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DOCUMENT NO.	FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
001	Court Filing	American Historical Association, et al. [40 PAGES RELEASED IN WHOLE ON PRA RE-REVIEW 09/08/2025 JLS]	40	02/08/2002	

COLLECTION TITLE:

Counsel's Office, White House

SERIES:

Kavanaugh, Brett - Subject Files

FOLDER TITLE:

PRA (Presidential Records Act) Litigation [Folder 1]

FRC ID:

9802

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.

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SUPERSEDED

DOCUMENT NO.	FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
001	Court Filing	American Historical Association, et al.	40	02/08/2002	P5;

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN HISTORICAL
ASSOCIATION, et al.,
Plaintiffs,

v.

NATIONAL ARCHIVES AND
RECORD ADMINISTRATION, et al.,
Defendants.

No. 1:01CV02447 (CKK)

MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

Craig, I
scribbled a
lot and
made a
number of
suggestions.
Great job. I
look forward
to your
reactions.
Brett

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Assistant Attorney General

ROSCOE C. HOWARD, JR.
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Date: February 8, 2002

Do not feel obligated
to use words I suggest
or agree with them.
But let's discuss
bigger ones if
you disagree.

In its 1977 decision in Nixon v. GSA, the Supreme Court recognized that both current and former Presidents retain the right to assert privileges over the records of a former President.

PRELIMINARY STATEMENT

In the wake of the Supreme Court's decision in Nixon v. Administrator of General Services, 433 U.S. 425 (1977), Congress, in 1978, passed the Presidential Records Act ("PRA" or "the Act"), 44 U.S.C. §§ 2201-2207, which established that Presidential records were government property, the put statute also provided that disclosure of particular records ^{can} "adversely affect" a President's (or former President's) "rights and privileges." Id. § 2206(3). Thus, Congress specifically provided that the PRA ^{does not} be construed to "limit . . . any constitutionally-based privilege which may be available to an incumbent or former President." Id. § 2204(c)(2).

On November 1, 2001, President Bush, acting ^{pursuant to the statute and} under his inherent constitutional authority, signed Executive Order ("EO") No. 13233 ("Bush Order") to "further implement" the PRA. The President's Order establishes policies and procedures for incumbent and former Presidents to claim constitutional privileges with respect to presidential records otherwise subject to release under the Act. It does not purport to establish whether, or under what circumstances, a former or incumbent President should assert or waive any constitutionally-based privilege. ited

Less than a month after President Bush signed EO 13233, Plaintiffs filed this action against the National Archives and Record Administration ("NARA") and John W. Carlin, Archivist of the United States ("Archivist"). Although neither President Bush nor any former President has asserted privilege over any records Plaintiffs seek, and although none of the Order's principal provisions has been applied to Plaintiffs, the Complaint seeks a declaratory judgment that EO 13233 is invalid on its face.

Plaintiffs also seek a mandatory injunction (or a writ of mandamus) requiring Defendants to make available approximately 68,000 pages of presidential records from the Administration of former President Reagan ("68,000 pages"). On November 29, 2001, former President Reagan, through his representative, stated he was not asserting constitutional privilege over any of the 68,000 pages. Since that time, the ^{Administration Executive Branch} White House has been actively reviewing these records for release. To date, ^{the President Bush} it has authorized release of approximately 8,000 pages, and expects to authorize release of thousands more in the upcoming days.

This action should be dismissed. Whether viewed as a problem of standing, ripeness, or mootness (or some combination of the three), Plaintiffs' claims are not justiciable. Most importantly, the only "injury" Plaintiffs allege is neither traceable to the Bush Order provisions they challenge, nor redressable against these Defendants. Plaintiffs' claims also are unripe, under either the constitutional or prudential branch of the ripeness doctrine.

because
no privilege
has been
asserted
over
any
records

Even assuming justiciability, this action should be dismissed for failure to state a claim. While the PRA recognizes that presidential records may be subject to constitutionally-based privileges – and, indeed, states it should not be construed to "limit" such privileges – the Act does not address the mechanics for asserting and preserving privilege objections. Congress, instead, appropriately left those issues to the Executive Branch, and the Bush Order is fully consistent with ~~both the letter and spirit of~~ the PRA, as well as the ~~leading cases~~ on presidential ~~constitutional~~ privilege. *Supreme Court precedent*

In the end, Plaintiffs' arguments are based on a fundamental misunderstanding of the Bush Order. EO 13233 ~~is not a classification scheme; it~~ does not make records "secret." It establishes procedures by which incumbent and former Presidents can – subject to judicial review – assert constitutionally-based privileges in presidential records prior to their release under the PRA. ~~These procedures make sense and are effective. Since EO 13233 was issued, the White House has actively been reviewing, and releasing, the Reagan records Plaintiffs seek. No page has been withheld on grounds of privilege. In the event the Court determines to reach the merits of Plaintiffs' challenge, it is this practical experience, not Plaintiffs' speculations of frivolous privilege assertions and indefinite delay, that should guide the Court's decision.~~

BACKGROUND

A. Statutory and Regulatory Framework

To understand the issues raised by Plaintiffs' challenge, it is necessary to put the Bush Order into an historical framework.

1. Nixon Papers Litigation

A President's papers historically were viewed as his personal property. See Nixon v.

Are n't 3 conclusions relevant the third being that Congress can't recognize that both branches can assert privileges over particular records.

United States, 978 F.2d 1269, 1287-96 (D.C. Cir. 1992). Congress first broke with this tradition in 1974, when, concerned that then-recently-resigned President Nixon "might destroy documents necessary to the Watergate investigation," see id. at 1271, it passed the Presidential Recordings and Materials Preservation Act ("PRMPA"). See note following 44 U.S.C. § 2111. The PRMPA transferred control of Mr. Nixon's presidential materials to the Administrator of General Services ("Administrator"), and directed the Administrator to promulgate regulations opening the materials for public access. See id. at §§ 101, 104.

Challenged immediately by Mr. Nixon, the Supreme Court upheld the PRMPA as facially constitutional in Nixon v. Administrator. *Two* of the Court's conclusions are relevant here. *First*, the Court rejected Mr. Nixon's claim that Congress could not, consistent with the separation of powers doctrine, authorize the Administrator to regulate the disposition of his presidential materials. See 433 U.S. at 441-46. The Court stressed that the materials remained in the Executive Branch, under the control of an officer appointed by, and subordinate to, the President, see id. at 441, and that the Act "facially is designed to ensure that the materials can be released only when release is not barred by some applicable privilege inherent in [the Executive Branch]." Id. at 444.¹

Second, the Court rejected Mr. Nixon's claim that the presidential privilege shielded his papers and tapes from archival scrutiny. See 433 U.S. at 446-55. The Court reaffirmed that the privilege is constitutionally based (see United States v. Nixon, 418 U.S. 683 (1974)), and held, for the first time, that it can be asserted by a former President. See 433 U.S. at 447-49.

Nevertheless, The Court concluded that, given the important congressional purposes underlying the PRMPA, the "limited intrusion" worked by ~~archival~~ screening outweighed Mr. Nixon's

¹The Supreme Court did not decide whether Mr. Nixon or the United States had legal title to the presidential materials governed by the PRMPA. See Nixon v. Admin., 443 U.S. at 445 n.8. The D.C. Circuit subsequently held that Mr. Nixon had title, and that the PRMPA constituted a "taking" requiring "just compensation." See Nixon v. United States, 978 F.2d at 1295-87.

Third, and critically, the Court held [discuss privilege over records issue here] [see previous page]

general privilege claim. See id. at 452-54. Again, the Court noted that the PRMPA “specifically preserved” Mr. Nixon’s right to assert presidential privilege to bar release of particular documents. See id. at 455.

2. The Presidential Records Act of 1978

Against the backdrop of Nixon v. Administrator, Congress in 1978 began work on a bill to deal “more broadly with control of and access to Presidential papers.” See Presidential Records Act of 1978, H. Rep. No. 95-1487, reprinted in 1978 U.S.C.C.A.N. 5732, 5737 (“House PRA Report”). Both Houses held hearings on draft legislation.²

Congress fully recognized what one legislative sponsor described as “the constitutional issues which must be dealt with by all who attempt to legislate in this area.” See Senate PRA Hearing at 2 (statement of Sen. Nelson); see also House PRA Report at 5737-38. One government witness, the Deputy Assistant Attorney General for the Department of Justice’s Office of Legal Counsel, testified at length about ~~separation of powers~~ *privilege* concerns from the Executive Branch’s perspective. See, e.g., House PRA Hearings at 91, 96, 100-01, 105, 124-25 (advocating that legislation preserve a former President’s ability to assert legally- or constitutionally-based rights or privileges prior to release of specific records).

The PRA, as enacted, reflects Congress’s consideration of the constitutional issues and its

²See To Amend Title 44 to Insure the Preservation of and Public Access to the Official Records of the President, and for other Purposes: Hearing before the Senate Committee on Governmental Affairs, 95th Cong. (1978) (“Senate PRA Hearing”); To Amend the Freedom of Information Act to Insure Public Access to the Official Papers of the President, and for other Purposes: Hearings Before a Subcommittee of the House Committee on Government Operations, 95th Cong. (1978) (“House PRA Hearings”). The draft legislation discussed during the hearings (particularly on the House side) varied in some respects from the final bill.

