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REINTERPRETING THE APPARENT FAILURE OF THE PRESIDENTIAL RECORDS ACT AND THE NECESSITY OF EXECUTIVE ORDER 13,233: DENYING HISTORIANS ACCESS OR PROTECTING THE PRA?

Erik Paul Khoobyarian*

I. INTRODUCTION

Presidents since George Washington have sought to protect certain information from the hands of Congress and others.¹ Executive privilege exists as a powerful tool, used by the President to guard such information. The import of executive privilege has manifested itself in a variety of ways resulting in questions of separation of powers and presidential immunity.² The Constitution of the United States is silent on many of these issues.³ More importantly, Congress historically maintained its

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1. This struggle is not the focus of this comment. It is important, however, to recognize that there is historical context to the concept that certain deliberations should be conducted in a candid fashion in order to reach results which could otherwise not be reached without confidential proceedings. See *United States v. Nixon*, 418 U.S. 683, 706 (1964) (“[t]he President’s need for complete candor and objectivity from advisors calls for great deference from the courts . . .”). This is not to say that this fact alone is sufficient to warrant that presidential secrets should all be preserved. See generally Dorsen and Shattuck, *Executive Privilege, the Congress and the Courts*, 35 OHIO ST. L.J. 1, 23 (1974) (providing background and history on the use of executive privilege).

2. See *id.*

3. See Dorsen and Shattuck, *supra* note 1 (explaining that the concept of separation of powers has evolved from the original structure of the Constitution and the intent of the Framers; executive privilege has been borne out of this concept). See also *Hearing on the Implementation and Effectiveness of the Presidential Records Act of 1978 Before the Subcomm. on Gov’t Efficiency, Fin. Mgmt., and Intergovernmental Relations, of the Comm. on Gov’t Reform, 107th Cong.* 40-62, at 42 (2002) [hereinafter *Hearings*] (prepared statement of Mark J. Rozell, Professor of Politics, Catholic University of America) (“Executive privilege is an implied power derived from Article II. It is most easily defined as the right of the President and high-level Executive branch officers to withhold information from those who have

power by refusing to buttress Executive claims of immunity from congressional interference.⁴ Ultimately, the Supreme Court stepped forward and gave the President the power to invoke the executive privilege.⁵ However, this decision raised new concerns as to whether the judiciary was empowered to make such a decision and from where that power originated.⁶ The separation of powers inherent in the Constitution has produced a body of constitutional law that makes it difficult for the layman to understand what information the President can and cannot keep from congressional reach under the executive privilege.⁷ Consequently, the duration and scope of the executive privilege sets the stage for this comment's focus on the release of presidential records.⁸

In response to pending litigation⁹ and Executive Order 13,233¹⁰ of November 1, 2001, this comment addresses the current status of the Presidential Records Act (PRA)¹¹. Part II of this comment first presents the history of presidential documents resulting in the passage of the Presidential Records Act in 1978.¹² Next, it outlines the PRA and its effect on the dissemination of presidential records.¹³ This section also discusses Executive Order 12,667¹⁴ (Reagan Order) issued at the close of President Ronald Reagan's term, which outlined the implementation of the PRA.¹⁵ Further, it addresses

compulsory power—Congress and the courts (and therefore, ultimately the public).”).

4. See Dorsen and Shattuck, *supra* note 1.

5. See *id.*

6. See *id.*

7. See generally *Hearings*, *supra* note 3 (prepared statement of Mark J. Rozell, Professor of Politics, Catholic University of America).

8. See *infra* Part II.D. In response to Executive Order 13,233, the American Historical Association, Hugh Davis Graham, Stanley I. Kutler, the Organization of American Historians, the National Security Archive, Public Citizen, Inc., and the Reporters Committee for Freedom of the Press filed a lawsuit against John W. Carlin, Archivist of the United States in the United States District Court for the District of Columbia in a complaint dated November 28, 2001. See *infra* note 130 and accompanying text. See also *supra* note 3.

9. See *supra* note 8.

10. Exec. Order No. 13,233, 3 C.F.R. 815 (2002), *reprinted in* 44 U.S.C.A. § 2204 (West 2002) [hereinafter Bush Order].

11. 44 U.S.C. §§ 2201-2207 (1994).

12. See *infra* Part II.

13. See *infra* Part II.A.

14. Exec. Order No. 12,667, 54 Fed. Reg. 3403, 1998 U.S.C.C.A.N. B95 (Jan. 16, 1989) [hereinafter Reagan Order].

15. See *infra* Part II.B.

interpretation of the PRA under Executive Order 13,233¹⁶ (Bush Order)¹⁷ and subsequent opposition to the Executive Order.¹⁸ Part III of this comment presents the legal problem with the PRA, resulting from the interpretations and implementations of the Reagan and Bush Orders.¹⁹ Part IV of this comment analyzes the implementation of the PRA from the Reagan Order to the Bush Order, and the feasibility of appropriate interpretation of the PRA as Congress drafted it in 1978.²⁰ With the introduction of legislation in 2002, this section also questions whether Congress has the legislative power to more thoroughly govern the President's use of executive privilege. Finally, Part V proposes that the Bush Order is the best way to implement the PRA.²¹

II. BACKGROUND

A. *Presidential Records Act (PRA)*

1. *Pre-Nixon*

Prior to the enactment of the 1978 Presidential Records Act (PRA),²² the President had control of his own documents both before and after his presidency.²³ This rule enabled the President to take all records of deliberations that took place while in office, presumably to the grave.²⁴ The PRA limited access to these documents by people other than the President's designees to situations involving subpoenas for legitimate court-approved reasons. Eventual release was at the discretion of the President.²⁵

Under the PRA, several Presidents released some of their materials that were then held by the presidential libraries.²⁶ The presidential libraries maintain the materials of former Presidents

16. Bush Order, *supra* note 10.

17. *See infra* Part II.C.

18. *See infra* Part II.D.

19. *See infra* Part III.

20. *See infra* Part IV.

21. *See infra* Part V.

22. Pub. L. No. 95-591, 92 Stat. 2523 (codified at 44 U.S.C. §§ 2201-2207 (1994)).

23. *See supra* note 1.

24. *See supra* note 1.

25. *See supra* note 1.

26. *See Hearings, supra* note 3, at 11-22 (prepared statement of John W. Carlin, Archivist of the United States).

Hoover, Roosevelt, Truman, Eisenhower, Kennedy, Johnson, Ford, and Carter.²⁷ These libraries operate according to the terms of the deeds of gift drafted by the former Presidents when they donated their materials to the National Archives.²⁸

The former Presidents deeded their respective materials to the National Archives with certain provisions.²⁹ According to John W. Carlin, Archivist of the United States, "[e]ach of these deeds has provisions outlining categories of records that may be withheld from public access for some period of time."³⁰ These provisions are intended to prevent disclosure of information that could "harm national security, invade personal privacy, or cause embarrassment or harassment."³¹

Prior to the PRA, the director of each Presidential Library maintained the materials of the former Presidents.³² The National Archives and Records Administration (NARA), in consultation with the former President, appointed these directors.³³ According to Carlin, "[l]iving former Presidents in some cases would establish priorities for the processing of particular subjects or series of records."³⁴ Other than these priorities for processing of documents established by the Presidents before providing them to NARA, once released to NARA, the former President gave up control of the documents.³⁵ Furthermore, most former Presidents released the vast majority of their documents, thereby subjecting them to the scrutiny of the general public.³⁶

Typically, the Freedom of Information Act (FOIA) governs the release of government documents.³⁷ The FOIA sets a timetable for the release of government documents at the request of the public as well as requirements for the reporting of statistics relating to rates of request and the number of requests

27. *See id.* at 14.

28. *See id.*

29. *See id.*

30. *Id.*

31. *Id.*

32. *See Hearings, supra* note 3, at 14-15 (prepared statement of John W. Carlin, Archivist of the United States).

33. *See id.* at 14.

34. *Id.*

35. *See id.* at 14-15.

