



# Department of Justice

---

STATEMENT

OF

M. EDWARD WHELAN III  
ACTING ASSISTANT ATTORNEY GENERAL  
OFFICE OF LEGAL COUNSEL

BEFORE THE

SUBCOMMITTEE ON GOVERNMENT EFFICIENCY,  
FINANCIAL MANAGEMENT, AND  
INTERGOVERNMENTAL RELATIONS

COMMITTEE ON GOVERNMENT REFORM  
UNITED STATES HOUSE OF REPRESENTATIVES

CONCERNING

OVERSIGHT OF THE PRESIDENTIAL RECORDS ACT

PRESENTED ON

NOVEMBER 6, 2001

Mr. Chairman, Congresswoman Schakowsky, and members of the Subcommittee:  
Thank you for affording me the opportunity to speak on behalf of the Administration on the important topic before you.

As you are aware, last week President Bush signed an executive order that implements the Presidential Records Act. Specifically, President Bush's executive order implements section 2204(c) of the Presidential Records Act. That section provides that the Act shall not be "construed to confirm, limit, or expand any constitutionally-based privilege which may be available to an incumbent or former President." In the Act, Congress thus expressly recognized that both the incumbent President and former Presidents might invoke constitutionally based privileges to prevent the disclosure of presidential records that might otherwise be disclosed pursuant to other provisions of the Act, including after the expiration of the 12-year period of presumptive nondisclosure under the Act. As Senator Percy explained, if a President "believe[d] that the 12-year closure period does not suffice, that President could object to the release of some document in the 13<sup>th</sup> or 15<sup>th</sup> or 20<sup>th</sup> year." Cong. Record S36844 (Oct. 13, 1978).

Congress's recognition that former Presidents, as well as the incumbent President, might assert constitutionally based privileges is consistent with, and compelled by, Supreme Court case law. In Nixon v. Administrator of General Services, 433 U.S. 425 (1977), the Supreme Court embraced the view that "[u]nless [the President] can give his advisers some assurance of confidentiality, a President could not expect to receive the full and frank submissions of facts and opinions upon which effective discharge of his duties depends." 433 U.S. at 448-49. In order to provide this necessary assurance of

confidentiality, the Court ruled that the President's constitutionally based privileges for confidential communications must "survive[] the individual President's tenure." Id. at 449. The Court further held that a former President, although no longer a government official, is entitled to assert constitutionally based privileges with respect to his Administration's presidential records, and it expressly rejected the argument that "only an incumbent President can assert the privilege of the Presidency." Id. at 448.

The Supreme Court's ruling that both a former President and the incumbent President are entitled to assert constitutional privileges with respect to the records of the former President, and Congress's express accommodation of that ruling in section 2204(c) of the Presidential Records Act, entail the need for procedures to govern review of any records to which such privileges may apply. President Bush's executive order establishes clear, sensible, and workable procedures that will govern the decisions by former Presidents and the incumbent President whether to withhold or release privileged documents.

Consistent with the Supreme Court's decision in Nixon v. Administrator of General Services and with sound policy, President Bush's executive order confers on former Presidents the primary responsibility for asserting privileges with respect to their presidential records. Indeed, by providing (in section 4) that the incumbent President will, absent compelling circumstances, defer to the former President's decision whether or not to invoke a privilege, President Bush's executive order grants the incumbent President less authority over the records of a former President than the incumbent President had under the previous 1989 executive order implementing the Act.

Let me emphasize, moreover, that the executive order is wholly procedural in nature. By its express terms, it does not, and is not intended to, “indicate whether and under what circumstances a former President should assert or waive any privilege.” (Executive order § 9.) Nor does it in any respect purport to redefine the substantive scope of any constitutional privilege.

Before the Presidential Records Act took effect, former Presidents generally released the vast majority of their presidential records even though they were under no legal obligation to do so. The Administration anticipates that this historical practice will continue. Indeed, because the Act and the executive order give former Presidents less power to withhold records than they had before the Act was enacted, there is no reason to anticipate that former Presidents will exercise their constitutional privileges in a way that leads to greater withholding of records.

I hope that this information is helpful and would be pleased to respond to any questions you may have about this matter.