³124 Cong. Rec. 36846 (Oct. 13, 1978) (statement of Sen. Nelson); see also 124 Cong. Rec. 34895 (Oct. 10, 1978) (statement of Rep. Brademas) (legislation “strikes a reasonable balance between the public’s right to have access to the work product of the Government . . . and the need to provide for a free flow of ideas within the executive branch”); 124 Cong. Rec. 36844 (Oct. 13, 1978) (statement of Sen. Percy) (“while it is crucial to protect the public interest in

desire to draft a bill "fair to all parties concerned."³ Under the Act, "Presidential records" – but not "personal records" (see 44 U.S.C. § 2201(3)) – are subject to the "complete ownership, possession, and control" of the United States. See id. § 2202. The Act's provisions can be grouped in two parts: those governing presidential records during a President's term in office, and those governing presidential records after a President's term (or terms) ends. See id. §§ 2203(c)-(f).

During a President's term of office, the PRA "accords the President virtually complete control over his records." See Armstrong v. Bush, 924 F.2d 282, 290 (D.C. Cir. 1991). For example, while the PRA requires an incumbent to create records adequate to document "the performance of his constitutional, statutory, or other official or ceremonial duties," see 44 U.S.C. § 2203(a), this duty is not enforceable in the courts. See Armstrong, 924 F.2d at 290. Moreover, ~~subject to obtaining the views of the Archivist (and, when the Archivist deems necessary, notifying Congress)~~ ^{under certain conditions,} an incumbent may dispose of records that, in his judgment, "no longer have administrative, historical, informational, or evidentiary value." See 44 U.S.C. §§ 2203(c)-(e); ^{the PRA provides that} see also Armstrong, 924 F.2d at 290 (neither Congress nor the Archivist can "veto" a President's disposal decision).

After a President's term (or terms) ends, the Archivist⁴ assumes responsibility for the "custody, control, and preservation of, and access to" PRA-covered records. See 44 U.S.C. § 2203(f). While the Archivist has an "affirmative duty" to "make such records available to the public as rapidly and completely as possible," id., that duty must be exercised "consistent with"

these papers, we must also protect the constitutional rights of the individuals involved"); see generally House PRA Report at 5737-40.

⁴In 1984, Congress transferred statutory responsibility for archival- and records-management functions from the Administrator of General Services to the Archivist, an Executive Branch official appointed, and removable, by the President. See National Archives and Records Administration Act, 44 U.S.C. §§ 2101-2118; id. § 2103(a). NARA, an Executive Branch agency, is administered "under the supervision and direction" of the Archivist. See id. § 2102.

→ shouldn't the order of these 2 be flipped?
~~the PRA's other provisions~~ Id. The PRA has three principal provisions that constrain or otherwise limit the Archivist's ability to disclose presidential records.

^{otherwise}
First, access to presidential records is governed by the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552.⁵ See 44 U.S.C. § 2204(c)(1). Thus, as the House Report explains, presidential records are not "automatically available to the public," but, instead, requests for access are treated as FOIA requests, "subject to" FOIA's exemptions from compulsory disclosure. See House PRA Report at 5746-47; see also 5 U.S.C. § 552(b) (listing FOIA exemptions). The only exception to this rule is that NARA may not withhold presidential records based on FOIA exemption (b)(5), see id. 44 U.S.C. § 2204(c)(1), which generally ~~protects from disclosure materials subject to traditional common law privileges applicable in~~ civil litigation. See 5 U.S.C. § 552(b)(5); Coastal States Gas Corp. v. Dep't of Energy, 617 F.2d 854, 862 (D.C. Cir. 1980).

Second, prior to leaving office, a President may, for up to twelve years, restrict public access to records containing any of six categories of information.⁶ See 44 U.S.C. § 2204(a). These categories are: classified information; see id. § 2204(a)(1); information relating to appointments to federal office; id. § 2204(a)(2); information exempt from disclosure by statute (other than under FOIA or the Privacy Act); id. § 2204(a)(3); trade secret and commercial/financial information; id. § 2204(a)(4); personnel and medical information and

⁵Because the Office of the President is exempt from the requirements of FOIA, see Kissinger v. Reporters Comm. for Freedom of the Press, 445 U.S. 136, 156 (1980), the PRA deems presidential records "to be records of [NARA]." See 44 U.S.C. § 2204(c)(1). The Archivist is required to "administer[] [presidential records] in accordance with" FOIA, id. § 2204(c)(1), on the date no later than five years after obtaining custody of the records. See id. § 2204(b)(2).

⁶These restrictions do not apply to access request by Congress, the courts, and the incumbent President, who may access presidential records otherwise restricted from public view "subject to any rights, defenses, or privileges which the United States or any agency or person may invoke." See 44 U.S.C. § 2205(2).

This needs to be highlighted in separate paragraphs as the critical aspect of this portion of statute and is the reason the const. concerns arise

similar information the disclosure of which would invade privacy; id. § 2204(a)(6); and, in the so-called "P5" exception, "confidential communications requesting or submitting advice, between the President and his advisers, or between such advisers." Id. § 2204(a)(5).

Factbook
This last category, which protects disclosure of presidential communications, deliberations, and other information subject to a common-law or constitutionally-based privilege, was the basis for restricting public access to the 68,000 pages of Reagan records. See Complaint ("Compl.") ¶ 31. A President's decision to restrict access to a particular category of information is not judicially reviewable. See Armstrong v. Executive Office of the President, 1 F.3d 1274, 1291, 1293 (D.C. Cir. 1993).

during the 12-year period from ship end of the presidency

Once a President imposes an access-restriction, any record (or segregable portion thereof) containing restricted information "shall be so designated by the Archivist," and access barred under the FOIA until the presidential restriction expires or (if earlier) is waived. See 44 U.S.C. § 2204(b)(1); see also 36 C.F.R. § 1270.40. During a period of presidential restriction, the Archivist, in consultation with the former President, has responsibility to determine whether a particular record falls within a restricted category. See 44 U.S.C. § 2204(b)(3).

An aggrieved requester can obtain administrative (but not judicial) review of the Archivist's decision to deny access "because such record is restricted." See 44 U.S.C. § 2204(b)(3); see also 36 C.F.R. § 1270.42 (administrative review procedures). A former President can obtain judicial review of the Archivist's decision to permit access, see id. § 2204(b)(3), and the PRA authorizes the District Court for the District of Columbia to hear any action by a former President alleging that an archival decision violates his "rights or privileges." See id. § 2204(e); but see 124 Cong. Rec. 34895 (Oct. 10, 1978) (Rep. Preyer) (statutory jurisdictional provision not intended to preclude jurisdiction on other available grounds).

does this fit here? don't think so

Third, and finally, the PRA does not purport to override a President's assertion of constitutional privilege. Congress understood it could not compel, or otherwise provide for, release of privileged records. See House PRA Report at 5737 (noting that, under Nixon v. Admin., Congress may provide for release of presidential records "only when [release is] not

barred by some applicable privilege inherent in the Executive Branch").⁷ As the PRA states: "[n]othing 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." See 44 U.S.C.

§ 2204(c)(2).

The PRA
~~Thus, the PRA directs the Archivist to issue regulations governing (among other things) notice to a former President when disclosure may "adversely affect [his] rights and privileges."~~
~~See 44 U.S.C. § 2206(3). The Act does not, ^{however} ~~however~~, establish policies and procedures for asserting constitutionally-based privileges. Those issues are left to the Executive Branch. See 124 Cong. Rec. 34895 (Oct. 10, 1978) (statement of Rep. Preyer) (legislation not "designed to prejudge" issues "involving the manner of assertion of the constitutional privilege").~~

3. NARA's Regulations

Why relevant?
~~NARA issued implementing regulations on December 15, 1988, at the end of President Reagan's second term (President Reagan's records were the first presidential records made subject to the PRA). See 53 Fed. Reg. 50404 (Dec. 15, 1988); see also note following 44 U.S.C. § 2201 (effective date provision).~~

~~On the one hand, the regulations addressed the issues required by Congress in 44 U.S.C. § 2206. See, e.g., 36 C.F.R. §§ 1270.46(a), (d) (Archivist must provide at least thirty-days notice to a former President (with copies to the incumbent) "before any Presidential records of his Administration are disclosed"); id. § 1270.46(c) (former President may assert privilege during this thirty-day window).~~

~~But the regulations addressed other issues as well. For example, upon assertion of~~

⁷See also 124 Cong. Rec. 34895 (Oct. 10, 1978) (statement of Rep. Preyer) (noting that the Archivist, "if so directed," would be required to "exercise any assertion of privilege on the incumbent President's behalf"); 124 Cong. Rec. 36844 (Oct. 13, 1978) (statement of Sen. Percy) (acknowledging that Congress "cannot prevent a former or incumbent President from arguing, even after the [lapse of a presidentially-imposed restriction], that a particular confidential communication between the President and an adviser should not be released").

*count shouldn't
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these
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I still feel like this is distracting and unhelpful as so much text

privilege by a former President, the regulations contemplated (at least in theory) that the Archivist might "nevertheless determine[]" that the record in question should be disclosed." See 36 C.F.R. § 1270.46(c). In that event, the regulations required the Archivist to notify the former President of this decision, specify the date for disclosure, and wait "at least 30 calendar days from receipt of the notice by the former President" before making the record publicly available. See id. § 1270.46(c), (d).

