BUSH'S SECRECY FETISH

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The United States was attacked in a stunning suicidal assault on September 11, 2001. We have retaliated and apparently destroyed a regime that harbored terrorists, and the hunt goes on for other sponsors and perpetrators of terrorism. Eventually, they will be eliminated or neutralized, and the republic will stand.

But what republic? We pledge allegiance to a flag and "to the republic for which it stands," but is it now a different republic? As calmer moments inevitably return, we will question whether the assault on the World Trade Center and the Pentagon justifies the suspension of some constitutional principles and laws. Make no mistake: the threat from without has resulted in extraordinary government measures. The Department of Justice has arrested and detained people for lengthy periods of time, usually under the cover of secrecy. Attorney General John Ashcroft presided over naming the Department's building after Robert F. Kennedy, with whom he seeks to identify. Perhaps this symbolizes the Bush Administration's gesture toward bi-partisanship. But World War I Attorney General A. Mitchell Palmer, notorious for the round-up of political undesirables, might offer a better model. And conveniently, he, too, was a Democrat.

The Bush Administration has turned to history to justify the extraordinary measures it has proposed. During the Civil War, military courts operated in some border areas to try civilians. Following Abraham Lincoln's assassination, a military tribunal convicted eight conspirators, some on questionable evidence, and executed four. In World War II, a military tribunal tried eight Nazi saboteurs, and sentenced six to death. The plot had been betrayed to the FBI by one of the saboteurs. J. Edgar Hoover unsuccessfully had recommended the death penalty for the renegade saboteur; nevertheless, he received a medal for "uncovering" the plot. Earlier President

Franklin D. Roosevelt ordered the incarceration of more than 110,000 Japanese-Americans, citizens and aliens alike. No mass evacuations or deportations have occurred in our present crisis, although the Immigration and Naturalization Service has detained a wide array of various ethnics, including Arabs, Israelis, Afghans, Sikhs, and Indians.

The Bush Administration has consistently shown itself partial to official secrecy. Some actions might be justified on emergency grounds. But not all. President Bush clearly has acted in behalf of other matters on his agenda, using the needs of the present situation as an excuse.

On November 1, President George W. Bush issued Executive Order 13233 that effectively undermines the Presidential Records Act of 1978, and he has done so in the name "national security." If his action stands, Bush will substantially shut down historical research of recent presidents. With this order, we would have no studies of recent events such as we have for the Vietnam War, using Lyndon Johnson and Richard Nixon's records to reveal their own doubts about the war, including its origins and attempts to make peace. We would not have any insight into Nixon's thinking and the role of his advisors in discussing and promoting various Supreme Court candidacies. We would have understood little of the origins and changes in Nixon's monetary policies or his manipulation of environmental legislation. Our history would have been be poorer; and certainly, present and future leaders would be less aware of past mistakes and errors.

The executive order constitutes nothing less than a wholesale emasculation of the Presidential Records Acts of 1978. That law was passed in the wake of Watergate and Richard Nixon's audacious attempt to retain, seal, and then destroy his presidential records. Later revelations of his archives confirmed the widespread suspicions of his criminal behavior and abuses of power. Congress properly recognized that a free nation would benefit and profit from a frank and full

disclosure of its historical records.

The 1978 law marked a conscious departure from traditional practice which allowed Presidents to leave office and retain their records. In 1974, Assistant Attorney General Antonin Scalia, prepared a memo for President Gerald Ford, arguing that the practice represented established "law" when, in fact, it was only custom. The new 1978 act provided that the National Archives house and maintain control over a former president's papers. Still, the law allowed those presidents a twelve year period of exclusive access to the papers, giving them a window for a personal bonanza. Writing memoirs has provided gainful employment for ex-presidents since Herbert Hoover. William J. Clinton's $9 million contract is good for his pocket; rest easy, the publisher will not be hurt one penny.

The Presidential Records Act established an orderly release of papers twelve years after the President left office. Ronald Reagan, the first president for whom the law applies, had a first installment of nearly 68,000 pages of his records ready for release in January 2001. The National Archives had sorted, filed, and vetted those papers for "national security" considerations. Reagan's papers, not incidentally, contain Vice President George H. W. Bush's records, whose own presidential papers are scheduled for opening in January 2005. Maybe.

