Testimony of
Joan Hoff
to the
House Committee on Government Reform
April 11, 2002

Good afternoon, Mr. Chairman and members of the committee. Thank you for inviting me to testify before you this afternoon.
My name is Joan Hoff. I was the Executive Director of the Organization of American Historians in the 1980s. In the 1990s, I was President and CEO of the Center for the Study of the Presidency in New York City and Director of the Contemporary History Institute at Ohio University. Currently, I am the Distinguished Professor of Research at Montana State University. I have conducted research in all the presidential libraries except for Reagan's, and published many articles and 2 books on Presidents Herbert Hoover and Richard Nixon. I have previously testified before House and Senate committees on presidential historical sites, in defense of the Freedom of Information Act, and in support of separating the National Archives and Records Administration (NARA) from the General Services Administration (GSA). I also testified in *Taylor and Griffin v. United States* –the case which determined the monetary value of Nixon's presidential materials.

Today, I am representing the views of the historical profession about the independent archival status of presidential papers as I have observed and defended them over the last two decades.

Given my extensive research in Nixon's papers and tapes and the administrative positions I have held in national historical organizations, I have long been personally and professionally concerned with access to presidential papers. For example, I closely followed for over twenty years the litigious attempts by President Nixon and later his estate to prevent the implementation of certain sections of the 1974 Presidential Recordings and Materials Preservation Act (PRMPA), specifically to block the release of his secret tape recordings. Since before and after the passage of the 1978 Presidential Records Act (PRA), I have also observed the attempts by various presidents to extend executive privilege over their papers and the testimony of government officials either by arranging private agreements with the National Archives or with Executive Directives or with Executive Orders, as President Reagan did with an Executive Order 12356 in 1982 and, again, with his Executive Order 12667 in 1989, and as President Clinton did with his Executive Order in 1994.

The 1978 Presidential Records Act represents one of the most important pieces of reform legislation passed in the aftermath of Watergate. Historians generally concur that Watergate was about holding top government officials accountable to the people in a democratic system. The issue of government accountability is inextricably linked to access to information. Watergate roused the historical profession, other scholars, and journalists to this important linkage, but that linkage remains fragile and needs to be constantly guarded. The 1978 PRA provides this

protection primarily because it terminated private ownership of presidential papers by making them the property of the federal government from the moment of their creation. It specifically authorizes public access, regardless of whether a former or incumbent president agrees. Granted, past and present presidents have certain enumerated privileges that are set forth in the Freedom of Information Act (FOIA), as amended in 1974. Moreover, under exceptional circumstances, a president can assert a constitutionally based privilege subject to review by the Archivist of the United States or by the courts. When, on November 1, 2001, President Bush signed E.O.13233 it represented a step backward with respect to holding government officials accountable–the very issue that was at the heart of Watergate.

Moreover, this Executive Order would appear to be incompatible with the 1978 statute by allowing a former or incumbent president to assert a laundry list of privileges beyond those recognized in that law. It also places undue financial burden on academic researchers, in particular, to the degree that they would have to retain counsel and sue for restricted documents without knowing what was in them.

There is no point second guessing why the Bush administration issued this Executive Order because that would bog us down in the abyss of endless political speculation. The simple fact is that like War Powers Act, presidents in general don't like the PRA or the FOIA. Unlike the War Powers Act, however, to date they have found it slightly harder to avoid complying with the PRA and the FOIA, than when ordering military incursions without keeping Congress fully informed in violation of the spirit of the War Powers Act.

Hence, each president since Nixon has devised slightly different ways for protecting secrecy either through officially claiming executive privilege or calling it something else such as presidential or constitutional privilege. In his testimony on November 6 before the subcommittee on Government Efficiency, Financial Management and Intergovernmental Relations of this committee, Professor Mark J. Rozell explained in detail how each President from Ford through Clinton tried to exert executive privilege to protect government secrets. But President Bush has gone beyond all these previous attempts by Presidents to operate in secret with his E.O. 13233. If vigorously enforced it would constitute an executive rewriting of two congressional statutes: the PRA and the FOIA.

We talk about the people's right to know, but more often than not it is Congress that has to protect that right when the public isn't paying attention and demanding it. This is why we are all here today and that is why Congressman Horn has proposed the "Presidential Records Act Amendments of 2002" to nullify E.O. 13233 entitled, "Further Implementation of the Presidential Records Act."

