STATEMENT

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BEFORE THE

HOUSE SUBCOMMITTEE ON EFFICIENCY, FINANCIAL MANAGEMENT AND INTERGOVERNMENTAL RELATIONS, COMMITTEE ON GOVERNMENT REFORM

CONCERNING

H.R. 4187, THE PRESIDENTIAL RECORDS ACT AMENDMENTS OF 2002

PRESENTED ON

APRIL 24, 2002

Mr. Chairman and Members of the Subcommittee:

My name is Morton Rosenberg. I am a specialist in American Public Law in the American Law Division of the Congressional Research Service (CRS). Among my areas of professional coverage at CRS are the problems raised by the interface of Congress and the Executive which involve the scope of congressional oversight and investigative prerogatives, the validity of claims of executive and common law privileges before committees and the courts, and issues of separation of powers raised by the exercise of presidential authority through executive orders and directives.

Background: The Presidential Records Act and the E.O. 13,233

You have asked me here today to discuss the legal and practical efficacy of H.R. 4187, the Presidential Records Act Amendments of 2002, which is designed to address the constitutional and other legal issues that appear to have been raised by President Bush's issuance of Executive 13,233 on November 1, 2001. That Order, entitled "Further Implementation of the Presidential Records Act," sets forth procedures and substantive standards to govern claims of executive privilege by former and incumbent Presidents following the expiration of the 12-year period of restricted access under the Presidential Records Act (PRA). 44 U.S.C. 2201-2207 (2000). At the end of that period, the PRA requires that materials involving confidential communications between former Presidents and their advisors which had been withheld must be made publically available by the Archivist of the United States unless they fall within one of the exemption categories of the Freedom of Information Act (FOIA), 5 U.S.C. 552 (2000), except for the exemption set forth in 5 U.S.C. 552 (b)(5), which incorporates the "deliberative process" and other common law evidentiary privileges *Id.*, Section 2204 (c) (1); or are subject to a constitutionally based claim of executive privilege. *Id.*, Section 2204 (c) (2); 2206 (3).

The PRA provides that vice-presidential records are also public property and are to be opened for public access on the same terms and conditions as presidential records. *Id.*, Section 2207. Thus, the requirement that confidential communications be made public after the 12-year restriction period expires applies to vice-presidential records as well.

Finally, the PRA requires that the Archivist of the United States give a former President notice "when the disclosure of particular documents may adversely affect any rights which the former President may have." *Id.*, Section 2206 (3). Under his authority to promulgate regulations to implement the provisions of the PRA, the Archivist issued a rule providing that whenever he intends to make public any presidential record, he will provide 30 days' notice to the former President to allow him (or his designated representative) to assert any rights or privileges that would foreclose public access to the materials. 36 CFR 1270. 46 (a), (b), (d). The Archivist's implementing regulation further provides that he may reject the assertion of a right or privilege by a former President provided that he states the basis for his decision in writing and notifies the former President of the date on which he will disclose the records in question. *Id.*, Section 1270 46 (c). When the Archivist rejects a former President's claim of privilege he must withhold public access for an additional 30 days to allow the former President to seek judicial review. *Id.*, Section 1270. 46 (c), (d). See also 44 U.S.C. 2204 (e). Notice of a rejection of a privilege claim of a former President must also be given to the incumbent President. *Id.*, Section 1270. 46 (e).

Thus at the beginning of the current Bush Administration, when the 12-year restriction period expired, applicable law and regulations vested authority in the Archivist to determine whether to release a past President's documents upon expiration of the 12-year restriction period; allowed the former President to raise a claim of constitutionally based privilege with respect to particular records covered by the release announcement within 30 days of his notification; permitted the Archivist to reject the former President's claim of privilege; and, upon notification of the former President of the rejection, allowed the former President 30 days to file a court challenge to the determination and seek a restraining order to prevent disclosure pending a court ruling on the merits.

Executive Order 13,233 was promulgated some nine months after the expiration of the 12-year restriction period for the withheld papers of President Reagan and Vice President George H.W. Bush.The delay in disclosure was effected pursuant to Section 2(b) of Executive Order 12,667, issued by President Reagan on January 18, 1989, which provided that during the 30 day notification period "the incumbent President or his designee [could instruct the Archivist] to extend the time period.." On January 20, 2001, the expiratiion date of the restriction period, some 68,000 pages of documents that had been restricted by President Reagan as "confidential communications" were subject to release, according to the Archivist. As of March 7, 2002, the White House Counsel announced that President Bush had authorized the release of all but 150 pages of the documents.