Executive Order 13233 began to take shape as soon as the Bush II Administration took power. The archives had published its intention to release the Reagan materials, as required by law. But Alberto Gonzalez, the White House legal counsel, immediately requested a postponement to review "constitutional and legal questions." He received a 90-day delay and two subsequent ones from John Carlin, the Director of the National Archives, anxious to ensure "everyone's comfort level" -- and retain his position. Since 1978, through twelve years of Republican Administrations and eleven of Democratic ones, these presumably important and pressing "constitutional and

legal" questions had never surfaced. Strange indeed that the Executive Order should emerge when the nation was on a war footing, readily justifying the familiar and ever-dubious blanket of "national security." September 11 made it safe to circumvent standing law and close presidential records. We know Ronald Reagan will neither object nor agree; the decision apparently is George W. Bush's alone. Whatever "secrets" Reagan may have had are safe; more important, perhaps, Reagan's Vice President can rest easy.

Let us be perfectly clear: Bush's action has nothing whatsoever to do with protecting the nation. It has everything to with protecting our exclusive club of ex- and future ex-presidents. Most immediately, he is also covering for Reagan's Vice President as his order incredibly extends executive privilege to that officer, as well. Who knows? Perhaps we might learn something about that Vice President's role in Iran-contra, a role for which he famously denied any knowledge. President Bush, of course, will ultimately become a member of the club and undoubtedly, he is anxious to make certain that his record will be sanitized. In any event, extending executive privilege for one who was not the chief executive (at least in that period) is quite a leap. Speculation is rampant that Bush also is eager to protect Reagan aides who now are prominent in his Administration. They include current Secretary of State Colin Powell, OMB Director Mitch Daniels, Jr., and Chief of Staff Andrew Card. The Los Angeles Times had it right, calling the order a "secrecy fetish."

Executive Order 13233 provides presidential papers may be released only if the former and sitting president agree. This amounts to a concurrent veto. White House Press Secretary Ari Fleischer insisted the new order was innocuous and merely "implemented" existing law. The details, of course, showed otherwise, but when pressed, he retreated, leaving the "matter for the lawyers." He contended that the order provided a "safety valve" for a current administration

because former presidents, out of office for twelve years, might not realize the national security implications. Acting Assistant Attorney General M. Edward Whelan III deadpanned that the executive order was "not designed and it does not in any respect override any provisions" of the 1978 law. He, too, insisted that it merely provided procedures and filled gaps to implement the Presidential Records Act. The next day, President Bush, now in line with his cue cards, noted that his order provided "a process that I think will enable historians to do their jobs."

The 1978 act specifically mandated the release of a President's "confidential and private communications" with his advisors. Presumably, a legal counsel is an advisor, and the law did not provide for withholding an "attorney-client" or "attorney work product" materials. But the new executive order simply sets aside the act's provisions. The 1978 law recognized various exemptions contained in the 1965 Freedom of Information Act. Now, these have been expanded by executive fiat and we have a state secrets privilege; communications with advisors' privilege; attorney-client privilege; and attorney work product privilege. We are back to 1973 when one of Nixon's lawyers arrogantly said: "It is for the President alone to say what is covered by executive privilege."

Brett M. Kavanaugh, a Gonzalez staffer who apparently drafted the order, said that a 1987 Reagan executive order, which attempted much less restraint, offered "no defense whatsoever to the opinions of a former president." Bush's order, of course, now gives former presidents, their families, and former vice presidents a right to prevent the release of papers. Once again, a Watergate score has been settled. A few years ago, Mr. Kavanaugh worked with Kenneth Starr, and eagerly argued that President William J. Clinton had no right to retain documents, no executive privilege, and must yield to every demand made by the Office of Independent Counsel. Bush's action drips with irony.

The House Subcommittee on Government Efficiency and Intergovernmental Affairs of the House Committee on Government Reform held a brief hearing on the Executive Order on November 6, 1901. Somewhat gingerly, Chairman Stephen Horn (R-CA) thought that "the new order appears to create a more elaborate process" for releasing documents. "It also gives the former and incumbent presidents veto power over the release of the records." Administration spokesmen (Gonzalez did not appear) simply stonewalled and repeated the mantra of clearing away constitutional problems. No Democrats showed up for the hearing, but the other committee member, an ardent Reagan booster, Doug Ose (R-CA), appeared and strongly called for the administration to reconsider its order. An unabashed admirer of Ronald Reagan, Ose seems to believe releasing the Reagan Papers can only enhance his reputation. Horn belatedly offered his support.