36. *See Hearings, supra* note 3, at 20-21 (testimony of M. Edward Whelan, III, Acting Assistant Attorney General, Office of Legal Counsel, Dept. of Justice).

37. 5 U.S.C. § 552 (1988).

that are honored.³⁸ Presidential documents deeded to NARA are not subject to the same disclosure requirements as the FOIA, because they are not deemed government documents, but rather considered collectively as a gift to NARA.³⁹ As a result of the exemption from the FOIA, directors' collection of documents at presidential libraries is much quicker than typical FOIA requests.⁴⁰ However, historians and researchers have no legal recourse for materials that are not released.⁴¹ They would have these rights under the FOIA.⁴²

The concept of exempting presidential documents from the FOIA was essential to the Act, as passage of the FOIA was contingent upon it.⁴³ The FOIA was never intended to cover presidential documents.⁴⁴ In fact, it was not until the Watergate scandal that questions regarding presidential immunity and executive privilege came to the forefront of discussions of preservation of documents.⁴⁵

2. *President Nixon and the Presidential Recordings and Materials Preservation Act (PRMPA)*

In order to ensure government control of the Nixon papers and tapes, Congress passed the Presidential Recordings and Materials Preservation Act (PRMPA)⁴⁶ in 1974.⁴⁷ The PRMPA effectively opened the door to the question as to when the federal government would take ownership of presidential documents.⁴⁸ Federal ownership of presidential documents would result in their inclusion under FOIA, meaning denied requests for documents by individuals would be open to judicial review.⁴⁹ Although the PRMPA was specifically geared towards the Watergate materials, it resulted in the formation of

38. *See id.*

39. *See Hearings, supra* note 3, at 15 (prepared statement of John W. Carlin, Archivist of the United States).

40. *See id.*

41. *See id.*

42. *See id.*

43. *See id.*

44. *See id.*

45. *See Hearings, supra* note 3, at 15-16 (prepared statement of John W. Carlin, Archivist of the United States).

46. 44 U.S.C. § 2111 (1974).

47. *See Hearings, supra* note 3, at 15-16 (prepared statement of John W. Carlin, Archivist of the United States).

48. *See id.* at 15.

49. *See id.*

committees that ultimately resulted in the drafting of the PRA in 1978, four years after passage of the PRMPA.⁵⁰

The PRMPA established the National Study Commission on Records and Documents of Federal Officials.⁵¹ The PRMPA charged the commission with studying "whether the historical practice regarding the records and documents produced by or on behalf of Presidents of the United States should be rejected or accepted and whether such practice should be made applicable with respect to all federal officials."⁵² The commission produced its 1977 report, which Congress used during the formation of the PRA.⁵³

3. PRA Enactment

The Presidential Records Act, passed in 1978, directs the Archivist of the United States to administer presidential records as they would FOIA requests.⁵⁴ There are several exceptions to the FOIA distributions related to the timeframe for the release of documents.⁵⁵ Presidential records are not released during the President's term of office, and are only released under the authorization of the incumbent President after five years have elapsed.⁵⁶ Furthermore, under the PRA a President may restrict access for up to twelve years to any of his records that fall within six specified categories.⁵⁷ These six categories, roughly distilled, include: national defense, appointments to federal office, statutorily exempted materials,⁵⁸ trade secrets, confidential communications,⁵⁹ and personnel and medical files.⁶⁰

50. *See id.* at 15-16.

51. *See id.* at 15.

52. *Id.* at 15 (citing Pub. L. No. 93-526, 88 Stat. 1695).

53. *See Hearings, supra* note 3, at 15 (prepared statement of John W. Carlin, Archivist of the United States).

54. 44 U.S.C. § 2204(c).

55. *See id.* § 2204(a). Typically records requested under the FOIA are immediately available to the public. *See id.*

56. *See Hearings, supra* note 3, at 16 (prepared statement of John W. Carlin, Archivist of the United States).

57. *See Hearings, supra* note 3, at 65-77 (prepared statement of Peter M. Shane, professor, University of Pittsburgh and Carnegie Mellon University).

58. 44 U.S.C. § 2204(a)(3) ("[S]pecifically exempted from disclosure by statute . . . provided that such statute requires the material to be withheld from the public in such a manner as to leave no discretion on the issue, or . . . establishes particular criteria for withholding or refers to particular types of material to be withheld.").

59. *See id.* § 2204(a)(5) (explaining that such communications are those "between the President and his advisors, or between such advisors").

"This structure...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 [sic] may be available to an incumbent or former President.'"⁶¹ Such privileges must be identified before the President leaves office and they are not subject to judicial review.⁶²

The Archivist of the United States is responsible for "the custody, control, and preservation of, and access to, the Presidential records of th[e former] President."⁶³ Under the PRA, the NARA has taken control of the presidential records of Presidents Ronald Reagan, George H.W. Bush, and William J. Clinton.⁶⁴ The PRA mandates that the Archivist must "make [the presidential] records available to the public as rapidly and completely as possible consistent with the provisions of the Act."⁶⁵

The House report accompanying the PRA states:

The legislation would terminate the tradition of private ownership of Presidential papers and the reliance on volunteerism to determine the fate of their disposition. Instead, the preservation of the historical record of future Presidencies would be assured and public access to the materials would be consistent under standards fixed in law. The primary function of the Presidential libraries remains unchanged. The libraries are to continue to provide information about their holdings and to make records available to researchers upon request on an impartial basis.⁶⁶

Under the PRA all the presidential records of an administration are transferred "to the legal and physical custody of [NARA] immediately upon the end of the President's last term of office."⁶⁷ The PRA is a significant change from the treatment of

60. *See id.* § 2204(a)(6).

61. *Hearings, supra* note 3, at 67.

62. *See Hearings, supra* note 3, at 16 (prepared statement of John W. Carlin, Archivist of the United States).

63. 44 U.S.C. § 2203(f)(1).

64. *See Hearings, supra* note 3, at 12 (prepared statement of John W. Carlin, Archivist of the United States).

65. 44 U.S.C. § 2203(f)(1).

66. H.R. REP. NO. 95-1487, at 2-3 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5732, 5732.

67. *Hearings, supra* note 3, at 12 (prepared statement of John W. Carlin, Archivist of the United States).

Presidential documents for the 200 years, and represents a codification of the practice of Presidents who voluntarily handed their documents over to the federal government through their libraries.⁶⁸ The House Report on the PRA states that “[i]t is anticipated that the Archivist will process the former administration’s papers in a manner roughly similar to current practices.”⁶⁹

The PRA gives some degree of flexibility in its application to the Archivist and the NARA.⁷⁰ The President also may waive certain restrictions or shorten the length of restricted access.⁷¹ The Archivist’s freedom to negotiate with the former President is important to ensure that the former President’s interests are considered regarding the distribution of documents.⁷² The PRA does not take away the President’s power to exercise executive privilege after he leaves office.⁷³ Had the PRA taken that power away, it would have been preempted by the Supreme Court.⁷⁴ However, the President must decide before leaving office how he will use the restrictions and for which documents he will invoke the privilege.⁷⁵ The authority for the determination of what documents are to be released ultimately rests, however, in the Archivist.⁷⁶

Congress intended that the PRA would further allow the

68. *See id.* *See also supra* Part II.A.1-2.

69. H.R. REP. NO. 95-1487, at 15 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5732, 5746.

70. *See Hearings, supra* note 3, at 13-14, 17 (prepared statement of John W. Carlin, Archivist of the United States).

71. *See id.* at 16-18.

72. *See id.* at 13-14.

73. *See id.* at 17.

74. *See Nixon v. Adm’r of Gen. Servs.*, 433 U.S. 425, 449 (1977) (holding that constitutionally based privileges available to a President survive the President’s term).

75. *See Hearings, supra* note 3, at 17-19 (prepared statement of John W. Carlin, Archivist of the United States). When the President hands his documents over to the Archivist, the President must designate which records he intends to protect under the executive privilege. *See id.* These can be broad categories of documents and the President will ultimately need to decide, most likely after leaving office, whether to invoke the privilege with regard to these specific documents. *See id.* The President does not need to make this decision when leaving office, and retains the right to make the decision after they are no longer in office. *See id.* To do otherwise would violate the Supreme Court position that the privilege survives the President’s term. *See id.; Adm’r of Gen. Servs.*, 433 U.S. at 449.

