Statement by **Thomas S. Blanton**, National Security Archive,
George Washington University, (www.nsarchive.org)

March 1, 2007 Hearing on the Presidential Records Act

Mr. Chairman and members of the subcommittee, thank you for inviting me to testify about the crisis currently facing one of the glories of our democracy, the Presidential Records Act. Other experts you are hearing today will give you the legislative history and the legal reasoning behind this landmark law; my own conviction is simply that this statute fulfills a core motivation of our Constitutional system, that of preventing our Presidents from becoming – or acting like – kings. Their records actually belong to us, the citizens, and the Presidential Records Act makes that core principle a reality. Or at least it used to.

The cover page of my testimony today contains a simple chart that documents the crisis. **Since 2001, the government has added five years of delay into the process of releasing presidential records**. These are statistics from the Reagan Presidential Library – their official estimates of response times that they send to you when you request documents. The delay has risen from 18 months in 2001 to 78 months today.

Let me give you some of the specifics. The late President Ronald Reagan left office 18 years ago, in January 1989, and the Reagan Library began making his White House records public in 1994, as the law envisions, with most restrictions expiring by the 12-year mark, or January 2001. The Freedom of Information Act

says federal agencies have to respond to requests for records within 20 working days (roughly four weeks), yet if you write the Reagan Library today asking for a specific record, the Library staff will write you back with an estimate of 78 months (six and a half years!) you will have to wait before they complete processing. At the 12-year mark, that is, in early 2001, the Reagan Library's estimated response time was only 18 months. For organizations like mine that are veteran users of the Freedom of Information Act, 18 months is not an unusual delay when the subject matter involves classified documents or complicated processing.

But early 2001 is the moment that the new White House counsel (now the Attorney General) decided to hold up the scheduled release of the infamous 68,000 pages of Reagan Library records that were ready to go, cleared by the professional archivists and the career reviewers, under the process that actually worked in the 1990s. During 2001, as those 68,000 pages sat on a White House lawyer's desk, the delay estimated by the Reagan Library went from 18 months to 24 months, by the time President Bush issued his Executive Order 13233 in November 2001. Since then, the delay reached 48 months in 2003, and 60 months in 2005, before its current 78 months.

In other words, **we are only six years down the road from the initial White House decision in early 2001 to intervene in the Presidential Records Act process, and five years of that turns out to be pure delay**.

The delay and the backlog are not driven by the restrictions in the statute. Again, look at the Reagan Library experience. Between 1994 and 2001 – the statutory 5-to-12-year period in which access limitations apply – the Reagan Library opened some five million pages of presidential records. Since 2001 – the 12-year mark when the statutory access limits are lifted – that total is only a few hundred thousand. At this rate, as the National Archives admits, it will take 100 years to open all of President Reagan's White House records.

I am using the Reagan Library example because I visited Simi Valley in January, when I was able in about two days – thanks to the highly skilled and professional archival staff there – to look at every page that has been declassified since 2001. Four stacks of paper, about 3700 pages in all, a sad contrast to the millions of pages opened in the 1990s. But the same blockage is on view at the other presidential libraries as well. For example, the former Soviet leader Mikhail Gorbachev published in Russian in 1993 his interpreter's verbatim notes of the December 1989 summit meeting at Malta with President George H.W. Bush. Citing the Russian publication, I asked for President Bush's transcripts of Malta with a Freedom of Information request that went to the College Station, Texas-based Bush Library in 1999. In 2001, the Bush Library responded that the documents had been referred out to the agencies for declassification review, and by November 2005 that review was complete, the Library told me.

The next conversation is the one that became absurd. The documents were cleared, no damage to national security (I already knew that from reading the Russian transcript), so when would I get the package? The Bush Library professional staff said, **"As you know, the present and former Presidents under the Executive Order have no time limit for their review, and the White House does have a large backlog."** How long will it take, how long does it take on average? "There's no average, I really don't know, I wish I could help you, but it's all in Washington at this point." Indeed, it's all in Washington at this point.