4. Executive Order No. 12667

~~Shortly after NARA published its regulations, President Reagan issued EO 12667 to "establish policies and procedures governing the assertion of Executive privilege by incumbent and former Presidents" in connection with the release of presidential records under the PRA. See Exec. Order No. 12667 ("Reagan Order"), 54 Fed. Reg. 3403 (Jan. 18, 1989), reprinted in note following 44 U.S.C. § 2204. The Reagan Order (now revoked by EO 13233) expanded upon, and in some cases supplanted, NARA's procedures.~~

~~For example, the Order barred the Archivist from disclosing a record if, within thirty-days of receiving an intent-to-disclose notice, the incumbent or former President asserted executive privilege, or the incumbent instructed the Archivist to extend the thirty-day time period. See id. § 2(b). The Order imposed no limitation on the number of times (or for how long) the incumbent could extend the time for disclosure. See id.~~

~~Moreover, the Order required the Archivist to restrict public access upon an incumbent's assertion of privilege unless directed otherwise "by an incumbent President or by a final court order." See Reagan Order § 3(d). If a former President asserted executive privilege (and the incumbent did not), the Order required the Archivist to consult with the Attorney General and the Counsel to the President to decide whether "to honor" the former President's claim. See id. § 4(a). While the Order did not set a time for decision, it directed the Archivist to "abide by any instructions given him by the incumbent President," unless otherwise directed by a final court order. Id. § 4(b).~~

5. Executive Order No. 13233

*Footnote
Archives
regs here?*

President Bush took office on the date the access restrictions imposed by former President Reagan expired. See Compl. ¶ 27. Faced with administering, ~~for the first time by any President, the Reagan Order (or any other) procedures for asserting constitutional privilege over~~ ^{the PRA and the fact that otherwise} ~~privileged records were subject to release (because~~ ^{FOIA} ~~formerly restricted (but now FOIA-able) presidential records,~~ the Bush Administration undertook "exemption (b)(5) was not available" a thorough legal review of the PRA and consider[ed] its long-term implications on the deliberative process for the Presidency and the Executive Branch." See Compl. ¶ 36 (quoting statement of the Archivist).

As a result of that review, President Bush, on November 1, 2001, issued EO 13233 to "[f]urther [i]mplement[]" Section 2204 of the PRA. See Exec. Order No. 13233 ("Bush Order"), 66 Fed. Reg. 56025 (Nov. 1, 2001). ~~Like the Reagan Order it revokes (see Bush Order § 13),~~ EO 13233 is designed to "establish policies and procedures . . . with respect to constitutionally based privileges." See id. (preamble). It is "not intended to indicate whether and under what circumstances a former President should assert or waive any privilege." See id. § 9.

Five provisions of the Bush Order are relevant to Plaintiffs' claims.

Sections 3(a)-(c). These sections establish procedures for reviewing requests for access to presidential records under 44 U.S.C. § 2204(c)(1). See Bush Order §§ 3(a)-(c). For example, under the Bush Order, former Presidents have ninety days to review requested records for privilege, absent an "unduly burdensome" request. See id. § 3(b). Privilege review for an incumbent is not time-limited. See id. § 3(d).

Section 3(d). Section 3(d) establishes that the Archivist ~~may not second-guess a former President's assertion of constitutional privilege.~~ ^{may not release} See Nixon v. Admin., 433 U.S. at 448-49 ^{PHRASING} (former President has an independent constitutional right to assert the privilege). Thus, ~~it provides that, when a former President requests withholding and the incumbent does not concur, the Archivist (at the incumbent's direction) shall deny access to the requested records "unless and until the incumbent President advises the Archivist that the former President and the incumbent President agree to authorize access . . . or until so ordered by a final and nonappealable court order."~~ ^{has asserted privileges. This provision is designed to accord with the Supreme Court's decision in Nixon v. GSA, which requires} See Bush Order § 3(d)(1)(ii).

→ I think this logically comes after the next point. set footnote.

or having
(but not sale)
Section 4. ~~Similarly to Section 3(d)~~, Section 4 confers on former Presidents the primary responsibility for asserting constitutional privileges with respect to their records. It provides that the incumbent, absent compelling circumstances, will "concur in the privilege decision of the former President in response to a request for [public] access." See Bush Order § 4. ~~When under~~ this standard, the incumbent concurs in a former President's privilege assertion, he "will support that privilege claim in any forum in which the privilege claim is challenged." Id.

Section 10. Section 10 provides that a former President may designate a representative to assert constitutional privileges on his behalf in the event he dies or becomes disabled. See Bush Order § 10. Absent such a designation, the former President's family may designate a representative to "act on the former President's behalf for purposes of the [PRA] and this order, including with respect to the assertion of constitutionally based privileges." See id.

Section 11. Finally, Section 11 states that the Bush Order policies and procedures apply equally to "records that are subject to any constitutionally based privilege that the former Vice

denies
8If the incumbent concurs in the former President's privilege assertion, the Archivist must deny access "unless and until the incumbent President advises the Archivist that the former President and the incumbent President agree to authorize access . . . or until so ordered by a final and nonappealable court." See Bush Order § 3(d)(1)(i). If the former President does not assert privilege, the incumbent may either concur in the former President's assessment (in which case the Archivist is directed to "permit access to" the requested documents), see id. § 3(d)(2)(i), or, if the incumbent does not concur, "independently order the Archivist to withhold privileged records . . . unless and until the incumbent President advised the Archivist that the former President and the incumbent President agree to authorize access . . . or until so ordered by a final and nonappealable court order." See id. § 3(d)(2)(ii).

9The other provisions of the Bush Order (not challenged by Plaintiffs) are: Section 5, which states that the Order does not expand or limit an incumbent's right to obtain presidential records under 44 U.S.C. § 2205(2)(B); see Bush Order § 5; Section 6, which establishes procedures for reviewing judicial and congressional document requests under 44 U.S.C. § 2205; see Bush Order § 6; Section 7, which states that the Order does not limit a former or incumbent President's right to withhold records on any ground supplied by Constitution, statute, or regulation; see id. § 7; Section 8, which states that, during the 12-year period of restricted access established by 44 U.S.C. § 2204(a), a former or incumbent President may request withholding of any privileged records not already protected from disclosure under § 2204(a); see Bush Order §

This means that the incumbent President ordinarily will assert privilege over otherwise privileged records when the former President does so and that the incumbent President will waive privilege over otherwise privileged records when the former President does so waive privilege

President does so waive privilege

President may be entitled to invoke.” See Bush Order § 11.⁹

8; and Section 12, which states that the Order is not intended to create any right or benefit enforceable at law by a party other than a former President or his representative. See id. § 12.

B. Facts As Alleged In Plaintiffs' Complaint

Plaintiffs – two historians, three historical and/or archival organizations, a press association, and a public interest group (Public Citizen, Inc., also serving as counsel) – filed this action against the Archivist and NARA on November 28, 2001, a little less than a month after President Bush signed EO 13233.

Plaintiffs' factual assertions are straightforward. President Reagan, upon leaving office, restricted access to approximately 68,000 pages of records based on 44 U.S.C. § 2204(a)(5), the PRA's "P5" exception. See Compl. ¶ 31. These restrictions, which President Reagan generally imposed for twelve years, lapsed on January 20, 2001 (although some of the restrictions were narrowed by Mr. Reagan before President Bush took office). See id. ¶¶ 26, 27.

NARA, by letter dated February 28, 2001, notified Mr. Reagan and President Bush of its intent to disclose the 68,000 pages, but (Plaintiffs claim) did not state that release raised a "substantial question of executive privilege." See Compl. ¶ 33. Nevertheless ~~(they say)~~, President Bush, upon receiving NARA's letter, three times directed the Archivist to extend the time period for releasing the 68,000 pages, twice for ninety days, once "indefinite[ly]." See id. ¶¶ 36, 37. At the end of this period (and, Plaintiffs claim, having reviewed no records), the President issued EO 13233, see id. ¶¶ 37, 38, 55, upon which NARA now relies in withholding the 68,000 pages from the public. See id. ¶¶ 52, 53.

One of the historian-plaintiffs, Hugh Davis Graham, notes that, during the period of restricted access, he was denied access to Reagan presidential records on the basis of the P5 exception. See Compl. ¶¶ 29-30. Plaintiffs do not contend, however, that either President Bush or former President Reagan has claimed constitutional privilege over any of the 68,000 pages (or that they have a right to access constitutionally-privileged records). See id. ¶ 56. Rather, Plaintiffs' claim is that, in the absence of a privilege assertion (or some applicable FOIA exemption), the 68,000 pages should be released now, whether or not President Bush and Mr. Reagan have completed their privilege review. See id. ¶¶ 54-57.

Plaintiffs assert two claims for relief. In their first count, they seek a declaration that the

Bush Order is contrary to both the PRA and NARA's regulations. See Compl. ¶¶ 58-63 & p. 22. Specifically, Plaintiffs' contend that the five Bush Order provisions discussed supra pp. 12-13 are unlawful. See Compl. ¶¶ 60(i)-(v) (challenging these provisions). Plaintiffs claim their challenge is reviewable under the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 551, et seq., the Declaratory Judgment Act, 22 U.S.C. § 2201, and their "nonstatutory right to judicial review" of "unlawful" executive action. See Compl. ¶¶ 1, 65.

In their second count, Plaintiffs' seek a mandatory injunction, or, in the alternative, a writ of mandamus, compelling the Archivist to make the 68,000 pages "available to the public at the Reagan Presidential Library forthwith." See Compl. ¶¶ 67-75 & p. 22. According to Plaintiffs, "[b]ecause the Bush Order is unlawful and in violation of the PRA, its terms cannot be relied upon as a basis for continued withholding of the 68,000 pages." See id. ¶ 72. Plaintiffs claim this "withholding" is reviewable under the APA, the Declaratory Judgment Act, and the mandamus statute. See id. ¶ 75.

C. Additional Facts Relevant To The Court's Jurisdiction

Before turning to the merits of our motion, there are two facts relevant to the Court's jurisdiction not contained in Plaintiffs' Complaint. See Bayvue Apartments Joint Venture v. OCWEN Fed. Bank FSB, 971 F. Supp. 129, 132 n.5 (D.D.C. 1997) ("[i]n determining the presence of subject matter jurisdiction on a motion to dismiss under F.R.C.P. 12(b)(1), the court may look to material outside the complaint").

