"Private Papers" of Public Officials

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TRADITIONAL CONCEPTS REGARDING THE OWNERSHIP of and access to the papers of public officials have been challenged by events of the last several years and particularly by activities closely associated with the administration of President Richard M. Nixon. Heretofore, politicians, archivists, and historians had accepted policies dictated by the belief that the President owned the papers and records of his office and of the officials most closely connected with the White House as his own personal property and had the constitutional right to set the terms of access. Faith in this concept, however well or poorly founded, has been shaken by events connected in large part with Watergate, the investigations of this and other activities of the Nixon administration, and the President's resignation.

The opposition by officials of the Nixon administration to attempts by government investigators to examine the files of the Office of the President, the suits and counter suits which have been brought in attempts to quiet the title to these records, and the unsettled condition of the presidential libraries system have revealed the weak legal and constitutional foundation supporting the traditional concepts and policies regulating presidential records.

Scholars must analyze the historical, legal, political, and archival development of the concept of the right of private ownership of the papers of public officials, particularly those of the Office of the President, if sound policy for the future is to be adopted. This paper argues that the papers of public officials belong to the people, and that any legislative acts, legal interpretations, administrative policies, or hoary traditions to the contrary are not, and have not been, in the public interest.

F. Gerald Ham, a past president of the Society of American Archivists, put it well: "It is a fiction that these are private papers. The very great bulk of these papers originate from one activity only—that of serving in a public capacity. I think they should be public papers."[1]

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[1] *Time,* 31 December 1973, p. 12.

H. G. Jones, another past president of the Society, made the same point even more bluntly in his book *The Records of a Nation.* After asserting that President Franklin D. Roosevelt clearly established the people's claim to ownership of their chief executive's files, Jones declared that "the prerogative assumed by his predecessors in asserting private title was in fact only a lingering vestige of the attributes of monarchy, not an appropriate or compatible concept of archival policy for the head of a democratic state to adopt."[2]

There is a surprisingly small amount of literature dealing with the right of public officials to claim as private property records prepared at public expense. Historians generally have supported the position that a President's papers belong to him and not to the nation.[3] Allan Nevins's 1947 article "The President's Papers—Private or Public?" encouraged the preservation of presidential papers, but the author nevertheless concluded that "considerations of good taste and decorum" were the nation's "principal reliance" in urging public officials to preserve for public use "what they are certain to call their own papers."[4] Other historians have objected not so much to presidential ownership as to the denial of rights of historians also to use the files.[5]

Not until 1960 did historians directly confront the issue of private ownership of presidential papers. After President Eisenhower announced the donation of his papers to the people of the United States, Julian P. Boyd, editor of the *Papers of Thomas Jefferson,* and Lucius Wilmerding, Jr., formerly a government official and a writer about the American political system, wrote to the New York *Times* stating that "the records of the office of the President belong to the people who created that office. They cannot be given away by one who happens to be its incumbent." The two scholars rejected the notion that "the privilege of the President follows a man into retirement as a personal right to be exercised by himself for the duration of his natural life and then to be descendable to his executors and heirs. No private citizen is authorized to determine what papers of the Presidency the current holder of the office may or may not see."[6]

[2] H. G. Jones, *The Records of a Nation: Their Management, Preservation, and Use* (New York: Atheneum Press, 1969), p. 155.

[3] Samuel Eliot Morison, "The Very Essence of History," *New York Times Magazine,* March 19, 1939, pp. 4–5; Richard S. Kirkendall, Ethan P. Allen, and Philip C. Brooks, eds., *Conference of Scholars on Research Needs and Opportunities in the Career and Administration of Harry S. Truman, March 25–26, 1960* (Independence, Mo.: Harry S. Truman Library, 1960), pp. 9–11; James H. Rodabaugh, ed., *The Present World of History: A Conference on Certain Problems in Historical Agency Work in the United States* (Madison: State Historical Society of Wisconsin, 1959), pp. 37, 52; John McDonough, R. Gordon Hoxie, and Richard Jacobs, "Who Owns Presidential Papers?" *Manuscripts* 27 (Winter 1975): 2–11; Arthur M. Schlesinger, Jr., "Who Owns a President's Papers?" *Wall Street Journal,* 26 February 1975, p. 16.

[4] *New York Times Magazine,* 19 October 1947, p. 52.

[5] See Herbert Feis, "The President's Making of History," *Atlantic Monthly* 224 (September 1969): 64–65; and Alexander DeConde, "What's Wrong with American Diplomatic History," *Society for Historians of American Foreign Relations Newsletter* 1 (May 1970): 4–6.

[6] New York *Times,* 1 May 1960, Sec. E., p. 10.

Many prominent members of the archival profession have supported private ownership: Robert H. Bahmer and R. D. W. Connor, former Archivists of the United States; Herman Kahn, director of the Roosevelt Library and later the assistant archivist for presidential libraries; Philip D. Lagerquist, research archivist in the Harry S. Truman Library; David Demarest Lloyd, executive director of the Truman Library; and, more recently, James E. O'Neill, Deputy Archivist of the United States. One common theme runs through the argument of these archivists who accept the position that presidential records are private property. Over and over they have asserted the premise that the constitutional nature of the presidential office exempts the papers of that office from public control. Another former Archivist of the United States, Wayne C. Grover, stated this view clearly:

> In the United States, the office of the President, like the offices of members of the Congress and the Supreme Court, is a constitutional office having a separate and independent status in the governmental system. Every President since George Washington has considered that this separate and independent status extends to and embraces the papers of the incumbent of the office. Thus, as is the case with the papers of the individual members of the Congress, the papers of the Presidents have always been considered their personal property, both during and after their incumbency. This principle has the sanction of law and custom and has never been authoritatively challenged.[7]

Perhaps this theory of constitutional law "has never been authoritatively challenged," but amplification or justification of this concept seemingly does not exist.

While the Office of the President has been held in the past to be immune to the argument that its records are public property, three of America's most prominent scholars on constitutional law have recently challenged the traditional interpretation of presidential privilege on which archivists have relied. Gerhard Casper, professor of constitutional law in the law school of the University of Chicago, when asked his opinion of Nixon's claiming to own his presidential papers, called it "a curious and dubious practice. . . . Just because it's been done for 200 years doesn't make it legal. A lapse of time does not establish legality under the law." Raoul Berger, senior fellow of American legal history in

[7] Wayne C. Grover, "Presidential Libraries: A New Feature of the Archival System of the United States," *Indian Archives* 11 (January 1957): 1–2. See also Wayne C. Grover, "The Presidential Library System," *Palimpsest* 43 (August 1962): 387–92; Robert H. Bahmer and Herman Kahn, "Presidential Libraries—Their Growth and Development," Interagency Records Administration Conference *Proceedings*, 17 January 1958, p. 5; Philip C. Brooks, "The Harry S. Truman Library—Plans and Reality," *American Archivist* 25 (January 1962): 25–37; Robert Digges Wimberly Connor, "The Franklin D. Roosevelt Library," *American Archivist* 3 (April 1940): 82; Herman Kahn, "The Presidential Library—A New Institution," *Special Libraries* 50 (March 1959): 106–7; David D. Lloyd, "Presidential Libraries and How They Grew," *The Reporter* 10 (February 2, 1954): 31–34; Philip D. Lagerquist, "The Harry S. Truman Library as a Center for Research on the American Presidency," *College and Research Libraries* 2 (January 1964): 32; James E. O'Neill, "Will Success Spoil the Presidential Libraries?" *American Archivist* 36 (July 1973): 344.

Harvard Law School, declared: "We're not talking about private letters. We're talking about government property." Berger compared Nixon to any other federal employee working on government files with government property. The late Alexander Bickel of Yale Law School also agreed that the papers did not belong to Nixon, but questioned the equity of not treating Nixon as other Presidents have been treated.[8]

Until Judge Charles R. Richey of the U.S. District Court in Washington, D.C., ruled on January 31, 1975, that almost all of the records produced by the Nixon administration belong to the government, no court had ever dealt directly with the issue of the ownership of presidential papers. A few cases have touched upon the efforts of a federal government employee to copyright work done for the government, the right of the government to protect military secrets, and the right of the accused to compel the government to release the identity of an informer so the defendant may have access to material witnesses.[9]

A controversial court case in 1953 which determined the ownership of some notes and documents from the Lewis and Clark Expedition awakened archivists, manuscript curators, collectors, and dealers to the issue of the ownership of records prepared by employees of the federal government.[10] The United States became a party in the case when named as a possible owner of the Lewis and Clark notes by the executor of the estate in which the papers were found. The then-assistant Archivist of the United States, Robert H. Bahmer, helped the government prepare its case. Stating that "we do not believe that historical scholarship would be served by permitting the Clark papers to remain in private hands," Bahmer argued that the National Archives believed it had no choice but to attempt to regain control of public records which had not been "lawfully alienated from Federal custody."[11] This position raised concern among private dealers and collec-

[8] Elgin, Illinois, *Daily Courier-News* 15 August 1974, p. 1. See also Raoul Berger, *Impeachment: The Constitutional Problems* (Cambridge: Harvard University Press, 1973), and New York *Times*, 9 September 1974, pp. 1, 24–26, 33. "Ownership of Presidential Papers," an unpublished memorandum by Ralph S. Brown, Jr., Yale University law professor, contains an excellent analysis of the complex legal, constitutional, and political issues which must be faced if sound policy in this area is to be established. See note 66 below for citations to the *Congressional Record* containing the arguments of both sides of the public ownership question.