The question on the table today is executive branch implementation of the law, and there, to quote the immortal phrase, "Houston, we've had a problem." We now have actual data and more than six years experience with which to test the claims made about Executive Order 13233 back in 2001. President Bush told the press on November 2, 2001, "I don't see this as anything other than setting a set of procedures that I believe is **fair and reasonable**." The White House press secretary, Ari Fleischer, told the press briefing on November 1, 2001, "... [T]hanks to the executive order that the President will soon issue [that day], more information will be forthcoming. And it will be available through a **much more orderly** process." A few days later, the acting assistant attorney general told this committee that "President Bush's executive order establishes **clear, sensible, and workable** procedures that will govern the decisions by former Presidents and the incumbent President whether to withhold or release privileged documents." (M. Edward Whelan III, November 6, 2001) [Emphasis added]

None of that turns out to be true, we now know. There was a fair, reasonable, orderly, clear, sensible, and workable process for Presidential records in place during the 1990s that Executive Order 13233 overturned and replaced with the opposite. I would also argue, and my organization is a co-plaintiff in the lawsuit that makes this argument, that the Order is contrary to the statute and therefore illegal. Here I will leave that argument to the experts, and you will hear our able attorney Scott Nelson of Public Citizen Litigation Group today on this subject.

My point is a different one: That the Executive Order is not just wrong, but stupid. **The Order added White House review into a process that did not need such review**. Before the Order, the National Archives had released millions of pages of presidential records, and most strikingly, thousands of hours of Oval Office audio tapes containing the most sensitive conversations at the highest level, with no damage to national security or other national interests. That is the Archivist's job, and the White House should have left that job to the professionals, instead of stacking up the files on the already overloaded desks of White House lawyers. Surely, those lawyers have better things to do with their time and more pressing policy and legal issues on which they should be working.

The shell game the government played with the Reagan documents in our litigation shows the kind of wasteful and counterproductive withholding of historic files that the Executive Order in effect invites. For example, after the

representatives of former President Reagan asserted privilege over 11 documents in our litigation, our ace attorney found one of them in the public domain, a six-page memo dated December 8, 1986 to the President and the Director of Public Affairs titled "Talking Points on Iran/Contra Affairs." The Bush White House then intervened and made its own privilege assertion on nine of the documents, not invoking the Executive Order, so that the government's lawyers could claim that no documents were being withheld under the Order and thus our lawsuit was moot. That claim has not worked for the government, and the federal judge in the case has found that the delays in access amount to an "injury in fact."

Back in 2001, I predicted that the burden of documents review would soon bring the White House to its senses, and the counsel's office would revise the Order, but I was wrong; instead, all we have seen is delay and more delay. Back in 2001, some scholars speculated that the stall on the release of Reagan Library records was because there must be embarrassing material in those 68,000 pages, perhaps about the Iran-contra scandal, perhaps about former President George H.W. Bush. Now, years later, we have the 68,000 pages, and scholars have found no substantive reason in those files for any serious sensitivity. Nowadays, the cynical view is that the process is deliberately inefficient – if the White House was setting out to stall and stonewall, it could hardly have been more effective.

I am not prepared to adopt the cynical view, yet. My own conclusion is that the administration's top lawyers asked only one question about implementation of

the Presidential Records Act, and the question was how to increase presidential power over that implementation. They did not ask what was the most efficient process, what was the most doable process, what we could learn from the recent past, what the medium- or long-term outcomes might be. As on so many policy issues of the past few years, the exit strategy and the cost-benefit analysis seem to be missing from the decision making.