76. *See Hearings, supra* note 3, at 16-19 (prepared statement of John W. Carlin, Archivist of the United States) (with the exception relating to Presidential restrictions that preserves the President’s ability to prevent certain documents from being released by the Archivist).

Archivist to control the documents in a manner consistent with previous practice.⁷⁷ The rights of the former President are held by the incumbent President in that the incumbent President may exercise the executive privilege to block the release of certain documents.⁷⁸ The PRA states that “[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.”⁷⁹

Like much legislation, the PRA gives the President the responsibility to interpret and implement the law.⁸⁰ Although the guidelines for implementation are found in the statute,⁸¹ the PRA never spelled out the interplay between the incumbent President, the former President, and the NARA.⁸²

B. *Executive Order 12,667 (Reagan Order)*

Two days before leaving office in 1989, President Ronald Reagan issued Executive Order 12,667⁸³ entitled the “Presidential Records” order (Reagan Order). The introduction to the Reagan Order states that it was enacted “in order to establish policies and procedures governing the assertion of executive privilege by incumbent and former Presidents in connection with the release of Presidential records by [NARA] pursuant to the [PRA] of 1978.”⁸⁴

The Reagan Order establishes a method for the release of

77. *See id.* at 17.

Moreover, in the legislative history, Congress anticipated that the Archivist [would negotiate the Presidential restrictions with the former President]: “It is also expected that the Archivist will follow past practice in applying the restrictive categories to former Presidents’ deeds of gift, and negotiate with the ex-President or his representative on an on-going basis to lessen the number of years chosen for particular mandatory restriction categories, to eliminate entire categories, or to permit release of particular records otherwise restricted.”

Id. (quoting H.R. REP. NO. 95-1487, at 15 (1978), reprinted in 1978 U.S.C.C.A.N. 5732, 5746).

78. *See Hearings, supra* note 3, at 18 (prepared statement of John W. Carlin, Archivist of the United States).

79. 44 U.S.C. § 2204(c)(2).

80. *See generally Hearings, supra* note 3 (prepared statement of John W. Carlin, Archivist of the United States).

81. 44 U.S.C. §§ 2201-2207 (2001).

82. *See generally Hearings, supra* note 3 (prepared statement of John W. Carlin, Archivist of the United States) (specifically, the role of the directors of the Presidential libraries and the Archives Director are not included in the PRA).

83. Reagan Order, *supra* note 14.

84. *Id.*

Presidential records covered under the PRA.⁸⁵ Significantly, President Reagan was the first President whose records were subject to the PRA.⁸⁶ More than nine years after passage of the PRA, and on the eve of its implementation, the Reagan Order was enacted, outlining how requests under the PRA would fit into NARA's information dissemination process.⁸⁷

The Reagan Order requires the Archivist to notify the incumbent President and the former President when he receives notification of a request that may raise a question of executive privilege.⁸⁸ The Reagan Order instructs the Archivist to use his discretion, requiring him to identify materials which "he believes may raise a substantial question of Executive privilege."⁸⁹ However, if the Archivist does not identify documents as being potentially protected under executive privilege, the incumbent and former Presidents retain their respective right to exercise executive privilege for appropriate subject matter.⁹⁰ The former President and the incumbent President then have thirty days to invoke executive privilege before the Archivist is directed to release the documents.⁹¹

1. *Claim of Executive Privilege by Incumbent President*

The Reagan Order directs the Attorney General and the incumbent President to coordinate with other Federal Agencies to determine whether "invocation of Executive privilege is justified."⁹² The Attorney General and the Counsel to the President may determine that it is not appropriate to invoke executive privilege, in which case they must notify the Archivist "promptly . . . of any such determination."⁹³ If after consultation with the Attorney General and the Counsel to the President, the incumbent President decides to invoke executive privilege with regard to the records, the former President and the Archivist are notified.⁹⁴ The "Archivist shall not disclose the privileged

85. *See id.*

86. *See Hearings, supra* note 3, at 32-36 (prepared statement of Anna K. Nelson, Distinguished Adjunct Historian in Residence, American University).

87. *See id.* at 33.

88. Reagan Order, *supra* note 14.

89. *Id.*

90. *See id.*

91. *See id.*

92. *Id.* § 3(a).

93. *Id.* § 3(b).

94. *See Reagan Order, supra* note 14.

records unless directed to do so by an incumbent President or by a final court order."⁹⁵

2. *Claim of Executive Privilege by Former President*

When a former President claims executive privilege, the Archivist consults with the Attorney General and other Federal agencies to determine whether to disclose the records, or to honor the former President's claim of privilege.⁹⁶ The Archivist makes his determination regarding the disclosure of the documents according to the incumbent President's instructions.⁹⁷ Once the Archivist makes his determination, he notifies the incumbent President and the former President that the documents are to be released.⁹⁸

C. *Executive Order 13,233 (Bush Order)*

January 18, 2001, marked twelve years since President Reagan left office. This twelve-year point was significant because, even under the Reagan Order, the incumbent President had only thirty days to invoke executive privilege with regard to any of former President Reagan's records.⁹⁹ The Reagan Order specified that the incumbent President must notify the Archivist "in writing of the claim of privilege *and the specific Presidential records to which it relates.*"¹⁰⁰ President George W. Bush received several requests for roughly 68,000 pages of documents that had been withheld for the twelve years since the end of the last Reagan term.¹⁰¹ Although the PRA had been signed into law more than twenty years earlier, these records would be the first released under its mandate.¹⁰² Furthermore, these requests

95. *Id.* § 3(d).

96. *See id.* § 4(a).

97. *See id.* § 4(b).

98. *See id.*

99. *See* 44 U.S.C. § 2204. *See also* Reagan Order, *supra* note 14, § 3(c). President Reagan left office in January 1989. He was first elected President in 1980 and took office in 1981, serving two four-year terms. *See* The Reagan Presidency at <http://www.reagan.utexas.edu/ref/rrpres.htm> (last visited April 1, 2003).

100. Reagan Order, *supra* note 14, § 3(d) (emphasis added).

101. *See Hearings, supra* note 3, at 447 (prepared statement of Morton Rosenberg, specialist in American public law, American Law Division, Congressional Research Service).

102. *See id.* at 446-48. It is important to note, however, that the government-ownership of documents became ordinary under the FOIA and that release of records to the public had been taking place for some time. Furthermore, the Nixon records were both the motivation and the model for further release of Presidential

would be the first time that privileged documents would be released—setting a precedent for further release of Presidential records under the PRA.¹⁰³

On November 1, 2001, President George W. Bush issued Executive Order 13,233 titled “Further Implementation of the Presidential Records Act.”¹⁰⁴ The Bush Order modified the practice under the Reagan Order and ultimately revoked Executive Order 12,667 (the Reagan Order).¹⁰⁵

1. *Constitutional and Legal Background for the Bush Order*

Prior to leaving office, the former President and the incumbent President have the ability to limit access to records.¹⁰⁶ These limits last for twelve years under the PRA.¹⁰⁷ After that period, the PRA requires the Archivist to use the FOIA as the guide for administering Presidential records.¹⁰⁸ “Section 2204(c)(2) recognizes that the former President or the incumbent President may assert any constitutionally based privileges, including those ordinarily encompassed within exemption (b)(5) of section 552.”¹⁰⁹

According to the Bush Order, the Executive exercise of constitutionally-based privilege cannot cease solely due to the passage of time, without regard to the incumbent President’s ability to discern the timeliness of the release of records.¹¹⁰ The Bush Order relies upon the Supreme Court holding in *Nixon v. Administrator of General Services*¹¹¹ that “[u]nless [the President] can give his advisors 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.”¹¹²

records. *See id.*

103. *See Hearings, supra* note 3, at 34 (prepared statement of Anna K. Nelson, Distinguished Adjunct Historian in Residence, American University).

