

TO: Transition Team

FROM: Attached List of Organizations

RE: Presidential Records

DATE: November 12, 2008

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The records of former presidents are critical resources for the public to understand our nation's history and role in the world. An accurate and complete historical record of presidential decision-making is vital to our free democratic society. In a statement that is now inscribed at the entrance to his Presidential Library, President Harry Truman said: "The papers of the Presidents are among the most valuable sources of material for history. They ought to be preserved and they ought to be used."

To ensure an accurate documentary history, the Presidential Records Act (PRA), 44 U.S.C. §§ 2201-2207, made clear that records of the president belong to the public and are not the property of the outgoing president as he or she leaves office. The PRA created a framework for public access to the records. However, in 2001 President Bush issued an executive order that severely compromised the public's interest in historical presidential records and reverted to a regime under which a former president may continue to exert ownership in the records, including through his or her descendents. That order purported to create new constitutional privileges to prevent disclosure and to grant authority to block release of records to individuals who never served in an elected office. The Bush order attempted to override the orderly process established by the PRA and regulations of the National Archives and Records Administration (NARA) and created excessive delays that a court subsequently ruled illegal.<sup>1</sup>

Aside from the executive order that undermines the legal framework, every White House that has used email to communicate has struggled to adequately preserve and archive its email records, even as email has replaced paper records as the primary means of communicating within the White House. The Bush administration has acknowledged the loss of hundreds of days of its presidential and federal email records, amounting to as many as 5 million missing records from the Office of Management and Budget, the United States Trade Representative, the Office of the Vice President, and the rest of the Executive Office of the President. In September 2008, the Government Accountability Office issued a report indicating that there is a risk that NARA will not have the capability to process the Bush Administration's presidential records at the time of the January 2009 presidential transition and has not yet developed a plan to mitigate this risk<sup>2</sup>. In addition, the Office of the Vice President acknowledges preserving only those records that it narrowly defines under the PRA as records related to functions "specially assigned" to the vice president by the president and records of the vice president's function as president of the Senate. In light of Vice President Cheney's view that his office is not part of the executive branch, this narrow definition excludes any records that he determines arise from his "legislative" or statutory responsibilities. These practices create great uncertainty about whether the outgoing

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<sup>1</sup> *Am. Historical Ass'n v. Nat'l Archive and Records Admin.*, 516 F. Supp. 2d 90 (D.D.C. 2007)

<sup>2</sup> See <http://www.gao.gov/cgi-bin/getrpt?GAO-08-1105>.

administration's records will survive the presidential transition. The current statutory framework lacks oversight mechanisms to ensure that recordkeeping practices are appropriate to preserve the historically and legally important records.

Policies and procedures for the maintenance, preservation, and access to presidential records should be a stable and reliable source of guidance from administration to administration and should not be subject to shifting political winds. The PRA, as implemented by NARA, establishes the necessary framework to protect the interests of current and former presidents and the public.

While the president is in office, the PRA protects his or her use and control over presidential records, including allowing disposal of records upon consultation with the Archivist. After the president leaves office, the PRA provides for the records that are not needed by the incoming administration to be transferred to the custody of NARA, where they are processed by professional archivists for eventual release between five and twelve years after the president leaves office, depending on the nature of the records and the departing president's wishes. The PRA protects constitutional privileges by generally incorporating the principles of the Freedom of Information Act and ensures that information related to protected interests will not be disclosed.

Regulations promulgated by NARA govern implementation of the PRA. These regulations, 36 CFR § 1270, permit the incumbent president to dispose of records after obtaining the views of the Archivist. They offer an outgoing president the opportunity to restrict certain types of records from disclosure for 12 years. They also provide for notice to a former president before records are disclosed and procedures for a former president to assert claims that the records are privileged and should not be disclosed. They provide for extensions of time to review records and withholding of records pending judicial review if there is a dispute.

Implementation of the PRA has been further directed by two executive orders: Executive Order 12667, issued by President Reagan in January 1989, and the Bush Order, Executive Order 13233, which was issued in 2001 to replace the Reagan Order.

### **Recommendations:**

**The next president should swiftly revoke E.O. 13233 in order to ensure the preservation and timely disclosure of historically valuable presidential records.** Revocation of E.O. 13233 is necessary to restore the PRA's protection of presidential records for eventual disclosure to the public and prevent the assertion of constitutional privileges by presidential family members and former vice presidents. Upon revocation of E.O. 13233, existing NARA regulations governing the release of presidential records will remain in effect and provide procedures for management of presidential records and appropriate notification of former presidents before records are made public. Attached to this memorandum is a draft executive order revoking E.O. 13233 and clarifying that claims of constitutionally based executive privilege may be asserted by living former presidents or the incumbent president, or through their representatives.