Vice President Cheney has given us the clearest expression of this approach, which I believe explains the motivation behind EO 13233. ABC's Cokie Roberts asked the Vice President back in January 2002 why he was resisting giving his energy task force documents to the General Accounting Office, thus turning a one-day story about his meetings with former industry colleagues into a year-long story that suggested coverup. Vice President Cheney began by saying that withholding the information was where "the lawyers decided" to draw the line, but went on to cite "an erosion of the powers and the ability of the President of the United States to do his job" because of "unwise compromises that have been made over the last 30 or 35 years." The Presidential Records Act is surely on the Cheney list of those laws that eroded White House power. The Executive Order was clearly an effort to take back that power.

We now know that Executive Order 13233 creates real delay in the system, but I need to be very clear about the fact that the Order is not the only reason for the delay. The National Archives suffers under severe resource constraints, and it

doesn't help when Constitution Avenue floods their basement, or the pipes burst out at the Suitland Federal Records Center. The National Archives labors under an enormous backlog of records that have already been declassified but not yet "accessioned" (meaning organized and prepared for the public to look through). The overall records backlog has been growing for decades, and the vast expansion of electronic records presents enormous challenges that no one has complete answers for. My own organization brought the lawsuit that forced the National Archives to begin saving the White House e-mail, and we had to overcome three Presidents (Reagan, Bush 41, and Clinton) to win the case. Now there are tens of millions of email records in the system, very few of them processed for public access, and the best the National Archives can do so far is maintain a migration strategy to move them from storage medium to storage medium as the technology changes.

But there are also problems with the ways that the Presidential libraries allocate the resources they do have. For example, the Carter Library has failed even to make an effort to deal with Mandatory Review requests dating back to 1997. The Carter Library has not even formally acknowledged the requests. Apparently, the Remote Archives Capture project, in which the CIA's teams of scanners scooped up Carter records that were classified – in order to automate a process of review back in Washington – absorbed whatever declassification energy existed at the Carter Library. But other Presidential libraries have participated in

RAC and kept their MDR process going, in effect showing they can walk and chew gum at the same time.

Another source of the crisis is that the government is creating record numbers of new national security secrets that will clog the system for decades; and federal agencies still insist on exercising their "equities" to the point of reclassifying records that have already been on the public shelves and on public Web sites. To date, Congress has been part of the problem and not the solution by mandating re-reviews like the Kyl and Lott amendments, which absorb millions of taxpayer dollars combing through already released documents for nuclear-related tidbits that mostly turn out to be outdated Cold War location and policy information, not weapon designs. No doubt this was the inspiration for the reclassification program that was exposed last year, apparently initiated by the CIA and the Air Force to review publicly available records and remove thousands of them from the open shelves. Front-page exposure prompted Archivist Weinstein to halt the program and order an audit that hopefully will produce more rational classification decisions.

Congress can save the Presidential Records Act, and this hearing is obviously a good start. A real solution will have to address the Executive Order as well as the other sources of the blockages in the information arteries of our democracy. On the Order, we now know that litigation will not solve the problem – we helped bring the lawsuit with the American Historical Association as the lead

plaintiff against the National Archives in its capacity as implementer of the Order. But that case has been pending now for almost as long as the delay backlog at the Reagan Library, and it hasn't even reached the appellate court yet.

Congressional action could remove the worst features of the Executive Order. **We need to rescind the veto power the Order gives to former presidents and their descendants; we need to eliminate the Order's invention of a new vice presidential privilege; and we need to restore the 30-day notification process that worked so well in the 1990s.** Interestingly, as you will hear from Scott Nelson, the Department of Justice has never argued in our litigation that these features are somehow constitutionally required, so Congress is free to modify these provisions through legislation.

To address the potential objections of the current or future occupants of the White House, the legislation could include the idea that was in President Reagan's Executive Order, that the Archivist has to notify the White House when the Archivist believes there is an issue with records about to be released that might require review or might raise a privilege issue. But the Archivist should not have to hold up release unless the White House affirmatively asks for that review.