104. Bush Order, *supra* note 10.

105. *See id.* § 13.

106. *See supra* notes 53-63 and accompanying text.

107. 44 U.S.C. § 2204.

108. *See* Bush Order, *supra* note 10, § 2 (quoting 44 U.S.C. § 2204).

109. *Id.* (referring to the PRA which limits the use of exemptions under the FOIA, noting also that even with the exemption, the President retains their privileges after they leave office).

110. *See id.*

111. 433 U.S. 425 (1977).

112. Bush Order, *supra* note 10, § 2 (quoting 433 U.S. at 448-49) (internal quotations omitted).

The Bush Order also relies on the Supreme Court ruling in *United States v. Nixon*,¹¹³ which “held that a party seeking to overcome the constitutionally based privileges that apply to Presidential records must establish at least a ‘demonstrated, specific need’ for particular records, a standard that turns on the nature of the proceedings and the importance of the information to that proceeding.”¹¹⁴ Additionally, the Bush Order notes that although Presidents have had this ability to exercise executive privilege, they have still historically *chosen* to release their records in due time.¹¹⁵ Although Presidents have frequently exercised the privilege in the past, after “appropriate period[s] of repose” most have ultimately “decided to authorize access.”¹¹⁶

2. *Procedure for Administering Privileged Presidential Records Under the Bush Order*

The Bush Order profoundly changes the procedures for administering privileged presidential records,¹¹⁷ while maintaining several steps from the Reagan Order.¹¹⁸ After the Archivist receives the request for access to Presidential records, the Archivist notifies the former President and the incumbent President.¹¹⁹ The Archivist provides both Presidents with the requested records,¹²⁰ and he may not release the records while the former President reviews them.¹²¹

The incumbent President concurrently has the ability to determine whether to invoke executive privilege with regard to the records.¹²² If the former President has requested withholding of the records and “the incumbent President concurs in the former President’s decision to request withholding of records as privileged, the incumbent President shall inform the former President and the Archivist.”¹²³ The Archivist may not permit access to the records until the

113. 418 U.S. 683 (1974).

114. Bush Order, *supra* note 10, § 2 (quoting 418 U.S. at 713).

115. *See id.* § 2(c).

116. *Id.*

117. *See id.* § 3.

118. *Compare id. with* Reagan Order, *supra* note 14, § 3(d).

119. *See id.*

120. *See* Bush Order, *supra* note 10, § 3(a).

121. *See id.* § 3(b) (“The Archivist shall not permit access to the records by a requester during this period of review or when requested by the former President to extend the time of review.”).

122. *See id.* § 3(d).

123. *Id.* § 3(d)(1)(i).

incumbent President informs them that both he and the former President agree to authorize access "or until so ordered by a final and nonappealable court order."¹²⁴

The Bush Order uses section 2204(c)(2) of title 44 to invoke the executive privilege that exists outside of the PRA.¹²⁵ By invoking the Supreme Court guarantee of Presidential privilege beyond the term of office, the Bush Order effectively enables Presidents to block the release of records indefinitely.¹²⁶ The Bush Order has caused significant discussion because the current requests for the Reagan records are the first under the PRA and thus will set precedent for the release of future presidential records.¹²⁷

D. *Opposition to The Bush Order*

When the Bush Order was released to the press on November 1, 2001, they immediately questioned the President's motive and the effect that the Bush Order would have on the PRA.¹²⁸ Less than one month after the Bush Order was released, several groups and individuals filed a complaint (Complaint) in the United States District Court for the District of Columbia.¹²⁹ The plaintiffs in the case ranged from history professors¹³⁰ to

124. *Id.*

125. *See supra* notes 110-116 and accompanying text.

126. *See* Reagan Order, *supra* note 14, § 2(a). *See also supra* notes 110-116 and accompanying text. This section draws a connection to the Supreme Court support of constitutionally-based privileges which supercede the limitations placed on the privilege by legislation like the PRA. *See* Reagan Order, *supra* note 14, § 2(a).

127. *See Hearings, supra* note 3, at 34 (prepared statement of Anna K. Nelson, Distinguished Adjunct Historian in Residence, American University).

128. *See infra* Part IV and *supra* note 8. *See generally* Stephen L. Hensen, *The President's Papers Are the People's Business*, THE WASH. POST, Dec. 16, 2001, at B01 (The Bush Order "directly subverts the intent of the [PRA] by placing ultimate responsibility for decisions regarding access to presidential papers . . . with any sitting president in the future . . . apparently without limit."); Robert Dallek, *All the Presidents' Words Hushed*, THE L.A. TIMES, Nov. 25, 2001, at M1 ("the principal victim of Bush's directive will be himself and the country"). *But cf.* Press Briefing by Ari Fleischer, Office of the Press Secretary, The White House (Nov. 1, 2001), available at <http://www.whitehouse.gov/news/releases/2001/11/20011101-4.html> ("[Presidential records] will be available through a much more orderly process. The Executive order will lay out the terms of that process, and it will help people to get information.").

129. *See supra* note 8.

130. *See* Complaint at paras. 4-5, *Amer. Historical Ass'n v. Nat'l Archives and Records Admin.* (D.D.C. 2001) (No. 1:01 CV02447), available at <http://www.rcfp.org/news/documents/20011128ahavnara.pdf> (Nov. 28, 2001) [hereinafter Complaint].

Plaintiff Hugh Davis Graham holds appointments as the Holland N.

nonprofit research organizations¹³¹ to a non-governmental research institute.¹³²

The Complaint sought declaratory, injunctive and mandamus relief.¹³³ The principle claim was that the NARA must administer the PRA without regard to the Bush Order.¹³⁴ The plaintiffs wanted the court to “compel the release of the presidential materials of former President Ronald Reagan that are in the custody of NARA and are being withheld in violation of the PRA.”¹³⁵ In their outline of the PRA, the plaintiffs stated that “[a]fter expiration of the 12-year restriction period, formerly restricted materials become available to the public through FOIA to the same extent as materials that were not restricted by the former president.”¹³⁶

Plaintiffs further claimed that once the twelve year restriction period ends, the right to executive privilege is no longer available due to the PRA removal of the FOIA’s exemption five.¹³⁷ The Complaint further delineated that “a president may prevent disclosure of records that reflect confidential communications with or among his advisors for no more than 12 years.”¹³⁸ After these twelve years pass, the materials should not be withheld and must be released to the public unless they fall under another FOIA exemption.¹³⁹

The Reagan documents were the first to be made available under the PRA, and over the past twelve years approximately four million pages of documents have been released.¹⁴⁰ Plaintiffs

McTyeire Professor of History and as Professor of Political Science at Vanderbilt University, as well as a three-year appointment as Adjunct Professor of History at the University of California at Santa Barbara . . . Plaintiff Stanley I. Kutler is Professor Emeritus of History and Law at the University of Wisconsin.

Id.

131. *See id.* at paras. 3, 7-9. Plaintiffs American Historical Association, Organization of American Historians, Public Citizen, Inc., and the Reporters Committee for Freedom of the Press are all nonprofit organizations. *See id.*

132. *See id.* at para. 6 (“Plaintiff National Security Archive is an independent non-governmental research institute and library located at The George Washington University in Washington, D.C.”).

133. *See id.* at para. 1.

134. *See id.*

135. *Id.*

136. Complaint, *supra* note 130, at para. 16.

137. *See* 5 U.S.C. § 552(b)(5).

138. Complaint, *supra* note 130, at para. 17.

139. *See id.* at para. 17.

140. *See id.* at para. 28.

estimate in the Complaint that the Reagan records obtained by the NARA are around forty-four million pages of documents.¹⁴¹ The instant concern is the documents restricted under the PRA by President Reagan.¹⁴² The records total approximately 68,000 pages of documents restricted because President Reagan invoked the "confidential communications" privilege.¹⁴³ Historians documenting the Reagan presidency have requested access to these documents.¹⁴⁴

The NARA provided notice in February 2001, that requests for the 68,000 pages previously restricted by President Reagan would be honored because there was no "substantial question of Executive privilege" within the meaning of the Reagan Order.¹⁴⁵ The NARA intended to distribute the documents on a schedule prescribed by the Archivist to the White House.¹⁴⁶ The White House Counsel sent letters to the Archivist requesting extensions for review of the documents.¹⁴⁷

President Bush issued the Bush Order in response to these requests, and the Complaint charged that this change in procedure is not in line with the PRA.¹⁴⁸ The Complaint alleged

141. *See id.* at para. 25.