First, by letter dated November 29, 2001, the representative of former President Reagan informed NARA that Mr. Reagan had no objection to release of any of the 68,000 pages. See Letter from Joanne Drake to Gary Stern (Nov. 29, 2001) (attached at Tab A).

Second, by letter dated December 19, 2001, the Counsel to President Bush notified NARA that Mr. Bush had determined not to assert any constitutionally-based privilege over approximately 8,000 of the 68,000 pages (the totality of records provided to and reviewed by the White House as of that date). See Letter from Alberto R. Gonzales to Gary Stern (Dec. 19, 2001) (attached at Tab B); Press Release, NARA, Previously Withheld Reagan Presidential Materials to

be Released (Dec. 20, 2001) (attached at Tab C). The letter directs NARA to "take all appropriate steps to make these records available to researchers as rapidly as possible," see Tab B, and NARA has now made the records available at the Reagan Library. Privilege review of the remaining records proceeds.

ARGUMENT

Our argument is in three parts. Part I demonstrates that Plaintiffs' claims are not justiciable because they lack standing and their claims are either unripe or moot. Part II demonstrates that, even assuming justiciability, the Court lacks jurisdiction over Plaintiffs' request for a mandatory injunction. Part III demonstrates that, even assuming a proper claim, Plaintiffs' challenge lacks merit because the Bush Order is fully consistent with the PRA and any applicable constitutional principles.

I. PLAINTIFFS' CLAIMS ARE NOT JUSTICIABLE.

The judicial power extends only to cases and controversies. See National Treasury Employees Union v. United States, 101 F.3d 1423, 1427 (D.C. Cir. 1996) ["NTEU"]. "In an attempt to give meaning to Article III's case-or-controversy requirement, the courts have developed a series of principles termed 'justiciability doctrines,' among which are standing, ripeness, [and] mootness." Id. (citing Allen v. Wright, 468 U.S. 737, 750 (1984)).

Each of these doctrines presents an independent bar (partial, in the case of mootness, complete, in the case of standing and ripeness) to the Court's consideration of Plaintiffs' claims. Two of the doctrines – standing and ripeness – are closely interrelated on these facts and, indeed, to a degree, overlap. No matter how the Court views the justiciability issue, however, the outcome is clear: Plaintiffs' claims should be dismissed for lack of jurisdiction.

A. Plaintiffs Lack Standing.

The party asserting jurisdiction always has the burden "clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute." FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 231 (1990) (internal citation omitted). To have standing under the Constitution, Plaintiffs must allege they have suffered (or will suffer): (1) an "actual or imminent" injury-in-fact; (2) "fairly . . . trace[able] to the challenged action of the defendant"; and (3) "likely" to be "redressed by a favorable decision." See Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992) (internal quotations and citations omitted).

Plaintiffs claim they have been injured solely by the ongoing privilege review (under Section 3(c) of the Bush Order), which (they say) has "delayed" release of the 68,000 pages beyond the conclusion of the twelve-year restricted period. See, e.g., Compl. ¶¶ 57, 63, 74

why should we assume this for this motion?

¹⁰While assuming this point for purposes of this motion, we do not concede it. The PRA does not purport to establish "deadlines" for constitutional-privilege review. Indeed, President Bush did not even take office until January 20, 2001, the day the twelve-year restrictions imposed by former President Reagan expired. See Compl. ¶ 27. Nothing in the PRA would – or

Assuming that such “delay,” absent an ultimate withholding, can amount to injury,¹⁰ the Complaint should be dismissed because Plaintiffs cannot meet the second and third standing requirements.

1. Any “Injury” Is Not Traceable To The Challenged Provisions.

To satisfy traceability, a plaintiff must establish a “causal connection between the injury and the [complained of] conduct.” See Lujan, 504 U.S. at 560; see also Allen, 468 U.S. at 753 n.19. All but one of the provisions Plaintiffs challenge, however, applies only upon *invocation* of a constitutional privilege. See Bush Order § 4 (requiring an incumbent to concur in a former President’s privilege assertion absent “compelling circumstances”);¹¹ id. § 3(d)(1) (requiring the Archivist to withhold access to requested documents upon a former President’s privilege assertion); id. § 10 (authorizing a former President to designate a representative to assert constitutional privilege on his behalf); id. § 11 (stating that the Order applies equally to any assertion of constitutional privilege by an incumbent or former Vice President); see also Compl. ¶¶ 60(ii)-(v) (alleging these provisions are unlawful).¹²

could – have required release of the 68,000 pages on that date. Because the Constitution requires a meaningful opportunity to assert the privilege, see Nixon v. Admin., 433 U.S. at 444 n.7, absent some showing that privilege review has been unreasonably long under the circumstances (something Plaintiffs have not – and cannot – show here), it is hard to see how delay, standing alone, can constitute injury. See Claybrook v. Slater, 111 F.3d 904, 906 (D.C. Cir. 1997) (absent a duty to act, failure to act cannot constitute injury). In any event, for purposes of this motion, we rest our standing argument on Plaintiffs’ failure to meet the traceability and redressability requirements.

¹¹This provision also applies when a former President determines not to assert a privilege, see Bush Order § 4, but Plaintiffs presumably do not challenge it to that extent.

¹²The remaining provision Plaintiffs challenge, Section 3, establishes procedures for incumbent and former Presidents to determine whether to assert a privilege. See Bush Order §§ 3(a)-(c); Compl. ¶ 60(i) (challenging this provision). As explained below, even if Plaintiffs have been injured by this provision (through any “delay” caused by the President’s ongoing privilege review under Section 3(c)), they lack standing because any “injury” is not redressable.

duty concede?

Because neither President Bush nor former President Reagan has asserted privilege over any of the 68,000 pages, Plaintiffs' cannot establish a "causal connection" between their alleged "injury" and these sections of the Bush Order, which have caused Plaintiffs no harm. See Lujan, 504 U.S. at 560 (traceability requires such a connection); Allen, 468 U.S. at 753 n.19 (same). The heart of Plaintiffs' challenge (i.e., to all but Section 3(c) of the Bush Order) should, therefore, be dismissed *for that reason alone*.

2. Plaintiffs' Claims Are Not Redressable.

Even putting traceability aside, Plaintiffs lack standing because *none* of their claims (including their Section 3(c) challenge) is redressable. Our redressability argument has two parts. The first point relates to Plaintiffs' requests for both declaratory and injunctive relief. The second point relates only to Plaintiffs' request for declaratory relief.

a. The Named Defendants Cannot Provide Plaintiffs The Relief They Seek.

Plaintiffs sued NARA and the Archivist (presumably) because they could not have brought their claims directly against the President. The Chief Executive is not subject to suit under the APA. See Franklin v. Massachusetts, 505 U.S. 788, 796 (1992) (plurality) ("the President is not an agency within the meaning of the [APA]"). Moreover, while the Constitution does not "bar every exercise of jurisdiction over the President," see Nixon v. Fitzgerald, 457 U.S. 731, 753-54 (1982), courts generally have "no jurisdiction of a bill to enjoin the President in the performance of his official [as opposed to ministerial] duties." Franklin, 505 U.S. at 802-03 (plurality) (quoting Mississippi v. Johnson, 71 U.S. (4 Wall.) 475, 501 (1866)); see also id. at 826 (Scalia, J., concurring) (providing a majority). This latter principle plainly would bar a direct suit by Plaintiffs against President Bush (a suit which, in effect, would seek to direct the President *not* to assert a constitutional privilege over any of the documents Plaintiffs seek).

To be sure, an aggrieved party ordinarily may obtain review of presidential action indirectly, i.e., by suing the subordinate official directed to carry out an allegedly illegal

presidential command. See Chamber of Commerce of the United States v. Reich, 74 F.3d 1322, 1328 (D.C. Cir. 1996). But the D.C. Circuit has noted that there may be “rare instances where the bypass [of a subordinate-officer suit] is closed, and only injunctive relief against the President himself will redress [a plaintiff’s] injury.” Swan v. Clinton, 100 F.3d 973, 979 (D.C. Cir. 1996). In that instance, if the underlying presidential conduct is not subject to an injunction – where, for example, the action at issue relates to the President’s “official” duties – the plaintiff lacks standing.¹² See id. at 976-77; see also id. at 978 (noting that, in Reich, review of executive order did “not raise issue of whether judicial power can be brought ‘to bear directly on the President’”) (quoting 74 F.3d at 1331 n.4). That is the case here.

In determining whether the “bypass” is closed, Swan, 100 F.3d at 979, the critical question is whether injunctive relief against a subordinate officer *alone* can “substantially redress” a plaintiff’s injury. See id. In Swan, a holdover appointee of the National Credit Union Administration (“NCUA”) advisory board sued then-President Clinton, a presidential aide, and the NCUA’s Executive Director, seeking reinstatement and removal of his presidentially-appointed successor (Wheat). See 100 F.3d at 975. Swan alleged the President’s actions violated the removal provisions in the NCUA statute. See id. at 977.

Although finding the statutory “duty” ministerial (and thus *potentially* enforceable against the President), see 100 F.3d at 977, the court nevertheless considered whether it could

¹²This principle applies to requests for declaratory relief, see Swan, 100 F.3d at 976 n.1; id. at 988 (Judge Silberman, concurring), and for “non statutory” review. See Dalton v. Specter, 511 U.S. 462, 474 (1994).