[9] See "Memorandum Opinion of United States District Court Judge Charles R. Richey," January 31, 1975, *Richard M. Nixon* v. *Arthur F. Sampson, et al.; The Reporters Committee for Freedom of the Press, et al.* v. *Arthur F. Sampson, et al.;* and *Lillian Hellman, et al.* v. *Arthur F. Sampson, et al.* (Civil Actions Nos. 74–1518, 74–1533, 74–1551, U.S. District Court for District of Columbia). See also *Heine* v. *Appleton*, 11 Fed. Cas. 1032, No. 6324; *United States* v. *Reynolds*, 345 U.S. 1; *Roviaro* v. *United States*, 353 U.S. 53; *United States* v. *Chadwick*, 76 F. Supp. (N.D. Ala., 1948); *Sandy White* v. *United States*, 164 U.S. 100; *Wilson* v. *United States*, 221 U.S. 361; and *Boyd* v. *United States*, 116 U.S. 616.

[10] Calvin Tomkins, "Annals of Law: The Lewis and Clark Case," *New Yorker* 42 (October 29, 1966): 105–48. See also Julian Boyd, "These Precious Monuments of . . . Our History," *American Archivist* 22 (April 1959): 147–80.

[11] Robert H. Bahmer, "The Case of the Clark Papers," *American Archivist* 19 (January 1956): 19–22.

tors of manuscripts that the federal government, through the National Archives, would soon lay claim to other documents alienated from federal control. In vain did Bahmer and other spokesmen attempt to assure them that the government had an interest only in those alienated records of the federal government not being properly cared for. The government explained that these Lewis and Clark notes had been found in a dusty attic with no record of them ever having been properly released from government custody. The National Archives denied any intention of seizing by right of eminent domain properly maintained private collections of former government records.[12]

The court decided the case not on the abstract right of government ownership of property prepared and used while on a government mission, but rather on the basis of the usefulness of the documents to the government in 1806. The judge determined that Lewis and Clark had submitted reports to the government containing all the scientific, geographical, and botanical data gathered on the expedition, and therefore the government had no need of these preliminary notes. The court rejected the government's position that President Thomas Jefferson had intended that rough copies of notes and reports be turned over to the government. Their later historical or monetary value was not at issue, and arguments that the notes had been improperly removed from government offices were irrelevant. In effect, the court ruled that for reasons lost in history, William Clark inadvertently left some of his private property in a government installation.[13]

In the government's appeal of this decision, the lower court's findings were upheld, and the government declined to appeal to the Supreme Court. The appeals court did declare that had the trial court held the Clark notes to be "the written records of a government officer executed in the discharge of his official duties, [then] they are public documents and ownership is in the United States." Although neither court sustained the government's arguments that Clark's preliminary notes met this requirement, the appellate judge's observation surely would apply to the written records of the President of the United States, prepared in the course of executing official and constitutional duties.[14]

Julian P. Boyd defended the government's claim to the ownership of the work notes of one of its employees in a carefully reasoned article for the *American Archivist* in 1959. Reviewing the Clark case in detail, Boyd argued persuasively that Jefferson shared this view, and he

[12] Bahmer, "Case of the Clark Papers; A Government Threat to Manuscript Collections," *Manuscripts* 7 (Summer 1955): 214–5; Robert F. Metzdorf, "Lewis and Clark I: A Librarian's Point of View," *Manuscripts* 9 (Fall 1957): 226–30.

[13] *First Trust Co. of St. Paul* v. *Minnesota Historical Society,* 146 F. Supp. 652. The decision is reprinted in "In the Matter of the Lewis and Clark Papers," *Manuscripts* 9 (Winter 1957): 1–21. See also Burt W. Griffin, "Historical Writings: The Independent Value of Possession," *Yale Law Journal* 67 (1957): 151–63.

[14] *United States* v. *First Trust Co. of St. Paul,* 251 F. 2d 686 and 688. See also Jones, *Records of a Nation,* pp. 288–94.

criticized the judge's decision for not recognizing the government's right to ownership.[15]

In 1971, in another important case bearing on the matter of public records, the U.S. Circuit Court of Appeals in Washington, D.C., considered the issue of executive privilege and the right of the President to withhold information from the public. Suit was brought under the provisions of the Freedom of Information Act to force the government to release a report on the supersonic transport. John Ehrlichman, domestic affairs advisor to President Nixon, denied Congressman Henry Reuss access to the report, asserting that the Office of Science and Technology which prepared the report was not an "agency" as defined in the Freedom of Information Act, but a part of the Office of the President. As such, Ehrlichman contended, communications between the office and the President were privileged. While the lower court upheld the President's view, the Court of Appeals held that the lower court erred in not ruling that the Office of Science and Technology was a federal agency, and ordered the report released.[16]

Court decisions almost always rule on the narrowest possible grounds, and this case was no exception. Thus, the question of the right of the chief executive to withhold from a Member of Congress a government-prepared report was not considered.

The responsibility of public officials to preserve and make available as public property the record of their governmental activities is more certain in the individual states than it is on the federal level. At least nine state court decisions make clear the duty of state officials to act as custodians of public property by maintaining the records created in their offices.[17] The most authoritative and influential of these decisions was made a century ago. In 1874 the Virginia Court of Appeals upheld the conviction in a forgery case in which the defendant had argued that the accounting record he kept as the secretary of a state-owned "sinking fund" did not belong to the state because (1) it contained entries not required by state law and (2) even the maintaining of the record book was not dictated by specific statute. The court rejected this defense, stating:

> Whenever a written record of the transactions of a public officer in his office is a convenient and appropriate mode of discharging the duties of his office, it is not only his right but his duty to keep that memorial, whether expressly required so to do or not; and when kept it becomes a public document—a public record belonging to the office and not the officer; is the property of the state and not of the citizen, and is in no sense a private *memorandum.*[18]

[15] Boyd, "These Precious Monuments," pp. 147–80.

[16] *Soucie* v. *David,* 448 F. 2d 1067. See also *Public Citizen, et al.* v. *Sampson* (Civil Action No. 74–303, U.S. District Court for District of Columbia).

[17] *Detroit* v. *Board of Accessors,* 91 Mich. 78, 51 NW 787; *People* v. *Peck, et al.,* 138 N.Y. 386, 34 NE 347; *Mileneux* v. *Collins,* 177 N.Y. 395, 69 NE 727; *People* v. *Mills,* 178 N.Y. 274, 70 NE 786; *Robison* v. *Fishback,* 175 Ind. 132, 93 NE 666; *Polk County* v. *Parker,* 178 Iowa 936, 160 NW 320; *International Union* v. *Gooding,* 251 Wis. 362; and *State* v. *Kelly,* 149 W. Va. 766, 143 SE 2d 136.

[18] *Coleman* v. *Commonwealth,* 25 Gratt. (66 Va.) 865, quotation from p. 881.

This logical, forthright ruling has not been adopted by federal courts.

