Letter Regarding Executive Order 13,233 on Further Implementation of the Presidential Records Act

November 19, 2001

The Honorable Stephen Horn
Chairman, Subcommittee on Government Efficiency, Financial Management
and Intergovernmental Relations
House Committee on Government Reform
2157 Rayburn House Office Building
Washington, DC 20515-6143

Dear Chairman Horn:

We write to you today on behalf of the American Association of Law Libraries, the American Library Association, the Association of Research Libraries and the National Humanities Alliance to express our serious concerns with Executive Order 13,233 on Further Implementation of the Presidential Records Act. The library and humanities communities have a strong interest in federal information policy and open government. Our organizations represent librarians and information professionals, researchers and archivists who are committed to the principle that public access to government information is a core tenet of our democracy. Our members know first-hand, on a daily basis, the importance and impact that government information has on the lives of all Americans, on the public's trust and confidence in our government, and on the preservation of our democratic ideals. An open government is the hallmark of our democracy.

Congress enacted the Presidential Records Act (PRA) of 1978 to ensure that the public records of our presidents are government property and therefore belong to the American people. The PRA, as amended by Executive Order 12,667 issued by President Reagan in 1989, provides for a limited time period of 12 years during which presidential records, including confidential communications between a former president and his advisers, could be withheld from public access under custody of the U.S. Archivist. At the end of the 12-year period, FOIA requests could be made to the Archivist for access to view these records. The PRA provides for an exception only if providing public access would violate a constitutionally based executive privilege of the former or incumbent president, in which case public access could be denied. The PRA was intended by Congress to craft a careful balance between a president's ability to withhold certain records for a limited time period and the right of the public to access them. We believe this balance has been seriously thwarted by provisions of Executive Order 13,233.

Executive Order 13,233 effectively denies the public's legitimate right of access under the PRA by giving an incumbent or former president veto power over any public release of materials by the Archivist even after the 12-year restriction period has expired. The library and humanities communities oppose this effort to deny the public's legitimate right to access presidential records that are the property of our government, not of any one individual or of a former president's family or heirs. E.O. 13,233 imposes restrictive barriers to the public's legitimate right to access presidential records that must be overturned.

We urge you to consider the following specific flaws in E.O. 13,233 that we believe must be corrected to bring it into compliance with both the spirit and substance of the PRA:

- (Section 2(a) of the Executive Order states that the former president's constitutional privileges include not only the privilege for confidential communications with his advisers that has been recognized by the Supreme Court, but also the state secrets privilege, the attorney-client privilege and attorney work product privileges, and the deliberative process privilege. There is no precedent, however, for invocation of the state secrets privilege by a *former* president, as opposed to the incumbent. Moreover, the attorney-client and attorney work product privileges are clearly common-law, not constitutional privileges. And the deliberative process privilege, to the extent it would go beyond the privilege for confidential communications between the president and his advisers, is also a common-law, not a constitutional privilege.

- Section 2(b) of the Executive Order states that a party seeking access to presidential records must assert a "demonstrated, specific need" for those records, even after the end of the 12-year period, in order to overcome the former president's privilege. This provision is contrary to the PRA, which makes access available under FOIA standards that require no such showing of need. Moreover, the concept that the constitutional executive privilege requires a person seeking access to historical presidential records to make a showing of need was rejected by the U.S. Court of Appeals for the D.C. Circuit in *Nixon v. Freeman,* 670 F.2d 346 (D.C. Cir.), *cert. denied,* 459 U.S. 1035 (1982).
- Sections 3(a) and 3(c) of the Executive Order provide both a former president and the incumbent president an unlimited amount of time to review records to determine whether to object to their release to the public. These provisions are contrary to the PRA's requirement that the Archivist make such materials available to the public at the earliest possible date.

- Sections 3(d) and 4 of the Executive Order require the incumbent president to "concur in" and support in court an assertion of privilege by the former president, regardless of whether it is legally valid, unless there are compelling circumstances. Even if the incumbent president does not concur in a former president's assertion of privilege, the order requires the Archivist to bow to the former president's claim and withhold public access to any records to whose release the former president objects. These provisions are contrary to the PRA insofar as they require the Archivist to withhold documents from the public without determining the validity of the former president's claim of privilege. *See Public Citizen v. Burke,* 843 F.2d 1473 (D.C. Cir. 1988).

- Section 3(d)(2) empowers the incumbent president to order the Archivist to withhold access to the former president's records on grounds of privilege even if the former president does not object to their being made public, and even in the absence of any claim that national security would be affected by public release. Outside of the realm of national security, there is no precedent for an assertion of executive privilege by a sitting president as to 12-year-old records of a former president.

- Section 10 of the Executive Order permits a former president (or his family) to designate a "representative" to assert constitutionally based executive privileges in the event of the former president's death or disability. This provision allows for potentially eternal withholding of records. There is no precedent supporting the notion that a private citizen "representing" a deceased or disabled president can assert the constitutional executive privilege.

- Section 11 of the Executive Order allows a former vice president to assert constitutionally based privileges to bar release of records after the end of the 12-year restriction period applicable to his records under the PRA. There is no precedent supporting the concept that there is a constitutional privilege protecting vice presidential communications (except insofar as they may fall within the president's executive privilege).

Chairman Horn, changes in the PRA as embodied in E.O. 13,233 are counter to our strong commitment to an open government that is accountable to its citizenry. We concur with the belief of the American Historical Association and others that unless these provisions are eliminated, the Executive Order could not withstand legal scrutiny. We urge you to consider our concerns and respectfully request that our comments be added to the official hearing record of November 6, 2001 on "The Implementation of the Presidential Records Act of 1978." Thank you very much.

Sincerely,

Barbara A. Bintliff
American Association of Law Libraries
President

John W. Berry
American Library Association
President

Paula T. Kaufman
Association of Research Libraries
President

Rob C. Vaughan
National Humanities Alliance
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ORGANIZATIONAL BIOGRAPHIES

THE AMERICAN ASSOCIATION OF LAW LIBRARIES (AALL)
The American Association of Law Libraries is a nonprofit educational organization of over 5,000 members who respond to the legal information needs of legislators, judges, and other public officials at all levels of government, corporations and small businesses, law professors and students, attorneys, and members of the general public. AALL's mission is to promote and enhance the value of law libraries, to foster law librarianship, and to provide leadership and advocacy in the field of legal information and information policy.

THE AMERICAN LIBRARY ASSOCIATION (ALA)
The American Library Association is a nonprofit educational organization of over 60,000 librarians, library educators, information specialists, library trustees, and friends of libraries representing public, school, academic, state, and specialized libraries. ALA is dedicated to the improvement of library and information services, to the public's right to a free and open information society--intellectual participation--and to the idea of intellectual freedom.

THE ASSOCIATION OF RESEARCH LIBRARIES (ARL)
The Association of Research Libraries is a not-for-profit organization representing 122 research libraries in the United States and Canada. Its mission is to identify and influence forces affecting the

future of research libraries in the process of scholarly communication. ARL programs and services promote equitable access to, and effective use of, recorded knowledge in support of teaching, research, scholarship, and community service.

THE NATIONAL HUMANITIES ALLIANCE (NHA)

The National Humanities Alliance is a nonprofit coalition representing 90 organizations concerned with federal humanities policy. Collectively, NHA's members represent more than 850,000 individuals engaged in research, writing, teaching and public presentations of the humanities throughout the U.S. NHA member organizations include: scholarly and professional associations; museum and library organizations; historical societies, higher education associations, state humanities councils, and humanities research centers. The NHA is committed to broad scholarly access to historical and cultural records.