Bush order restricts access to presidential papers

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In a move that has received limited attention in the national media, President Bush signed an executive order November 1 that will have far-reaching implications regarding public knowledge of government activities. The order, further limiting access to presidential papers, is a further step in the attempt by the American political establishment to create a more secretive and anti-democratic form of rule in the wake of the September 11 attacks.

The executive order, which is presented as an "interpretation" of the 1978 Presidential Records Act (PRA), in fact effectively annuls the content of that legislation. Implemented in the wake of the Nixon Watergate scandal, the PRA, though itself extremely limited, was a response to the crisis of legitimacy faced by the scandal-ridden government. The legislation was intended to grant a certain degree of public access to the inner decision-making process that takes place within the White House, particularly in communications between the president and his advisors.

The Bush order essentially revokes this access, ensuring that any compromising records are kept far away from the public eye. It stipulates that both former and current presidents will have unlimited veto power over the release of presidential records, and it relegates any attempts to overrule this capacity to lengthy legal proceedings in which the applicant must establish a "demonstrated, specific need" for the particular information. Otherwise, the documents will remain closed indefinitely.

What is at issue is the fate of presidential documents, which include any records produced by the president or his aides while in office. Prior to 1978, these documents were considered to be the personal property of the president, and while most presidents donated most of their material to the National Archives (minus, of course, anything that might be compromising), they were not legally obligated to do so.

This changed with the Watergate scandal, when it was revealed to the public that the highest reaches of Richard Nixon's executive office were engaged in all manner of dirty tricks and corrupt practices. Upon leaving office, Nixon attempted to work out an arrangement, known as the Nixon-Sampson Agreement, that would prevent public disclosure of the extensive White House documents, including the infamous tapes which had recorded, among other things, all of Nixon's conversations with his aides. Congress initially passed legislation abrogating the agreement, then passed the Presidential Records Act to ensure that no similar agreements were made in the future.

On the one hand, the PRA was an attempt to contain one of the greatest crises in American governmental history—when Americans caught a glimpse of what really happens behind the doors of the Oval Office. Some move had to be made to provide the pretence of public oversight of the government. On the other hand, it was an attempt by Congress to assert control over an executive office that had clearly gotten out of hand.

Under the PRA, which took effect with Reagan in 1981, the official records of the president and his staff are not the private property of the president, but belong to the United States government. When the president leaves office, the records are transferred to the National Archivist. During the first five years only, Congress, the courts and the incumbent president can have access; after five years, access is restricted by regulations in the PRA as well as the Freedom of Information Act (FOIA). The PRA exemptions include properly classified national security information, information about appointees to federal office, information regarding trade secrets, and communications between the president and his advisors.

After 12 years, the records are reviewed for FOIA exemptions only, which protect for "national security" and the like. In a provision directly related to the history of the Watergate scandal, the act expressly states that communications between the president and his advisors are not exempt from release. The purpose of the PRA was to ensure that the former president did not have control over presidential papers upon leaving office, and to provide for a limited amount of public access. The Bush order undermines this aspect of the act.

The road to undermining the PRA began with Reagan, who issued an executive order in 1989 that stipulated a presidential veto over the release of any documents. If the current president decided, for whatever reason not limited to those under the FOIA, that any presidential records should be kept secret even after 12 years, then they would not be made public. While Reagan's action has been denounced by historians as a presidential annulment of the PRA, even this order did not attempt to give the former president an overriding veto, because such a move would so obviously contradict the intent and letter of the law.

Reagan was the first president on whom the PRA was to take effect, and January 1 of this year marked the end of the 12-year period following his term in office. Earlier this year, the National Archives and Records Administration (NARA) provided a 30-day notification to the president, required under the Reagan order, requesting the release of 68,000 pages of Reagan's

communications with advisors. These had been withheld during previous years according to the provisions of the PRA.

Bush clearly does not want to release the documents, which likely contain revealing conversations between Reagan and his vice president at the time, George Bush Sr. The current administration includes several former Reagan aides—including UN Ambassador John Negroponte (US ambassador to Honduras under Reagan), Secretary of State Colin Powell (Reagan national security advisor) and Budget Director Mitch Daniels (head of Reagan's White House Office of Intergovernmental Affairs), among others. The documents could very well contain damning information relating to the various underworld activities of the Reagan administration.