Under the traditional theories of political science and archival administration, a haphazard system of public, private, and federal ownership of presidential records has developed. Papers of various Presidents are kept in a variety of depositories ranging from private archives to historical societies to the Library of Congress and the National Archives. All of this is a result of what H. G. Jones, in an address before the American Historical Association in 1971, only half-jokingly called "the larcenous habits of Presidents from George Washington on."[19]

In fact George Washington may have begun a "tradition" of private ownership not so much because he favored such a policy, but rather because the federal government had no adequate facility for the housing of his papers. In 1782 Washington wrote the Reverend William Gordon, historian of the Revolutionary period who had requested access to the general's records, that he believed no adequate history of the war could be written until Congress, the individual states, and the heads of the various government departments all opened their records. Preoccupied with maintaining an army in the field in case the British reopened full-scale hostilities following their defeat at Yorktown, Washington was not willing to take time from his military duties to open his papers to researchers. However, he declared his files to be "a species of Public property, sacred in my hands," which he would gladly open to historical research when writers were given "free access to the Archives of Congress." A year later Washington again wrote Gordon saying that "All my Records and Papers shall be unfolded to your View" when "the Sovereign Power" opens government files to authors. In April 1784 Washington agreed to "lay before you with chearfulness, my *public* [emphasis in original] papers for your information." Of course, the new government did not take the time to preserve the papers of its leaders, much less provide "free access," and so Washington's papers passed to his heirs.[20]

Though he may well have been willing to give his records to an archives established by the government, Washington clearly regarded his military and presidential files as a part of his estate. In his will he gave "all the Papers in my possession, which relate to my Civil and Military Administration of the affairs of this Country . . . [and] also, such of my private Papers as are worth preserving," to his nephew Bushrod Washington.[21] The President made a distinction between "private," personal files, such as correspondence regarding farming at Mount Vernon, and his "public" papers which dealt with his service to the nation. By the term public he usually did not mean "official" in

[19] H. G. Jones, "Presidential Papers: Is There a Case for a National Presidential Library?" *American Archivist* 38 (July 1975): 328.

[20] John C. Fitzpatrick, ed., *The Writings of George Washington from the Original Manuscripts Sources, 1745–1799*, 39 vols. (Washington: Government Printing Office, 1931–1940), vol. 25, 288; vol. 27, 52, 399. See also ibid., vol. 27, pp. 370–1.

[21] Ibid., vol. 37, p. 284.

the sense of a presidential proclamation, for example, but rather referred to his own individual involvement as a military and political leader in the affairs of the country.[22] After leaving the presidency, Washington wrote the secretary of war of his desire to build a house "for the accommodation and security of my Military, Civil, and private Papers which are voluminous, and may be interesting." Similarly, he wrote the secretary of the treasury of his plans "to build one [a house] for the security of my Papers of a public nature."[23]

Throughout his career Washington maintained his papers for eventual use by historians and, so far as was consistent with his view of sound government, instructed his subordinates to cooperate with requests for information.[24] Unfortunately, the government did not build a depository for the files of its first President and Washington took them to Mount Vernon. Upon his death the records passed to Bushrod Washington, whose possession of the papers led to the establishment of legal precedents that have determined ownership of presidential records to this day.

Thus sacred public property became private property, at least partially because of the government's failure to act. Had the United States established an archives during Washington's tenure as President, the tradition he established might have been altogether different and the nation might have avoided the losses that have resulted from private ownership.

In 1827 Bushrod Washington, by then an associate justice of the United States Supreme Court, signed an agreement with the historian and educator Jared Sparks and Chief Justice John Marshall to publish the writings of George Washington together with a biography written by Sparks. Following fifteen months of negotiation and persuasion by Marshall and others, Washington agreed to the publication of his uncle's papers, after he, as heir, obtained the right to forbid the publication of any letters he deemed embarrassing or damaging. Sparks, who had established his literary and editorial reputation in Boston as editor of the *North American Review,* completed the twelve-volume project in 1837 and obtained a copyright on the published work.[25]

At an early date Associate Justice Joseph Story entered the negotiation with his Supreme Court colleagues Washington and Marshall over the publication of General Washington's papers. According to

[22] Ibid., vol. 36, pp. 1–2; vol. 27, p. 174. For a detailed analysis of the term "public" as applied to records, see Oliver W. Holmes, " 'Public Records'—Who Knows What They Are?" *American Archivist* 14 (January 1960): 3–26, especially pp. 5, 12–16, 20, and 23.

[23] Fitzpatrick, *Writings of Washington,* vol. 35, pp. 430–31, 447.

[24] Ibid., vol. 27, p. 155; vol. 32, pp. 15, 41, 233.

[25] Articles of Agreement, March 7, 1827, *Folsom* v. *Marsh,* October 1841 Term, FRC 81757, Records of the United States Circuit Court for the District of Massachusetts, Record Group No. 21, Archives Branch, Boston Federal Archives and Records Center, Waltham, Mass.; Fitzpatrick, *Writings of Washington,* vol. 1, p. iv; Herbert B. Adams, ed., *The Life and Writings of Jared Sparks,* 2 vols. (Boston: Houghton, Mifflin and Co., 1893), vol. 1, 219–58, 389–413; vol. 2, 1–333.

Sparks's journal of March 6, 1827, Story took "an ardent interest in this work from the beginning, and has assisted me much in bringing the matter to its present issue."[26] A year earlier Story reported to Sparks on a meeting he had with Bushrod Washington in which Washington expressed the intention of publishing his uncle's writings himself. Story concluded that Washington "deems these letters a sort of family inheritance, and that no person ought to be permitted to have anything to do with the publication unless he stands in his own intimate confidence."[27]

In spite of the fact that he would later take out a copyright on his edition of Washington's writings, Sparks wrote in reply to Story that "Washington's public letters and papers are the property of the nation;"[28] he announced his intention to carry out the project with or without Bushrod Washington's cooperation. Both Story and Marshall supported Sparks's efforts to edit and publish the Washington papers because Bushrod Washington did not intend to annotate the correspondence in his proposed work. By the early spring of 1827 Story and Marshall had prevailed on Washington to permit the use of his uncle's papers by Sparks.[29]

Story's interest in Sparks's work extended to advice on the scope and editorial plan of the work, and in his preface to the biographical volume Sparks expressed thanks to Story "for the lively interest he has manifested in my labors, and for the benefit I have often derived from his suggestions and advice." Story's "lively interest" in the biography and writings of Washington proved invaluable after the work went on the market. In spite of his close involvement in negotiations over the publishing of Washington papers with his friends and colleagues Justices Marshall and Washington, who would share half the profits from the venture, and notwithstanding his advice to Sparks on editorial and publishing matters, Joseph Story still tried a case involving the violation of Sparks's copyright. In the 1841 case of *Folsom* v. *Marsh,* Story, sitting as trial judge in the United States Circuit Court in Massachusetts, permanently enjoined the author and publishers of another biography of Washington from selling their work.[30] The learned judge ruled that the author of this second biography had violated Sparks's copyright by reprinting a large number of Washington letters exactly as edited in Sparks's copyrighted volumes. The defendants argued that the letters were official in nature rather than literary and, as such, could not be copyrighted. To this objection Judge Story declared: "It is most manifest, that President Washington deemed

[26] Adams, *Life and Writings of Sparks,* vol. 2, p. 8.
[27] Ibid., vol. 1, p. 403.
[28] Ibid., vol. 1, p. 404.
[29] Ibid., vol. 1, pp. 404–13.
[30] Jared Sparks, ed., *The Writings of George Washington,* 12 vols. (Boston: Little, Brown and Co., 1855), vol. 1, xi–xii; *Commercial Review* 6 (1842): 174; *Folsom* v. *Marsh,* October 1841 Term, FRC 81757, Record Group 21, Boston Federal Archives and Records Center.

them his own private property, and bequeathed them to his nephew. . . . The publication of the defendants, therefore, to some extent, must be injurious to the rights of property of the representatives and assignees of President Washington."[31] In essence, Story held that Washington's heirs and assigns held a copyright to the general's literary property; but he did not consider or rule on the propriety of a copyright being issued in the first place on documents and correspondence of an official of the United States government.

The judge also rejected any absolute distinction between literary and official (i.e., government business) letters, holding that the latter might also be protected by a copyright. The master in chancery who examined for the court the letters involved in the copyright question had found that Sparks published "official letters and documents." The defendants maintained that no valid copyright could be obtained on this material on the grounds that it had become public property as a result of the sale by George Corbin Washington, Bushrod Washington's heir, of the Washington papers to the federal government for $25,000. The court held that the government purchase was "subject to the copyright already acquired." Story supported the government's right to publish "official letters, addressed to the government . . . by public officers" even though the writer of the letter might be opposed, provided that the government determined that publication would be in the public interest.[32]

Folsom v. Marsh, a ruling by a judge personally interested in maintaining the presidential and military papers of George Washington as the private property and preserve of his heirs and sympathetic biographers, has been cited in many judicial decisions during the last one hundred thirty years. In fact, Story's decision has served as the precedent for the judicial defense of the private property concept, and Attorney General William B. Saxbe's opinion on the Nixon papers relied heavily on this decision. But this ruling should not be regarded as the ultimate legal test of the right of private ownership of presidential papers. Justice Story determined a question of copyright between two private parties. He did not rule on the validity of George Washing-

[31] *Folsom* v. *Marsh,* 9 Fed. Cas. 345. See also *Eyre* v. *Higbee,* 35 Barb. 502 (New York Supreme Court, 1861); and *Mayor* v. *Lent,* 51 Barb. 19 (New York Supreme Court, 1868), for two other cases involving ownership of Washington's letters. In neither case was any doubt raised of the letters having originally been Washington's private property.