142. *See id.* at para. 31.

143. *See id.*

144. *See* Complaint, *supra* note 130, at para. 29 ("Members of plaintiff AHA were among those who requested access to Reagan presidential records, and who did not receive access to restricted records.").

145. *See id.* at para. 33 (quoting Reagan Order, *supra* note 14, § 2(a)).

When the Archivist provides notice to the incumbent and former Presidents of his intent to disclose Presidential records pursuant to section 1270.46 of the NARA regulations, the Archivist, utilizing any guidelines provided by the incumbent and former Presidents, shall identify any specific materials, the disclosure of which he believes may raise a *substantial question* of Executive privilege.

Reagan Order, *supra* note 14, § 2(a) (emphasis added). Whether or not the materials raise "a substantial question" is left to the sole discretion of the Archivist with the caveat that the incumbent or former President may "invoke Executive privilege with respect to materials not identified by the Archivist." *Id.*

146. *See id.* at para. 35.

147. *See id.* at para. 36.

According to defendant Carlin . . . rather than reviewing whether there was a basis for objecting to the release of particular documents that was consistent with the terms of the PRA, the White House was instead "conduct[ing] a thorough legal review of the PRA and consider[ing] its long-term implications on the deliberative process for the Presidency and the Executive Branch."

Id.

148. *See id.* at paras. 40-41. The Bush Order is "[i]n contrast to the PRA, which makes presidential records available after the 12-year restriction period has ended

that the Bush Order “violates the PRA” on five points.¹⁴⁹

First, it alleged that the Bush Order makes it possible for materials to be held for an unlimited time, by allowing the incumbent and former Presidents to review the materials.¹⁵⁰ The Complaint charged that this violates “the PRA’s commands that records may not be restricted after the 12-year period expires and that the Archivist has an affirmative duty to make them public as soon as possible.”¹⁵¹

Second, the complaint charged that the Bush Order weakens the power of the incumbent President by requiring the incumbent President to concur with the former President about whether to prevent the release of documents even if there is no legal claim for the exercise of privilege.¹⁵² The Complaint alleges that the Bush Order requires the incumbent President to concur with the former President “absent ‘compelling circumstances,’ . . . even if the privilege claim is legally improper or unfounded.”¹⁵³

The third claim against the Bush Order was that the Bush Order does not allow the Archivist to release the records until the former President agrees with the release, even if the former President has invoked the privilege and the incumbent President has authorized release.¹⁵⁴ The only way to effectuate release is through a binding court order or with the former President’s acquiescence.¹⁵⁵ In either instance, the Archivist is unable to act without direction from the incumbent President who makes his decision in response to the former President’s actions.¹⁵⁶

The plaintiff’s fourth and fifth claims related to who may invoke the privilege on behalf of a former President.¹⁵⁷ The Bush

under FOIA standards.” *Id.*

149. *Id.* at para. 60.

150. *See* Complaint, *supra* note 130, at para. 60(i).

151. *Id.*

152. *See id.* at para. 60(ii).

153. *Id.* (quoting Bush Order, *supra* note 10, § 4).

154. *See id.* at para. 60(iii). In this circumstance the incumbent President would be overruling the invocation of privilege by the former President. However, even when the incumbent President legally overrules the former President, under the Bush Order the Archivist is not authorized to release the documents.

155. *See id.* (referring to Bush Order, *supra* note 10, § 6).

156. *See* Complaint, *supra* note 130, at para. 60(iii). If Complaint charges that the former President does not take action, the incumbent President does not have to respond to requests by the Archivist and he can delay release by ignoring the information from the Archivist. *See id.*

157. *See id.* at paras. 60(iv-v).

Order allows the former President to designate a representative to act on his behalf with regard to the assertion of executive privilege.¹⁵⁸ Also at issue is the concern as to whether the Vice President should be able to invoke executive privilege "independent of the privilege of the former or incumbent president."¹⁵⁹ The Bush Order requires the Archivist to, as stated in the Complaint, "accord such a claim [of executive privilege by a Vice President] the same respect as a claim of privilege made by a former president, even though there is no constitutional basis for a vice presidential executive privilege."¹⁶⁰

The demands outlined in the Complaint sought the immediate release of all of the requested 68,000 pages of documents, claiming that the Bush Order is unconstitutional.¹⁶¹ By refusing the release of the records, the Complaint charged that the NARA violates the PRA and that the Court should mandate release of the documents satisfying the letter and the intent of law.¹⁶²

III. IDENTIFICATION OF THE PROBLEM

When Representative Stephen Horn convened the House of Representatives Subcommittee that held hearings on the Bush Order, he stated that he "appreciate[s] the need to preserve whatever constitutional privileges may still be appropriate for a former president's records after many years . . . [h]owever, [he is] concerned that the new procedures [under the Bush Order] may create additional delays and barriers to releasing the Reagan records."¹⁶³ Thus, Representative Horn marked the principal problem with the PRA—the need for excessive executive interpretation for effective implementation.¹⁶⁴

Congress enacted the PRA more than twenty years before the Bush Order. The Bush Order relates specifically to FOIA requests under the FOIA for records owned by the federal government because of the PRA.¹⁶⁵ The PRA attempted to codify practices that were already taking place as former

158. See Bush Order, *supra* note 10, § 10. See also Complaint, *supra* note 130, at para. 60(iv).

159. Complaint, *supra* note 130, at para. 60(v).

160. *Id.*

161. See *id.* at paras. 65, 73.

162. See *id.* at para. 75.

163. *Hearings, supra* note 3, at 4 (opening statement of Rep. Steve Horn).

164. See *id.* at 3-4.

165. See Bush Order, *supra* note 10.

Presidents left office.¹⁶⁶ As a result of Supreme Court precedent that established a constitutionally-based privilege, the PRA could not eliminate presidential privilege with regard to confidential documents after the President leaves office.¹⁶⁷

The PRA thus created a conflict when the procedure of implementing the Act would determine the breadth and depth of its scope.¹⁶⁸ The inherent problem is that the PRA leaves the Executive Branch with the role of interpreting legislation that deals directly with its own interests.¹⁶⁹

Like all legislation, the drafters never intended that the PRA would be without need for further interpretation by the Executive Branch at a later time.¹⁷⁰ By leaving several issues unanswered, Congress left room for a balancing-act in the process of implementing the law.¹⁷¹ However, in this balancing act, Congress left two elements unaddressed.¹⁷² First, the PRA provides no administrative procedures for settling disputes between the Archivist and the incumbent President or former President.¹⁷³ Second, there is no process in the PRA to permit the incumbent President to "consider whether privilege ought be asserted to prevent the mandatory withholding of a predecessor's records."¹⁷⁴

IV. ANALYSIS

A. *Implementation Under the PRA and Changes Arising from the Bush Order*

The PRA does not take away the President's constitutionally-based privileges,¹⁷⁵ but rather adds to them.¹⁷⁶

166. See *supra* Part II.C (including the granting of gift-deeds to the National Archives of President's private presidential records).

167. See *supra* notes 113-116 and accompanying text.

168. See generally *Hearings, supra* note 3, at 447 (prepared statement of Morton Rosenberg, specialist in American public law, American Law Division, Congressional Research Service).

169. See *Hearings, supra* note 3, at 479-80 (prepared statement of Todd F. Gaziano, Senior Fellow in Legal Studies and Director, Center for Legal and Judicial Studies at The Heritage Foundation).

170. See *Hearings, supra* note 3, at 67-68 (prepared statement of Peter M. Shane, professor, University of Pittsburgh and Carnegie Mellon University).

