

House Moves To Rescind Bush Order On Papers

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Rep. Dan Burton, Indiana Republican, says President Bush is doing a great job on the economy and the war against terrorism. He says Bush is his kind of guy.

But White House counsel Alberto Gonzales, or somebody else, is giving the president pretty bad advice on withholding presidential records, says Burton, chairman of the House Committee on Government Reform.

Burton was speaking at a House Government Reform subcommittee hearing last week on Executive Order 13233, which limits public access to presidential records. It was the Subcommittee on Government Efficiency, Financial Management and Intergovernmental Relations' third hearing on the executive order, which Bush signed on Nov. 1, 2001. Wednesday's hearing, chaired by Rep. Stephen Horn (D-Calif.), focused on a legislative "fix" for what members on both sides of the aisle and scholars have called a "deeply flawed" and "misguided" executive order. The fix is H.R. 4187, a bill that Horn and several of his colleagues introduced on April 11. The bill, co-sponsored by Burton and Democratic Reps. Jan Schakowsky (Ill.) and Henry A. Waxman (Calif.), would rescind the executive order and replace it with statutory procedures for the review of records and the assertion of privilege claims.

Bush's executive order effectively invalidates the Presidential Records Act of 1978. The act was passed in the wake of the controversy over President Richard Nixon's attempts to hold on to his papers and tape recordings. It decreed that presidential and vice presidential records are public property, which must be made available to historians, journalists and the public no later than 12 years after the president or vice president leaves office.

Bush issued the order after delaying the release of 68,000 pages of Ronald Reagan's White House records, including vice presidential papers from the elder Bush, for 11 months.

The key features of Executive Order 13233 include:

- It prohibits the release of records unless and until both the former and incumbent president affirmatively consent to their release.
- It imposes no firm time limit on record reviews and assertions of privilege claims. It allows the former or incumbent president to extend the review period unilaterally and indefinitely.

- It requires the archivist to withhold records in response to any privilege claim by a former president, regardless of its merit. It thereby places the burden on the requester to sue to contest the privilege claim.
- It requires an archivist to withhold records if the incumbent president claims privilege, placing the burden on a public to sue to contest the claim.
- It appears to permit family members, descendants, or other representatives to claim privilege on behalf of a former president.
- It may be read to permit a former vice president to claim executive privilege.
- It asserts a very expansive view of the scope of executive privilege. It suggests that a requester under the Presidential Records Act must establish "a demonstrated, specific need" for records in order to overcome a privilege claim.

Burton, who famously investigated former President Clinton's executive privilege claims, fumed at the hearing: "For the White House to block documents that Congress should rightly have access to is absolutely insane."

Bush may feel that he is standing on constitutional terra firma with his executive order, but from a political standpoint, with a slim Republican majority in the House and Democrats in control of the Senate, "it makes no sense," Burton asserted.

Hoping to make the president come to his senses, the lawmaker threatened: "Now if the executive order stands, and Congress can't have access to the presidential records we need, he's going to have big problems with me. If he needs a crucial vote on the budget or on an appropriations bill, he's not going to get it."

Burton believes that if H.R. 4187 gets to the floor, it will pass. And if Bush vetoes the bill, "he will veto it at his own peril."

After decrying the administration's "secret activities" in energy, the census, Social Security and taxes, Schakowsky, said: "In reality, the legislation we are discussing today is a gift to President Bush.

"It is a way out," she added. "He and his administration should support it. I don't think the president and his men want to have a Papergate on their hands."

Three of the four scholars who testified at Wednesday's hearing believe legislation is a "proper remedy" for the Bush executive order.

Mark J. Rozell, professor of politics at The Catholic University of America, said: "It is not sufficient for Congress merely to reinstate the Presidential Records Act and to repeal the executive order.

"The administration is correct in its view that the Presidential Records Act needs to be revisited and that, in hindsight, some of the law's provisions are flawed. And the executive order raises some legitimate points about the practical difficulties of implementing Congress's intent under the law in certain circumstances, such as the disability of a former president.

"But a legislative remedy is an appropriate course of action to solve such problems rather than to allow an executive order to supercede an act of Congress. I also believe that a legislative remedy is far preferable to waiting for a resolution in the courts or a redrafting of the executive order by the executive branch."

Rozell and fellow panelists Jonathan R. Turley, professor of public interest law at George Washington University Law School, and Morton Rosenberg, a Congressional Research Service specialist in American public law, agreed that H.R. 4187 does not infringe on a president's or ex-president's constitutional prerogative.

Indeed, Rozell said, the bill protects the interests of former and incumbent presidents by establishing a procedure whereby they are provided a reasonable time period- an outer limit of 40 working days- to review government records to consider whether to claim executive privilege. The bill further requires the archivist to abide by any such claim of privilege by an incumbent president and places the burden on those seeking access to such records to seek a judicial remedy.

The bill remedies the problem of the executive order displacing the authority vested in the archivist. "H.R. 4187 offers a workable middle ground by requiring the archivist to withhold records [20 days] long enough for the former president to file a suit to protect his claims of privilege," Rozell said.

Most of the panelists were pleased that the bill reaffirms the principle that executive privilege is a presidential power that cannot be delegated to some other person and cannot be exercised independently by a current or former vice president. Finally, most of them agreed, the bill overcomes a major flaw in the provision of the Bush executive order that requires an incumbent president to support a former president's claim of privilege, even if the incumbent disagrees.

"This provision clearly violates the constitutional requirement that the president 'take care' to faithfully execute the law," Rozell said. "For a president to uphold what he believes may be man improper use of executive privilege by a predecessor would violate the Article II, Section 3, 'take care' clause of the Constitution."

Turley said the House bill "will protect the historic work of a prior Congress" and "will further improve a statue that has become a symbol of our unique form of open and democratic government."

Todd F. Gaziano, director of The Heritage Foundation's Center for Legal and Judicial Studies, was the only panelist who fully supported Bush's executive order. And his support infuriated Burton.

"I don't know if you have any influence over there at the White House, but somebody is leading that guy [Bush] down the wrong path," Burton said. "I'm saying this as a Republican."