Received(Date): 17 DEC 2001 07:33:43
From: P6/b(6)
To: Brett M. Kavanaugh (CN=Brett M. Kavanaugh/OU=WHO/O=EOP@EOP [WHO])
Subject: : Piece on EO
P_QL015004_WHO.TXT_1.html
P_QL015004_WHO.TXT_2.doc

Begin Original ARMS Header
RECORD TYPE: PRESIDENTIAL (NOTES MAIL)
CREATOR P6/b(6)
CREATION DATE/TIME:17-DEC-2001 07:33:43.00
SUBJECT:: Piece on EO
TO:Brett M. Kavanaugh (CN=Brett M. Kavanaugh/OU=WHO/O=EOP@EOP [WHO])
READ:UNKNOWN
End Original ARMS Header

First, thank you so much for meeting with the group, Brett. You created good will with a group of people who are earnestly interested in the issue of presidential records. It is important to have a strong channel where people feel they can go and be heard.

It is good to know you have such good records practices. The creation and maintenance of records is a critical part of the records issue. Not just full disclosure. Make sure you have good practices in place where people leave the White House so they don't walk away with originals. I know it happens because I have seen them in peoples' homes and offices after they have left.

I have a favor to ask of you and that is to take a quick look at this piece. It is a draft of an article I am doing for Presidential Studies Quarterly. I want it to be a resource article where people can find what are the important elements to consider where looking at the EO.

I have quoted you and alluded to our meeting so make certain and view these parts. The piece is way overdue as it was supposed to be just a short one introducing some of the documents they wanted to run. I decided they needed something different and just kept going. If you want to talk about it, my cell phone is probably best today P6/b(6) and tomorrow you can find me on my cell phone and at 639-8734.

Warm Wishes,

Martha

Martha Joynt Kumar
Director
White House 2001 Project
1730 Rhode Island Avenue NW, Suite 301

Washington, DC 20036
202 496-1348 office
202 785-8460 fax

P6/b(6)

Washington, DC
20007
- att1.htm - PSQ Piece on EO 12-16-01.doc
ATT CREATION TIME/DATE: 0 00:00:00.00
File attachment <P_QL015004_WHO.TXT_1>

ATT CREATION TIME/DATE: 0 00:00:00.00
File attachment <P_QL015004_WHO.TXT_2>

First, thank you so much for meeting with the group, Brett. You created good will with a group of people who are earnestly interested in the is sue of presidential records. It is important to have a strong channel where peo ple feel they can go and be heard.

It is good to know you have such good records practices. The creation and m aintenance of records is a critical part of the records issue. Not just full di sclosure. Make sure you have good practices in place where people leave the Whi te House so they don't walk away with originals. I know it happens because I ha ve seen them in peoples' homes and offices after they have left.

I have a favor to ask of you and that is to take a quick look at this piece . It is a draft of an article I am doing for Presidential Studies Quarterly. I want it to be a resource article where people can find what are the important e lements to consider where looking at the EO.

I have quoted you and alluded to our meeting so make certain and view these parts. The piece is way overdue as it was supposed to be just a short one intr oducing some of the documents they wanted to run. I decided they needed somethi ng different and just kept going. If you want to talk about it, my cell phone i s probably best today P6/b(6) and tomorrow you can find me on my cell phone and at 639-8734.

Warm Wishes,

Martha

Martha Joynt Kumar
Director
Wh ite House 2001 Project
1730 Rhode Island Avenue NW, Suite 301
Washington, DC 20036
202 496-1348 office
202 785-8460 fax
P6/b(6)
Washington, DC 200 07

Executive Order 13233 Further Implementation of the Presidential Records Act

Martha Joynt Kumar

Towson University

On November 1st, President Bush signed Executive Order 13233 allowing for the release of a select category of records only after the incumbent and former presidents agree on their release. In addition, the order rescinded Executive Order 12667 signed by President Reagan in 1989, which established procedures for the incumbent and former President to review certain presidential records twelve years after the Chief Executive left office and to block release of documents based on a claim of executive privilege. The Bush executive order was occasioned by a group of presidential documents coming to the White House from the Reagan Library under the terms of the Presidential Records Act of 1978 and the regulations provided for in Executive Order 12667.