Section 2 (a) and (b) of the new Order purports to describe the scope of the constitutionally based privileges of former and incumbent Presidents and Vice-Presidents. While recognizing that the PRA incorporates the FOIA (but not exemption 5's coverage of common law evidentiary privileges) in setting the standards and procedures for release of presidential records after the 12-year restriction period ends, the Order declares that a "President's constitutionally based privileges subsume privileges for records that reflect: military, diplomatic, or national security secrets [the states secrets privilege]; communications of the President or his advisors [the presidential communications privilege]; legal advice or legal work [the attorney-client or attorney work product privileges]; and the deliberative processes of the President or his advisors [the deliberative process privilege)." Moreover, in contrast to the PRA, which makes presidential records available under FOIA standards-- requiring no showing of need for access--the Order asserts that "a party seeking to overcome the constitutionally based privileges that apply to Presidential records must establish a 'demonstrated, specific need' for particular records, a standard that depends on the nature of the proceeding and the importance of the information to that proceeding." It would appear that the showing of need requirement would apply to the common law evidentiary privileges noe subsumed in the Executive Order's recitation.

Section 3 of E.O. 13,233 supercedes of the Archivist's authority under his regulations that provide for rejection of a former President's claim of privilege and place the burden on the former Chief Executive to go court to vindicate his claim. Under Section 3, the Archivist must notify both the former and incumbent Presidents of a request for presidential documents. The former President is given an initial 90 days to review any requests "that are not unduly burdensome," but he may request a further extension for an unspecified period of time, at the end of which time the former President informs the Archivist whether he authorizes access or claims privilege. During the former President's review the Archivist must withhold access. Section 3(c). The incumbent President is allowed to review the requested materials either concurrently with or subsequent to the former President's review for an unspecified period of time. Section 3(d). The Order provides that "[a]bsent compelling circumstances, the incumbent President will concur in the privilege decision of the former President" and will support a former President's privilege claim "in any forum in which the privilege is challenged." Section 4. When the incumbent President concurs in the former President's privilege decision, the Archivist is directed not to permit access to the materials unless both Presidents change their minds or a court orders the materials released. Section 3(d)(1). If only the former President claims privilege, and the incumbent President does not concur, the Archivist still must not disclose until both Presidents concur. Section 3(d)(1)(ii). Similarly, if only the incumbent claims privilege, the Archivist cannot disclose. Sections 3(d)(2)(ii).

The new Order authorizes surrogates to assert constitutionally based privileges on behalf of a former President. Section 10 provides that a former President or his family may designate a representative "to act on his behalf for purposes of the Presidential Records Act and this order." Upon the former President's death or disability, such a designated representative "shall act" on the former President's behalf, "including with respect to the assertion of constitutionally based privileges."

Section 11 of E.O. 12,233 appears to provide that a former Vice-President may assert an independent claim of executive privilege to bar access to his materials under the PRA, and that such a claim will be treated exactly the same as a privilege by a former President, which means that the Archivist would have to withhold access to materials once a claim is made, unless the former Vice-President authorizes access or a court orders release of the records.

Finally, Section 13 of the Order revokes President Reagan's Executive Order 12,667 of January 18, 1989.

At this time, although the Archivist has indicated that he will acquiesce in those respects that the Order differs from his regulations, the regulations have not yet been amended pursuant to the required notice and comment process. Moreover, there has as yet been no claim of constitutionally based privilege with respect to any requested document.

The Committee's Legislative Response: H.R. 4187

The President's Order has precipitated much controversy and resulted in hearings by this Committee, of which this is the third, the filing of a law suit challenging the legality of the Order, and an outpouring of public commentary. These hearings, the public input, and the lawsuit challenging the legality of the Order, *American Historical Association et al.* v. *The National Archives and Records Administration, et al.*, No. 1:01CV02447 (CKK) (D.D.C.) (*AHA* suit), have served to inform the Committee's concerns with legal and practical problems raised by E.O. 13,233 with respect to the effective implementation of the PRA..The Committee is exploring an immediate legislative solution to the perceived problems. H.R. 4187 is that vehicle.

