

STATEMENT BEFORE
THE SUBCOMMITTEE ON GOVERNMENT EFFICIENCY
OF THE HOUSE COMMITTEE ON GOVERNMENT REFORM
ON EXECUTIVE ORDER NO. 13,233 "FURTHER IMPLEMENTATION
OF THE PRESIDENTIAL RECORDS ACT"
November 6, 2001

Mr. Chairman and Distinguished Members:

I am honored by your invitation to speak to you today about Executive Order No. 13,233, "Further Implementation of the Presidential Records Act," issued by President Bush on November 1, 2001. My views of the legal issues raised by the Order are informed, no doubt, by my three years as a Justice Department and OMB lawyer from 1978-1981, but are shaped even more by my nearly 20 years as a teacher and researcher in the field of separation of powers law. My opinion is that the impact of Executive Order No. 13,233 is very hard to predict from its terms. It does not seek to change executive privilege law, as much as to fill gaps necessarily posed by the Presidential Records Act (PRA), 44 U.S.C. §§ 2201-2207. How it is implemented, however, could have a significant impact on the pace by which records of former Presidents are disclosed.

In order to understand Executive Order No. 13,233, it is necessary to understand the basic structure of the PRA. In essence, the Act gives the Archivist custody of a former President's

records upon the conclusion of the President's term of office, and requires the Archivist, within specific procedural guidelines, to make presidential records "available to the public as rapidly and completely as possible." 44 U.S.C. §2203(f)(1). The key procedural guidelines are two-fold.

First, a President is entitled to restrict access for up to 12 years to any of his records that fall within six specified categories. These do not include the full scope of the executive's so-called deliberative privilege, but do include records relating to appointments to federal office, records consisting of confidential communications requesting or submitting advice between the President and his advisers, or between such advisers,"and certain other files, "the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 44 U.S.C. §2204(a).

Second, at such time as a record becomes available for disclosure – either because no President has restricted access or because the time for restricted access has expired – the Archivist is to handle requests to view such records as FOIA requests, except that FOIA's exemption 5, the so-called deliberative privilege exemption, is not available as a ground for withholding a record. 44 U.S.C. §2204(c).

This structure, while thoughtful in its conception, leaves certain important questions unanswered. Those questions exist in part because, in providing for a staged release of records from past Presidents, the Act is also explicit in leaving untouched "any constitutionally-based privilege which may be available to an incumbent or former President." 44 U.S.C. §2204(c)(2). It provides for consultation between the archivist and a former President before the release of any presidential record that the former President had designated for up to twelve years of restricted access. 44 U.S.C. §2204(b)(3). It requires the Archivist to promulgate rules governing notice to a former President "when the disclosure of particular documents may adversely affect any

rights and privileges which the former President may have." 44 U.S.C. §2206(3). It also envisions judicial review to protect presidential privilege, vesting jurisdiction in the U.S. District Court for the District of Columbia "over any action initiated by [a] former President asserting that a determination made by the Archivist violates the former President's rights or privileges." 44 U.S.C. §2204(d). In short, in enacting the PRA, Congress envisioned a balancing act -- an orderly process for making presidential records "available to the public as rapidly and completely as possible," 44 U.S.C. §2203(f)(1), while preserving opportunities for former Presidents, at least, to assert constitutionally based privileges as grounds for withholding documents from mandatory disclosure.

It is in implementing that balance that the PRA leaves two obvious procedural issues unaddressed. First, it provides no administrative procedures for handling disagreements between the Archivist and either a former or sitting President with regard to a document's release. Second, it provides no process to permit incumbent Presidents to consider whether privilege ought be asserted to prevent the mandatory withholding of a predecessor's records.

Regulations issued by the Archivist of the United States have since addressed both problems, at least in part. Under 36 C.F.R. §1270.46(a)(2000), the Archivist commits to notifying a former President whenever *any* records of his Administration are to be disclosed. In paragraph (d) of that same regulation, the Archivist is ordinarily not to disclose any such records for at least 30 calendar days from receipt of such notice by the former President. Implicit, but unsaid, is the corollary that the Archivist will continue to withhold records over which a former President claims privilege if the former President files suit for that purpose within 30 days. Paragraph (e) of the regulation states that "[c]opies of all notices provided to former Presidents

under this section shall be provided at the same time to the incumbent President.”

President Reagan sought to build further specificity into the processes of consultation and review through Executive Order No. 12,667, issued on January 18, 1989. First, he required that, in providing notice of intended disclosure of presidential records, the Archivist would use whatever guidelines incumbent or former Presidents might provide to identify for the Presidents any records that might raise a substantial question of executive privilege. The Order provided that either an incumbent or former President could extend by a claim of executive privilege the 30 day period otherwise provided between notice and disclosure by the Archivist. And, in the event that a former President claims executive privilege, Executive Order No.12,667 required the Archivist to heed the incumbent President’s determination whether or not to respect the former President’s claim of privilege.

Executive Order No. 13,233 takes a somewhat different approach. Perhaps most important, Executive Order No. 12,667 – the Reagan Order – was triggered by any Archivist notice of an intent to disclose presidential records pursuant to 36 C.F.R. §1270.46. Because §1270.46 provides that the Archivist is to notify the former and incumbent Presidents upon any disclosure whatsoever, it would follow that the Reagan Order applied to any and all releases of presidential records.

