Research Article

Nixon's Legal Legacy: White House Papers and the Constitution

BRUCE P. MONTGOMERY

Abstract: After President Richard M. Nixon resigned his office under threat of impeachment, Congress seized his White House papers for the continuing Watergate trials and investigations. With some justification, Nixon vigorously argued that the records were his private property, and thus began an extraordinary legal campaign to reclaim them. Nixon's protracted legal fight has not only caused the overturning of the historical tradition of private ownership of presidential records but has generated an important legacy of constitutional law concerning the presidential prerogatives of the separation of powers and executive privilege. Although Nixon lost his case for ownership before the Supreme Court, he has since managed to block the National Archives and Records Administration from releasing the majority of his White House records. Nixon's continuing and highly effective lawsuits against the National Archives raises the question of who really controls the White House materials of the Nixon presidency.

About the author: *Bruce P. Montgomery is curator and head of the Historical Collections and University Archives at the University of Colorado at Boulder.*

Downloaded from https://prime-pdf-watermark.prime-prod.pubfactory.com/ at 2025-07-01 via free access

FOLLOWING HIS RESIGNATION over the Watergate affair, former President Richard M. Nixon has fought an extraordinary legal campaign for nearly twenty years to win control over his presidential records. Among all presidents, Nixon alone lost control of his White House records by an act of Congress. As a result, the Nixon Library has none of his White House papers, an estimated 42 million pages that now sit in a warehouse in Alexandria, Virginia. Nixon's legal odyssey has left in its wake an important historical and constitutional legacy. Not only has his quest led to the overturning of almost two hundred years of tradition of private ownership of presidential papers, but it has also produced a significant corpus of constitutional law concerning the presidential prerogatives of the separation of powers and executive privilege.

While in office, Nixon used the constitutional cloak of the separation of powers and executive privilege to deny Congress and the special Watergate prosecutor selected tapes and records needed for the Watergate investigations and trials. Never before had a president invoked the constitutional prerogatives of his office so vigorously against Congress. After his resignation, Nixon continually averred that the constitutional prerogatives of the executive branch, as well as his fundamental personal rights of privacy, association, and speech, survived his presidency and justified his claims of ownership over his White House materials. With some justification, Nixon claimed that history was on his side. Indeed, prior to his presidency, the tradition of private presidential ownership was nearly as old as the republic itself. President George Washington took his White House papers with him on leaving office (later bequeathing them to his heirs) and started a tradition that remained unimpeded for nearly two centuries. Questions had been raised about the propriety of this tradition before, but not until the controversial years of the Nixon presidency did it come under wholesale investigation.

Although Nixon lost his case for ownership in 1977 before the U. S. Supreme Court, he has since fought a highly effective series of federal court battles to control public access to them. It is important to note that Nixon's campaign to control his presidential records coincidentally produced an important legal legacy of constitutional law concerning the prerogatives of the executive branch with respect to the other two branches of government. Nixon twice pressed his constitutional arguments before the Supreme Court, which compelled the Court to clarify the permissible scope of the presidential prerogatives of the separation of powers and executive privilege in order to rule on his ownership claims. In both *United States* v. *Nixon* (1974) and *Nixon* v. *Administrator of General Services* (1977), the Court ruled that the constitutional prerogatives of the excecutive branch could not be construed to be absolute and inviolable. In so doing, the Court once and for all appears to have abandoned a strict constructionist view of the Constitution as conceiving of three wholly separate and distinct branches of government. Ironically, although the Supreme Court rejected Nixon's constitutional claims in both cases, it left the way open for Nixon's successful use of similar arguments to prevent the National Archives and Records Administration from publicly releasing the majority of his presidential records. Nixon's continuing campaign to block release of his White House materials and his legacy of constitutional law have a direct bearing on the historical and archival professions, one of whose greatest missions is the preservation of the nation's historical memory. In a republic whose highest official is a public servant, perhaps no archival or historical question is more critical than who controls the records of the Oval Office after a president leaves office. Although Nixon lost his case for ownership, the issue of who really

Downloaded from https://prime-pdf-watermark.prime-prod.pubfactory.com/ at 2025-07-01 via free access

controls his presidential materials remains very much in question.