[32] *Folsom* v. *Marsh,* 9 Fed. Cas. 346–47; Master's Report, pp. 11–12, and Agreement between Secretary of State and George C. Washington regarding purchase of George Washington papers, 1834, *Folsom* v. *Marsh,* FRC 81757, Record Group 21, Boston Federal Archives and Records Center. This interpretation is similar to the long established legal principle (also cited by Story in this case) that literary property rights may be violated in a trial in an effort to defend oneself against a charge made by the writer of the letter. Attorney General William B. Saxbe referred to this portion of Story's decision in his opinion on the ownership of the Nixon papers. Thus it would appear that the government could publish the papers and tape recordings of the Nixon administration even if the former President objected. See Opinion of Attorney General Saxbe to President Gerald R. Ford, September 6, 1974, in *Weekly Compilation of Presidential Documents* 10 (September 16, 1974): 1108.

ton's original assertion of ownership of what might well be regarded as government property. He merely accepted the terms of Washington's will and applied them without critical examination to the case before him. Given the judge's bias in favor of Washington's heirs, it is virtually certain how he would have ruled had be faced this issue. In fact, however, Story did not confront the fundamental constitutional issue.

Curiously, the defendants in *Folsom v. Marsh* apparently made no objection on the grounds of conflict of interest to Story's presiding over their case in spite of the justice's being: (1) a colleague of both Bushrod Washington and John Marshall on the Supreme Court, where he had been a strong advocate of Marshall's judicial and constitutional views, (2) well aware of and having publicly stated his approval of the terms of George Washington's will leaving his papers to Bushrod Washington and, most important, (3) closely involved in the editing and publishing of Sparks's work.[33]

Sparks's possession of a copyright on the Washington papers denied others access; his use of the papers as private property (he moved the records from Mount Vernon to Boston where they remained for a decade) led to the loss and alienation of some of the documents to autograph collectors. Before the Department of State obtained final possession of the papers from Sparks and George Corbin Washington, other items were permanently given to Sparks and others. Thus, more of the public's heritage ended up in private hands.[34] Heirs more often lose, misplace, give away, or destroy presidential papers than do the Presidents themselves. Most Presidents, concerned about their place in history, carefully preserve the documentation biographers will require. Although Ulysses S. Grant destroyed some of his correspondence, his act did not compare with the destruction of Warren G. Harding's files by his widow. Bequeathing presidential records to heirs has (as in the case of George Washington and James Madison, for example) forced the government to purchase the papers from several sources with considerable risk of their being mishandled and weeded out before they are reassembled.[35]

[33] Story wrote a eulogy of Bushrod Washington after his death on November 26, 1829, for the Boston *Daily Advertiser*. He praised the justice as a good, solid, if not profound or brilliant, judge. After observing that Bushrod was George Washington's favorite nephew and had inherited Mount Vernon from his uncle, Story commented: "To him, also President Washington gave all his valuable public and private papers as a proof of his entire confidence and attachment, and made him the active executor of his will. Such marks of respect from such a man—the wonder of his own age, and the model for all future ages—would alone stamp a character of high merit and solid distinction upon any person." From William W. Story, ed., *Life and Letters of Joseph Story*, 2 vols. (Boston: Little and Brown, 1851), vol. 2, 29–30. At the time of *Folsom* v. *Marsh* Story and Sparks were colleagues at Harvard. Story had been a professor of law there since 1829, and Sparks became a professor of history in 1839. Charles Folsom, whose firm published Sparks's work, held a partnership in the Harvard College Press at the time he charged a violation of the copyright. On Folsom, see Theophilus Parsons, "Memoir of Charles Folsom," *Proceedings of the Massachusetts Historical Society* 13 (April 1873): 26–42.

[34] Fitzpatrick, *Writings of Washington*, vol. 1, xlix–li.

[35] Buford Rowland, "The Papers of the Presidents," *American Archivist* 13 (July

Little defense of the traditional view of presidential papers as private property exists in the writings of the Presidents themselves. Only two sources are commonly cited. In 1886 Grover Cleveland responded to a demand by the Senate for access to his files dealing with the dismissal from office of a district attorney. The Senate claimed this right under its power to advise and consent in appointments, but Cleveland refused the demand. He held firm against what he regarded as a totally unwarranted interference by the Congress in the President's affairs. He did not base his opposition even on a defense of the Executive Department, but rather on his *personal* rights as President:

> I regard the papers and documents withheld and addressed to me or intended for my use and action purely unofficial and private, not infrequently confidential, and having reference to the performance of a duty exclusively mine. I consider them in no proper sense as upon the files of the Department, but as deposited there for my convenience, remaining still completely under my control. I suppose if I desired to take them into my custody I might do so with entire propriety, and if I saw fit to destroy them no one could complain.[36]

Apparently, Cleveland received no opposition to this view except from Senators thwarted in their attempt to challenge his authority. Thirty years later, former President William Howard Taft, who probably shared Cleveland's concept of the presidency and of the sanctity of private property, wrote in *Our Chief Magistrate and His Powers* that "the Executive Office of the President is not a recording office." He compared a President's files to the correspondence of a British ambassador, which remains with the individual after his retirement instead of being transferred to the Foreign Office. Taft acknowledged that "thus there is lost to public record some of the most interesting documents of governmental origin bearing on the history of an administration," but he saw no legal, official remedy to the problem.[37]

These problems, in spite of being well known to historians and archivists for generations, have received little attention. Efforts have

1959): 195–211; Kate Stewart, "James Madison as an Archivist," *American Archivist* 21 (July 1958): 243–57; William H. Runge, "The Madison Papers," *American Archivist* 20 (October 1957): 313–17; "The Present Status of Presidential Papers," *Manuscripts* 8 (Fall 1956): 9–15; Helen D. Bullock, "The Robert Todd Lincoln Collection of the Papers of Abraham Lincoln," *Library of Congress Quarterly Journal* 5 (November 1947): 3–8, especially 4–5; Bernard A. Weisberger, "The Paper Trust," *American Heritage* 32 (April 1971): 38–41; Donald E. Pitzner, "An Introduction to the Harding Papers," *Ohio History* 75 (Spring/Summer 1966): 76–84; New York *Times,* 25 December 1925, p. 1; Kenneth W. Duckett and Francis Russell, "The Harding Papers: How Some Were Burned . . . And Some Were Saved," *American Heritage* 16 (February 1965): 24–31, 102–10.

[36] James D. Richardson, comp., *A Compilation of the Messages and Papers of the Presidents, 1787–1897*, 10 vols. (Washington: Government Printing Office, 1896–1898), vol. 8, p. 378.

[37] William Howard Taft, *Our Chief Magistrate and His Powers* (New York: Columbia University Press, 1916), p. 34. Beginning in 1832 the State Department began to consider the papers of American diplomats and consuls as official government records. See Meredith B. Colket, Jr., "The Preservation of Consular and Diplomatic Post Records of the United States," *American Archivist* 6 (October 1943): 193–205, especially p. 193.

been made to preserve the papers of an individual President, but few have attacked the root cause: the private mismanagement and exploitation of public records.

Would that all those involved in the passage of the 1955 Presidential Libraries Act had considered this problem. The presidential libraries, however, originated not in response to abstract constitutional concepts, but rather out of the intention of one man to give the American people a record of his career as President. That man, of course, was Franklin Delano Roosevelt. In 1938 he began to make provisions for a library for his papers, and the institution that developed at Hyde Park served in many ways as the model for the libraries which followed. Herman Kahn, who became director of the newly opened library in 1948, faced enormous practical problems, and every archivist can take pride in the superb way he carried out his duties. Within a few years the vast bulk of the Roosevelt papers had been opened for scholarly research, and every effort has been made to serve historians. Without doubt the incredible volume of archival material which had to be processed made it difficult to worry about the possibility of the establishment of unhappy constitutional precedents. Kahn and his staff had to operate the library in a manner that would satisfy future Presidents if the National Archives was to have any hope of seeing additional libraries built.