The bill would repeal E.O. 13,233 and establish a new process for consideration of claims of constitutionally based privileges by past and incumbent Presidents. Like the present Order, the bill would require the Archivist to notify past and present Presidents of his intention to publically release presidential records that have not been made previously available. New 44 U.S.C. 2208 (a)(1),(2). The Archivist would be required to withhold records (or parts of records) for which the *incumbent* President claims privilege. Under the bill's scheme, a requester would have the burden of having to go to court to challenge the withholding and the Archivist could not release the materials until a court so ordered or the privilege is waived. *Id.*, Section 2208 (d). With respect to a former President, the bill provides that after a review period by him of 20 work days, the Archivist may release the records unless the past President invokes privilege. Upon receipt of a privilege claim the Archivist must wait 20 days before releasing the subject material unless before the expiration of that period the past President initiates a legal action under Section 2204 (e) and the court enjoins release. *Id.* Section 2208 (a)(3)(A), (B), (C)(1), and (2). Claims of privilege must be in writing; specify the record (or reasonably segregable portion of a record) to which the claim applies; be signed by the former or incumbent President; and state the nature of the privilege and the specific grounds for the claim. *Id.*, Section 2808 (a)(4).

The bill to raise no substantial legal or constitutional issues. There would appear to no question that Congress may repeal an executive order. Well over 200 orders have been revoked or modified since the second Cleveland administration. See William J. Olson and Alan Woll, Executive Orders and National Emergencies: How Presidents Have Come to "Run the Country" by Usurping Executive Power, *reprinted in* Hearing, "The Impact of Executive Orders on the Legislative Process: Executive Lawmaking?", House Subcom. On Legislative and Budget Process, Com. on Rules, 106th Cong., 1st Sess. 124-127 (1999). See generally, T.J. Halstead, Executive Orders: Issuance and Revocation, CRS Rept. No. RS 20846, March 19, 2001. Nor do the procedures adopted in the bill materially differ from those found constitutionally appropriate by the Supreme Court in *Nixon* v. *Administrator of General Services*, 433 U.S. 425 (1977), dealing with the Nixon papers, or subsequent lower court rulings treating issues under the Nixon papers legislation and the PRA. See *e.g.*., *Nixon* v. *Freeman*, 670 F. 2d 346 (D.C. Cir. 1982)), *cert. denied sub nom. Nixon* v. *Carmen*, 459 U.S. 1035 (1982); *Public Citizen* v. *Burke*, 843 F. 2d 1473 (D.C. Cir. 1988); *American Historical Association* v. *Peterson*, 876 F. Supp. 1300 (D.D.C. 1995). H.R. 4178 also does not appear to interfere with the ability of a former or incumbent President to exercise to the fullest extent the protections of executive privilege accorded them under the Constitution and the case law interpreting the scope of that privilege. *Public Citizen* v. *Burke, supra*, would appear particularly supportive in its holding that an attempt by the Justice Department to force the Archivist to acquiesce in any claim of executive privilege asserted by former President Nixon, and thereby block disclosure of materials, was inconsistent with the Presidential Recordings and Materials Preservation Act and a regulation promulgated pursuant to it which empowered the Archivist to reject claims of privilege and which required the former President to seek court redress. 843 F. 2d at 1480 (the duty of the Archivist under the PRMPA is to "afford an 'opportunity' to Mr. Nixon to *assert* his privileges.") The "opportunity to assert" constitutionally based privileges is fully accorded to former and incumbent Presidents under H.R. 4187.

Discussion

As previously indicated, the hearings, public commentary, the pleadings in the *AHA* litigation indicate that the Executive Order raises substantial legal and constitutional issues by virtue of the manner in which deals with public and congressional access to the papers of past presidents under the PRA. The most salient for current purposes appear to be the Order's conflict with the role contemplated for the Archivist under the PRA; the Order's authorization of representatives of a disabled or deceased former President to invoke constitutional privileges; the Order's indication that former Vice Presidents may claim constitutionally based privileges; and the Order's limitation on congressional rights of access to presidential materials pursuant to its constitutionally based oversight and investigatory powers. I will briefly discuss each of these legal issues

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1. The Role of the Archivist Under the PRA