The reaction to the order from scholars and organizations with members using records was immediate and it was critical of the order. While the President and his staff

view the order in terms of the procedures it establishes and, thus, the efficiency it brings to the records review process, others did not. Critics consider the order to be an impediment to the release of records rather than facilitating their release. The President and his staff describe Executive Order13233 as a procedural one carrying out the requirements of the Presidential Records Act of 1978 relating to a group of confidential advice records scheduled to become available beginning in January 2001. "We responded to a new law written by Congress that lays out a procedure that I think is fair for past Presidents. And it is a process that I think will enable historians to do their job, and at the same time protect state secrets. That's why I did what I did," said President Bush.[1]

A common criticism expressed on editorial pages, stated by scholars, and related by organizations is the restrictive impact of the order on the traditional access of the public to information generated by its government. In addition to organizations and users of records, former President Clinton's representative expressed concern over the impact of the Bush executive order. In a and letter to the White House, Bruce Lindsey, who represents the former President in records matters, expressed the need to make public the decision making process. "A government's legitimacy is based on the trust of its people, and when decisions are made on behalf of the American people, citizens eventually have to be able to see the process of how those decisions came to be," he said.[2]

The members of Congress who have publicly commented on the order have been critical of it, including ones in the President's party. In hearings conducted by Representative Stephen Horn, chairman of the Subcommittee on Government Efficiency of the House Government Reform Committee, committee member Don Ose (R-Ca.)

commented: "The bottom line is that the new order appears to violate not only the spirit but also the letter of the Presidential Records Act. In 1978, Congress very clearly expressed its intent to make presidential records available for congressional investigations and then for the public after a 12-year period. This new order undercuts the public's rights to be fully informed about how this government, the people's government, operated in the past."[3] Representative Horn called on the administration to "revisit" the order. "We must insure that the spirit of this law, the Presidential Records Act, needs to be upheld. And in light of the issues raised today and research conducted by the subcommittee staff, the administration should revisit the issue."[4] Democratic subcommittee members Reps. Henry Waxman (D-Ca.) and Janice Schakowsky (D-Ill.) released a joint statement calling on the President to rescind the order because it "violates the intent of Congress and keeps the public in the dark."[5]

Acting on behalf of two historians and a group of organizations representing the interests of their members using presidential records, Public Citizen has filed a complaint in U.S. District Court for the District of Columbia, *American Historical Association v National Archives and Records Administration.*

Executive Order 13233: Origins and Explanations

To understand Executive Order 13233 and the issues surrounding it, one needs to review the relevant portions of the basic components of the legal and administrative history of presidential records. The basic documents are the Presidential Records Act of

1978 and the Reagan Executive Order 12667 as well as court cases relating to the records issue.

The Presidential Records Act of 1978 and Presidential Privilege. The Presidential Records Act of 1978 established public control of presidential records and their orderly release depending upon the degree of sensitivity of the documents. It created procedures for the handling of records in presidential libraries beginning with the papers of Ronald Reagan. Prior to the 1978 act, presidential records were under the control of the President whose administration generated them. The earlier presidential libraries, known as Deed of Gift libraries, are governed by different procedures as the materials in those libraries were donated by the presidents through Deeds of Gift to the National Archives.

While there has been an interest of government in records since 1789 when the Department of State was made responsible for their maintenance, the control of presidential records did not fall to the public until the 1978 Act. The courts, however, had stated the public interest in records as far back as 1841. In *Nixon v. Administrator of General Services et al*, the majority opinion refers to the nineteenth century case: "It has been accepted at least since Mr. Justice Story's opinion in *Folsom v. Marsh*, 9 F. Cas. 342, 347 (No. 4,901) (CC Mass.1841), that regardless of where legal title lies, 'from the nature of the public service, or the character of the documents, embracing historical, military, or diplomatic information, it may be the right, and even the duty, of the government to give them publicity, even against the will of the writers.'"[6]

The Presidential Records Act of 1978 provides that records of an administration are closed until five years following the end of an administration, except at the request of

the courts or the Congress. At that point, records are available through the Freedom of Information Act [FOIA]except for those covered by the following categories: national security, personnel records; records specifically exempt by law; trade secrets; confidential communications between a President and his advisors; personal privacy. A President can deny access to records falling within those categories for up to twelve years and then they become subject to FOIA, except for the confidential advice category that contains the "deliberative process" and executive privilege claims. In order to carry out the provision protecting a President's constitutional claims, the Archivist is required to let the former President view the records "when the disclosure of particular documents may adversely affect any rights and privileges which the former President may have." To implement this provision, the Archivist informs the former President that he or his representative has 30 days to assert any rights or privileges that would prevent release of the records in question. If none is asserted, the documents are released.

President Reagan's Executive Order 12667. Executive Order 12667 signed by President Reagan on January 16, 1989, further brought the sitting and former presidents into the review process for presidential confidential advice records prior to their public release. The Reagan order requested the Archivist to notify the former President of the intention of the National Archives to release records from his library and to "identify any specific materials, the disclosure of which he [the Archivist] believes may raise a substantial question of Executive privilege."[7] If the former President wanted to prevent the release of records he could claim executive privilege, but the Archivist was not bound by his claim. The order defines executive privilege issues: "A 'substantial question of

Executive privilege' exists if NARA's [National Archives and Records Administration] disclosure of Presidential records might impair the national security (including the conduct of foreign relations), law enforcement, or the deliberative processes of the Executive branch."[8] Additionally, the order provided that the incumbent President could act of the advice of the Attorney General and the White House Counsel to assert executive privilege and then order the Archivist not to release the records under review. The review had a time limit of 30 days after which the documents would be released.