171. See *id.* at 67.

172. See *id.* at 67-68.

173. See *id.* at 68.

174. *Id.*

175. See *id.* at 67 (stating that if the PRA had purported to do so, it would have

The intent of the PRA was never to provide all presidential records to the people, but rather to maintain the records at NARA with the potential for access to them should the former President and the incumbent President authorize the release.¹⁷⁷

The Bush Order attempts to fill in gaps left in the PRA.¹⁷⁸ The concern lies in the implementation of the Bush Order with relation to the speed with which documents are released under the PRA and the FOIA.¹⁷⁹ Presidential records transferred to NARA and eventually to the Presidential libraries are then released under the FOIA schedule.¹⁸⁰ The Bush Order has the potential to speed up this process, due to its focus on the specific records that the PRA places in the jurisdiction of the FOIA.¹⁸¹ All other claims not covered under the FOIA are exempt from the Bush Order and the Archivist retains the ability to administer the records as he sees fit according to his own regulations.¹⁸²

The Bush Order may result in speedier release of documents under the PRA.¹⁸³ In order for this to occur, there are two conditions that must be present.¹⁸⁴ First, there must be a large volume of presidential records that the FOIA would not protect from mandatory disclosure.¹⁸⁵ Second, the Archivist must be willing to take the initiative to release documents before a request has been made.¹⁸⁶ In this instance, the Archivist would make the sole decision as to whether materials present some substantial question of privilege.¹⁸⁷ "In such circumstances, the

been found unconstitutional when subjected to judicial review).

176. See *Hearings, supra* note 3, at 71 (prepared statement of Peter M. Shane, professor, University of Pittsburgh and Carnegie Mellon University) ("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.").

177. See *id.* See also *Hearings, supra* note 3, at 12-17 (prepared statement of John W. Carlin, Archivist of the United States).

178. See *Hearings, supra* note 3, at 70-73 (prepared statement of Peter M. Shane, professor, University of Pittsburgh and Carnegie Mellon University).

179. See *id.*

180. See *id.*

181. See *id.* See also 44 U.S.C. § 2204(c)(1) (listing the requests that are covered under the FOIA and thus subject to the Bush Order).

182. See *Hearings, supra* note 3, at 67-79 (prepared statement of Peter M. Shane, professor, University of Pittsburgh and Carnegie Mellon University).

183. See *id.* at 70-71.

184. See *id.*

185. See *id.*

186. See *id.*

187. See *Bush Order, supra* note 10.

Bush [O]rder 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."¹⁸⁸

B. *Congruence Between the Bush Order and the Intent of the PRA*

The Complaint filed by historians against the NARA, in response to the implementation of the PRA under the Bush Order, asserts that the order is not in accordance with the PRA and should not be followed.¹⁸⁹ However, Congress did not intend the PRA to allow unlimited access to all presidential records.¹⁹⁰ Rather, defining the ownership of the documents was the primary element in the PRA legislation.¹⁹¹ Thus, records previously owned by Presidents and then deeded to the government automatically become the property of the federal government under the PRA.¹⁹²

Where the historians' Complaint has merit is in its claim that the incumbent President gains some ability to restrict documents under the Bush Order that the FOIA does not grant.¹⁹³ This ability does not create any new rights. Indeed, the President is merely executing his executive privilege, to which he is entitled regardless of the Bush Order.¹⁹⁴ The Bush Order merely codifies the interaction between executive privilege and the PRA.¹⁹⁵

Although Congress may not have intended the PRA to allow for incumbent Presidents to block the release of former Presidents' records indefinitely,¹⁹⁶ the Bush Order applies the

188. *Hearings, supra* note 3, at 71 (prepared statement of Peter M. Shane, professor, University of Pittsburgh and Carnegie Mellon University).

189. *See* Complaint, *supra* note 130.

190. *See Hearings, supra* note 3, at 479-80 (prepared statement of Todd F. Gaziano, Senior Fellow in Legal Studies and Director, Center for Legal and Judicial Studies at The Heritage Foundation).

191. *See id.* This can be inferred from the fact that implementation of the PRA is not included in the act itself. The key was for Presidents to know, upon taking office, that the records they assembled were not their own property. Implementation was thus left to the Executive in accordance with the provisions which the Act did include. *See id.*

192. *See* 44 U.S.C. §§ 2201-2207.

193. *See* Complaint, *supra* note 130.

194. *See Hearings, supra* note 3, at 479-81 (prepared statement of Todd F. Gaziano, Senior Fellow in Legal Studies and Director, Center for Legal and Judicial Studies at The Heritage Foundation).

195. *See id.* *See also* Bush Order, *supra* note 10.

196. *See Hearings, supra* note 3, at 33-34 (prepared statement of Anna K. Nelson, Distinguished Adjunct Historian in Residence, American University).

PRA in an appropriate manner, considering the powerful right of presidential privilege.¹⁹⁷ The Complaint fails to recognize that the PRA does not give the people a right beyond public ownership of the records.¹⁹⁸ Public access to the records is governed by the FOIA, which remains subject to executive privilege.¹⁹⁹ Furthermore, the PRA allows the judiciary to compel disclosure of specific documents.²⁰⁰ However, the Complaint requests complete disclosure of documents and nullification of the Bush Order.²⁰¹ Such nullification is not necessary to maintain the PRA.²⁰²

C. *Presidential Intent for the Bush Order*

Maintaining the constitutionally-based privileges that Congress never intended to remove from former or incumbent Presidents via the PRA was vital to implementation of the Act.²⁰³ Section 2204(c) of the PRA provides that nothing in the Act "shall be construed to confirm, limit, or expand any constitutionally-based privilege which may be available to an incumbent or former President."²⁰⁴

Congress expressly asserted that both the incumbent and former Presidents would maintain their rights to these constitutionally-based privileges to prevent the disclosure of presidential records which might otherwise be released under the PRA.²⁰⁵ In fact, when testifying before the House

197. See Bush Order, *supra* note 10; see also *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425.

198. See *Hearings*, *supra* note 3, at 11-13 (prepared statement of John W. Carlin, Archivist of the United States).

199. See *id.*

200. See *id.* at 18-19.

201. See Complaint, *supra* note 130.

202. See *Hearings*, *supra* note 3, at 20 (statement of M. Edward Whelan, III, Acting Assistant Attorney General, Office of Legal Counsel, Dept. of Justice).

This Supreme Court ruling [*Nixon v. Administrator of General Services*], together with Congress's express accommodation ruling in section 2204(c) of the [PRA] entail a need for procedures to govern review of any records to which such privileges might 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.

Id.

203. See *id.*

204. 44 U.S.C. § 2204(c)(2).

205. See *Hearings*, *supra* note 3, at 20 (statement of M. Edward Whelan, III, Acting Assistant Attorney General, Office of Legal Counsel, Dept. of Justice).

Subcommittee, Acting Assistant Attorney General M. Edward Whelan, III, explained that the Bush Administration saw the Bush Order as a way to make the PRA consistent with these constitutionally-based privileges.²⁰⁶

The desire to maintain the executive privilege to protect confidential communications is central to the Bush Order.²⁰⁷ The Supreme Court's protection of such confidential communications is stronger than any statutory mandate for disclosure—either under the FOIA or the PRA.²⁰⁸ Where the statute provides liberal access to documents, and the Supreme Court is exceedingly protective of potentially confidential documents, the Bush Order effectively strikes a balance²⁰⁹ by adhering both to the PRA and the Supreme Court orders in *Nixon v. Administrator of General Services*²¹⁰ and *United States v. Nixon*.²¹¹

“President George W. Bush issued Executive Order No. 13233 to establish neutral procedures for the incumbent and former Presidents to review documents subject to release and invoke constitutionally based privileges.”²¹² In contrast, the PRA's vague guidelines were silent as to how presidential privilege and the PRA would interact.²¹³ For the first time in its history, the PRA needed to be interpreted, and the Bush Administration, specifically the Office of Legal Counsel, took time to address the Act's concerns while balancing the executive privilege.²¹⁴ Whelan and others in the Bush Administration

206. *See id.* at 20.