The PRA is a product of a history in which, prior to 1974, President's exercised complete control over their presidential papers. See *Nixon* v. *United States*, 978 F. 2d 1269, 1277 (DC. Cir. 1992) (recounting past history of control of presidential papers through the passage of the PRA). While some Presidents insured that such papers would pass by descent, others made outright gifts of their papers, often imposing personal restrictions on public access, and a number of Presidents destroyed their records. 978 F. 2d at 1277-80. But following the resignation of President Nixon in 1974 and his attempt, through an agreement with the Administrator of the General Services Administration, to maintain control of his presidential papers and tapes, Congress acted to take control of official records of Presidents. Before the Nixon-Sampson agreement became effective, it was superseded by the Presidential Recordings and Material Preservation Act, Pub. Law 93-526 (1974). The Act directed GSA to take custody of all tape recordings and other presidential materials accumulated during the Nixon presidency and required the Administrator to promulgate regulations governing public access to the materials. The Supreme Court upheld the facial constitutionality of the Act in *Nixon* v. *GSA*, 433 U.S. 425 (1977).

The controversy over the Nixon materials, however, prompted reconsideration of the disposition and preservation of presidential materials. That reconsideration resulted in the passage of the PRA in 1978, which "terminate[s] the tradition of private ownership of Presidential papers and the reliance on volunteerism to determine the fate of their disposition." H. Rept. No. 95-1487, 95th Cong., Sess. 2 (1978). Under the PRA, the National Archives and Records Administration (NARA) and the Archivist are given total control of the records of past Presidents, which are made the property of the United States. The Act gives specific directions for the custody and administration of such records, the end goal being the "affirmative duty" of the Archivist "to make such records available to the public as rapidly and completely as possible." 44 U.S.C. 2203 (f)(1). The encompassing supervisory role

of the Archivist is central to the accomplishment of the congressional purpose. Section 2203 (a) and (b) directs the President, under the supervision of the Archivist, to ensure adequate documentation of his official activities, and to categorize and file appropriately those documents to the extent practicable. The section also restricts the President while in office from disposition of materials that he thinks have no historical or other informational value unless he obtains the opinion of the Archivist. If the Archivist chooses, he may request the advice of Congress when a President intends to dispose of records and he considers them of special interest to Congress or if he determines that consultation with Congress is in the public interest. Congress has 60 days to act. *Id.*, Section 2203 (d), (e).

The Archivist may dispose of records he determines to have insufficient administrative, historic, informational, or evidentiary value to warrant preservation. *Id.*, Section 2203 (f)(3).

The Archivist is given the authority, during the 12 year restricted period, to make the discretionary determination whether to grant access to a restricted presidential record or to a reasonably segregable portion of that record. Such a determination is not subject to judicial review except by a former President who challenges the Archivist's determination as a violation of his rights or privileges. The Archivist must provide internal appeal procedures for denied public requesters. *Id.*, Section 2204 (b)(3), (e).

Access to records during and after the 12 year restricted period are to be administered in conformity with the FOIA, minus exemption (b)(5), and for the purpose of FOIA access the records are deemed to be records of NARA. Thus the Archivist makes final accessibility determinations. *Id.*, Section 2204 (c)(1).

On death or disability of the President or former President, any discretion or authority of the President or a former President will be exercised by the Archivist unless a representative was previously provided by a written notice. *Id.*, Section 2204 (d).

The Archivist is given authority to promulgate rules necessary to carry out the Act's provisions, and must include regulations, among others, which provide notice to former Presidents that he will release records under Section 2205 (2) or that he has determined to release particular documents that may adversely affect a former President's rights and privileges. *Id.*, Section 2206 (2),(3).

In short, the scheme of the Act indicates a congressional intent to totally commit the area of supervision and control of presidential papers to the exclusive jurisdiction of the Archivist. Executive Order 13,233 appears to contradict that statutory commitment. .

Under the constitutional scheme of separation of powers, the President has no general authority to legislate, whether through issuance of executive orders or otherwise. An executive order is lawful only if it constitutes on exercise of power that is granted to the President by an Act of Congress or directly by the Constitution: "The President's power, if any, to issue an executive order must stem either from an Act of Congress or the Constitution itself." *Younstown Sheet & Tube* v. *Sawyer*, 349 U.S. 579, 585 (1952). Justice Jackson's concurring opinion in the Steel Seizure case has become an influential model for resolving such separation of powers conflicts. Justice Jackson established a tri-partite scheme for analyzing the validity of presidential actions in relation to constitutional and congressional authority. *Id.* at 635-638.