It was under the provisions of the Reagan order that in February, President Bush was brought into the process of reviewing the confidential files sent forward by Reagan Library and Archives officials. The records were scheduled for release once the President took his turn at reviewing them under the provisions established by the Reagan executive order. The records scheduled for release by the Reagan Library and Archives officials included 68,000 pages of documents withheld under the confidential advice category. During the twelve year period archivists reviewed nearly four million pages of Reagan records working with FOIA requests. White House Counsel Alberto Gonzales instructed Archivist John Carlin that the White House was extending the review of the records release. After a second 90 day extension, on August 31st Judge Gonzales notified the Archivist that the White House was taking an indefinite extension to consider the release of the identified Reagan records. On November 1st President Bush issued Executive Order 13233.

President Bush's Executive Order 13233. The order revisits the issue of the roles of the current and former President as well as the Archivist. It adds in representatives of the

former President and elaborates on the notion of what constitutes executive privilege. Additionally, the order establishes a threshold researchers must meet to get records where executive privilege is at issue. When the National Archives is to release records categorized as confidential advice, the Archivist is to inform the incumbent and former presidents. Each has 90 days to review the documents and request the withholding of those where either believes executive privilege is at issue. Both may request unlimited extensions to review records, which is a provision not found in the original act. The order states that "absent compelling circumstances, the incumbent President will concur in the privilege decision of the former President in response to a request for access under section 2204 (c)(1)."[9] Additionally it provides the "incumbent President will support that privilege claim in any forum in which the privilege claim is challenged."[10] If the former President wants to release records and the incumbent President does not, however, "the incumbent President may independently order the Archivist to withhold privileged records."[11]

To have standing to challenge a claim, the order interprets Supreme Court rulings as providing 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."[12] The Presidential Records Act does not establish a demonstrated need threshold of any sort for access to presidential records nor do Archives officials use one.

The scope of "constitutionally based privilege" is enlarged from the Reagan order, though "law enforcement" concerns are no longer included. In the Bush order privilege is defined as "including those that apply to Presidential records reflecting

military, diplomatic, or national security secrets, Presidential communications, legal advice, legal work, or the deliberative processes of the President and the President's advisors."[13] In addition to the incumbent President and the former President whose papers are in question, representatives of the President are authorized to prevent the release of papers by exercising his constitutional privileges. After the President dies, his representative can still exert claims of privilege. There is no provision for disputed papers to ever become public no matter how far back a President died.

Administration Explanations of the Origins and Aims of the Order. Administration officials have elaborated on the origins and aims of Executive Order 13233. The order itself contains the President's explanation of the constitutional and legal background of the order and in public venues administration officials have discussed their reasons for issuing it.

Legal Basis of the Order. The legal basis of their reasoning in the order is found in the original act and two Supreme Court decisions, which establish a President's and former President's constitutionally based privileges in the area of information and records as well as the threshold required to overcome a President's constitutionally based privileges. In the order, the administration points up the recognition in the Presidential Records Act of 1978 [section 2204(c)(2)], "Restrictions on access to Presidential records", that "the former President or the incumbent President may assert any constitutionally based privileges." Brett Kavanaugh, Associate Counsel in the Office of White House Counsel and the person who crafted the order, said the order is designed to make operational the dictates of two Supreme Court decisions.[14] The cases are *Nixon v.*

Administrator of General Services and *United States v. Nixon*. From *Nixon v. Administrator of General Services*, the administration cites the Supreme Court recognition of the need for the President to have confidential communications: 'Unless [the President] can give his advisers some assurance of confidentiality, a President could not expect to receive the full and frank submissions of facts and opinions upon which effective discharge of his duties depends. 433 U.S. at 448-49." The same case also established that "constitutionally based privileges 'survive a President's tenure.'" The administration cites *United States v. Nixon* for the standard set by the Supreme Court for the order's requirement a person to overcome the President's privileges applying to records "must establish at least a 'demonstrated, specific need' for particular records, a standard that turns on the nature of the proceeding and the importance of the information in that proceeding."[15]