¹³The court noted that, even in the context of a purely ministerial act, “injunctive relief against the President personally is an extraordinary measure not lightly to be undertaken.” See Swan, 100 F.3d at 978; see also Franklin, 505 U.S. at 802 (plurality) (leaving open whether the President “might be subject to a judicial injunction requiring the performance of a purely ‘ministerial’ duty”). The Court of Appeals also questioned whether one of its prior decisions, National Treasury Employees Union v. Nixon, 492 F.2d 587 (D.C. Cir. 1974), wherein it asserted (but did not exercise) the authority to order the President to perform a ministerial act, remained good law after Franklin. See 100 F.3d at 978.

redress Swan's alleged injury by enjoining a presidential subordinate.¹³ See id. at 979. The court held it could provide such "*de facto*" relief, by ordering the other NCUA board members (added by the court as defendants) to "treat[] Swan as a member of the NCUA Board and allow[] him to exercise the privileges of that office . . . denying any such treatment to Wheat." See id. at 980 & n.3.

Here, injunctive relief solely against NARA or the Archivist (or any other subordinate official) cannot provide Plaintiffs even partial relief. In their Complaint, Plaintiffs acknowledge their request for a mandatory injunction requiring release of the 68,000 pages is really a request for release of *non-privileged* records, for Plaintiffs have no right, under the PRA or elsewhere, to access presidential records subject to a valid assertion of constitutional privilege.¹⁴ Neither the Archivist nor NARA, however, can invoke the President's authority to assert constitutional privilege. See, e.g., United States v. Nixon, 418 U.S. at 713; 124 Cong. Rec. 34895 (Oct. 10, 1978) (statement of Rep. Preyer) ("the Archivist could not, on his own authority, withhold deliberative documents for which Presidential privilege might be claimed"). Nor can they "waive" the President's privilege by releasing records before the President has determined whether any privilege *should* be asserted. There is, therefore, no "*de facto*" relief for Plaintiffs to obtain against these Defendants.

¹³The court noted that, even in the context of a purely ministerial act, "injunctive relief against the President personally is an extraordinary measure not lightly to be undertaken." See Swan, 100 F.3d at 978; see also Franklin, 505 U.S. at 802 (plurality) (leaving open whether the President "might be subject to a judicial injunction requiring the performance of a purely 'ministerial' duty"). The Court of Appeals also questioned whether one of its prior decisions, National Treasury Employees Union v. Nixon, 492 F.2d 587 (D.C. Cir. 1974), wherein it asserted (but did not exercise) the authority to order the President to perform a ministerial act, remained good law after Franklin. See 100 F.3d at 978.

¹⁴See, e.g., Compl. ¶ 33 ("NARA's notice [of intent to release] did not state that any of the records 'raise a substantial question of Executive privilege' within the meaning of § 2(a) of the Reagan Order"); id. ¶ 56 ("[n]o one has asserted a constitutionally based right or privilege that would preclude release of the 68,000 pages").

← This is not to say that a President's (or former President's) assertion of privilege is unreviewable. As explained supra pp. 6-7, the PRA directs the Archivist to administer presidential records in accordance with FOIA, and disclosure decisions are reviewable in the FOIA context. See 44 U.S.C. § 2204(c)(1). Thus, if a requester is denied access to a record upon assertion of a constitutional privilege, the requester can obtain judicial review of the merits of the assertion in a FOIA suit.

For all of these reasons, then, Plaintiffs' claims against NARA and the Archivist are not redressable. Moreover, because Plaintiffs cannot bring their claims directly against the President, they lack standing.

b. Declaratory Relief Will Not Alleviate Plaintiffs' "Injury."

Plaintiffs declaratory claim is not redressable for an additional reason: because they cannot show that relief is "'likely' to flow from a favorable judicial decision." See Allen, 468 U.S. at 751. As noted above, the only injury Plaintiffs' allege is "delay" in making the 68,000 pages available. See, e.g., Compl. ¶¶ 57, 63, 74, 75. More specifically, because former President Reagan's representative has determined not to assert privilege over any of these records (see Tab A), the only injury Plaintiffs allege is "delay" due to President Bush's ongoing privilege review.

If Plaintiffs prevail on their declaratory judgment claim, however, ^{either} the Reagan Order will again govern the procedures for asserting constitutional privilege. Under the Reagan Order (which Plaintiffs do not challenge or otherwise take issue with), an incumbent may "instruct[]" the Archivist to delay the time for privilege review. See Reagan Order § 2(b). In fact, as Plaintiffs note in their Complaint, before issuing EO 13233, President Bush, under authority of the Reagan Order, three times directed the Archivist to extend the time period for releasing the 68,000 pages, twice for ninety days, once "indefinite[ly]." See Compl. ¶¶ 36-37. These extensions account for the bulk of the "delay" at issue.

Thus, if Plaintiffs prevail on their declaratory judgment claim, and if President Bush has not completed review of the 68,000 pages, the President likely will, under authority of the Reagan Order, instruct the Archivist to extend, for as long as is necessary to conduct his privilege review, the time for release. Plaintiffs cannot establish, therefore, that declaratory relief will have any impact on (let alone abate) their alleged injury. See Allen, 468 U.S. at 753 n.19 (to satisfy redressability prong of standing, a plaintiff must establish a "causal connection" between "the alleged injury and the judicial relief requested"); see also Mideast Sys. and China Civil Constr. Saipan Joint Venture, Inc. v. Hodel, 792 F.2d 1172, 1177 (D.C. Cir. 1986) (plaintiff

is this accurate?
how can that be?

~~WANT TO DRAG AND IMPORTANT~~

¹⁵Indeed, even if Plaintiffs could establish standing, declaratory relief would be improper because, given the President's authority to extend the time for privilege review under the Reagan

could not establish standing where “the remedy would not alleviate the injury”).¹⁵

B. Plaintiffs’ Claims Are Not Ripe.

Even assuming, *arguendo*, that Plaintiffs can establish standing, their claims are unripe. The ripeness doctrine has both a constitutional and a prudential component. See NTEU, 101 F.3d at 1427. Plaintiffs cannot establish ripeness under either aspect of the doctrine.

1. Absent A Withholding, Plaintiffs’ Claims Are Not Constitutionally Ripe.

To establish constitutional ripeness, Plaintiffs must show their alleged injury is both “imminent” and “certainly impending.” See NTEU, 101 F.3d at 1427-28. As the Supreme Court has stated, a claim is not constitutionally ripe “if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all.” Texas v. United States, 523 U.S. 296, 300 (1998) (internal quotations and citations omitted).

Even assuming Plaintiffs have been injured by any “delay” caused by Section 3(c), but see n.11 supra, their remaining claims are not constitutionally ripe because they are directed to provisions of the Bush Order that rest, for their application, upon a future event: an assertion of privilege by an incumbent or former President. See supra pp. 18-19; see also Lujan v. National Wildlife Fed’n, 497 U.S. 871, 892-94 (1990) (ripeness is determined on a claim-by-claim basis). It is impossible, at this stage, to say when, if ever, these provisions may be invoked against these Plaintiffs. Any “injury” Plaintiffs might suffer, therefore, is neither “imminent” nor “impending.” See Texas, 523 U.S. at 300 (where court has “no idea whether or when” an

Order, a declaratory judgment would serve no “useful purpose.” See Public Serv. Comm’n v. Wycoff Co., Inc., 344 U.S. 237, 244 (1952) (before issuing a declaratory judgment, court should be able to see “what legal issues it is deciding, what effect its decision will have on the adversaries, and some useful purpose to be achieved in deciding them”); McCorkle v. United States, 559 F.2d 1258, 1262 (4th Cir. 1977) (“[a]n important question of public law should not be resolved by a declaratory judgment if that judgment would be futile.”), cert. denied, 434 U.S. 1011 (1978).

allegedly unlawful action may occur, "the issue is not fit for adjudication") (internal citation omitted); City of Williams v. Dombeck, 151 F.Supp.2d 9, 14 (D.D.C. 2001) (alleged injury not constitutionally ripe where "there is no certainty as to when Plaintiffs will suffer this injury").

2. Even If Plaintiffs' Claims Technically Meet Article III Ripeness Requirements, The Court Should Stay Its Hand Under The Prudential Ripeness Doctrine.

Even where a plaintiff satisfies constitutional ripeness, prudential ripeness bars jurisdiction where a court otherwise would "prematurely entangl[e] [itself] in abstract disagreements." See NTEU, 101 F.3d at 1431. In analyzing prudential ripeness, courts apply a two-part test, evaluating: "[1] the fitness of the issues for judicial decision and [2] the hardship to the parties of withholding court consideration." See id. (quoting Abbott Labs. v. Gardner, 387 U.S. 136, 149 (1967)). None of Plaintiffs' claims (including their Section 3(c) challenge) is ripe under this test.

First, Plaintiffs' claims are not fit for review because they are academic. See NTEU, 101 F.3d at 1431. No Plaintiff has been affected, in *any* way, by the challenged provisions at the heart of this lawsuit (*i.e.*, those triggered by an assertion of privilege). See Abbott Labs., 387 U.S. at 148-49 (prudential ripeness protects other Branches from judicial interference until the effects of their decisions are "felt in a concrete way by the challenging parties"). Nor is it clear when, if ever, Plaintiffs will be affected by a withholding. See, *e.g.*, Toilet Goods Ass'n, Inc. v. Gardner, 387 U.S. 158, 163 (1967) (claim challenging inspection regulations unripe where Court had "no idea whether or when such an inspection will be ordered").