In contrast, the new Bush order applies only upon requests for access to presidential records that occur under 42 U.S.C. §2204(c)(1) – requests that the Act requires the Archivist to treat as FOIA requests. Depending on how the Archivist implements the PRA, this could conceivably expedite the release of numerous presidential records. I say that because, upon the expiration of a former President’s designated period for restricted access, there are presumably

numerous such records for which FOIA would not provide any plausible ground for withholding. This would include, for example, all presidential deliberative documents that only FOIA's exemption (5) – the deliberative privilege exemption – would protect from mandatory disclosure. One way that an Archivist could fulfill the “affirmative obligation” to provide for the speedy and complete release of records would be to determine as quickly as possible upon assuming custody of presidential records which such records – upon the expiration of the former President's access restrictions – will immediately become non-withholdable under FOIA criteria. The Archivist could lawfully provide for the wholesale disclosure of such documents at precisely that time and without waiting for any FOIA-type request for access. If I read Executive Order 13,233 correctly, President Bush has added nothing by way of additional presidential review with regard to such documents.

On the other hand, for documents that the Archivist has not previously disclosed and which would thus become disclosable only upon a FOIA-type request, the Bush order contemplates notice to both the former and incumbent Presidents and an opportunity to determine whether to assert privilege. Unlike the Reagan Order, the Bush Order limits the former President's review to 90 days, except in unusual circumstances. There is no time limit on the incumbent President's review.¹ The Bush Order also provides that, “[a]bsent compelling circumstances, the incumbent President will concur in the privilege decision of the former President in response to a request for access.” Should either the former or incumbent President lodge a claim of privilege, the Archivist is directed to withhold the requested records until the

¹ Where the requester is a court or either House or any committee of Congress, the former President is limited to 21 days to conduct his review, and the incumbent President is to

Presidents direct otherwise or "a final and nonappealable court order" mandates release.

The effect of the Bush Order, in contrast with the Reagan order, is not necessarily easy to predict in terms of prolonging otherwise restricted access authorized by PRA longer than the statutory maximum of twelve years. If two conditions really exist, then the Bush Order should lead to speedier release than the Reagan order. The first condition is that there is a substantial volume of presidential records that FOIA minus exemption 5 would *not* protect from mandatory disclosure. The second condition is that the Archivist would be willing to exercise discretion to provide for the public release of all such documents on the Archivist's own initiative – that is, without waiting for any request. In such circumstances, the Bush order would not contemplate any review by the incumbent President, and it would appear much easier to achieve the release of presidential records after 12 years.

If, however, either of these conditions does not exist, then the Bush Order could slow the release of documents considerably. That is – if there are relatively few presidential records that FOIA fails to protect or if the Archivist decides not release any presidential records except pursuant to specific request – then the Bush Order would impede access considerably. The Bush order plainly provides for slower deliberation than the Reagan Order because, under the Reagan Order, both former and incumbent Presidents get only 30 days (unless extended) in which to decide whether to assert privilege following notice of the Archivist's intent to disclose. Under the Bush Order, the former President typically gets 90 days, and the incumbent President has no time limit to decide.

have 21 further days to make his own determination. §6.

There is, however, an arguably even more intriguing way that the Bush Order could slow access to presidential records. The PRA provides only six grounds upon which a former President may restrict access to his records for up to 12 years. At the same time, the statute holds all constitutionally based privileges intact. This holds open at least the theoretical possibility that the statutory grounds for restricted access might leave unprotected at least some records that executive privilege might cover. Section 8 of the Bush Order provides that, in such cases, a former President or an incumbent President may seek restricted access to those records for up to 12 years from the conclusion of the former President's term. In such cases, a record that the PRA would not have protected at all might become subject to withholding for up to 12 years absent a court order.

As it happens, however, the number of documents implicated is unlikely to be very large. The broadest form of executive privilege that courts have recognized and that Presidents are likely to care about is a privilege for presidential communications. This privilege goes very far even in covering documents solicited or received not by the President himself, but rather by his advisers. *In re Sealed Case*, 121 F.3d 729 (D.C. Cir. 1997). Such documents are protected only if created in the course of preparing advice for the President, only if they concern official governmental operations calling ultimately for the President's decision making, and only if the advisers are involved are senior. But, once those conditions are met, a document may be privileged even if the President never saw it. The PRA, however, already allows Presidents to seek up to twelve years of restricted access for such memoranda. Indeed, the PRA provision may be yet broader than the constitutionally based privilege recognized by the D.C. Circuit. Thus, although Section 8 of the Bush Order would allow Presidents to request the withholding of

privileged documents from disclosure for up to twelve years, whether or not their subject matter falls within the PRA's six grounds for restricting access to presidential records, it is just not clear how many documents are likely to be implicated in practice.

It may be said, of course, that any prospect that exists to extend executive privilege beyond the four corners of the PRA exists not because of any executive order, but because of the Constitution, and because Congress itself recognizes that courts have afforded constitutional status to presidential claims of confidentiality. Whether this prerogative turns into a brick wall of resistance to the disclosure of any former President's records, however, depends upon how the Presidents use it. Just as FOIA typically permits federal agencies to disclose even those records that are not subject to mandatory disclosure, the Constitution does not command that Presidents invoke privilege to disclose records when out of office or with regard to their predecessors. Whether the law is used for good or for mischief in this case turns again, as it often does, not on the letter of the law, but on the spirit in which it is implemented -- both by our Presidents, current and past, and by the Archivist charged with preserving and sharing our nation's precious historic record.