Public Explanations by Administration Officials. In several different venues, President Bush, Press Secretary Ari Fleischer, White House Counsel Alberto Gonzales, and Associate Counsel Brett Kavanaugh have commented on their executive order. In all of their remarks, the President and White House officials explain the need to establish procedures to implement the Presidential Records Act and the benefits they see accruing to historians and others using records coming from presidential libraries covered by the act. They view the order as necessary to effectuate the use of executive privilege by presidents whose records are scheduled for release. President Bush views the order as a procedural one: "There are some documents are privileged, protected. And this is just to make sure those documents remain protected and privileged. I don't see this as anything other than setting a set of procedures that I believe is fair and reasonable."[16]

Orderly Process. The heart of the order lies in the procedures it creates relating to the role of former presidents in making claims executive privilege. "What we have done in this executive order is to provide a process, an orderly process, to help the Archivist, with respect to the presidential records of a former President," commented White House Counsel Alberto Gonzales.[17] He elaborated on this statement in a piece he wrote for *USA Today* emphasizing the President's statutory and court based obligation to protect the rights of former presidents to exercise executive privilege "The order fulfills the president's statutory obligation to implement the Presidential Records Act, as well as his obligations under a 1977 Supreme Court ruling that held that former presidents continue to have the right to assert privileges over their records even after their term has ended. Neither Bush nor Congress has the power or authority to ignore that Supreme Court ruling. The Presidential Records Act fails to establish a procedure for former presidents to assert their constitutionally guaranteed privilege. President Bush's order provides such procedures and sets a reasonable time frame for review of records and assertion of privileges."[18]

More Information Will Flow. Press Secretary Ari Fleischer indicated the order will result in more information being released than can be counted on as coming from one of the Deed of Gift libraries, those established before the 1978 Presidential Records Act.

> As a result of the new law that is now going into effect, and thanks to the executive order that the President will soon issue, more information will be forthcoming. And it 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. There will be a 90-day time line put on it, so that academicians or whoever can get that information on request to the Archivist of the United States. The Archivist will then get in touch with the former President, with this administration. And unless an objection to releasing the information is raised, on the basis of those objections that are allowable under the law, the information will then become released.

Correcting Problems Contained in Reagan Order. In part administration officials say, the Bush Executive Order is meant to correct the problems of the Reagan order as much as it is to fill in procedures to implement the 1978 law. While the Reagan Executive Order 12677 brought the former President into the process of reviewing documents for an executive privilege component, the Bush White House did not believe the former Chief Executives had a sufficient role in determining the fate of their own records. "There was an executive order that was signed by Ronald Reagan dealing with his presidential records. That will be rescinded by this order. And the reason that we are rescinding that order is because that order gives no deference whatsoever to the opinions of a former President. It basically says – it gives, basically, the decision making to the incumbent President," commented Gonzales in a private briefing with a select group of reporters.[19] "And we felt that was inconsistent with current Supreme Court precedent, and also, quite frankly, reflected bad policy. And we thought it would be more appropriate to really give the primary responsibility regarding presidential records to the former President whose records they belong to, and to have the incumbent President sort of be

the backstop in making decisions about whether or not those documents should in fact be released."

Incumbent Will Follow Wishes of Former President. In his explanation of the order in his testimony before the House Subcommittee on Government Efficiency of the Committee on Government Reform, Edward Whelan III, Acting Assistant Attorney General, Office of Legal Counsel at the Department of Justice, commented the incumbent President will have less say over the records of his predecessor than he did prior to the issuance of the order. "Consistent with the Supreme Court's decision in Nixon v GSA, 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 that the incumbent president will, absent of compelling circumstances, concur in 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."[20]

Critics Offer Their Explanations for the Order. Critics of the order quickly came forward with their comments quoted in wire service reports, in the major newspapers, and on the air. Editorials ran in the *New York Times,* the *Washington Post*, and the *Los Angeles Times* with respectively the following titles, "Cheating History," "A Flawed Approach on Records," and "A Dark Oval Office."[21] Critics of the order, focused on what they saw as reasons for the order. Three recurring themes of the critics are: to protect current administration officials who served in the Reagan White House; the desire to develop a court case to get a reading by the Supreme Court of executive privilege; the

order is viewed as part of an overall information and policy seeking to reassert a President's control over the release of information government-wide. Wire service and newspaper articles reporting the order almost uniformly reported in their stories on the order with quotes from or allusions to scholars or others who raised the question whether the order was an effort to protect people currently working in the Bush Administration who served in the White House and in departments and agencies during the Reagan years.[22] Many officials currently serving had a place in the Reagan Administration, including Colin Powell, Andrew Card, Mitch Daniels, Larry Lindsey.