Second, absent an assertion of constitutional privilege, it is difficult to see how Plaintiffs will be harmed if the Court defers review. The only "harm" Plaintiffs allege is delay. But, as explained above, even if Plaintiffs prevail on their challenge, President Bush will still have authority, under the Reagan Order, to direct the Archivist to withhold access to the 68,000 pages until the ~~White House Counsel's~~ ^{Executive Branch} office finishes reviewing those records for constitutional privilege. See Reagan Order § 2(b). The prospect of "delay," therefore, exists independently of

the Bush Order. See Winter v. California Med. Review, Inc., 900 F.2d 1322, 1325 (9th Cir. 1990) (showing of hardship requires some “nexus” between the alleged injury and the challenged action).

Moreover, any “hardship” Plaintiffs might suffer is outweighed by the institutional interests in postponing review. See State Farm Mut. Auto. Ins. Co. v. Dole, 802 F.2d 474, 480 (D.C. Cir. 1986) (“if the interests of the court and agency in postponing review outweigh the interests of those seeking relief, settled principles of ripeness squarely call for adjudication to be postponed”), cert. denied, 480 U.S. 951 (1987). Plaintiffs’ challenge, at bottom, implicates the “usually unspoken element of the rationale underlying the ripeness doctrine: If [a court] do[es] not decide [the issue] now, [it] may never need to.” See NTEU, 101 F.3d at 1431; see also City of Williams, 151 F.Supp.2d. at 16. As the D.C. Circuit has explained:

Not only does this rationale protect the expenditure of judicial resources, but it comports with our theoretical role as the governmental branch of last resort.
Article III courts should not make decisions unless they have to.

NTEU, 101 F.3d at 1431 (internal citation omitted) (emphasis added).

This Court does not “have to” reach the merits of Plaintiffs’ challenges. Moreover, there is no reason why this Court *should* reach out now to decide abstract claims implicating the Executive’s authority to assert constitutionally-based privileges. See NTEU, 101 F.3d at 1432 (deciding claim that “may never be ripe . . . to decide” is “at best a waste of judicial resources, and at worst a usurpation”); see also United States v. American Telephone & Telegraph Co., 567 F.2d 121, 133 (D.C. Cir. 1977) (“delay” in adjudication may be “an inherent corollary of the existence of coordinate branches”).

If, in the future, Plaintiffs are denied access to a presidential record on grounds of privilege, they will be free to file an action challenging the withholding. See Bush Order

¹⁶Finally, Plaintiffs’ claim for injunctive relief surely is moot to the extent it seeks production of records made public since this action was filed. As to these documents, Plaintiffs

§§ 3(d)(1)(i), (ii). Until such time, their claims are premature.¹⁶

II. THE COURT LACKS JURISDICTION OVER PLAINTIFFS' REQUEST FOR A MANDATORY INJUNCTION.

Plaintiffs' request for a mandatory injunction – i.e., that the Court require Defendants to “make the 68,000 pages . . . available” (Compl. p. 22) – is essentially a request for a writ of mandamus. See Swan, 100 F.3d at 976 n.1. Assuming, *arguendo*, that Plaintiffs have standing to raise this claim (and that it is ripe), the Court, nevertheless, lacks jurisdiction to hear it.

To establish mandamus jurisdiction, a plaintiff must make three showings: (i) that the plaintiff has a “clear right to relief”; (2) that the defendant has a “clear duty to act”; and (3) that there is “no other adequate remedy” available. See Swan, 100 F.3d at 976 n.1. Putting aside, for the moment, the first and third requirements,¹⁷ the Court lacks jurisdiction over Plaintiffs' mandamus claim because Plaintiffs cannot establish that Defendants have a “clear duty” to disclose the 68,000 pages.

A court may, in its discretion, issue a writ of mandamus to compel a federal official to perform a “statutorily required ministerial duty.” Swan, 100 F.3d at 976 n.1; see also Hayakawa v. Brown, 415 U.S. 1304, 1305 (1974) (Douglas, Circuit Justice) (writ is discretionary). A court has no power, however, under the mandamus statute, to require any government official to

have obtained “everything that [they] could recover . . . by a judgment . . . in [their] favor.” See Nat'l Res. Def. Council, Inc. v. United States Nuclear Regulatory Comm'n, 680 F.2d 810, 814 (D.C. Cir. 1982) (internal quotation and citation omitted). Because the Court “can hardly order [defendants] at this point to do something that [they have] already done,” see id., Plaintiffs' claim for release of any now-publicly-available records should be dismissed. Cf. Perry v. Block, 684 F.2d 121, 125 (D.C. Cir. 1982) (“however fitful or delayed the release of information under the FOIA may be, once all requested records are surrendered, federal courts have no further statutory function to perform”).

¹⁷The requirements for stating a cause of action under the mandamus statute are the same as the requirements for establishing jurisdiction. See Swan, 100 F.3d at 976 n.1. We show infra, Part III, in our discussion of the merits, why Plaintiffs cannot establish the first mandamus requirement (i.e., that they have “a clear right” to mandamus relief).

perform a discretionary act. See Swan, 100 F.3d at 977. Generally speaking, “a duty is discretionary if it involves judgment, planning, or policy decisions.” Beatty v. Washington Metro. Area Transit Auth., 860 F.2d 1117, 1127 (D.C. Cir. 1988) (internal quotation marks and emphasis omitted).

The “duty” at issue here – disclosure of the 68,000 pages under review – plainly is discretionary. As an initial matter, the PRA imposes no duty to disclose records the incumbent President, in his judgment, says are privileged (absent, of course, a contrary final court order). See 124 Cong. Rec. 34895 (Oct. 10, 1978) (statement of Rep. Preyer) (under the PRA, “the Archivist would continue to act under the supervision of the incumbent President and would, if so directed, exercise any assertion of privilege on the incumbent President’s behalf”). Indeed, the Archivist is duty-bound, under the Constitution, to honor an incumbent’s disclosure decisions. See, e.g., Myers v. United States, 272 U.S. 52, 134 (1926) (when exercising Executive discretion, subordinate officers “must do [the President’s] will”).

If Defendants have no duty to disclose records asserted (by the incumbent) to be privileged, then, *a fortiori*, they can have no duty to disclose while the incumbent is in the process of determining whether any privilege should, in fact, be asserted. At a minimum, construing the Act to require disclosure of records unreviewed-for-privilege would contravene Congress’s express instruction that the PRA not be read to “limit . . . any constitutionally-based privilege which may be available to . . . an incumbent.” See 44 U.S.C. § 2204 (c)(2). Because the “duty” at issue is neither “ministerial” nor “statutorily-required,” see Swan, 100 F.3d at 976 n.1, the court lacks jurisdiction over Plaintiffs’ mandamus request.

III. EO 13233 IS A LAWFUL EXERCISE OF PRESIDENTIAL POWER.

Notwithstanding these various jurisdictional barriers, in the event the Court determines to reach the merits of some, or all, of Plaintiffs’ legal challenges, it should dismiss this action under Fed. R. Civ. P. 12(b)(6) for failure to state a claim.

Plaintiffs challenge five specific provisions of the Bush Order: (i) Section 3(a) (which establishes time frames for privilege review); (ii) Section 3(d)(1) (which obliges the Archivist to

accommodate a former President's privilege assertion by not releasing requested records upon an assertion of privilege); (iii) Section 4 (which provides that an incumbent will generally concur in a former President's privilege assertion); (iv) Section 10 (which establishes procedures by which a former President may designate a representative for purposes of asserting a constitutional privilege); and (v) Section 11 (which establishes procedures by which a former Vice President may assert a constitutional privilege). See Compl. ¶¶ 60(i)-(v). In addition, Plaintiffs allege the Bush Order is contrary to NARA's regulations, and "the proper constitutional scope of executive privilege." Id. ¶¶ 61, 62.

We show below why each of Plaintiffs' challenges lacks merit. At the outset, however, it is important to note the standard by which the Bush Order should be judged. A President's power to act "must stem either from an act of Congress or from the Constitution itself." See Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 585 (1952). Here, the power stems largely ~~(if not wholly)~~ from the Constitution: authority to establish policies and procedures governing the assertion of constitutionally-based privileges derives from, and is a necessary corollary of, the President's Article II power to assert constitutional privilege in the first instance. See, e.g., United States v. Nixon, 418 U.S. at 705-07 (privilege rooted in the Constitution).

To the extent Congress has authority in this area, it has left the task of devising procedures for asserting constitutional privileges to the Executive Branch. See 124 Cong. Rec. 34895 (Oct. 10, 1978) (statement of Rep. Preyer) (PRA is not "designed to prejudge" issues "involving the manner of assertion of the constitutional privilege"); 124 Cong. Rec. 36846 (Oct. 13, 1978) (statement of Sen. Nelson) (PRA "not in any way . . . intended to impinge on whatever constitutional Presidential privilege the incumbent or the former President might assert"); 44 U.S.C. § 2206(3) (delegating to NARA authority to promulgate regulations governing notice to former Presidents "when the disclosure of particular documents may adversely affect any rights and privileges which the former President may have").

Where a President exercises not only his own powers, but those delegated (explicitly or implicitly) by Congress, his action is "supported by the strongest of presumptions and the widest

latitude of judicial interpretation, and the burden of persuasion [] rest[s] heavily upon any who might attack it.” Dames & Moore v. Regan, 453 U.S. 654, 668 (1981) (internal quotation omitted). With these principles in mind, we turn to the specific provisions at issue.

A. Section 3(a).

Section 3(a) of the Bush Order establishes procedures for Presidents and former Presidents to review requests for access to presidential records under 44 U.S.C. § 2204(c)(1). Plaintiffs contend these provisions violate the “PRA’s command that records may not be restricted after the 12-year period expires,” see Compl. ¶ 60(i), as well as the Archivist’s “duty” to make presidential records public “as soon as possible.” See id. Both contentions are wrong.