The segments of E.O. 13233 that particularly disturb me as a presidential historian are these:

> 1) in contrast to the PRA, the burden of judicial proof is shifted to the researcher who, at his or her expense, must show a "demonstrated specific need" for the restricted records. Research is already too expensive and time consuming for most academics, especially graduate students, and this provision would simply discourage many from working in presidential papers;
> 2) in contrast to the PRA, the power of executive privilege is extended to the vice president;
> 3) in contrast to the PRA, incumbent presidents have an unlimited amount of time to review any presidential materials that are subject to access and "absent compelling circumstances," to concur with the privilege decisions of former presidents and support them "in any forum in which the privilege claim is challenged," meaning funding litigation by former presidents and thus "tilt[ing] the scale in favor of secrecy;"
> 4) in contrast to the PRA, which mandates that the Archivist of United States "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," President Bush's E.O. puts the Archivist in the untenable position of having to violate the PRA not only when he postpones releasing certain documents when a presidential library has approved their release, as in the recent case of the Reagan papers, but also even when the incumbent president finds "compelling circumstances" to disagree with the former president's ground of privilege. In both instances, the Archivist is being asked to violate his constitutional duty to execute the 1978 law faithfully.

Congressman Horn's bill rectifies most of my specific concerns as I have outlined them above and, most importantly, abrogates some of the other questionable legal aspects of E.O.13233 as delineated by Attorney Scott L. Nelson in his testimony before the subcommittee on Government Efficiency, Financial Management and Intergovernmental Relations of this committee on November 6, 2002. However, I still believe that it gives incumbent presidents too much authority over the release of papers of former presidents.

The need for government accountability and access to information in our democracy has not changed, but the public doesn't always think it is important. We are in one of those times of public indifference because of September 11. The Bush administration is taking advantage of public fear about national security to take steps to keep its activities secret, especially its decision-making activities, and has extended that secrecy to the policy formulation processes of previous administrations.

Contrary to the claims of members of the Bush administration, privacy and national security are currently adequately protected by both the 1978 PRA, the Freedom of Information Act, and by

previous presidential executive orders. Back in April 2001, the President said that he had stopped e-mailing personal messages to his daughters. His aides later cited this statement as one of the reasons for Bush's Executive Order. Likewise, they have asserted arguments about not being able to obtain open and honest advice unless such advice remains secret indefinitely, and that incumbent presidents are the best judges of what should be withheld in the name of national security from the papers of their predecessors. Such comments appear to be part of a general predisposition on the part of the Bush administration to withhold rather than release information.

Secrecy with respect to access to information was a concern of this administration before September 11, as demonstrated when it postponed three times the release of 68,000 documents in the Reagan Library from January 2001 to March 2002. Then, there are Attorney General Ashcroft's memoranda of for September 28 and October 12. The first threatened disciplinary action against career lawyers to talked to "outside entities" and "internal legal deliberations" with respect to civil rights enforcement. The second encouraged all government agencies to resist FOIA requests by seeking out any and all good legal reasons (the exact phrase was "sound legal basis") "for withholding as much information as possible. None of these actions has anything to do with protecting national security; instead, they represent a pretext for protecting decision-making from public scrutiny and a denial of the public's right to know.

The President and his aides and the Attorney General have set a dangerous tone and are sending the wrong message to government officials and to the American public. That message is frightening in its simplicity: *secrecy is more important than openness in government.* Presidential tone is often more important than direct presidential action and less easy to contain. In this case, it is creating an atmosphere of hostility and suspicion that can permeate the minds of government officials and dull public awareness about the dangers of secrecy to a democracy such as ours. This is especially true in time of war when state protected secrets are on the rise, anyway.

Lastly, it has been abundantly evident since Nixon that any administration which arrogantly asserts executive privilege to prevent pubic access to decision-making processes or to dodge accountability does not ingratiate itself with members of the media or scholars who usually become all the more determined to ferret out government secrets. The general historical rule of thumb is that presidents' reputations do not usually suffer as more of their papers are opened. Closed papers do not protect presidents in the long run, however tempting it may be to restrict them in the short run.

That concludes my formal statement, Mr. Chairman, and I would be happy to answer any questions at the appropriate time.