207. *See id.* at 479-81 (prepared statement of Todd F. Gaziano, Senior Fellow in Legal Studies and Director, Center for Legal and Judicial Studies at The Heritage Foundation).

208. *See id.* *See also supra* text accompanying notes 110-115.

209. *See Hearings, supra* note 3, at 20 (statement of M. Edward Whelan, III, Acting Assistant Attorney General, Office of Legal Counsel, Dept. of Justice).

210. 433 U.S. 425 (1977). The President's constitutionally based privileges “survive the President's tenure” and “[u]nless [the President] can give his advisors 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.” *Id.* at 552.

211. 418 U.S. 683 (1974).

212. *Hearings, supra* note 3, at 480 (prepared statement of Todd F. Gaziano, Senior Fellow in Legal Studies and Director, Center for Legal and Judicial Studies at The Heritage Foundation).

213. *See id.* at 20 (statement of M. Edward Whelan, III, Acting Assistant Attorney General, Office of Legal Counsel, Dept. of Justice).

214. *See id.* at 447 (prepared statement of Morton Rosenberg, specialist in American public law, American Law Division, Congressional Research Service). The result was the drafting of the Bush Order. *See id.* at 20 (statement of M. Edward

drafted the Bush Order as a response to these requests.²¹⁵

The Bush Order does not purport to give the incumbent President any additional rights.²¹⁶ Rather, the Bush Order specifically mentions that it does not "indicate whether and under what circumstances a former President should assert or waive any privilege."²¹⁷ The Bush Order clarifies the process through which PRA requests are honored.²¹⁸ During the November 1, 2001, Press Briefing by Ari Fleischer,²¹⁹ questions arose regarding the Bush Order and the PRA.²²⁰ Fleischer's responses to these questions about the Bush Order specified that the Administration intended the Bush Order to increase efficiency in PRA implementation, thereby easing the burden on those requesting documents.²²¹ More importantly, Fleischer stated that the Bush Order would begin the process of releasing documents from the Reagan presidential records, which had been stalled until implementation language was drafted.²²²

The government needed the Bush Order to withhold certain documents that may still contain matters that must be kept confidential.²²³ By placing only a temporal limitation on the release, the Reagan Order failed to address documents that the former President consents to the release of, but which the incumbent President deems confidential.²²⁴ Fleischer articulated this potential problem in an example:

There very [well] may be a decision by an administration that has been out of office for 12 years to release certain documents. Those documents could still have national

Whelan, III, Acting Assistant Attorney General, Office of Legal Counsel, Dept. of Justice). Once President Bush took office in January 2001, there were numerous requests for the Reagan Administration documents. *See id.* at 447 (prepared statement of Morton Rosenberg, specialist in American public law, American Law Division, Congressional Research Service). Whelan never specifically states that the requests were coming in, although it is apparent from the filing of the Complaint by the various historical groups that these requests did take place. *See id.* at 20 (statement of M. Edward Whelan, III, Acting Assistant Attorney General, Office of Legal Counsel, Dept. of Justice).

215. *See id.* at 20-21.

216. *See id.* at 21.

217. Bush Order, *supra* note 10, § 9.

218. *See id.*

219. White House Press Secretary.

220. *See* Press Briefing by Ari Fleischer, *supra* note 128.

221. *See id.*

222. *See id.*

223. *See id.*

224. *See id.*

security implications. A previous administration that is not currently in power would not be as aware as a current administration of ongoing national security issues. So that provides for an ability of a current administration to review it.²²⁵

The Bush Order thus takes the mandates of the PRA and implements them while maintaining the superior, constitutionally-based privileges.²²⁶

The release of Presidential records is not new to the PRA. Presidents have a history of releasing documents, even those that have previously been considered confidential.²²⁷ The PRA merely attempted to codify the patterns of previous Presidents, and specifically did so in response to the concerns following the Nixon presidency.²²⁸ The Bush Administration offered Executive Order 13,233²²⁹ as a means to make the difficult-to-interpret elements of the PRA²³⁰ fit with the Act's purpose while remaining constitutionally-sound.²³¹

After the initial Congressional committee hearings²³² in response to the Bush Order Representative Horn introduced House Bill 4187²³³ entitled "Presidential Records Act Amendments of 2002." Representative Horn held further hearings before the Subcommittee on Government Efficiency, Financial Management, and International Relations to discuss House Bill 4187.²³⁴ House Bill 4187 includes a requirement that

225. Press Briefing by Ari Fleischer, *supra* note 128.

226. *See id.*

227. *See* Dorsen and Shattuck, *supra* note 1, at 2 ("Executive privilege has proliferated over the decades very much as executive power itself has grown. Early presidents asserted the privilege infrequently and in narrow circumstances.").

228. *See supra* notes 46-52. *See generally* Dorsen and Shattuck, *supra* note 1. Although Presidents had previously gifted their papers to the federal government, the PRA codified this practice. Additionally, following the Nixon presidency there was much attention paid to the need for oversight of the Office of the President with regard to potentially incriminating records.

229. *See* Bush Order, *supra* note 10.

230. Namely this is a reference to the provisions which relate to the matters discussed *supra* relating to the release of presidential records after the expiration of the 12 year period following their term.

231. *See Hearings, supra* note 3, at 480-82 (prepared statement of Todd F. Gaziano, Senior Fellow in Legal Studies and Director, Center for Legal and Judicial Studies at The Heritage Foundation).

232. *See generally* *Hearings, supra* note 3.

233. H.R. 4187, 107th Cong. (2002), available at <http://thomas.loc.gov/bss/d107/d107laws.html>.

234. Horn introduced the third, and final, hearings as an opportunity to determine whether House Bill 4187 was the appropriate legislative response to the

"[t]he Archivist shall not make publicly available a Presidential record that is subject to a privilege claim asserted by a former President until the expiration of [a] 20-day period . . ." ²³⁵ This requirement effectively proposed to put an unconstitutional limit on the President's exercise of executive privilege. ²³⁶ Unlike the Bush Order, which implements the PRA, House Bill 4187 attempts to broaden the reach of the PRA by placing new restrictions on the President requiring an expedited schedule for release of documents by the Archivist. ²³⁷ Additionally, House Bill 4187 would change the PRA to require that "[u]pon the expiration of such [twenty-day] period the Archivist shall make the record publicly available unless otherwise directed by a court order in an action initiated by the former President." ²³⁸ It is unclear why Representative Horn justified placing such a burden on the former President when Congress would be in a

Bush Order.

Our earlier hearings fully explored the problems with Executive Order 13233. Today's hearing focuses on potential solutions. Specifically, we will consider H.R. 4187, a bill that I and several of my colleagues introduced on April 11, 2002. H.R. 4187 would replace the executive order with a statutory process for former and incumbent Presidents to review records prior to their release and assert executive privilege claims, if they so choose.

Hearings, supra note 3, at 389 (opening statement of Rep. Steve Horn).

235. H.R. 4187 § (c)(1).

236. Todd F. Gaziano, Senior Fellow in Legal Studies and Director of the Center for Legal and Judicial Studies at The Heritage Foundation (a nonpartisan research and educational organization) identifies the constitutional problem with the legislature attempting to place limits on the President's exercise of executive privilege:

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

Hearings, supra note 3, at 482 (prepared statement of Todd F. Gaziano).

237. *See id.* at 484 ("H.R. 4187 does not amend the framework of the PRA that is within Congress's power, but it is an attempt to modify, condition, and partially nullify incumbent and former Presidents' constitutional powers. In these respects, H.R. 4187 would be void even if it were passed.")