The Nixon-Sampson Agreement

On 9 August 1974, President Nixon resigned from office under threat of impeachment. Immediately afterward, a heated controversy erupted over the fate of the White House materials generated during his administration. On his resignation, Nixon directed government archivists to assemble and transfer his White House records to him in San Clemente, California. But when Special Watergate Prosecutor Leon Jaworski warned that some of the materials might be relevant to pending criminal investigations, the Ford administration agreed to assume temporary custody of the materials. Concurrently, President Gerald R. Ford requested an opinion from Attorney General William Saxbe concerning the issue of ownership of the Nixon presidential materials. On 6 September Saxbe advised that, based on historical practice and the absence of any statute to the contrary, the records and tapes were rightfully Nixon's. Saxbe, however, cautioned that Nixon's claim was limited by public interest rights in the records of the federal government and that the materials should be subject to court orders and subpoenas.[1]

Following Saxbe's opinion, the administrator of the General Services Administration (GSA), Arthur F. Sampson, executed a depository agreement with Nixon, allowing the former president almost total control over the documentary materials, including the controversial White House tapes. Under the terms of the Nixon-Sampson agreement, the materials would be deposited with the government under a joint-control arrangement and transferred from Washington to San Clemente until they could be placed in a new presidential library. The agreement granted the former president sole access to the records for three years; thereafter he could "withdraw from deposit without formality any or all of the materials for any purpose or use." He would also be permitted the right to direct the administrator to destroy any tapes of his choosing after the gift became effective on 1 September 1979. Otherwise, destruction of the tapes would take place either at the time of his death or on September 1, 1984, whichever occurred first. Nixon agreed to respond to any court subpoenas or court order as the "owner and custodian of the materials, with the sole right and power of access thereto and, if appropriate, assert any privilege or defense I may have."[2]

Although the agreement appeared highly suspicious in light of the Watergate conspiracy, the former president's approach to the presidential records was really no different from that of his predecessors. Nevertheless, the attempt to formalize the agreement in law amid congressional and judicial inquiries into the Watergate affair caused a storm of public protest. What Nixon's many critics feared was not only that he would use the agreement as legal cover to destroy revealing tapes and documents related to Watergate but also that he would endlessly stonewall requests for information by the special Watergate prosecutor. The *Washington Post* immediately termed the agreement an "open invitation to a monumental coverup" and a giveaway that would allow Nixon "every opportunity to use the records of his presidency to obstruct

[1]See Opinion of Attorney General Saxbe to President Gerald R. Ford, September 6, 1974, in *Weekly Compilation of Presidential Documents* 10 (16 September 1974), 1108: Final Report of the National Study Commission on Records and Documents of Federal Officials, March 31, 1977, 9; Norman A. Graebner, *The Records of Public Officials* (New York: The American Assembly, 1975), 12–13. Also see Patricia L. Spencer, "*Nixon* v. *Administrator of General Services*," *Akron Law Review* 11 (Fall 1977): 373.

[2]Text of letter of agreement between Richard Nixon and Arthur F. Sampson reprinted in *Congressional Record*, 93rd Cong., 2nd Sess., 1974, 120, Pt. 25: 33965.

Downloaded from https://prime-pdf-watermark.prime-prod.pubfactory.com/ at 2025-07-01 via free access

justice and stonewall history."[3] Anthony Lewis of the *New York* Times called it "contemptuous of the national interest."[4] Arthur S. Miller, professor of law at George Washington University, denounced the agreement as a "legal nullity."[5] Journalist I. F. Stone said it was tantamount to sending the "full truth [of Watergate] to the gas chambers."[6] U. S. Representative Herman Badillo decried the agreement as "one more element of the endless Watergate coverup."[7] Senator Charles Percy stated that "These documents, tapes, and other materials are rightly the property of the American people,"[8] and Representative Jonathan B. Bingham denounced the agreement as an "appalling abuse of historical precedent."[9]

Many historians also attacked the Nixon-Sampson agreement as a grave threat to a full and accurate understanding of the Nixon years. The National Historical Publications and Records Commission and the Organization of American Historians urged immediate passage of legislation asserting public control over the presidential materials. Similarly, M. B. Schnapper, historian and editor of Public Affairs Press, decried the agreement as a "great hoax," and petitioned Congress for legislation declaring official documents to be public property. Schnapper was joined by a group of renowned historians, political scientists, and archivists.[10]