Congress did not carefully consider the issue of ownership of executive documents in 1955 when it passed the legislation establishing the presidential library system. Because of this omission, the entire system is a house of cards whose existence is dependent on the goodwill of individual Presidents. When President Nixon announced in his November 17, 1973, press conference that if tax deductions for his gift of his vice presidential papers were disallowed he would be glad to have the papers back because they were worth more than he had claimed, all of the National Archives and Records Service should have shuddered at the prospect of his removing the papers and proceeding to sell them to the highest bidder. This issue may appear to be moot, at least for the moment, because Nixon agreed to leave the papers in the National Archives and that agency announced that, in any event, it regards the contribution as a valid gift not subject to recall even if the deductions are denied.[38] But the very title of the 1955 legislation reveals the inability of the National Archives adequately to protect the public interest.

Public Law 373, 84th Congress, provides "for the acceptance and maintenance of Presidential libraries." In other words, the papers

[38] New York *Times*, 5 April 1974, p. 19. On the matter of Nixon's tax deductions and the question of tax deductions for manuscript donations, see J. Frank Cook, " 'Private' Papers of Public Officials: An Analysis of the Archivist's Dilemma," in *The "Public Documents Act": Hearings Before the Subcommittee on Printing of the Committee on House Administration, House of Representatives, Ninety-third Congress, Second Session, on H.R. 16902 and Related Legislation* (Washington: Government Printing Office, 1974), pp. 61–72, especially pp. 62–5.

belonging to a President will be *accepted* and *maintained* in a facility built at private expense. A reading of the transcript of the hearing on the legislation makes it clear that two purposes overrode all other considerations: (1) to do nothing which might appear to dictate to the President what he must do with his papers, and (2) to make every effort to save the taxpayers' money by depending on private sources to build the libraries. Al E. Snyder, assistant administrator in the General Services Administration, the agency which supervises the National Archives, explicitly stated these views in a letter to Senator John L. McClellan: "This legislation is not mandatory, but permissive in character. In the best tradition, it provides an opportunity for former Chief Executives and other officials to make disposition of their personal papers and documents subject to such restrictions as may appear to them to be appropriate." Snyder added that "Under this legislation the Government will be able to take advantage of the generosity of a President, and of his associates and friends whose interests in a memorial would provide the general public with the expensive physical facilities and equipment for an archival depository at no cost to the Nation's taxpayers."[39]

The Archivist of the United States at the time, Wayne C. Grover reiterated the points made by Snyder and repeated the argument about the right of constitutional officers to determine for themselves the disposition of records they have created while working for the government. He did acknowledge that "what has been done with them in the past in many instances has been most unfortunate. They have fallen into the hands of heirs, they have been dispersed, in many cases they have been burned up in fires."[40]

If the National Archives and Records Service had agreed that the recordkeeping of former Presidents and their heirs has occasionally been "unfortunate," it might have sought legislation requiring the chief executive to turn over his presidential files to the National Archives. This alternative would likely have faced political resistance both in the Congress and from the White House. But no spokesman for such a plan testified before the committee. For whatever reasons they might have had, everyone accepted the premise that the Office of the President was not subject to such legislation. Clearly, the federal government trusted the preservation of the single most important body of records it generates not to the protection of the law but to the goodwill of each succeeding President. The testimony reveals no concern about

[39] *Providing for the Acceptance and Maintenance of Presidential Libraries* (S. Rept. 1189, 84th Cong., 1st sess., serial 11817; Washington, 1955), pp. 6–8; *Presidential Libraries* (H. Rept. 998, 84th Cong., 1st sess., serial 11823; Washington, 1955), pp. 109; *Congressional Record* 110 (July 5, 1955): 9934–8; Presidential Libraries Act, Pub. Law 373, 84th Cong., 69 Stat. 965–66.

[40] *To Provide for the Acceptance and Maintenance of Presidential Libraries, and for Other Purposes: Hearings Before a Special Subcommittee of the Committee on Government Operations, House of Representatives, Eighty-fourth Congress, First Session, on H. J. Res. 331, and H. J. Res. 332* (Washington: Government Printing Office, 1955), p. 45.

the possibility that some President at some time might refuse to give his or her papers to the people. No one made any attempt to distinguish between "public" and "private" presidential files.[41]

The efforts of Herman Kahn and his successors have been successful beyond any question. The presidential library system is a glorious achievement of the archival profession. With justifiable pride Kahn could write the AHA-OAH committee investigating the charges of Francis L. Loewenheim against the Roosevelt Library that "it is completely taken for granted that no president will ever again take his papers home with him when he leaves the White House."[42] Yet things "taken for granted" often fall apart when attacked. The presidential library system must meet and overcome the threat presented by the possibility that a President might choose to take his papers with him.

It must be conceded that to date no President has failed to respond to appeals for the establishment of a presidential library. But apparently nothing could legally be done if a President were to attempt to sell "his" papers to the highest bidder. Acting on the advice of his appraiser, Ralph G. Newman, President Nixon had some of his files—presumably the more valuable autograph items—segregated from the papers that he had indicated it was his intention to deed to the National Archives. Later, in a letter dated August 8, 1974, the day he announced his intention to resign from office, Nixon wrote to the General Services Administration closing all of the pre-presidential papers deeded in 1968–69, not until the end of his administration as the original deed of gift states, but until 1985. Although the deed had reserved to the President the right to change the terms of access as he saw fit, this is another example of the shaky foundation of the presidential libraries system.[43] Assurances that fears of a former President

[41] Elizabeth Hawthorn Buck, "General Legislation for Presidential Libraries," *American Archivist* 18 (October 1955): 337–41; *Congressional Record* 84 (April 19–20, 1939): 4431, 4543–44; 101 (June 20, 1955): 8655; Frederick W. Ford, "Some Legal Problems in Preserving Records for Public Use," *American Archivist* 20 (January 1957): 41–47; Grover, "Presidential Libraries," p. 5. See also Federal Records Act of 1950, Pub. Law 754, 64 Stat. 588; O. Lawrence Burnette, Jr., *Beneath the Footnote: A Guide to the Use and Preservation of American Historical Sources* (Madison: State Historical Society of Wisconsin, 1969), pp. 30–31, 98–99; and Attorney General Saxbe's Opinion to President Ford in *Weekly Compilation of Presidential Documents* 10 (September 16, 1974), pp. 1105–8.

Whether NARS took its position in response to a desire not to confront the President on such an issue during the height of the Cold War, or in respect for the high public esteem enjoyed by President Eisenhower, or because the National Archives feared it did not possess sufficient political strength to resist after losing its fight to avoid being subordinated in the General Services Administration in 1949 is not known.

[42] *Final Report of the Joint AHA-OAH ad hoc Committee to Investigate the Charges Against the Franklin D. Roosevelt Library and Related Matters* (Washington: American Historical Association, 1970), p. 420.

[43] Chicago *Sun-Times*, 12 August 1974; New York *Times*, 18 January 1974, p. 1; *Wisconsin State Journal*, 25 May 1973, p. 19; Chicago *Sun-Times*, 9 August 1974, p. 48, and 22 August 1974, p. 34; Milwaukee *Journal*, 18 August 1974, p. 3; New York *Times*, 1 April 1974, p. 1; Madison, Wisc., *Capital Times*, 4 April 1974, p. 1; *Wisconsin State Journal*, 10 April 1974, p. 10, and 11 April 1974, p. 2; U.S. Congress, Joint Committee on Internal Revenue Taxation, *Examination of President Nixon's Tax Returns for 1969 Through*

selling (or destroying) his papers are nonsense are almost as nonsensical as the current practice of a constitutional republic's allowing its elected head sole control of records supposedly created by those elected and appointed to serve the people. Perhaps such an arrangement would be satisfactory in a monarchy; but even there the crown jewels belong not to the ruler but to the realm.

Such concerns are not theoretical or academic. In the summer of 1974 former President Nixon received an offer of one million dollars for his vice presidential papers. No one can be confident that the former President would not be favorably inclined to a similar offer for his presidential files now that he faces large debts, heavy legal fees, and a life without the perquisites he enjoyed in the White House. Nixon's resignation, the IRS audit for alleged tax irregularities, and the dissolution of the Nixon Library Foundation all raise serious doubts about the future of privately funded presidential libraries. Will the former President feel any obligation to a nation which has subjected him to such humiliation? Will he feel safe, even with a presidential pardon, in giving his papers to the country now that he may be subject, at least as a material witness, to both civil and criminal suits? He might find "his" papers being used against him.

