

Bush Urged to Rescind Order On Presidential Materials

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The Republican chairman of a House subcommittee pointedly urged the Bush administration yesterday to rescind an executive order that both Democratic and GOP lawmakers denounced as charting a new era of secrecy for presidential records.

Rep. Stephen Horn (R-Calif.), whose panel has jurisdiction over the Presidential Records Act, said the administration should "revisit" the order President Bush signed last week to remove the hurdles to public access that it creates. Aides said Horn is also considering legislation to supplant the controversial decree.

Acting Assistant Attorney General M. Edward Whelan III told the subcommittee at a hearing yesterday that Bush's order simply sets up a procedure whereby the incumbent president and former presidents can invoke "constitutionally based" privileges to withhold documents that might otherwise be disclosed after a 12-year waiting period.

Whelan denied that the order amounts to an expansion of the privileges recognized under the records act or that it otherwise revises the 1978 law.

Under the order, a former president or a sitting president -- or in some cases, the family of a deceased president -- could block the release of records requested by journalists, scholars or others and force them to go to court to challenge such decisions.

Under current interpretations of the Presidential Records Act, a former president can claim privilege for particular documents, but the archivist of the United States could overrule him, and the former president would have to go to court to sustain his claim.

The Bush order would require individuals to show a "demonstrated, specific need" for particular records if they wished "to overcome the constitutionally based privileges" that have been invoked. The Presidential Records Act imposes no such requirement.

Rep. Doug Ose (R-Calif.) said Bush's order would treat as privileged two broad new categories of documents: "communications" between the president and his advisers; and records containing "legal advice or legal work (the attorney-client or attorney work product privileges)." The 1978 law protects only "confidential communications" between the president and his advisers and makes no mention of the attorney-client privilege.

"The bottom line is that the new order appears to violate not only the spirit but also the letter of the Presidential Records Act," Ose said. "In 1978, Congress expressed its clear intent to make presidential records available for congressional investigations and then for the public after a 12-year period. This new order undercuts the public's rights to be fully informed about how its government operated in the past."

No Democrats attended the hearing, in part because of travel delays and Election Day commitments, but Reps. Henry A. Waxman (D-Calif.) and Janice D. Schakowsky (D-Ill.) said in a letter that the Bush order also "tries to rewrite the act by withholding records that are a part of the deliberative process." There is a deliberative process exemption for records sought under

the Freedom of Information Act, but the two Democrats said the 1978 records act specifically states that exemption cannot be used for presidential materials after a 12-year period.

Whelan took the position that "constitutionally based privileges" include those involving attorney-client relationships as well as the deliberative process even if the 1978 law did not mention them. He also said that the dropping of the word "confidential" from "confidential communications" did not amount to an "expansion" of authority.

Asked for the policy reasons underlying the "expansion" of authority, Whelan replied: "There is no expansion. Therefore, there is no policy basis for an expansion."

Historians, academics and public interest advocates at the hearing were also highly critical of the Bush order. Scott Nelson, an attorney for Public Citizen, said the Reagan Justice Department issued a virtually identical ruling in the 1980s, requiring the archivist to abide by former President Richard M. Nixon's claims of privilege, but the ruling was repudiated in the U.S. Court of Appeals here.