The special prosecutor's office also expressed grave alarm over the Nixon-Sampson agreement. Deputy Special Prosecutor Henry Ruth argued that the agreement would obstruct the government in its continuing investigation of the Watergate conspiracy. Ruth warned that, under the agreement, Nixon could object to subpoenas for materials required as evidence in the Watergate trials. The special prosecutor's office urged Attorney General Saxbe to reopen negotiations with Nixon to obtain a less restrictive agreement. Saxbe refused but gave assurances that the Nixon materials would remain under federal custody pending further discussions about the disposition of the tapes and documents.[11]

The whole question of access to the White House tapes and documents had already been embroiled in the Watergate controversy for more than a year. Only six months into his second term, Nixon's presidency fell victim to the Watergate scandal and constitutional crisis that began with the burglary of the Democratic National Committee headquarters at the Watergate office-apartment complex in Washington, D.C. During the criminal trials of the Watergate burglars, it became increasingly apparent that they had close ties to the Central Intelligence Agency and the Committee to Re-elect the President. In rapid succession, some of Nixon's top aides began to divulge information implicating others in Nixon's inner circle. In 1973, the Senate established an investigative committee under Senator Sam Ervin, Jr., to pursue the mounting scandal.

Amid increasing disclosures of illegal activities and a widespread cover-up that implicated the White House, Nixon jetti-

[3]"Presidential Records and the Public Interest," *Washington Post*, 15 September 1974, p. A12.

[4]Anthony Lewis, "Now You See It," *New York Times*, 16 September 1974, p. 35.

[5]Arthur S. Miller, "Who Owns the Nixon Tapes and Papers?" *Washington Post*, 21 September 1974, p. A16.

[6]See I. F. Stone, "The Ford-Nixon Fix," *New York Review of Books*, xxi (3 October 1974), p. 6.

[7]*Cong. Rec.*, 93rd Cong., 2nd Sess., 1974, 120, pt. 24: 32501.

[8]*Cong. Rec.*, 93rd Cong., 2nd Sess., 1974, 120, pt. 24: 32465.

[9]*Cong. Rec.*, 93rd Cong., 2nd Sess., 1974, 120, pt. 24: 32290.

[10]See Graebner, *The Records of Public Officials*, 9; and Finlay Lewis, "The Tapes That Ousted Nixon May Become His Richest Asset," *Minneapolis Tribune*, 25 August 1974, reprinted in *Cong. Rec., 93rd Cong., 2nd Sess., 1974, 120, pt. 23:31817.*

[11]Bob Woodward and Carl Bernstein, "Turnover of Tapes Delayed," *Washington Post,* 14 September 1974, pp. A1, 6.

Downloaded from https://prime-pdf-watermark.prime-prod.pubfactory.com/ at 2025-07-01 via free access

soned his top assistants, John Ehrlichman and H. R. Haldeman. Rather than allaying public suspicion, the action fueled an aggressive investigation by Judge John J. Sirica, the *Washington Post*, the Ervin committee, and Archibald Cox, who was appointed special prosecutor in May 1973. When Alexander Butterfield, a former White House staff member, revealed the existence of a White House taping system, Watergate was "transformed into a bitter contest between the President on the one side and the Congressional investigating committees and the Special Watergate Prosecutor . . . on the other, as Nixon sought to keep exclusive control over the tapes by invoking the separation of powers."[12] Whatever the fine points of the legal debate, former Secretary of State Henry Kissinger later noted, disclosure of the taping system "necessarily placed Nixon in the position of withholding information that on the face of it could settle the various allegations once and for all."[13] From then on, Nixon's attempt to withhold evidence became the critical issue.[14]