Some critics have alluded to the administration's fights on many fronts over the issue of executive privilege. Professor Peter Shane raised the question in his testimony at the House hearing if the administration was seeking a confrontation on executive privilege. "This administration has seemed to develop what might be called a kind of ideology of executive privilege, it is picking fights over records of past administrations," Shane said. "In one case with regard to the vice president's meetings and his contest of GAO [General Accounting Office], I have to say it's a current president but the information seems almost trivial, it seems like an almost intent to pick a fight."[23] Scholars and others raised concern over the variety of areas in which the administration had restricted the release of information, including in addition to the Cheney example the October 16th order by John Ashcroft departments and agencies informing them they can "be assured" the Justice Department will defend them in their refusal to release records under the Freedom of Information Act, thus reversing an order by Attorney General Janet Reno calling on governmental agencies to err on the side of the release of records. Executive Order 12958, a 1995 order issued by President Clinton declassifying

government national security records is currently under review and, in the view of the critics of the Bush order, at risk for major revision.

Perspectives on the Issues Arising From the Order

The order raises important constitutional questions relating to presidential privilege, including its scope, the right of a former President to invoke privilege, the ability of a former President's representative and family members to make such claims for him after his death, and the ability of the Vice President to make claims of executive privilege on his own behalf independent of a presidential claim. In addition to presidential privilege issues, the order raises questions about the role assigned to the Archivist of the United States in the Presidential Records Act as an arbiter of records, the requirement of the order that a person requesting records "establish at least a 'demonstrated, specific need' for particular records." Additionally, scholars point to the impact of the order through the increased length of time provided officials to process records and the need to go through the court system to appeal a negative decision on the release of records rather than work through the Archivist for appeals.

What Is the Proper Scope of Executive Privilege? Critics of the order raise questions about the notion of presidential privilege put forth in the order. Representative Don Ose in his opening statement at the House subcommittee hearing stated his concern that the order creates two new areas of privilege: "Those two areas being communications of the

president of his advisors, that is the presidential communications privileges, and legal advice or legal work, meaning the attorney- client or attorney-work-product privilege. I am deeply concerned about the two new broad limitations in the order. Both of them, especially the presidential communications privilege, could severely limit congressional access to key documents in its investigations of any former administration."[24] In his response to Representative Ose's questions, the administration's representative, Edward Whelan III, said no such expansion is intended. "No substantive change is intended, or effected, by the difference in words used to describe the privilege. Nor could any president, through an executive order, change the contours of the constitutional privileges available to existing and former presidents." While that may be so, some take the position the listing of privileges found in the executive order needs to be challenged by the Congress or future presidents might seek to act on the basis of the list.[25]

What Weight Does a Former President's Privilege Claim Have? In *Nixon v. Administrator* the Supreme Court established that a President's privilege survives the tenure of the Chief Executive. Speaking for the Court, Justice Brennan said "we reject the argument that only an incumbent President may assert such claims and hold that appellant [former President Nixon], as a former President, may also be heard to assert them."[26] At the same time, though, the majority opinion states the "incumbent President is vitally concerned with and in the best position to assess the present and future needs of the Executive Branch, and to support invocation of the privilege accordingly."[27] In the same majority opinion, Justice Brennan noted "the expectation of the confidentiality of executive communications thus has always been limited and subject to erosion over time

after an administration leaves office."[28] While Associate Counsel Brett Kavanaugh indicated White House officials understand erosion takes place, it is unclear how that process takes place. It is, he indicated, a judgment the courts will have to make.[29]

Can Representatives of a President Assert Privilege? The order provides a former President's representative can make executive privilege claims on his behalf, even if the President has died. In a briefing with a select group of reporters, Judge Gonzales indicated representatives will be allowed to speak for presidents. "We will look to the representative of the former President to decide whether or not a privilege should be asserted. And the executive order makes clear that except for compelling circumstances, that this administration will agree with the decision by President Reagan's representative," he said.[30] Queried as to what the qualifications must be for an individual chosen to represent the President, Acting Assistant Attorney General said a former President "may designate whomever he sees fit."[31] He continued: "A former president presumably would want to select as his representative, someone who was knowledgeable about, and sensitive to, the interests that advisors would have so that advisors in the future would have confidence that they could give their full, frank advice." Yet the order does not require a former President choose such a person, nor following his death that his family members select someone with records expertise. As it relates to presidents who have died or are disabled, the order is at odds with the Presidential Records Act, which provides in such cases authority passes to the Archivist.[32]

Who Has the Burden of Proof on Records Issues? A variety of groups representing archivists, academics, and journalists view the order as subverting the Presidential Records Act rather than implementing it as the Congress intended for it to operate. In the House hearings, Professor Mark Rozell raised an issue brought up by many critics: instead of the government proving why information should be kept secret, the order now requires the public to justify why it needs records. "With regard to legislative executive disputes over information, the burden is on the president to demonstrate a need for confidentiality and not on Congress to prove that it has the right to conduct oversight. Similarly, the burden should be on a president or ex-president to demonstrate a need to close off access to past presidential records and not on citizens to prove that they have a right to examine public records. The Bush administration actions on executive privilege dramatically shifts the burden away from where it belongs."[33]