The ownership of Nixon's tape recordings of conversations with staff members and advisors aroused even more controversy than did his papers. Following his resignation on August 9, 1974, Nixon's aides began preparations to move to California all files not restricted by subpoenas resulting from the special prosecutor's investigation of the Watergate break-in. Legal advisors in the White House and the Office of the Attorney General advised that all records not subject to court orders were Nixon's to dispose of as he wished. On September 6, Nixon and Arthur F. Sampson, administrator of the General Services Administration, signed an agreement assuring Nixon legal title and all literary property rights to the files created during his presidency. Sampson, neither a historian nor an archivist, administers the National Archives as a subordinate agency. By the terms of this agreement Nixon could begin to destroy the tape recordings on or after September 1, 1979, so that all of them would be destroyed by September 1, 1984, or following the death of the former President, whichever occurred first.[44]

Attorney General Saxbe's opinion to President Gerald R. Ford regarding the ownership of Nixon's papers represents, it seems to me, merely a recital of unproved legal theories and historical coincidences. No legislation specifically supporting the private ownership of records prepared by or for public officials has been cited. Saxbe quoted

1972 (S. Rept. 93–768; Washington, 1974), pp. A239–A240, A295–A299 (S. Rept. 93–768; Washington, 1974).

[44] See "Memorandum Opinion of Judge Richey," January 31, 1975, pp. 4–6; Nixon-Sampson Agreement, September 6, 1974, in *Weekly Compilation of Presidential Documents* 10 (September 16, 1974): 1104–5.

Article II, Section 1, of the Constitution, which states that the President shall receive no "other emolument" beyond his salary. Saxbe concluded that a President's retaining ownership of his presidential files constitutes additional compensation "only if one assumes that they are not the property of the President from the very moment of their creation." The attorney general failed to confront this issue when preparing an opinion on the question of ownership. Instead he dismissed as "circular in its reasoning" the "objection based upon this provision," with the observation that "the Constitutional provision can simply not be interpreted in such a fashion as to preclude the conferral of anything of value, beyond his salary, upon the President."[45]

Article IV, Section 3, of the Constitution reserves to Congress the "power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States." In light of these legislative and constitutional impediments, it would seem obligatory on the part of the attorney general to confront this issue in his brief for private ownership. Unfortunately, Saxbe did not confront these issues and concentrated instead on reinforcing the precedent established by George Washington when he removed his papers to Mount Vernon at the end of his second term—a questionable act, the validity of which the attorney general did not consider.

When the terms of the Nixon-Sampson agreement were announced, there was considerable public reaction against it and questions about its legality were raised. The United States gained from the agreement only the restricted use of the material for a few years and the promise of eventual donation of those portions of the papers so designated by Nixon. Nixon rather than the National Archives would determine the historical record to be preserved of the administration of the 37th President of the United States. Philip Buchen, President Ford's legal counsel, made clear the disregard by the parties to the agreement of the need of historians for full documentation. At a press conference the day the agreement was announced, a reporter asked: "Mr. Buchen, was any consideration given to the right of history and historians?" Buchen replied: "I am sure the historians will protest, but I think historians cannot complain if evidence for history is not perpetuated which shouldn't have been created in the first place."[46]

The first negative congressional response came less than a week later, when a GSA appropriation request for $110,000 to build a highly sophisticated vault in a federal records center in California to store 30,000 cubic feet of Nixon's papers and tapes was eliminated. Senate Majority Leader Mike Mansfield introduced a resolution on September 11, 1974, calling for "free access" by the public to all Watergate-related files created at any time during Nixon's five years as President. Senator Gaylord Nelson introduced legislation calling for the retention of the tape recordings.

[45] Opinion of Attorney General Saxbe to President Ford, in *Weekly Compilation of Presidential Documents* 10 (September 16, 1974): 1107.

[46] *Weekly Compilation of Presidential Documents* 10 (September 16, 1974): 1117–18.

Congress amended the Nelson bill to include the papers as well and the measure quickly became law.[47]

The Presidential Recordings and Materials Preservation Act called for Nixon to be compensated should the courts subsequently rule that the papers and tapes were his private property. During debate on the Nelson bill several Senate Republicans denounced the measure as a "legislative distortion of the Constitution," calling it a bill of attainder, a breach of the separation-of-powers doctrine, and a violation of both Nixon's privacy and his right of private property. Senator Sam Ervin dismissed these objections as "constitutional ghosts which don't exist," pointing out that the legislation provided only for custody, leaving the question of ownership up to the courts to decide. The passage of the bill by a margin of 56 to 7 on the Senate's first vote suggested that other measures might be passed in the newly elected and more heavily Democratic 94th Congress to extend the public ownership of officials' papers. In testimony before a Senate subcommittee considering the Nelson bill, John S. D. Eisenhower, son of the late President, declared that while he thought former Presidents were entitled to the literary property right to their papers, "the basic assumption that Presidential papers are personal property probably should be done away with."[48] Ex-President Nixon certainly did not accept this view. In December 1974 he announced that he would fight the new law in the courts.

A week after the White House announced the Sampson-Nixon agreement the Watergate special prosecutor stated an objection, insisting that legal investigations required that the papers and tapes be readily available to his staff rather than under Nixon's control. The special prosecutor had not been involved in the negotiations of the White House, the General Services Administration, and the former President. When the Ford administration realized the problems the agreement had caused, it delayed implementation. Justice Department lawyers argued in a civil suit seeking an injunction against carrying out the terms of the agreement that the arrangement was not "self-executing." That is, until the government physically turned over the records, Nixon would not gain legal control.

On October 11, 1974, the White House formally joined the special prosecutor in asking the court to set the agreement aside. Ten days later Judge Charles R. Richey agreed to such an injunction. The judge had stated earlier that a ruling on the legality of the Ford pardon and the Nixon-Sampson agreement "might be desirable." Lawyers for former President Nixon argued in vain against halting the agreement, claiming a violation of his constitutional rights; but the precarious state

[47] Presidential Recordings and Materials Preservation Act, Pub. Law 93–526, 88 Stat. 1695; Chicago *Sun-Times,* 12 September 1974, p. 8; *Congressional Record* 120 (Daily ed.; September 16 and 18, 1974): S16602–13, S16871–2; New York *Times,* 25 September 1974, p. 1; Washington *Post,* 25 September 1974, p. 8, and 30 September 1974, p. 26; Chicago *Sun-Times,* 1 October 1974; New York *Times,* 4 October 1974, p. 14, 5 October 1974, p. 1, and 10 December 1974, p. 30; and Washington *Post,* 10 December 1974, p. 1.

[48] New York *Times,* 5 October 1974, p. 9.

of Nixon's health probably convinced the court to act promptly, for fear that Nixon's death might lead to the destruction of the records and tapes as provided for in the agreement.[49]

Nixon's lawyers also sued to prevent the courts from making recordings of the Oval Office tapes public. Judge Gerhard A. Gesell of the U.S. District Court in Washington, D.C., ruled on December 5, 1974, that Nixon "has no right to prevent normal access to these public documents which have already been released in full text after affording the greatest protection to presidential confidentiality 'consistent with the fair administration of justice.' . . . His words cannot be retrieved; they are public property and his opposition is accordingly rejected." Nixon opposed the playing of the tapes in public on the grounds that they would be used by satirists and comedians, thus subjecting him to further embarrassment.[50] On the other hand, if Nixon's claim to the tape recordings had been allowed, he might have been able to prevent their use in legal proceedings even though he had received a presidential pardon. Without intending to hound the former President, historians and archivists, particularly those who are public servants, have a duty to see that all possible evidence is preserved.

Efforts by the ex-President either to restrict access to or to claim as his private property the records of his administration have been consistently restricted or eliminated, principally through the actions of the Congress and the courts. Newspaper coverage and the protests of citizens outraged by the events of Watergate have also played a major role. Unfortunately, the profession most affected by this issue has largely ignored the struggle.

Lawyers, judges, politicians, and pressure groups have determined policy in an area that should have been the archivist's most vital concern. At its 1974 meeting the Society of American Archivists rejected a resolution calling for "legislation which declares all records prepared by or for any public official of the Federal Government in the course of carrying out the duties of the office to which he or she has been elected or appointed, shall belong unequivocally and irrevocably to the people of these United States." The leadership of the Society and the archival profession in the United States urged the defeat of the resolution on the grounds that it was too hastily conceived, either too politically biased or not politically realistic, a threat to the Society's tax-exempt status because it called for a stand on pending legislation, and, finally, because it would force those officers of the Society who hold positions in the federal government to violate the Hatch Act by lobbying in support of specific legislation.[51]

Refusing to recognize that action would be taken by the Congress,

[49] A summary of the legal proceedings is given in "Memorandum Opinion of Judge Richey," January 31, 1975, pp. 6–12.

[50] Judge Gerhard A. Gesell, "Memorandum and Order," *United States of America* v. *John D. Mitchell, et al.* (Misc. No. 74–128, U.S. District Court for District of Columbia), p. 5.