Indeed, the president used the cloak of executive privilege to deny repeated requests by both Cox and the Ervin committee for selected tapes and documents. The dispute led Cox to subpoena the tapes and documents in question, but Nixon forced a showdown by firing the special Watergate prosecutor in what became known as the "Saturday Night Massacre." Between March and June 1974, the president, claiming executive privilege, rejected seven more subpoenas issued by the House Judiciary Committee. In a separate action, newly appointed Special Watergate Prosecutor Leon Jaworski ordered Nixon to turn over an additional sixty-four tapes. When Nixon refused, Jaworski brought suit in district court, which ruled against the president. But Nixon appealed the decision, and on 24 July, by a unanimous vote of 8 to 0, the Supreme Court in *United States* v. *Nixon* finally ordered the president to turn over the tapes and documents demanded by the special Watergate prosecutor. One of the tapes handed over to Jaworski contained the "smoking gun"—an Oval Office conversation between Nixon and Haldeman on 23 June 1972, which conclusively implicated Nixon in the Watergate conspiracy.[15]

By defining the permissible scope of the separation of powers and executive privilege with respect to the judiciary, *United States* v. *Nixon* marked a seminal case in the history of the Supreme Court. For the first time the Court addressed the issue of when a president could be compelled to release executive branch documents against his will.[16] Prior to the case, "the law defining the scope of executive privilege was incomplete at best, and at worst was simply nonexistent."[17] In addition, the Court in earlier opinions had consistently taken a strict constructionist view that the three branches had no business interfering with each other's policies and practices. *United States* v. *Nixon*, however, "replaced the strict constructionist interpretation of the separation of powers principle with a balancing test."[18] The Court weighed the president's claim of a privilege of confidentiality in executive

[12]See Henry Kissinger, *Years of Upheaval 1972–1974*, Vol. 2, (Boston: Little, Brown, 1979), 114.

[13]Kissinger, *Years of Upheaval*, 114.

[14]Woodward and Bernstein, "Turnover of Tapes Delayed," p. A6; see the following sources for more information on Watergate: Carl Bernstein and Bob Woodward, *All the Presidents Men* (New York: Simon & Schuster, 1974); Philip B. Kirkland, *Watergate and the Constitution* (Chicago: University of Chicago Press, 1978); and Stanley I. Kutler, *The Wars of Watergate: The Last Crisis of Richard of Nixon* (New York: Knopf; Distributed by Random House, 1990).

[15]See *United States* v. *Nixon*, 418 U.S. 683 (1974).

[16]Christopher Walter, "Legitimacy: The Sacrificial Lamb at the Altar of Executive Privilege," *Kentucky Law Review* 78 (1989–1990): 818–19.

[17]Walter, "Legitimacy," 818.

[18]Spencer, "*Nixon* v. *Administrator of General Services*," 378–79.

Downloaded from https://prime-pdf-watermark.prime-prod.pubfactory.com/ at 2025-07-01 via free access

communications against the constitutional needs for the judiciary to promote the fair administration of criminal justice.[19] Nixon had maintained throughout the case that he had an absolute and unreviewable privilege pertaining to all matters of his office. While stressing the fundamental necessity of the confidentiality of presidential communications, the Supreme Court declared that the privilege was limited to military, diplomatic, or sensitive national security secrets.[20] The Court thus compelled Nixon to turn over the very tapes and documents that helped to destroy his presidency.

A Question of Tradition

By entering into the Nixon-Sampson agreement, Nixon argued with some justification that he merely sought the same ownership rights as other presidents before him. Beyond the resounding cynicism of many, Nixon did indeed have history on his side. From George Washington through Franklin D. Roosevelt, presidents disposed of their papers as they saw fit. Presidents Washington, Jefferson, Madison, Monroe, Lincoln, and Harrison bequeathed their papers to their heirs and relatives, many of whom in turn sold them for profit. Martin Van Buren, Franklin Pierce, and Ulysses S. Grant personally purged their presidential papers. Warren G. Harding left his papers to his wife, who destroyed the bulk of them. The papers of William Henry Harrison, John Tyler, Zachary Taylor, and Andrew Johnson were destroyed or partially lost in fires while in their private possession. The records of presidents Grover Cleveland, Theodore Roosevelt, William Howard Taft, and Woodrow Wilson were deposited among several libraries, including the Library of Congress. Indeed, this tradition of private ownership of presidential records evolved in the "absence of other conventions, arrangements by the government, or indeed, any potential alternative."[21] Congressional activities and inactivities tended to reinforce this principle of private ownership. By repeatedly appropriating funds to purchase presidential papers, Congress implicitly recognized former presidents' rights of private ownership of their official papers.[22]