Executive Order 13233 provides that someone seeking to overcome the constitutionally based privileges that apply to Presidential records must establish at least a 'demonstrated, specific need' for particular records."[34] The Presidential Records Act does not establish a demonstrated need threshold of any sort for access to presidential records nor do Archives officials use one in implementing the legislation. The U.S. Circuit Court of Appeals for the District of Columbia in *Nixon v. Freeman* [670 F.2d 346 (D.C. Cir.), *cert.Denied,*459 U.S. 1035 (1982) rejected the need of the public to demonstrate a need in order to get access to presidential information, in that case the tapes of former President Nixon. "We also see no justification for requiring the Administrator to condition access upon a showing of particularized need."[35]

Does the Vice-President Have an Independent Claim of Executive Privilege? The executive order allows a Vice President to exercise executive privilege, an authority some question. In the hearings in the House of Representatives Subcommittee on Government Efficiency of the Government Reform Committee, Professor Peter Shane disputed the right of a Vice President to exercise executive privilege. "The vice-president's privileges, such as they are, could only be part and parcel of the privilege that protects the presidency. I don't read into the Constitution -- I know of no authority that suggests that there is independent executive privilege to protect the office of the vice-presidency. As a presidential advisor, vice- presidents are undoubtedly protected in their communications in order to protect the presidency," Shane said.[36] "But I would imagine that huge quantities of what the vice- presidents read and deliberate upon are no more protected by executive privilege than, say, the records of the Federal Energy Regulatory Commission or the Small Business Administration. He's just another federal administrator." While he may be more than "just another federal administrator," it is unclear where his independent claim to executive privilege lies.

What Is the Appropriate Records Role of the Archivist? In the Presidential Records Act, the Archivist is the linchpin of the process of the dissemination of records. In language inserted on the House floor, the act articulates the role of the Archivist: "The Archivist shall have an affirmative duty to make such records available to the public as rapidly and completely as possible consistent with the provisions of this Act."[37] As an example of his reach, the act provided that "upon the death or disability of a President or former President, any discretion or authority the President or former President may have

had under this chapter shall be exercised by the Archivist unless otherwise previously provided by the President or former President in a written notice to the Archivist."[38] The Bush order, however, does not provide for such a role for the Archivist preferring instead to deal with representatives of the President. Executive Order 13233 states: "Upon the death or disability of a former President, the former President's designated representative shall act on his behalf for purposes of the Act [Presidential Records Act] and this order, including with respect to the assertion of constitutionally based privileges."[39] Further, the order provides should there be no designated representative, "the family of the former President may designate a representative (or series or group of alternative representatives, as they in their discretion may determine) to act on the former President's behalf for purposes of the Act and this order, including with respect to the assertion of their constitutionally based privileges."[40]

The Archivist role in records review and decision-making is long-standing. In its 1974 Presidential Recordings and Materials preservation Act, the Congress assigned to the Archivist the duty upheld in *Public Citizen v. Burke* [843 F. 2nd 1473 (D.C. Circuit. 1988] to review claims of executive privilege. The court commented in that case on the suitability of the Archivist to assess privilege claims. "And the Archivist will be knowledgeable, as appellees emphasize, as to what information is already disclosed and therefore will be. If properly advised as to constitutional matters, uniquely suited to expressing the Executive Branch's determination on such claims."[41] "If, whenever Mr. Nixon asserts executive privilege, the Archivist in effect loses jurisdiction over his responsibilities to affect disclosure, the former President has gained power to withdraw from the Archivist some indefinite portion of the responsibilities that Congress delegated

to him – and transfer those responsibilities to the Judiciary. We think that is a strained interpretation of congressional purpose," the Court said in *Public Citizen v. Burke*.[42] While that case dealt with the Presidential Recordings and Materials Act, the stated role of the Archivist as an arbiter of records is similar to that assigned to him in the Presidential Records Act. In the Reagan order, the Archivist was assigned a prominent role in records decisions as he was given the authority to open records even when a former President is against it.

The Bush White House regards the Archivist's role in the Reagan executive order to be a mistaken one. The recent executive order effectively takes away the role of the Archivist of the United States to be an arbiter of the records as he no longer has a role in executive privilege claims. Rather than viewing the Archivist to be an independent official in the 1984 legislation creating the National Archives and Records Administration, the White House views him as a member of the President's team. While in *Public Citizen v. Burke* he is viewed as a "subordinate of the President," his status is not further defined.[43] He is very much an administration official responsible to the President, indicated Brett Kavanaugh, Associate Counsel in the White House Counsel's office. "Just like John Ashcroft or anyone else," he said.[44] The White House saw no distinction between the place in the administration of the Archivist and Cabinet members even though the Presidential Records Act calls upon the President to contact the Congress with his reasons for dismissing the Archivist and does not have such a provision for Cabinet members.