Section 3(a)’s procedures are straightforward. At an “appropriate time” after receiving a request, the Archivist must provide notice to the incumbent and former President, and, as “soon as practicable” thereafter, copies of any records sought for review. See Bush Order § 3(a). If the former President requests copies, he must review any records “as expeditiously as possible, and for no longer than 90 days for requests that are not unduly burdensome.” See id. § 3(b). “Concurrent with or after” the former President’s review, the incumbent “may also review the records in question” or utilize any other procedures to determine whether to concur in the former President’s privilege assessment. See id. § 3(d). The Archivist may not allow access to requested records while a President’s (or former President’s) review is ongoing. See id. §§ 3(b), (d).

The PRA does not “command” the Archivist to make presidential records available before the incumbent or former President can determine whether to assert a privilege. To the contrary, the Act states it should not be construed to “limit . . . any constitutionally-based privilege.” See 44 U.S.C. § 2204(c)(2). As the Supreme Court recognized in Nixon v. Administrator, the privilege would be meaningless without an ability to assert it. See 433 U.S. at 444 n.7 (PRMPA must be read to afford President Nixon “meaningful notice” of archival decisions potentially implicating constitutional or legal privileges); see also Nixon v. Freeman, 670 F.2d 346, 359 (D.C. Cir.), cert. denied sub nom. Nixon v. Carmen, 459 U.S. 1035 (1982) (“those who see in disclosure a threat to the privilege must be given a meaningful opportunity to

contest disclosure on that basis").¹⁸

Moreover, while Plaintiffs are correct that the Archivist has a duty to make presidential records available "as rapidly and completely as possible," see 44 U.S.C. § 2203(f)(1), the Archivist is required to exercise that duty "consistent with" the other provisions of the Act. See id. As noted above, the PRA specifically states it should not be read to "limit" any constitutionally-based privilege. See id. § 2204(c)(2). It would be flatly inconsistent with the Act, as well as the separation-of-powers doctrine, to require release of presidential records before the incumbent (or former) President has a "meaningful opportunity" for privilege review.¹⁹

B. Section 3(d)(1)(ii) and Section 4.

Section 4 of EO 13233 provides that the incumbent President, absent "compelling circumstances," will "concur in the privilege decision of the former President in response to a request for [public] access" and "[s]upport that privilege claim in any forum in which the privilege claim is challenged." See Bush Order § 4. Section 3(d)(1)(ii) provides that, even absent incumbent concurrence, upon a former President's assertion of privilege, the Archivist "shall not permit access" to requested records "unless and until" the incumbent and former Presidents "agree to authorize access . . . or until so ordered by a final and nonappealable court order." See Bush Order § 3(d)(1)(ii). Plaintiffs contend these provisions are inconsistent with the Archivist's

¹⁸Because a President's records can be so voluminous, see, e.g., Compl. ¶ 25 (President Reagan's records included "almost 44 million pages of documents"); Freeman, 670 F.2d at 349 n.3 (President Nixon's records included approximately 42 million pages of documents), it is appropriate that any privilege review take place as records are requested and subject to release.

¹⁹Plaintiffs also contend the Bush Order is unlawful because it allegedly requires requesters to establish a "demonstrated, specific need" in order to request specific presidential records. See Compl. ¶ 41. This is wrong. The portion of the Bush Order Plaintiffs cite merely notes, in a background section, that courts have required a showing of "need" to overcome a constitutional privilege. See Bush Order § 2(c). Nothing in the Bush Order suggests that a requester must make a showing of need merely to request a presidential record. Under the PRA, requests for presidential records are governed by the FOIA, see 44 U.S.C. § 2204(c)(1), which has no "need" requirement. The Bush Order does not change this procedure.

duty to make presidential records available "as rapidly and completely as possible" upon expiration of the 12-year restricted-access period.²⁰ Not so.

As an initial matter, Plaintiffs do not appear to contend (nor could they) that, absent the PRA, Sections 3(d)(1)(ii) and 4 would be unconstitutional. Former Presidents have an independent constitutional right to assert the constitutional privilege. See Nixon v. Admin., 433 U.S. at 448-49. While the privilege is "subject to erosion over time," see id. at 451, there are (as explained below) compelling reasons why an incumbent generally should defer to, accommodate, and support, a former President's assertion, free from considerations of political advantage (and there is certainly no constitutional bar to the incumbent doing so).²¹ See Public Citizen v. Burke, 843 F.2d 1473, 1478 (D.C. Cir. 1988) ("[i]t may well be . . . that a former President's privilege is diminished if an incumbent President sits 'as judge' of the validity of the claim"). President Bush is uniquely suited to judge this point, for he, as the incumbent, is in "the best position to assess the present and future needs of the Executive Branch." Nixon v. Admin., 433 U.S. at 449.

~~denial~~ deny
Requiring the Archivist to ~~deny~~ access when the incumbent determines not to concur in a former President's privilege assertion (and without regard to the ultimate merit of the former President's assertion), see Bush Order § 3(d)(1)(ii), presents no constitutional problem. Indeed, some form of access-denial is necessary to preserve a former President's ability to keep assertedly-privileged materials confidential pending the outcome of any challenge. See Freeman, 670 F.2d at 355 & n.12 (in PRMPA context, Archivist must deny access to requested records "

²⁰Plaintiffs' position is set out extensively in their lawyer's recent testimony before Congress. See <http://www.citizen.org/litigation/briefs/FOIAGovtSec/articles.cfm?ID=6427>.

²¹To be sure, an incumbent could not support a former President's assertion of privilege in a manner inconsistent with the incumbent's own constitutional duty to "take care that the laws be faithfully executed." See U.S. Const., Art. II, § 3, cl. 4. The Bush Order, however, specifically provides that, where "compelling circumstances" exist, the incumbent has no obligation to support (and, indeed, may choose to oppose) a former President's privilege assertion. See Bush Order § 4.

in court

until after Mr. Nixon has had a chance to appeal the determination [to disclose] both administratively and judicially"); see also id. at 359 ("those who see in disclosure a threat to the privilege must be given a meaningful opportunity to contest disclosure on that basis").

Thus, Plaintiffs' argument here is statutory: i.e., that Sections 4 and 3(d)(1)(ii) conflict with the PRA. ~~But this cannot be.~~ The PRA states expressly that it should not be construed to "limit" any constitutionally-based privilege of an incumbent or former President. See 44 U.S.C. § 2204(c)(2). Obligating an incumbent President, through the Archivist, to review, and take positions on, privilege assertions of a former President, while perhaps not a "constitutional anomaly," see Burke, 843 F.2d at 1480, could, as a practical matter, well have a "real world" impact on a former President's privilege.

"[O]ur Nation's history reveals a number of instances where Presidential transition has not been particularly friendly or easy," and that "[o]n occasion it has been openly hostile." Nixon v. Admin., 433 U.S. at 491 (Blackmun, J., concurring in part and in the judgment); see also Dellums v. Powell, 561 F.2d 242, 251 (D.C. Cir.) (Judge MacKinnon, concurring), cert. denied, 434 U.S. 880 (1977). It is not hard to imagine how an incumbent could, if determined, make it difficult for a former (and possibly antagonistic) President to assert an arguably valid privilege over politically-sensitive records.

Indeed, one reason why Congress made presidential records subject to "statutory access" was "to shield the Archivist from unnecessary pressure," see PRA House Rep. at 5739, including possible pressure from the incumbent President to release embarrassing and inappropriate material concerning a predecessor or rival." See id. at 5739-40; cf. National Archives And Records Administration Act of 1984, H. Conf. Rep. No. 98-1124, reprinted in 1984 U.S.C.C.A.N. 3894, 3895 (in creating NARA, noting that archival decisions should be "insulated from the political orientation of a particular administration"). Given Congress's apparent desire to "de-politicize" presidential-record disclosure decisions, it would be anomalous, to say the least, if the PRA were interpreted to require the incumbent to judge, in the first instance, the validity of a predecessor's privilege claim.

~~Indeed, if the statute must~~

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But the PRA never
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The PRA
in fact
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recognizes
that
former
Presidents
retain
the
right to
assert
privileges.
There
is
no
conflict
between
the PRA
and the
Bush
Order.

THIS DISCUSSION
IS A LITTLE
CONFUSING

Plaintiffs' contrary argument rests solely on the D.C. Circuit's decision in Burke, but that case ^{actually} supports, ~~not undermines~~, the challenged provisions' legality. Burke involved a challenge

to regulations NARA issued under the PRMPA. The regulations, as written, authorized the

Archivist to evaluate – in the first instance, and subject to judicial review – any privilege asserted ^{by}

^{the former President}

against the release of Nixon materials. See 843 F.2d at 1476. Before the regulations were

implemented, however, the OLC issued an opinion binding on the Archivist stating that he was “

constitutionally compelled” (id. at 1479) to honor any assertion of executive privilege by former

President Nixon, and that a requester could only challenge such an assertion in federal court. See

id. at 1476-77.

The court held that the regulations, as interpreted, impermissibly delegated to the

Judiciary the Executive Branch's responsibility under the PRMPA to evaluate, in the first

instance, claims of privilege by former President Nixon. See 843 F.2d at 1479-80. The court

noted that, under § 104(a)(5) of the PRMPA, “the Archivist must afford an ‘opportunity’ to Mr.

Nixon to *assert* his privileges.” See id. at 1480 (quoting PRMPA § 104(a)(5) (emphasis in

original). Given the PRMPA's emphasis on disclosure, the court held, “the implication of the

statute is that Mr. Nixon's assertion must be directed to that individual whom Congress entrusted

with the affirmative duty to disclose.” Id.

that is, whether the President
current constitutionally
was permitted
to defer to
the former
President's
privilege
claim.