Until the Nixon administration, few questioned this right, even after President Franklin Delano Roosevelt established a new tradition governing the preservation and accessibility of presidential materials through a new type of institution—the presidential library. Roosevelt offered to place his papers in the public realm if the government would maintain a public facility built with private funds. In 1955, Congress, expanding on this concept, passed the Presidential Libraries Act to enable other presidents to follow Roosevelt's example. The act established a nonmandatory system of presidential libraries, which explicitly recognized that presidential papers were the personal property of the chief executive. Under the Presidential Libraries Act, the donor re-

[19]Spencer, "*Nixon* v. *Administrator of General Services*," 379. See also *United States* v. *Nixon*, 418 U.S. 683 (1974), 711–12.

[20]See Alfred Hill, "Testimonial Privilege and Fair Trial," *Columbia Law Review*, 80 (October 1980): 1179.

[21]See Anna K. Nelson, ed., *The Records of Federal Officials: A Selection of Materials from the National Study Commission on Records and Documents of Federal Officials* (New York: Garland Publishing, 1978), ix–x.

[22]Herbert R. Collins and David B. Weaver, eds., *Wills of U.S. Presidents* (New York: Communications Channels, 1976), 24, 151; Frank L. Schick, Renee Schick, and Mark Carroll, *Records of the Presidency: Presidential Papers and Libraries from Washington to Reagan* (Phoenix, Ariz.: Oryx Press, 1989), 39, 45, 53, 56, 66, 68, 77, 79, 82, 85, 93, 101, 105, 109, 133; Graebner, *The Records of Public Officials*, 3–4. See also Kenneth W. Duckett and Francis Russell, "The Harding Papers: How Some Were Burned . . . And Other Were Saved," *American Heritage* 16 (February 1965): 24–31, 102–10; "Preserving the Public Papers," *Christian Science Monitor*, 20 August 1974; and Don McLeod, "Presidential Papers: Who Owns Them?" *Stars and Stripes*, 25 February 1974.

Downloaded from https://prime-pdf-watermark.prime-prod.pubfactory.com/ at 2025-07-01 via free access

tained the right to determine what presidential materials would be donated or deposited, to restrict public access to the presidential papers, and to dispose of or destroy at will papers retained by the donor.

In conceiving of the presidential library, Roosevelt had said that presidential papers were the "people's records." This assertion appeared to point the way for the next step in declaring presidential records to be public records. In 1955, however, Congress embraced and indeed sanctified the historical tradition that presidential records remained private property. The presidential libraries system did much to encourage the preservation and early accessibility of presidential materials, but the recognition of the prevailing tradition of private ownership left unresolved the problem that presidents or their heirs could permanently retain or even destroy some or all of the records produced while in office. Nothing in the Constitution countermanded the principle that the papers of elected or appointed officials were private rather than public property.[23]

Although Congress had clearly given its imprimatur to the tradition of private ownership, a countervailing legal trend had also emerged that established public dominion over the official papers and documents produced by federal officials while in office. Most of the case law, albeit sparse, involved the issue of copyright and whether government officials could profit from documentary materials while carrying out their official duties. Prior to the Nixon case, the courts had routinely ruled that ownership of any materials produced during the discharge of official duties belonged to the federal government. But this legal reasoning, which the federal courts so willingly applied to the records of lower federal officials, was never extended to the papers of the presidency or to those of Congress or the judiciary.[24]

Not until 1960 did historians and others begin directly and publicly to question the presidential tradition of private ownership. When President Dwight Eisenhower announced the donation of his papers to the United States, two historians in a published letter to the *New York Times* argued that the "records of the office of the President belong to the people who created that office."[25] Further, they challenged the notion that any presidential privilege survived the period of the presidency, endured for the remainder of the former president's natural life, and was descendible to heirs and executors.