How Long Can Records Be Withheld? The Presidential Records Act set a standard for the release of records to the public when it called for the Archivist to make "records available to the public as rapidly and completely as possible consistent with the provisions of this Act."[45] Executive Order 13233 provides no time limits for the President to make a claim of executive privilege. The Presidential Records Act and the Reagan executive order provide specific time limits for presidents and former presidents to review records although the Reagan order provides for the President or former Chief Executive to request an extension. The impact of the order is to lengthen the process because the Archivist is no longer the intermediary he was intended to be in the Presidential Records Act. Once the White House has received records, another time clock begins. "After receiving the records he requests, the former President shall review those records as expeditiously as possible, and for no longer than 90days for requests that are not unduly burdensome," the act provides.[46] Should the records request prove burdensome, there is no time frame within which the former President must complete review of the records. The same is true with the President.

Because the Archivist is no longer an arbiter, it means the only recourse for a researcher denied papers is to go to court. Under FOIA, if someone is denied records, the researcher could appeal to the Deputy Archivist and then to the Court. Going to court not only lengthens the process for a researcher, it makes it a costly one as well.

What Is the Status of the Reagan Records? The 68,000 records reviewed by the Reagan Library under the Presidential Records Act are under review by lawyers working with the White House. While the records were at the heart of Executive Order 13233, the

records themselves only recently came under scrutiny. Before the issuance of the order, the White House viewed only a small portion of the records. "The archivist came to us, asked that we actually sample some of the documents, which we did," said White House Counsel Alberto Gonzales.[47] "I think we sampled something like 2,000 documents provided to us by the archivist." A team of lawyers is currently going through the bulk of the records, indicated Brett Kavanaugh, Associate Counsel in the White House Office of Counsel to the President.[48] The White House expects the records to be released in coming months with few held back under terms of the order.

Critics Respond with Legal Action

Legal Action: ***American Historical Association v. National Archives and Records Administration.*** On November 28th, Public Citizen filed a complaint in the U.S. District Court for the District of Columbia against the National Archives and Records Administration. Filed under the Administrative Procedures Act, the Presidential Records Act and the plaintiffs "nonstatutory right to judicial review of unlawful executive action," the group of two historians and four organizations seeks "to obtain a declaratory judgment that the Archivist of the United States and the National Archives and Records Administration ('NARA') must administer the Presidential Records Act without regard to the terms of Executive Order No. 13,233 (the 'Bush Order'),and to compel the release of presidential materials of former President Ronald Reagan that are in the custody of NARA and are being withheld in violation of the PRA." The issues cited in the case as cause for the complaint include the expanded notion of executive privilege implied in the

order; the charge that the incumbent President will follow the claim of privilege by the former President; the provision that a former President can have a surrogate acting on his behalf after his death, including family members; the stipulation that a Vice President can exercise a claim of executive privilege separate from that of the President.

The Future of the Executive Order. As he was leaving a presentation at the American Enterprise Institute, Karl Rove was asked if the White House had any second thoughts about their order on presidential records, he said "no".[49] His position reflected the public voices of all White House officials who have spoken on the subject. In his meeting with representatives of organizations representing the interests of political scientists, historians, archivists, and journalists, Associate Counsel Brett Kavanaugh indicated the resolution of differences on the order would be settled by the courts. Indeed that appears to be the most likely venue for settling the dispute over the nature of executive privilege. In *United States v. Nixon* [418 U.S. 683 (1974)] the Supreme Court reaffirmed its authority to decide claims of privilege and used the landmark case of *Marbury v. Madison* [1 Cranch 137 (1803)] to do so. "We therefore reaffirm that it is the province and duty of this Court 'to say what the law is' with respect to the claim of privilege presented in this case."[50] It is likely it will be the court system that decides the claims put forward in the Bush order.

With its title "Further Implementation of the Presidential Records Act", Executive Order 13233 invites a congressional response. In their letter to President Bush, Representatives Henry Waxman and Janice Schakowsky called upon the President to rescind his order and "instead begin a dialogue with Congress and the public to determine

the need for clarification of this law."[51] While there is some discussion of bipartisan action in the House of Representatives, little is going on on the issue in the Senate. With one year left in the session and a packed agenda of domestic and terrorism related issues on the agenda, members of Congress are not likely to build a coalition of support for a measure to revoke the order. Any law would require a veto-proof majority, something difficult to achieve at any time. In addition, organizations and officials are reluctant to open up the Presidential Records Act for amendment for fear of opening up a larger discussion of records that might result in unintended alterations. There are those who would like to increase the number of years for records to be withheld from twelve years to somewhere in the neighborhood of 25.