Beginning in January, therefore, the Bush administration has repeatedly delayed releasing the documents, claiming that it needed time to establish a process for handling them. The last delay was in August. Then came the September 11 attacks, which have provided Bush with the justification not only to settle the question of the Reagan documents once and for all, but also to implement a far-reaching extension of the control by Bush over documents currently being created by his own administration.

Blocking the Reagan documents is thus only part of the story. Bush could have simply applied the executive privilege clause of the Reagan order to keep these documents under lock and key. However, the Bush administration has seized on the September 11 events as a pretext for a wholesale assault on democratic rights and civil liberties. In its "war on terrorism," both at home and abroad, the government is certain to be planning actions that it would prefer to keep under wraps, out of view of the American public. As David Hugh Graham, a presidential historian at Vanderbilt University, pointedly noted, "The executive branch is moving heavily into the nether world of dirty tricks, very likely including directed assassinations overseas and other violations of American norms and the UN charter. There is going to be so much to hide."

Bush wants to ensure that he will maintain a firm grip on these records after he leaves office. Since the PRA was passed precisely to prevent this, he has issued an order that—while purporting to interpret the act—actually guts it.

The PRA contains something of an escape clause, in that it states that nothing in the act "shall be construed to confirm, limit or expand any constitutionally-based privilege available to an incumbent or former President." Bush's executive order uses this vague exemption, together with Supreme Court cases that were decided before the PRA was passed, to make the argument that confidentiality of president-advisor communications is a constitutionally protected privilege.

Again citing a Supreme Court case before the enactment of the PRA, Bush's order asserts that to overcome these constitutionally based privileges an applicant must establish a "demonstrated, specific need," something not required by the PRA. If a document is blocked, then an applicant must appeal to a court and demonstrate specific need—a lengthy process that is certain to end in failure in most cases.

The argument of the Bush order is, to say the least, duplicitous. The purpose of the PRA was to prevent the former president from retaining control. It did this by declaring presidential documents to be under the ownership of the state and not the former president, and this was precisely the issue surrounding the Nixon tapes. In order to ensure that as little information as possible is provided to the public, the Bush order not only extends the veto of the current president, but also gives a veto to the former president.

In a statement exemplifying the cynicism and mendacity of the Bush administration, White House Counsel Alberto R. Gonzales stated in defense of the order: "We thought it would be more appropriate to really give the primary responsibility regarding presidential records to the former president whose records they belong to," ignoring that the PRA explicitly states that the records do not, in fact, "belong" to the former president.

Moreover, Bush's order blatantly contradicts the past 25 years of court precedent regarding the PRA. During the latter years of the Reagan administration, the Justice Department issued an order granting Richard Nixon authority over his presidential documents. This was challenged in court as a violation of the PRA. A D.C. Circuit court held that the Constitution does not require the archivist to defer to a former president's assertion of privilege, and the D.C. Court of Appeals held that persons seeking access to presidential records do not have to establish a "demonstrated specific need."

In a 1995 decision, the D.C. District Court struck down an agreement between former President Bush and former National Archivist Don Wilson that had granted Bush control over electronic records created by officials in the White House. The judge ruled that the agreement "would put the law back to where it was prior to 1978," i.e., before the PRA.

It should be stressed that current legislation regarding government documents is hardly a model of democratic access. The Freedom of Information Act (FOIA), which applies to all government documents and not just presidential records, provides for exemptions for the most important information regarding the inner workings of the government. Moreover, it is extremely difficult to get access to even censored documents through FOIA, and it is impossible to get information regarding the current decision-making process.

Nevertheless, the Bush order marks a definite step toward greater secrecy. It is in line with a memo released last month by Attorney General John Ashcroft, which directed US agency heads to exercise caution when responding to requests under FOIA. The White House is also considering changing an executive order signed by Bill Clinton that declassifies some federal agency documents.