President Nixon's attempt to claim tax benefits from his vice-presidential papers in 1972 raised the first popular concern over the disposition of records and documents of government officials. In 1973, the *Washington Post* broke the story that Nixon had violated the 1969 Tax Reform Act and allegedly was reaping unwarranted financial gain from public office.[26] F. Gerald Ham, then president of the Society of American Archivists (SAA), insisted that Nixon's vice-presidential papers were public property. "I think it is a fiction that

[23]See H. G. Jones, *The Records of a Nation: Their Management, Preservation, and Use* (New York: Atheneum, 1969), 157.

[24]For a discussion of these legal cases, see J. Frank Cook, "Private Papers of Public Officials, *American Archivist* 38 (July 1975): 302–11.

[25]Cook, "Private Papers of Public Officials," 300.

[26]Congress had originally passed the 1969 Tax Reform Act to bar President Lyndon B. Johnson from continuing to claim questionable tax benefits from the donation of political papers he had accumulated during his political career. The *Washington Post* reported that President Nixon had claimed nearly a half-million dollars in tax deductions on his 1969 tax return. The Internal Revenue Service and the Congressional Joint Committee on Internal Revenue Taxation investigated the case and disallowed the deduction. Neither President Nixon nor President Johnson were unique in claiming tax deductions for their political papers. Many former government officials had claimed similar tax benefits for donating their papers to historical societies and university libraries. See *Time*, 31 December 1973, "Who Owns the President's Papers," 12.

Downloaded from https://prime-pdf-watermark.prime-prod.pubfactory.com/ at 2025-07-01 via free access

these are private papers," stated Ham. "The very great bulk of these papers originate from one activity only—that of serving in the public capacity."[27]

A 1969 study of the AHA-OAH-SAA Joint Committee on the Status of the National Archives had put the case even more strongly. The committee said that the concept that a president's papers were his private property after leaving office was a "lingering vestige of the attributes of monarchy, not an appropriate concept . . . for the head of a democratic state."[28] H. G. Jones, who had served as secretary of the committee, further questioned how the nation or Congress could conceivably "vest in the highest officer of the land, or in his heirs or descendants, the right to sell, to destroy, to disclose, to refuse to disclose, or otherwise to dispose of documents of the highest official nature involving information that, if improperly, prematurely, or irresponsibly revealed, could not only wreck private lives but also vitally endanger the security of the nation."[29] The historian M. B. Schnapper also argued in favor of public ownership, stating that records and documents produced "in the course of a public servant's official duties cannot be considered private property."[30] Until the controversial Watergate episode, however, these arguments made little headway against a legislative consensus that a president's constitutional prerogatives legitimated his right of private ownership over his presidential papers.[31]

But never was such a claim of ownership of presidential records made under the shadow of grave suspicion. Tradition aside, the Nixon-Sampson agreement produced a barrage of lawsuits by plaintiffs seeking access and control over the Nixon presidential materials. (See appendix: Chronology of Events) On 10 September 1974, columnist Jack Anderson filed an application with the GSA under the Freedom of Information Act (FOIA) requesting access to the Nixon materials covered under the agreement. A few days later, author Lillian Hellman and other members of the Committee for Public Justice filed a similar application but limited it to the tape recordings of the White House and executive office. The GSA denied both applications on the grounds that the agency did not yet have possession of the materials, that the materials fell outside the purview of FOIA, and that the pertinent statute—the Presidential Libraries Act of 1955—gave the right to the administrator of GSA to make such an agreement.[32]

Nixon and the Courts

In the interim, anger over the agreement led thirteen members of the U.S. Senate to introduce legislation to abrogate the Nixon-Sampson agreement and to seize custody and control of the Nixon materials. Alarmed by this turn of events, Nixon quickly countered by bringing suit on 17 October, against

[27]"Who Owns the President's Papers," 12.

[28]See Anthony Marro, "A Paper Dispute," *Newsday*, 30 December 1973, 7.

[29]Jones, *Records of a Nation*, 162.

[30]See Marro, "A Paper Dispute," 7.