[51] *American Archivist* 38 (January 1975):115–16; author's transcript of SAA Business Meeting.

the courts, and some of the public, the Society of American Archivists let pass the chance to become involved in shaping the new laws, legal decisions, and administrative policies affecting the records of public officials. Instead, the Society passed a resolution calling on itself to study the issue, and the Council of the Society endorsed a heavily qualified resolution supporting the principle of public ownership.[52]

The Society of American Archivists apparently disagreed with the American Historical Association, the American Political Science Association, and the Reporters Committee for Freedom of the Press. These groups, together with other interested individuals, brought suit in October 1974 challenging the concept that the Presidential Libraries Act of 1955 sanctioned the terms that Sampson and Nixon agreed to. The archival profession found itself on the sidelines as their colleagues in related fields argued that "Congress surely did not intend to give a former President who resigns in the face of imminent impeachment a license to carry off, on a wholesale basis, vast stores of papers and materials prepared or received by the executive branch in the course of discharging its public responsibilities."[53]

The conflict between the public right to know and a President's need for confidentiality has always existed. The rapid expansion of the Executive Branch since the days of the New Deal into every aspect of American life has, however, greatly heightened this tension. Archivists and historians do have an obligation to avoid unwarranted disclosure of public officials' records when such disclosure weakens national security or compromises the government's ability to serve the public interest. But efforts of public officials to hide their activities under the protective mantle of "national security" must be resisted. Democratic government requires that everyone—citizen and official—respect the delicate balance between premature disclosure and unjustified restrictions. On occasion this balance will necessitate opposing a President's wishes for privacy.

Although Franklin Roosevelt expressed much concern about preserving the historical records of his administrations, he also believed strongly in the necessity for confidentiality between himself and his advisors. For example, he wrote a memorandum to the secretary of state in 1943 objecting to notes being prepared at diplomatic conferences: "Four people cannot be conversationally frank with each other if somebody is taking down notes for future publication. I feel very strongly about this." Perhaps historiography does not unduly suffer from a government's passion for confidentiality if the entire record is

[52] *American Archivist* 38 (January 1975):116; Society of American Archivists *Newsletter* (November 1974):1.

[53] New York *Times*, 22 October 1974, p. 29; *AHA Newsletter* 12 (December 1974):3–5; and *Chronicle of Higher Education* (October 7, 1974): 5. The briefs for both sides in *Nixon* v. *Sampson, et al.; Reporters Committee for Freedom of the Press, et al.* v. *Sampson, et al.;* and *Hellman* v. *Sampson, et al.* may be found in "*Public Documents Act*": *Hearings*, pp. 156–239. "Memorandum Opinion of Judge Richey," January 31, 1975, is his decision declaring almost all of the records produced by the Nixon administration to be public property.

ultimately made available, but a fully informed citizenry is unattainable under such conditions. Howard K. Beale commented on this problem in an address before the Mississippi Valley Historical Association in 1953. He quoted Roosevelt's memorandum and also observed: "Many officials . . . do not comprehend why in a democracy it is important to give the people and their historians full knowledge of what has been done in the past." In the instance cited, President Roosevelt wanted to prevent publication of the record of a conference following the end of World War I![54]

The next year Herman Kahn, director of the Roosevelt Library, addressed the American Historical Association, where he criticized Beale's position. Kahn asserted that "historians will never persuade high public officials that the first and most important responsibility of statesmen is to produce rich, full documentation in order that good history may be written." He reminded the historians that "the quality of this by-product will be high only if we are able to allay the fears felt about its use by such men as . . . Roosevelt."[55] Kahn spoke to only half of Beale's observation. Granted, historians may have to expect delays and confrontations with suspicious civil servants when they want to work in recent government records. But what of the people's right to know what their government is doing long before a historian may research the topic?

Because archivists and historians are an important conduit between public officials and the public, it behooves us not to place ourselves solely at the service of officials who are reluctant to inform the public fully. Kahn insisted that "if this attitude by government officials is ever to be overcome, we must assure them that there will be no unseemly violations of the confidentiality of their conversations and messages."[56] This attitude proposes a rather cozy arrangement for a democracy. Some measure of confidentiality regarding presidential records is probably required during a President's term in office. But why should the practical necessity for secrecy—in diplomatic negotiations, for example—be extended to former chief executives? Surely, the public has a greater equity than ex-Presidents have in the determination of proper access policy. A desire to avoid embarrassing former officials by revealing frank discussions of political advisers can in no way be equated with the public's right to know of corruption, knavery, or unwise policy. Present policy could lead to the ultimate absurdity: an ex-President denying an incumbent President the right to examine the predecessor's files on the grounds that the incumbent was a "security risk" and a threat to "national security." Former President Nixon's lawyers in fact suggested this possibility in their suit to compel the General Services Administration to implement the Nixon-Sampson

[54] Howard K. Beale, "The Professional Historian: His Theory and his Practice," *Pacific Historical Review* 22 (August 1953): 238–39.

[55] Kahn, "World War II and Its Background," *American Archivist* 17 (April 1954): 162.

[56] Ibid., p. 161.

agreement. They argued that the concept of "presidential privilege" entitled Nixon to continue to restrict access to files which, as President, he had controlled by right of "executive privilege." If this doctrine were not followed, Nixon's lawyers warned, the "confidentiality of communication between himself and his aides" would cease to exist. Nixon insisted that this "*carte blanche* license for subsequent Administrations to view and disclose such communications as they please, would be incalculably more devastating to 'public interest in . . . presidential decisionmaking.' "[57]

By this view, an ex-President would be able to claim ownership of and restrict access to millions of documents prepared during his administration. The prospect of a President's activities being thwarted or immobilized by his inability to examine documents of a past administration constitutes an "incalculably more devastating" threat to the public interest than the fears expressed by Nixon's attorneys.

Presumably, Presidents and their predecessors would cooperate with each other out of a mutual love of country. John Eisenhower, in his testimony before a House subcommittee considering legislation affecting the ownership of presidential papers, attempted to assure that such was the case. He illustrated this spirit of cooperation by revealing that in 1967, during the Arab-Israeli War, President Lyndon Johnson needed to see some 1957 correspondence between President Eisenhower and Israeli Prime Minister David Ben-Gurion. John Eisenhower acknowledged that the absence of this correspondence from the White House "gave the Israeli Government a certain advantage over President Johnson because they had the copies of correspondence and he did not." Johnson had to call the former President, who then sent his son to Gettysburg to retrieve the letters. John Eisenhower expressed much satisfaction that "all this took to remedy the situation was a telephone call," but the resulting delay might have been critical, given the rapidly changing military situation in the Middle East.[58]

No one at the hearing commented on the irony of the Israeli Government having control of its former prime minister's correspondence while the Johnson administration had to petition for access to the Eisenhower files. John Eisenhower did observe that "Presidential papers should be considered . . . governmental papers," but he added that former Presidents "should retain not only access but control" to prevent the incoming political party from embarrassing the preceding administration.[59]

In his testimony before the same subcommittee, Herman Kahn also objected strenuously to the President's political party files being de-

[57] *"Public Documents Act": Hearings,* p. 159; *The United States Law Week,* extra edition no. 1 (supplement to vol. 42), July 23, 1974, pp. 5237–47; and *Nixon* v. *Sirica,* 94 S. Ct. 3090.

[58] *"Public Documents Act": Hearings,* p. 81. The New York *Times,* 1 February 1975, p. 10, reported a similar incident during the administration of President John F. Kennedy.

[59] *"Public Documents Act": Hearings,* pp. 78–79.

clared public records. In his questions to Kahn, Congressman John Brademas, chairman of the subcommittee, argued against a democratic state's allowing a private individual to own and control government records. He reminded Kahn that modern political parties are a basic part of the governmental apparatus and pointed out that the President's involvement in a political party fundamentally affects the course of government. Kahn agreed, but insisted that the outgoing President's files as a politician should not be subjected to examination by the opposing political party: "That is one of the chief reasons the Presidents have insisted that their papers should leave the White House when they leave. Under the present regulations and procedures, that is possible only if their papers are considered to be their property."[60]

The passions aroused by partisan political struggle might well require the restricting of access for a period of time, but it certainly does not follow that an ex-President should, by right of ownership, personally determine that access. Rather, the government, on a bipartisan basis designed genuinely to serve the public interest, should set access policy.