The court's opinion is noteworthy for two reasons. *First*, while the court held OLC's interpretation was not constitutionally compelled, it never suggested the interpretation was not

constitutionally *permissible*. Rather, by analyzing whether OLC's interpretation was consistent

with the statute, the court necessarily concluded that it posed no constitutional problem. See 843

F.2d at 1480.

??

Second, while the PRA, like the PRMPA, emphasizes “disclosure” (see 843 F.2d at 1480), it contains no provision requiring the *Archivist* to “afford an ‘opportunity’” (id.) to a

former President to “assert” any privilege against public access. Compare PRMPA § 104(a)(5)

with 44 U.S.C. § 2206. Nor does the PRA contain any other provision which could impose a

duty on the Archivist to evaluate claims of privilege.²² Indeed, as explained supra pp. 35-36,

assessment of privilege claims
archival ~~review~~, in at least certain cases, could well be inconsistent with Congress's express instruction that the PRA not be read to "limit" a former President's constitutional privilege. See 44 U.S.C. § 2204(c)(2). For all of these reasons, Sections 3(d)(1)(ii) and 4 are fully consistent with the PRA.

C. Section 10.

Section 10 authorizes a former President to designate a representative (or group of representatives) "to act on his behalf" upon death or disability for purposes of asserting constitutionally-based privileges under the Bush Order. See Bush Order § 10. Absent a designation, Section 10 authorizes the former President's family, upon his death or disability, to designate a representative (or group of representatives) to act on the former President's behalf. See id. Plaintiffs claim this provision – which has never been invoked – is unlawful because "the Constitution does not allow for assertion of a claim of executive privilege by someone who has not held the office of president." Compl. ¶ 60(iv). This argument is contrary to both law and history.

I don't understand this.
The Constitution does not bar a delegatee from asserting constitutional privilege on a former President's behalf. To the contrary, the need for delegation flows directly from the nature of the privilege itself. The constitutional privilege exists "not for the benefit of the President as an individual, but for the benefit of the Republic." Nixon v. Admin., 433 U.S. at 449 (internal citation omitted). Unless a President "can give his advisers some assurance of confidentiality," he "could not expect to receive the full and frank submissions of facts and opinions upon which effective discharge of his duties depends." See id. at 448-49 (internal citation omitted).

It is true, of course, that a President's constitutional privilege is "subject to erosion over time." Nixon v. Admin., 433 U.S. at 451; see also id. at 450 (noting that modern Presidents have

²²The Reagan Order required that the Archivist, under the direction of the President, determine whether to honor a former President's privilege claim, see Reagan Order § 4, but only as a matter of Executive Branch policy.

IS IT WORTH DISCUSSING THAT PRACTICAL EFFECT HERE IS MINIMAL?
under their regime, former president belongs Bush, under our regime, the requester files suit.

historically deposited their papers for "eventual disclosure"). But the privilege is tied to the office (in the constitutional sense), not the occupant, and the public interest in asserting the privilege may well endure beyond a President's lifetime or capacity to act. See Freeman, 670 F.2d at 356 (duration of privilege not measurable by a "fixed number of years").

Plaintiffs' argument also is inconsistent with history. Until 1955, when Congress passed the Presidential Libraries Act, "the burden of preserving the records of the presidents was placed on each President and his heirs," see House PRA Hearings at 478 (Appendix 10), creating a system of "private control and access restrictions." See id. at 469-70. While presidential papers are now owned by the government, neither Congress nor the courts has ever questioned the legality of the prior practice. See, e.g., Nixon v. United States, 978 F.2d at 1277-78 (surveying history of private ownership); House PRA Rep. at 5739 & n.12.

To take a more recent example, under regulations implementing the PRMPA, Mr. Nixon's heirs (or agents) may assert any privilege on Mr. Nixon's behalf to bar public release of his presidential materials. See 36 C.F.R. §§ 1275.42, 1275.44. Again, no court has ever suggested these regulations are unlawful or somehow improper. See Freeman, 670 F.2d at 352 (discussing provision without comment).

Providing a means for former Presidents to delegate their authority to assert constitutionally-based privileges is thus consistent with the Constitution, history, and common sense. As with any assertion of privilege by the former President himself, assertion by a delegatee is subject to judicial review, and the Archivist must, of course, abide by any final nonappealable court order requiring disclosure of particular presidential records. See, e.g., Bush Order §§ 3(d)(1)(i), (ii).

D. Section 11.

The PRA applies equally to vice presidential records. See 44 U.S.C. § 2207 ("Vice-Presidential records shall be subject to the provisions of this chapter in the same manner as Presidential records"). Section 11 of the Bush Order provides that it, too, applies "with respect to any [executive records of the Vice President] that are subject to any constitutionally based

Under plaintiffs' theory, a President who dies in office loses all constitutional privilege immediately that is senseless as a matter of law and policy.

privilege that the former Vice President *may* be entitled to invoke.” Bush Order § 11(a) (emphasis added). Plaintiffs contend Section 11 is unlawful because “there is no constitutional basis for a vice presidential executive privilege.” Compl. ¶ 60(v). This argument misapprehends the true nature of the challenged provision.

Section 11 does not – nor could it – “create” a constitutional privilege in the Vice President. Such a privilege is created, if at all, by the Constitution. See United States v. Nixon, 418 U.S. at 703-07. Section 11 does provide *procedures* for Vice Presidents to assert any constitutional privilege they “may” be entitled to invoke. See Bush Order § 11. But the Bush Order simply does not speak to whether an incumbent or former Vice President has a constitutional privilege, or, if so, whether the privilege can be invoked to preclude release of a particular vice presidential record. Moreover, as EO 13233 itself contemplates, any assertion of constitutional privilege by a Vice President under the Order would be subject to judicial review in an appropriate “case” or “controversy.” See, e.g., Bush Order §§ 3(d)(1)(i), (ii).

E. The “Proper Scope” Of Constitutional Privilege.

The preamble to the Bush Order states it is intended to establish policies and procedures . . . 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 decision in [Nixon v. Admin.].

Plaintiffs contend this provision is “contrary to[] the proper constitutional scope of executive privilege” (Compl. ¶ 62) because it includes “not only the privilege for confidential communications between the president and his close advisers, but also the common-law attorney-client and work-product privileges, the deliberative process privilege, and the state secrets privilege.” Id. ¶ 40.

This argument is wrong for two reasons. Most importantly, as explained above, the Bush Order does not – and could not – “expand” the privilege beyond its constitutional scope. The

scope of the privilege is determined by the Constitution.

Moreover, the notion that the constitutional privilege may, in appropriate circumstances, embrace traditional common-law privileges – such as the attorney-client, attorney work-product, or executive “deliberative process” privileges – is not on its face remarkable. See Nixon v. Fitzgerald, 457 U.S. at 753 (“while courts generally have looked to the common law to determine the scope of an official’s evidentiary privilege, we have recognized that the Presidential privilege is ‘rooted in the separation of powers under the Constitution’”) (quoting United States v. Nixon, 418 U.S. at 708); 10 Op. Off. Legal Counsel 68, 78-79 (1986) (stating long-standing Executive Branch view that a President’s constitutional privilege may “subsume” otherwise common law privileges); 6 Op. Off. Legal Counsel 481, 494 n.24 (1982) (same); see also In re Sealed Case, 121 F.3d 729, 737 n.4 (D.C. Cir. 1997) (noting that “[s]ome aspects” of the common-law deliberative process privilege “have roots in the constitutional separation of powers”); cf. In re Lindsey, 158 F.3d 1263, 1271 (D.C. Cir.) (appearing to recognize that a communication may implicate both constitutional and common-law privileges), cert. denied, 525 U.S. 996 (1998).

There is no rule (nor could there be) that the constitutional privilege necessarily *excludes* attorney-client, work-product, or deliberative communications. Rather, in determining whether these types of communications fall within the scope of the constitutional privilege, ordinary considerations – involving separation of powers and effective performance of constitutional duties – apply. See, e.g., 10 Op. Off. Legal Counsel at 78-79.

F. NARA’s Regulations.

Plaintiffs’ suggestion that EO 13233 should be declared unlawful because it allegedly is inconsistent with NARA’s regulations (see Compl. ¶ 61) misunderstands the nature of the President’s position in the Executive Branch. The President directs the actions of subordinate Executive Branch officers like the Archivist in the performance of their statutory duties, not the other way around. See, e.g., Myers, 272 U.S. at 134-35; Burke, 843 F.2d at 1478. Given that EO 13233 is a lawful exercise of presidential authority, it necessarily supersedes any inconsistent regulations of NARA. See Carlisle Tire and Rubber Co. v. United States Customs Serv., 663

F.2d 210, 217-18 (D.C. Cir. 1980) (refusing to accept the "notion that a regulation of a cabinet department can serve to override a direct Executive Order of the President"). NARA, of course, may be required to amend their regulations to conform to the Bush Order, but that presents no constitutional problem. See Myers, 272 U.S. at 134-35.

CONCLUSION

For all of the foregoing reasons, this case should be dismissed for lack of jurisdiction, or, in the alternative, on the merits for failure to state a claim.

Respectfully submitted,

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Date: February 8, 2002

CERTIFICATE OF SERVICE

I certify that on February 8, 2002, I caused copies of the foregoing "Motion To Dismiss," "Memorandum In Support Of Motion To Dismiss," and draft order to be served by first-class mail, postage prepaid, and by facsimile, on:

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