---

[1] Remarks by President Bush and President Obasanjo of Nigeria in Photo Opportunity, November 2, 2001.
[2] Mike Allen and George Lardner Jr., "A Veto Over Presidential Paper; Order Lets Sitting or Former President Block Release," the *Washington Post*, November 2, 2001.
[3] Hearings of the Government Efficiency, Financial Management and Intergovernmental Relations Subcommittee of the House Government Reform Committee, "The Presidential Records Act," November 6, 2001.
[4] House hearings, November 6, 2001.
[5] November 6, 2001.
[6] *Nixon v. Administrator of General Services et al.*, p.445, note 5.
[7] Executive Order 12667, Section 2 (a).
[8] Executive Order 12667, Section 1 (g).
[9] Executive Order 13233, Section 4.
[10] Executive Order 13233, Section 4.
[11] Executive Order 13233, Section 3 (d)(2)(ii).
[12] Executive Order 13233 Section 2 (c).
[13] Executive Order 13233 preamble.
[14] Telephone conversation, Brett Kavanaugh and Martha Joynt Kumar, November 5th and in December 7th a meeting with scholars and representatives of organizations in the communities of political scientists, historians, archivists, and journalists.
[15] Executive Order 13233, Section 2.
[16] Remarks by President Bush and President Obasanjo of Nigeria in Photo Opportunity, November 2, 2001.
[17] "Press Roundtable with White House Counsel Alberto Gonzales," November 1, 2001, internal transcript.
[18] Alberto R. Gonzales, "Protect Sensitive Documents," *USA Today*, November 12, 2001.
[19] "Press Roundtable with White House Counsel Alberto Gonzales," November 1, 2001, internal transcript.

[20] House hearings, November 6, 2001.

[21] "Cheating History," the *New York Times*, November 15, 2001; "A Flawed Approach on Records," the *Washington Post*, November9, 2001; "A Dark Oval Office," the *Los Angeles Times*, November 6, 2001.
[22] See Deb Riechmann, "Bush Issues Executive Order Guiding Future Release of Presidential Papers," Associated Press, November 2, 2001; Deb Riechmann, "Legislators Urge Bush to Rethink Order Restricting Release of Presidential Papers," Associated Press, November 6, 2001; Elisabeth Bumiller, "Bush Keeps a Grip on Presidential Papers," the *New York Times*, November 2, 2001. Many editorials also mentioned the point, such as "Cheating History," the *New York Times*, November 15, 2001.
[23] House hearings, November 6, 2001.
[24] House hearings, November 6, 2001.
[25] See testimony of Professor Peter M. Shane, House hearings, November 6, 2001.
[26] *Nixon v. Administrator of General Services et al.*, IV, p. 439.
[27] *Nixon v. Administrator* of General Services et al, IV, B, p. 449.
[28] *Nixon v. Administrator of General Services et al.*, IV, B, p. 451. See also *Public Citizen v. Burke,* 2 (2) p. 1479, for a statement of the erosion over time of confidentiality of executive communications.
[29] Meeting with Brett Kavanaugh, December 7, 2001.
[30] "Press Roundtable with White House Counsel Alberto Gonzales," November 1, 2001, internal transcript.

[31] House hearings, November 6, 2001.
[32] Presidential Records Act of 1978, 44 U.S.C. 2204 (d).
[33] House hearings, November 6, 2001.
[34] Executive Order 13233 Section 2 (c).
[35] *Nixon v. Freeman*, III, C [4] (4), 359.
[36] House hearings, November 6, 2001.
[37] Presidential Records Act of 1978, 44 U.S.C. 2203 (f)(1).
[38] Presidential Records Act of 1978, 44 U.S.C. 2203 (d).
[39] Executive Order 13233, Section 10.
[40] Executive Order 13233, Section 10.
[41] *Public Citizen v. Burke,* 2 (2), p.1479.
[42] *Public Citizen v. Burke,* 2 (2), p.1480.
[43] *Public Citizen v. Burke,* 2 (2),p. 1479.
[44] Meeting with Brett Kavanaugh, December 7, 2001.
[45] Presidential Records Act of 1978, 44 U.S.C. 2203 (f)(1).
[46] Executive Order 13233, Section 3(b).
[47] "Press Roundtable with White House Counsel Alberto Gonzales," November 1, 2001, internal transcript.
[48] Meeting with Brett Kavanaugh, December 7, 2001.
[49] American Enterprise Institute, November 11, 2001.
[50] *United States v. Nixon*, IV, A.
[51] November 6, 2001.