A policy of restricted access that hides past errors in policy may lead to similar mistakes being made in the future simply through ignorance of past decisions. Archivists who acquiesce in such a policy are in effect colleagues of the undertaker who quietly buries the doctor's mistakes. The power of a President throughout his life to control access to his files is sufficient without our slavish cooperation. In fact, this power extends beyond the grave. Franklin Roosevelt died before some 2,500 cubic feet of his files had been transferred to Hyde Park, and it was not until 1947 that a decision by a New York surrogate court that Roosevelt's will did not include these papers as part of his personal property permitted their legal transfer to the library.[61]

It is hard to argue with success, and certainly the presidential libraries have successfully preserved the documentation of the careers of the last half-dozen Presidents. A 1973 article by James O'Neill, deputy Archivist of the United States, entitled "Will Success Spoil the Presidential Libraries?" summarized the magnificent accomplishments of the libraries and outlined the problems to be faced. O'Neill, who served as director of the Roosevelt Library from 1969 to 1971, remained optimistic about the future of the system. The title of his article, however, misleads. Success will not spoil the libraries. If they are spoiled it will not be because of their great contributions to historical scholarship under the direction of outstanding archivists such as Kahn and O'Neill. Rather, failure may well stem from the failure of historians, archivists, and politicians to meet the people's right to own and use the nation's records. O'Neill, however, still clings to the

[60] Ibid., p. 98.

[61] Waldo Gifford Leland, "The Creation of the Franklin D.. Roosevelt Library: A Personal Narrative," *American Archivist* 18 (January 1955): 27–28; "In re Roosevelt's Will," Surrogate's Court, Dutchess County, July 21, 1947, 73 N.Y.S. 2d 821.

traditional view of the President's right to ownership: "Whether one regards this as a suitable and constitutionally sound position or as the unfortunate result of neglect and legal *malaise,* it is, nonetheless, the case."[62]

Perhaps the revelations concerning Watergate have changed O'Neill's mind, but if his stated view remains, in fact, the case, what can be done about it? Officeholders may refuse to declare their records to be public property. H. G. Jones urged in *The Records of a Nation* that each President issue an executive order designating the papers of his administration public property. Such an order would quickly become a new tradition morally binding on future chief executives.[63] Once the new custom becomes established, the executive department might well find its past concerns about secrecy and confidentiality unnecessary for the proper functioning of government. In light of Watergate, however, moral suasion would seem a poor substitute for strong legislation. There is no law specifically declaring presidential papers to be public documents, and the Supreme Court could certainly overturn Judge Richey's decision that almost all of the records produced by a presidential administration are government property.[64]

Should the executive and judicial branches fail to serve the people's interests, the last recourse is the Congress. Senator Birch Bayh introduced a bill in 1974 that every historian and archivist should consider supporting when it is reintroduced in the new Congress. Bayh proposes an act which would require every elected federal official to turn over to the National Archives or an agency designated by NARS, within one hundred eighty days of leaving office, all papers created during his or her tenure. No specific records are required to be created by this measure, but "materials which were prepared by or for any elected federal officeholder, which involve public business, and which would not have been prepared if the individual had not held public office shall be turned over." Access limitations for specific periods and for specific reasons would remain legal under the bill's provisions.[65]

Title II of the Presidential Recordings and Materials Preservation Act provided for the establishment of a National Study Commission on

[62] O'Neill, "Will Success Spoil the Presidential Libraries?" p. 344.

[63] Jones, *Records of a Nation,* pp. 168–70.

[64] New York *Times,* 29 December 1973, p. 10; Washington *Post,* 29 December 1973, p. 12; and New York *Times,* 2 February 1975, p. 26. See also James Nathan Miller, "This Law Could Give Us Back Our Government," *Reader's Digest* (April 1974): 109–13; and Kenneth Culp Davis, "The Information Act: A Preliminary Analysis," *University of Chicago Law Review* 34 (1967): 761–816. Davis discusses the inadequacies of the Freedom of Information Act as passed and suggests areas where additional legislation is needed. *Environmental Protection Agency* v. *Mink,* 410 U.S. 73, reveals the inability of the Freedom of Information Act to force the revelation of factual material interfiled with items protected by a military or diplomatic restriction. Gregory L. Waples, "Freedom of Information Act: A Seven Year Assessment," *Columbia Law Review* 74 (June 1974): 894–959, analyzes the administration of the act.

[65] F. Gerald Ham, "Public Ownership of the Papers of Public Officials," *American Archivist* 37 (April 1974): 357–60; *Congressional Record* 120 (Daily ed.; February 4, 1974): S1132–3; (April 30, 1974): S6564–7; and (September 19, 1974): S17045–9.

Records and Documents of Federal Officials consisting of seventeen members representing all branches of the federal government, historical associations, the Society of American Archivists, and qualified citizens, "to study problems and questions with respect to control, disposition, and preservation of records and documents produced by or on behalf of Federal officials." This provision, proposed by Congressman Brademas, did not directly seek the type of legislation needed and should not be viewed as an alternative to legislation establishing the public ownership of the records of public officials. Nevertheless, it may lead to serious study of the wide variety of problems to be faced in this area.[66]

In his testimony before the House subcommittee considering the Brademas bill, the Archivist of the United States, James B. Rhoads, expressed his concern over efforts to change the traditional policy of private ownership of the papers of public officials. However, he declared that the National Archives and Records Service would "strongly support" any commission established to determine the best methods of preserving and using the nation's historical resources. Mack Thompson, executive director of the American Historical Association, likewise expressed the willingness of the AHA to cooperate in carrying out the objectives of the Brademas bill.[67]

Approval of legislation such as the Bayh proposal would finally remove one barrier to the archival profession's development. No longer would their work be regarded as an optional service whose use depends on the personal wishes of elected leaders. Perhaps the profession would be strengthened if federal archivists did not have to work in the President's shadow. The long-term effect on the conduct of government might be equally salutary if officeholders were convinced, by statute if necessary, that the very nature of the gigantic volume of records created by a President and his administration today make them public property. Because the federal government, particularly the Office of the President, has such an enormous impact on the life of every citizen, the nation can no longer afford the luxury of allowing its retiring elected leader to remove "his" files. What was an unsatisfactory arrangement in George Washington's day has today become a threat to the functioning of a democratic government.

[66] Public Documents Act, Pub. Law 93–526, Title II, 88 Stat. 1698–1700. The legislative history of the Presidential Recordings and Materials Preservation Act contains numerous statements of the arguments for and against public ownership. See *Congressional Record* 120 (Daily ed.; September 26, 1974): H9587–9, S17546, S17560; (September 30, 1974): H9671; (October 2, 1974): S17985, S17988–96; (October 3, 1974): S18233–64; (October 4, 1974): S18318–36; (October 7, 1974): H10097; (October 16, 1974): H10647–50; (December 3, 1974): H11204–12, H11261; (December 9, 1974): H11442–5, S20806–14; (December 10, 1974): H11579, S20875–6; U.S. Congress, House, Committee on House Administration, *Presidential Recordings and Materials Preservation Act* (H. Rept. 93–1507; Washington, 1974); and U.S. Congress, Senate, Committee on Government Operations, *Preservation, Protection, and Public Access With Respect to Certain Tape Recordings and Other Materials* (S. Rept. 93–1181; Washington, 1974).

[67] *"Public Documents Act": Hearings,* pp. 33–41, 57–60; James B. Rhoads, "Who Should Own the Documents of Public Officials?" *Prologue* 7 (Spring 1975): 32–35.

While it is true that some officials long used to secrecy and the right to confidentiality might destroy their files rather than turn them over to archivists for preservation, this practice would probably die out if the law were vigorously enforced and severe penalties were attached for violation. Gradually, public officials would learn to live with the act and, let us hope, might even learn to govern more responsibly because of the realization that their activities and policies would soon face public scrutiny. The necessity to preserve the confidentiality of some records for a set period would remain, but the cry of "national security" could not be used for personal or partisan purposes.

To arguments that such a proposal is naive, that it ignores human nature, or that it would end confidential advice by destroying the opportunity for candid assessments of policy and personnel, one need look no further than the bombings of Cambodia, the domestic activities of the Central Intelligence Agency, the controversy surrounding the Pentagon Papers, the Watergate break-in, and discredited reelection campaign practices. Current policy has gotten us where we are today. It is time to try—really try—to have "open covenants . . . , openly arrived at." The power of the President of the United States in the last quarter of the twentieth century is so vast, and the opportunities for abuse of that power so numerous, that it has become essential to insure a greater public access to the decision-making process, if our democratic form of government is to survive.

Archivists, insofar as they are known at all to the general public, are probably best known for the preservation of such famous documents as the Declaration of Independence. If they, as a profession working with their scholarly colleagues, can help to preserve a government of, by, and for the people, perhaps archivists will be remembered as having contributed, in some small way, to the preservation of independence.

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