**Immediately following the election, the new administration should commit to working with NARA and Congress to ensure the necessary oversight and resources for the transfer and processing of the Bush presidential records, in order to ensure that the requirements of the Congress, the incoming president, and the courts for information contained in the previous administration's records can be met.**

**Further, the next president should demonstrate his commitment to change by being the first president to effectively preserve all presidential records of administrative, historical, informational, or evidentiary value.** Attached to this memorandum is a draft presidential memorandum to the executive branch that would articulate the incoming president's views on preservation of the nation's documentary history and commit the administration to working together with Congress to pass permanent legislation to guide the preservation, management, and oversight of presidential records.

**Signatories:**

American Association of Law Libraries  
American Booksellers Foundation for Free Expression  
Association of American Publishers  
Association of Research Libraries  
The Brennan Center for Justice  
California First Amendment Coalition  
Center for National Security Studies (CNSS)  
Citizens for Responsibility and Ethics in Washington (CREW)  
Electronic Frontier Foundation  
Federation of American Scientists  
Government Accountability Project (GAP)  
iSolon.org  
Liberty Coalition  
Minnesota Coalition on Government Information  
National Coalition for History  
National Freedom of Information Coalition (NFOIC)  
The National Security Archive  
National Whistleblower Association  
Open Society Policy Center  
OpenTheGovernment.org  
Project On Government Oversight  
Public Citizen  
The Rutherford Institute  
Society for Historians of American Foreign Relations

## MEMORANDUM FOR THE HEADS OF DEPARTMENTS AND AGENCIES

SUBJECT: The Presidential Records Act

On the first day of my administration, I hereby declare my commitment to ensuring that the records of my presidency are maintained and preserved in accordance with both the letter and the spirit of the Presidential Records Act, to safeguard for the public and for future generations an accurate and complete documentary history of my administration's work.

To this end, I affirm that the Office of the President, the Office of the Vice President, and the Executive Office of the President will preserve all records of administrative, historical, informational, or evidentiary value, whether stored in paper, electronic, or any other format. My administration will establish adequate recordkeeping systems and comply with the provisions of the Presidential Records Act and the Federal Records Act, as well as regulations and guidelines established by the National Archives and Records Administration.

Because the preservation of our nation's most significant documentary history is critical for accountability, I am asking Congress to consult with the public and with the historical and archival communities to develop legislation that will establish appropriate procedures and standards for preservation, management and oversight of presidential and federal records in my administration and all future administrations. I commit to working with Congress to enact this bipartisan legislation, which will restore the confidence of the American people in the accountability of the highest office of our government.

To ensure transparency and timely release of presidential records, I am today issuing E.O. \_\_\_\_, which will revoke Executive Order 13233, issued by President Bush on November 1, 2001. Over the past eight years, Executive Order 13233 has undermined the American people's access to records that document critical portions of our history. By working together with Congress, I pledge to restore the spirit of accountability embodied in the Presidential Records Act and ensure that the process for making public important presidential records is efficient, fair, and transparent.

**Executive Order \_\_\_\_ : Revocation of Executive Order 13233 on Further Implementation of the Presidential Records Act**

By the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered as follows:

Section 1. *Revocation.*

Executive Order No. 13233 of November 5, 2001, is revoked, except insofar as it revoked Executive Order No. 12667 of January 18, 1989.

Section 2. *Claims of Constitutionally Based Privilege.*

Claims of constitutionally based privileges or rights that would restrict access to records subject to the Presidential Records Act, 44 U.S.C. §§ 2201 – 2207 (“PRA”), shall be asserted by persons claiming such privileges or rights, and shall be considered by the Archivist of the United States (“the Archivist”), in accordance with the procedures set forth in the Archivist’s regulations implementing the PRA, 36 C.F.R. § 1270.46. The Archivist may consider reasonable requests to extend the time provided for review of records as to which he has been provided notice of intent to disclose under 36 C.F.R. § 1270.46(a). Claims of constitutionally based executive privilege (or “presidential privilege”) may be asserted only by living former Presidents or the incumbent President, although assertions of privilege by a living former President may be communicated to the Archivist by the former President’s designated representative, and assertions of privilege by the incumbent President may be communicated to the Archivist by the White House Counsel. No claim of a constitutionally based “vice presidential privilege” shall be accepted or considered by the Archivist.