[31]Although a few archivists and historians made the case for public ownership of presidential records, their arguments on the whole generated little concern within their own professional communities. H. G. Jones, state archivist of North Carolina and adjunct professor of history at North Carolina University, lamented that he had trouble getting anyone concerned about the tradition of presidential private ownership except a "tiny band of ineffective archivists." Typifying the consensus view was Deputy Archivist of the United States James O'Neil, who admitted that while he could not fault Jones's logic regarding the issue, he could fault his "understanding of law and history." The passage of the Presidential Libraries Act of 1955 had engendered wide support for the arrangement of allowing retiring presidents to maintain private control over their records under the auspices of a government-operated facility. The desire to preserve presidential materials obscured the important question of whether these records should be considered public property. See Marro, "A Paper Dispute," 7; "Who Owns the President's Papers," 12; and Cook, "Private Papers of Public Officials," 301. See also Jones, *Records of a Nation*, 156–57.

[32]Graebner, *The Records of Public Officials*, 9.

Downloaded from https://prime-pdf-watermark.prime-prod.pubfactory.com/ at 2025-07-01 via free access

Arthur F. Sampson and the GSA, seeking to enforce the Nixon-Sampson agreement and to prevent unauthorized access to the records and tape recordings. But four days later, on 21 October, Jack Anderson again moved to intervene in the case to prevent the agreement's implementation. Special Watergate Prosecutor Leon Jaworski also intervened to ensure access to the records and tape-recorded conversations for the Watergate trials. On the same day, the Reporters Committee for Freedom of the Press, the American Historical Association (AHA), and the American Political Science Association brought suit against the GSA seeking to overturn the agreement. In response to these actions, Judge Charles R. Richey of the U.S. District Court of the District of Columbia issued a temporary restraining order prohibiting implementation of the agreement until the court could rule on the original motions. Shortly thereafter, Lillian Hellman and the Committee for Public Justice filed an action against the GSA and Nixon, seeking access to the controversial tapes. The court subsequently ruled to consolidate the various motions with the case *Richard M. Nixon* v. *Arthur F. Sampson* in which Nixon sought to compel government compliance with the terms and conditions of the Nixon-Sampson agreement.[33]

Nixon's chief lawyer, Herbert J. Miller, Jr., argued the Nixon case against the government around two major points: (1) that the government could not rightfully violate an agreement that was valid, binding, and nondiscretionary, and (2) that ownership and control over the materials and tape recordings were an essential constitutional right as part of the presidential privilege of confidentiality. Any use of the materials by the government would, according to Nixon, necessitate a search, which, without his explicit approval, would be a derogation of the rights and privileges afforded him by the Constitution. It would further violate his constitutional rights to be free from unreasonable search and seizure under the Fourth Amendment.[34]

The special prosecutor, however, claimed that his own office and the government had an overriding interest in the presidential materials, which supervened any contractual rights asserted by the former president. The government had recognized this interest prior to the Nixon-Sampson agreement and never intended to negate it by entering into the agreement. Jaworski argued that Nixon did not have the constitutional right to assert a claim of privilege against his successor, President Ford, who had given assurances that his office would have full access to the Nixon presidential files and tapes for the Watergate trials. Jaworski was clearly worried that, under the agreement, Nixon would continue to wage a furious campaign to withhold vital tapes and documents and thereby disrupt the judicial proceedings.

Lawyers for Jack Anderson, the Reporters Committee for Freedom of the Press, the AHA, Lillian Hellman, and other plaintiffs claimed that the White House materials were the public property of the United States. They contended that because the records and tapes were government property, and because the former president was a private citizen at the time he signed the agreement, Nixon could not rightfully impose restrictions on the materials as if they were his private property. The plaintiffs' key concern was that Nixon could never be trusted to donate the tapes and records to the federal government as he had promised in the agreement. A strong possibility existed, according to the plaintiffs, that Nixon not only would destroy vital tapes and documents but would also deny access to them. If Nixon had his way, a true understanding

[33]See *Nixon* v. *Sampson*, 389 F. Supp. 107 (1975), 117–18.

[34]*Nixon* v. *Simpson*, 118–19.

Downloaded from https://prime-pdf-watermark.prime-prod.pubfactory.com/ at 2025-07-01 via free access

of his White House years would be forever lost. The plaintiffs also attacked Nixon's claim of presidential confidentiality as invalid on the grounds that only an incumbent, and not a former president, could invoke the privilege.[35] The plaintiffs further inveighed against Nixon's contention that the tradition of presidential control of presidential records sanctioned his claims of ownership. The Presidential Libraries Act, they argued, had terminated the tradition of presidential private ownership.

