed by section 2204(a) and 2204(b) have expired.