These changes would help immensely, not least by sending a signal throughout the bureaucracy that foot-dragging is no longer acceptable. But Congress will also have to make sure that the National Archives has the resources to clean up the backlog, and get ahead of the curve on electronic records. Congress

will also need to change the declassification process, first by creating a centralized and more efficient process (like the proposed National Declassification Initiative by NARA) that gets us out of the endless daisy chain of agency referrals, at least on the historic documents. Congress also needs to build on the real declassification successes of recent years, specifically the Kennedy Assassination Records Act and the Nazi and Japanese War Crimes legislation, where the law changed the classification standards to reflect the passage of time and the public interest in the material, and set up independent review processes to pry loose these historically valuable records from the cold dead hands of the bureaucrats. Congress should incorporate those already tested standards into a new Historic Records Act that would provide the necessary bypass surgery for our almost completely blocked records system.

I thank you for your attention, I applaud the focus this Subcommittee is bringing to these issues, and I welcome your questions.

Thomas S. Blanton is the Director (since 1992) of the independent non-governmental National Security Archive at George Washington University, Washington D.C., and series editor of the Archive's award-winning Web, CD, book, and microform publications totaling more than 500,000 pages of declassified documents. The Archive has filed more than 30,000 Freedom of Information Act and Mandatory Declassification Review requests with federal agencies over the past 21 years, including more than 400 currently pending requests at every Presidential library from Eisenhower to Clinton. Blanton's books include *White House E-Mail: The Top Secret Computer Messages the Reagan-Bush White House Tried to Destroy* (New York: The New Press, 1995, 254 pp. + computer disk), which the *New York Times* described as "a stream of insights into past American policy, spiced with depictions of White House officials in poses they would never adopt for a formal portrait." He co-authored *The Chronology* (New York: Warner Books, 1987, 687 pp.) on the Iran-contra affair, and served as a contributing author to three editions of the ACLU's authoritative guide, *Litigation Under the Federal Open Government Laws,* and to the Brookings Institution study *Atomic Audit: The Costs and Consequences of U.S. Nuclear Weapons Since 1940* (Washington, D.C.: Brookings, 1998, 680 pp.). A graduate of Bogalusa (La.) High School and Harvard University, he won Harvard's 1979 Newcomen Prize in History and served as an editor of the daily newspaper, The Harvard Crimson. His articles have been published in *The International Herald-Tribune, The New York Times*, *The Washington Post*, *Los Angeles Times*, *The Wall Street Journal*, *The Boston Globe, Slate, Foreign Policy*, and many other publications. He serves as managing editor of the international network of Freedom of Information advocates, www.freedominfo.org, as co-chair of OpenTheGovernment.org, and on the boards of the National Coalition for History and the H-DIPLO electronic bulletin board, among many other professional activities. He won the 2005 Emmy Award for outstanding news and documentary research.

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Committee on Oversight and Government Reform, U.S. House of Representatives

Ronald Reagan Presidential Library
Estimated Response Times for FOIAs and MDRs

Date of Request	Estimated Response Time (months)[1]
26 April 2001	**18**
10 May 2001	18
13 November 2001	**24**
27 November 2001	24
24 June 2003	**42**
01 July 2003	42
10 July 2003	**48**
05 August 2003	48
21 August 2003	48
27 August 2003	48
11 September 2003	48
23 September 2003	48
19 March 2004	48
13 April 2004	48
29 April 2004	48
30 April 2004	48
11 May 2004	48
27 May 2004	48
4 June 2004	48
10 June 2004	**52**
18 June 2004	52
30 June 2004	52
2 July 2004	52
6 July 2004	52
15 July 2004	52
12 August 2004	52
16 August 2004	**54**
20 April 2005	**60**
15 December 2005	**62**
21 December 2005	62
4 August 2006	**58**
12 October 2006	**62**
16 February 2007	**78**

Reagan Library delay is now at 6.5 years.

[1] These numbers are actual estimates given by the Ronald Reagan Presidential Library in correspondence to the National Security Archive in response to the Archive's Freedom of Information Act and Mandatory Declassification Review requests.