238. H.R. 4187 § (c)(2).

better position to afford such expenses.²³⁹

V. PROPOSAL

The instant issue is the struggle between the desire for historians to have access to the documents of former Presidents and the need to maintain presidential privilege.²⁴⁰ While the interests of historians are important to the development of a national history,²⁴¹ executive privilege supercedes such academic interests.²⁴² In order to continue the pattern of liberal release of documents by former Presidents, the PRA needs to have guidelines for its implementation.²⁴³ The Bush Order effectively sets precedent for the future distribution of presidential records under the PRA.²⁴⁴

The PRA was the result of a Congressional attempt to codify the traditional action of Presidents gifting their records to the People of the United States.²⁴⁵ This attempt was bold, and the ownership of these records is now more important than ever as historians seek to learn more about the past.²⁴⁶ The PRA falls short, however, in its lack of clarity about the release of the

239. See *Hearings*, *supra* note 3 at 482 (prepared statement of Todd F. Gaziano, Senior Fellow in Legal Studies and Director, Center for Legal and Judicial Studies at The Heritage Foundation).

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

Id. at 482.

240. See *Complaint*, *supra* note 130.

241. See *id.*

242. See *Bush Order*, *supra* note 10. See also *Reagan Order*, *supra* note 14; *Hearings*, *supra* note 3.

243. See *Bush Order*, *supra* note 10.

244. See *id.* See also *Hearings*, *supra* note 3, at 480-82 (prepared statement of Todd F. Gaziano, Senior Fellow in Legal Studies and Director, Center for Legal and Judicial Studies at The Heritage Foundation).

245. See *Hearings*, *supra* note 3, at 479-80. See also *supra* notes 77-89 and accompanying text.

246. See *Complaint*, *supra* note 130.

confidential records of former Presidents.²⁴⁷ Perhaps twenty-five years ago, when Congress passed the PRA, it did not foresee the implementation of the Act beyond the question of ownership. However, legislative history suggests otherwise.²⁴⁸ As President Reagan left office and issued the Reagan Order, Congress chose not to change the PRA to delineate more specific procedures for the release of documents. Thus, the PRA left open to the political process the determination of how executive privilege would cooperate with the Act, resulting in the release of Presidential records.²⁴⁹

The fact that the Bush and Reagan Orders were able to modify the implementation of the PRA illustrates the weak nature of the Act. It also shows that the Act could not stretch beyond ownership without infringing upon the executive privilege. Therefore, the Act left the responsibility for interpretation of the PRA to the Executive,²⁵⁰ and any release of documents constitutes a permissive waiver of executive privilege.²⁵¹ The Bush Order organizes this waiver into a system of requests by the Archivist to the former President and eventually leaves authority with the incumbent President to invoke executive privilege.²⁵² The Bush Order thus strengthens the constitutionality of the PRA.²⁵³

Implementation of the PRA beyond the definition of who owns presidential documents, still must fall within the privilege requirements that the Supreme Court has established.²⁵⁴ The Bush Order does exactly this. Even without the PRA, history

247. See Reagan Order, *supra* note 14; Bush Order, *supra* note 10.

248. See *Hearings*, *supra* note 3, at 11-12 (prepared statement of John W. Carlin, Archivist of the United States).

249. See *id.* at 479-81 (prepared statement of Todd F. Gaziano, Senior Fellow in Legal Studies and Director, Center for Legal and Judicial Studies at The Heritage Foundation).

250. See *id.* at 68-71 (prepared statement of Peter M. Shane, professor, University of Pittsburgh and Carnegie Mellon University).

251. See *id.*

252. See Bush Order, *supra* note 10. See also *Hearings*, *supra* note 3, at 484 ("Thus, [the Bush Order] contains the President's public statement regarding how he will exercise his constitutional power (and respect the constitutional power of former Presidents) within the framework of the PRA. It also contains his instructions to the Archivist in such matters.").

253. See *Hearings*, *supra* note 3, at 480 ("The bulk of [the Bush Order] is not only lawful and prudent, but it is—with minor exceptions—practically the only way to implement the PRA consistent with the incumbent and former Presidents' constitutional obligations.").

254. See *supra* Part II.C.1.

proves that the men who have served thus far as President of the United States have opened their presidencies to historians by gifting their records to the People.²⁵⁵ Congressional opposition to the Bush Order will not serve the goal of those who profess to be against the order.²⁵⁶ Representative Horn, the Congressman who convened the hearings on the Bush Order and introduced House Bill 4187, retired from Congress in January 2003.²⁵⁷

Congress never passed the legislation that would have modified the PRA and invalidated the Bush Order.²⁵⁸ The Bush Administration ultimately released most of the documents at the heart of the debate about the PRA,²⁵⁹ further proving that in due time presidential documents make their way into the hands of historians. Although it is important for Congress to play a role in the release of presidential records, it is equally important to allow the Executive to implement the PRA. There is nothing

255. See *supra* note 3.

256. See *supra* Part II.D.

257. Due to significant changes in the make-up of the Congressional District which he represents, Representative Horn announced his retirement in September 2001:

Just days after a CA Assembly committee released a redistricting plan that would erase LB's 38th Congressional district (moving it to near Fresno), put most of L[ong] B[each] in the same Congressional district as Carson and Compton (now led by a Democrat) and split E[ast] L[ong] B[each], the man who represented much of LB, Lakewood and southeast L.A. County in the U.S. House of Representatives since 1992 has announced he will leave Congress at the end of his current term.

LB Cong. Steve Horn To Retire At End of Current Term Jan. 2003, LBREPORT.COM, at <http://www.lbreport.com/news/sep01/hornreti.htm> (Sept. 4, 2001). Representative Horn thus knew that he only had one term in which to take action on the Bush Order as he announced his retirement before commencing hearings on the proposed changes to the PRA.

258. After the close of the 107th Congress, the legislation pending needs to be reintroduced. With the absence of Representative Horn, the primary sponsor of House Bill 4187 and the bill's author, it is unlikely that the legislation will be introduced again in a future Congress. Furthermore, the release of the Reagan documents makes revision of the PRA, once again, unnecessary as there is no pressing dispute.

259. The NARA released nearly 60,000 pages of documents on March 15, 2002, and sent them to the Ronald Reagan Presidential Library. Historians now have the opportunity to access the records pursuant to the procedures of the library. An inventory of the records is available on the internet. See Ronald Reagan Library Inventories of P5 Material Opened on March 15, 2002, at <http://www.reagan.utexas.edu/p5inv031502.htm>. Additional documents were released on July 19, 2002. See Ronald Reagan Library Inventories of P5 Material Opened on July 19, 2002, at <http://www.reagan.utexas.edu/p5inv071902.htm>. The Ronald Reagan Presidential Library announces the release of the documents. See Official Web Site of the Ronald Reagan Presidential Library at <http://www.reagan.utexas.edu> (last visited April 1, 2003).

“simple” about American democracy when it comes to the interplay between the three branches. However, the PRA is a perfect example of how to reach the delicate balance of congressional legislation, Supreme Court rulings, and Executive Orders from the President.

VI. CONCLUSION

The Bush Order is, as its title suggests, a guide for “Further Implementation of the Presidential Records Act.”²⁶⁰ The problem, however, is that the PRA did little other than turn over ownership of presidential records to the federal government.²⁶¹ Due to superceding constitutionally based privileges, the PRA could not mandate release of all documents including confidential communications.²⁶² Even the FOIA provisions could not mandate that action. The Reagan Order, followed by the Bush Order, made the provisions of the PRA operate within the rights afforded the President under executive privilege.²⁶³ Dissent with the Bush Order charging that it is in opposition to the PRA, does not pass muster as the Order relies upon constitutional merits rather than the statutorily-based merits of the Act.²⁶⁴

Although Congress has the option of taking on the challenge of balancing the two important interests of executive privilege and access to historical information, the Bush Order is a strong solution to the problems of the PRA.²⁶⁵ Access to information is a vital part of understanding our past and the role of historians as we embark on the future cannot be ignored. Presidents should be encouraged to be candid with the release of their documents, but further legislation is not the best way to implement that goal. The Bush Order strikes a delicate balance in the need for implementing the PRA and securing history—only the future will test its effectiveness.

260. Bush Order, *supra* note 10.

261. See *supra* Part IV.

262. See *supra* Part V.

263. See Reagan Order, *supra* note 14. See also *supra* Part III.B.

264. See Bush Order, *supra* note 10. See also *supra* Part III.C.

265. See *supra* Part V.