Jackson's first category focuses on whether the President has acted according to an express or implied grant of congressional authority. If so, according to Justice Jackson, presidential "authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate," and such action is "supported by the strongest of presumptions and the widest latitude of judicial interpretation." Secondly, Justice Jackson maintained that, in situations where Congress has neither granted or denied authority to the President, the President acts in reliance only "upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain." In the third and final category, Justice Jackson states that in instances where presidential action is "incompatible with the express or implied will of Congress," the power of the President is at its minimum, and any such action may be supported pursuant only the President's "own constitutional powers minus any constitutional powers of Congress over the matter." In such a circumstance, presidential action must rest upon an exclusive power, and the Courts can uphold the measure "only by disabling the Congress from acting upon the subject." *Id.* at 637-38.

Two recent rulings, utilizing Jackson-like analyses, have stuck down executive orders that courts found to have conflicted with a statutory scheme. First, Congress committed exclusive jurisdiction over a subject matter--federal supervision of collective bargaining--to a particular agency, the National Labor Relations Board. Finding Justice Jackson's third category applicable, the courts declared unlawful the attempted intrusion on the exclusive domain of the NLRB. See *Chamber of Commerce* v. *Reich*, 74 F. 3d 1322, 1328-29 (D.C. cir.), *modified on other grounds*, 83 F. 3d 439 (D.C. Cir. (1996); *Building and Construction Trades Dept., AFL-CIO* v. *Allbaugh*, 172 F. Supp. 2d 138 (D.D. C. 2001), *appeal filed*.

In the *AHA* litigation, the government challenges this view, arguing both that the statutory scheme does not evidence such a total preempting commitment; and that in any event the Executive Branch is a legal hierarchy in which executive power is vested in the President and all subordinate responsibility flows up to the Chief Executive. The government points to the fact the Archivist himself is appointed by the President and is removable by him at will.

The question presented by the government's assertions is whether the President may *direct* the head of an agency to alter his judgment as to the approriate manner in which he complies with specific congressional mandates to him, or *displace* the judgment of the agency head by acting on his own. Based on a long line of Supreme Court precedents, the question presents little difficulty: The President does not have the authority to displace the ultimate decisionmaking power vested in the head of an agency by Congress.

The Supreme Court's rulings in *Morrison* v. *Olson,* 487 U.S. 654 (1988) and *Mistretta* v. *United States*, 488 U.S. 361 (1989), have clearly dispelled the notion that executive power is hierarchical in nature and uniquely vested in the President alone, the so-called theory of the unitary executive.

Morrison and *Mistretta* confirm what has been understood since the dawn of the Republic: That the President's duty under Article II to "take care" that the laws are faithfully executed vests in him no supervening substantive power, but simply is meant to enlist him to assure that subordinates in whom Congress vests the duty to carry out its directions do so scrupulously.

Historically, Article II has been seen as clearly anticipating the creation of an administrative bureaucracy by its mention of "Heads of Departments," U.S. Const. Art. II, § 2, cl. 2. And the Necessary and Proper Clause of Article I, art. 1 §8, cl. 18, makes it certain that it would be Congress alone that would do the creating. In this scheme, Congress can assign to a "Head of Department" any executive power not textually reserved to the President in Article II. Moreover, Congress has properly understood that the "take care" clause has not been read by the courts to vest absolute power in the President over heads of departments and other subordinate officials. That clause has been held to require only that the President "shall take care that the laws be faithfully executed," regardless of who executes them, a duty quite different from the claim of a single-handed responsibility for executing all laws.

A literal reading of the "take care" clause confirms the President's duty to ensure that officials obey Congress's instructions; it does not create a presidential power so great that it can be used to frustrate congressional intention. In the words of the Supreme Court, where a valid duty is imposed upon an executive official by Congress, "the duty and responsibility grow out of and are subject to the control of the law, and not to the direction of President." *Kendall v. United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524, 610 (1838). In the past, similar claims of broad substantive authority deriving from the "take care" clause have been consistently rejected by the courts. See, *e.g., Youngstown Sheet & Tube Co. v. Sayer*, 343 U.S. 579, 587 (1952)(holding that the President does not have the power to take possession of private property in order to keep labor disputes from stopping steel production); *In re Olson*, 818 F. 2d 34. 44 (D.C. Cir. 1987)(explaining that the "take care" clause does not require the President himself to execute the laws); *National Treasury Employees Union v. Nixon*, 492 F. 2d 587, 604 (D.D.C. 1973)(ruling that the executive branch does not have the inherent power to impound congressionally appropriated funds). Finally, the Court of Appeals for the Ninth Circuit, in condemning reliance on the "take care" clause as a justification for ignoring the mandate of an act of Congress, stated: "To construe this duty to faithfully execute the laws as implying the power to forbid their execution perverts the clear language of the 'take care' clause." *Lear Siegler, Inc. v. Lehman*, 842 F. 2d 1102, 1124 (9th Cir.), *reh'g en banc ordered sub nom Lear Siegler, Inc. v. Ball*, 863 F. 2d 693 (9th Cir. 1998)(*en banc).*