Scott L. Nelson, a member of the Public Citizen Litigation Group, offered the most significant testimony. Nelson has a special familiarity with presidential records. He spent fifteen years in private practice representing Richard Nixon, and later his executors, on matters relating to access to Nixon's materials. He represented Nixon against Public Citizen and myself in our successful suit to liberate the Nixon tapes. Now, Nelson has defected and eloquently argues for public access.

Nelson testified that the Executive Order "is fundamentally flawed, both constitutionally, and as a matter of policy." He flatly stated that the new directive imposed substantive standards "that displace and subvert" the 1978 law's provisions for public access. Nelson noted that the Bush order requires the Archivist to withhold materials if a former president asserts executive privilege, and even if the incumbent president disagrees. In Nixon v. Administrator of General Services (1977), the Supreme Court held that former presidents retained a limited right to

executive privilege, but the Court certainly did not imply that incumbent executive branch officials must honor such claims.

The 1978 law assumed and provided a right of access; Bush's order stands that right on its head. The burden now is on the researcher who must show a "demonstrable, specific need." In short, researchers maintain a very expensive right to litigate. In 1988, the Circuit Court for the District of Columbia gave short shrift to such judicial protection. The judges emphatically rejected a Reagan order directing the Archives to accept any claims advanced by former President Nixon to block release of his presidential materials. Reagan appointee Lawrence Silberman's opinion rejected Reagan's contention that the Archivist might legally and independently support a former president as long as he could be challenged in court. Silberman excoriated the Administration: "To say . . . that [the former President's] invocation of executive privilege cannot be disputed by the Archivist, a subordinate of the incumbent President, but must rather be evaluated by the Judiciary . . . is in truth to delegate to the Judiciary the Executive Branch's responsibility." The Bush order is no different, for it requires the Archivist to honor the former president's claims even when the incumbent disagrees with them. Such a course constitutes nothing less than the incumbent's abdication of his obligation of fidelity to the law. When the inevitable challenge to Bush's order appears on his doorstep, as is likely, one hopes Judge Silberman will remain consistent in his faith to the law.

Speaking of lawsuits, Bush's order provides no end to back scratching for that fellowship of ex-presidents. His order provides that if the incumbent and former president agree to block release, the President and his Department of Justice will defend the assertion of privilege, thus saving the former president potentially significant legal fees. Richard Nixon wrote endless volumes of memoirs to support his lawyer habit.

Make no mistake: the Bush order breaks much new ground. Allowing a former president's family or personal representative to assert privilege is novel and bizarre. This involves the delegation of some personal right and brazenly enlarges the constitutional privilege. That privilege is asserted on behalf of the office, now no longer his. The shadowy doctrine of executive privilege has been elevated to a personal right, extending a lifetime, and even beyond.

The order bestows a luxuriant privilege upon former presidents. Incumbents decide and judge the nature of national security, not former presidents. If the incumbent sees no national security issue at stake, why allow a former president, ever anxious to preserve and enhance his reputation, to make that determination?

This matter is not closed. Slowly, congressmen are beginning to understand the stakes. Dan Burton (R-IN) reportedly is "exercised" by the Bush order and he preparing for a more elaborate hearing by the full House Committee on Government Reform, which he chairs. He apparently understands that this is not a partisan issue. Surely, he must be tolling the days of the twelve years remaining before Bill Clinton's papers are scheduled for release. That prospect must tantalize Burton.

White House Counsel Gonzalez thus far has refused to say when or whether Reagan's papers would be released. There is no time limit on how long a former or incumbent president can seal his papers. This is not about process; it is very much about substantive results. We know the following: the papers have been cleared for national security and personal exemptions; President Reagan unfortunately cannot deal with these matters, and there is no indication that Nancy Reagan cares; it follows, then, that this Administration, will establish new precedents and proscribe any releases. Heads we win; tails you lose.

Early in the game, and long before September 11, a Gonzalez aide thought that "maybe twelve

years is too short a time." Congress might act boldly and promptly to override this order and assert its legislative prerogatives. Or it might change the existing law. But what is the proper amount of time? Twenty years? Thirty? A hundred? Or is any too many?

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