In sum, the pertinent case law, together with the statutory scheme of the PRA, would likely lead a reviewing court to find that Congress intended the Archivist to occupy the field of presidential papers control and supervision, thereby precluding the displacement effected by E.O. 13,233.

2. The Order's Authorization of Representatives of a Disabled or Deceased Former President to Invoke Constitutional Privileges

Delegation of authority to private citizen to direct an officer of the United States in the performance of his functions raises serious constitutional concerns. The Order's provisions that give an assertion of privilege by a representative of a deceased or disabled President the same effect as an assertion by the former President is legally suspect, for the constitutionally based privilege likely cannot be asserted except by the incumbent President or the former President personally.

The constitutionally based executive privilege for confidential presidential communication belongs to the office the President, not to a President individually. It is "the privilege of the Presidency" and serves the "needs of the Executive Branch." *Nixon* v. *Administrator*, *supra*, 433 U.S. at 448, 449. As such, it is not a personal property right of a President, and cannot be assigned or descended by gift, bequest or devise. The family of a President or former President has no legitimate claim to it. And although there is no definitive judicial ruling on the subject, it is likely that a court considering the matter would hold that the privilege must be asserted by the President (or former President) personally. See, *In re Sealed Case*, 121 F. 3d 729, 745 n. 16 (noting that *U.S.* v. *Reynolds*, 345 U.S. 1, 7-8 (1953), suggests "that the President must assert the presidential communications privilege personally."). Moreover, the notion of ceding control over the execution of the laws by an officer of the United States to a private party appears anomolous and has been rejected by the courts. See, *e.g. American Historical Association* v. *Peterson*, 876 F. Supp. 1300, 1321 (D.D.C. 1992).

3. The Order's Indication That Vice-President's May Claim Constitutionally Based Privileges

The Order appears to posit, in Section 11, the existence of an independent, constitutionally based privilege for vice presidential communications. Such a privilege has never been recognized in any case and is antithetical to the basis recognized by the courts: that the constitutionally based privilege for presidential communications recognized by *U.S.* v. *Nixon* and *Nixon* v. *Administrator*, applies "specifically to decisionmaking of the President" and is rooted in constitutional separation of powers principles and the President's unique constitutional role." *In re Sealed Case, supra*, 121 F. 3d at 745. In the *AHA* case, the government supports Section 11 on the ground that no court has ever addressed the question and therefore it remains open and arguable.

4. The Order's Limitation on Congressional Rights of Access to Presidential Materials

Section 6 of the Order in effect would allow Congress to wait indefinitely for a response to a request to the Archivist for presidential documents or a demand by subpoena. Section 2205 of the PRA makes it clear that Congress is not subject to the statutory restrictions of the Act and that it has not waived its constitutional prerogatives of oversight and investigation. In this regard, on its face Section 6 works a usurpation of congressional prerogatives and is unlawful.

Conclusion

Congress' authority over the papers of past President's has been recognized by the Supreme Court and lower federal courts since 1977. H.R. 4187 is well within the parameters of its acknowledged authority in the area. It therefore may repeal E.O. 13, 233 and replace it with procedures that assure an opportunity for former and incumbent President's assert constitutionally based privileges. Moreover, the substantial legal and constitutional questions raised by key provisions of E.O. 13,233 gives impetus the congressional option of enacting a legislative solution immediately by legislation rather than waiting for the outcome of litigation that is likely to be extended. Finally, experience under the Order suggests that unilateral delay is a strong likelihood despite the recent release of all but 150 pages of the originally withheld 68,000 pages. Millions of pages of documents are yet to be processed. The potential for unwarranted delay remains.

Source: http://www.house.gov/reform/gefmir/hearings/2002hearings/0424_hr4187/0424_witnesses.htm