This was a highly debatable supposition, however. During the original debate on the measure, Congress had heard considerable testimony supporting the premise that presidential papers were the private property of retiring presidents.[36] By passing the act, Congress had clearly given legislative sanction to a president's continued control over his records. While the act authorized the federal government to operate presidential libraries, it permitted and even embraced a former president's right to treat his records as personal property. Nixon could thus justifiably claim that not only historical precedent but the Presidential Libraries Act supported his ownership claims.

Presidential Recordings and Materials Preservation Act

While these combined actions were pending, Nixon suffered a significant setback when on 9 December 1974 Congress passed the Presidential Recordings and Materials Preservation Act; shortly thereafter, on 19 December, President Ford signed it into law. Title I of the act dissolved the Nixon-Sampson agreement and directed the GSA to assert immediate control over all the presidential materials, to make them available for use in judicial proceedings, and to develop regulations providing for their public access. The statute also provided for "just compensation" to Nixon, if the courts decided that the custodial arrangement deprived him of his property. Title II established the National Study Commission on Records and Documents of Federal Officials to "study the control, disposition, and preservation of records and documents produced by or on behalf of Federal officials."

The statute signaled a major retreat by the Ford administration, which originally supported Nixon's ownership claims through Attorney General Saxbe's legal opinion and the Nixon-Sampson agreement.[37] Following Nixon's resignation, President Ford had come under withering political attack for pardoning the former president for his involvement in the Watergate conspiracy. By pardoning Nixon, Ford had hoped to end the Watergate episode quickly and to heal the deep political rifts in the country. But when Nixon was permitted to sign a legal agreement giving him virtual control over the dispositions of his White House materials amid the Watergate trials, the Ford administration again fell victim to a fury of criticism. Congress could do nothing to reverse Nixon's pardon, but it could overturn the Nixon-Sampson agreement and ensure the availability of the tapes and records for the continuing Watergate trials. Rather than damage his presidency irreparably by supporting Nixon's ownership claims, Ford quickly surrendered the issue to Congress.

[35] *Nixon* v. *Sampson*, 120.

[36] During the debate on the Presidential Libraries Act in 1955, U.S. Representative John Moses, a supporter of the legislation, stated it should be "remembered that Presidential papers belong to the President." The archivist of the United States agreed in testimony before Congress, observing that the "papers of the President have always been considered to be their personal property, both during their incumbency and afterward. This has the sanction of law and custom." The administrator of GSA also testified that as a "matter of ordinary practice, the President has removed his papers from the White House at the end of his term." See *Cong. Rec.*, 84th Cong., 1st Sess., 1955, 101, pt. 8: 9935; and U.S. House, Committee on Government Operations, *To Provide for the Acceptance and Maintenance of Presidential Libraries, and for Other Purposes*, Hearings, 13 June 1955, 32, 14.

[37] Final Report of the National Study Commission, 10.

Downloaded from https://prime-pdf-watermark.prime-prod.pubfactory.com/ at 2025-07-01 via free access

Whatever support Nixon had expected from the Ford administration was now gone, leaving the former president alone in his campaign for the presidential materials.

From the beginning, the suspicion caused by the Nixon-Sampson agreement had produced an urgency in Congress to reverse the agreement and to make the White House materials the property of the federal government. As far back as February 1974, Senator Birch Baye of Indiana had introduced legislation declaring that all public records of federal officials should be the property of the government. By mid-September, Senator Jacob Javits introduced similar legislation but applied it only to the papers of the president and vice president. Senators Sam Ervin and Gaylord Nelson agreed to cosponsor legislation providing that, regardless of the Nixon-Sampson agreement, the government would retain complete possession of all the White House tapes and documents. Concurrently, Senate Majority Leader Mike Mansfield sponsored a resolution urging President Ford to keep the materials under federal custody. Mansfield sponsored a second resolution seeking to make the custody arrangement a legal directive to the president.[38]

Senators Nelson and Ervin and others who drafted and sponsored Title I of the Act uniformly viewed its provisions as emergency legislation necessitated by the extraordinary events that led to Nixon's resignation and pardon and by his efforts to control the disposition of his papers. Senator Nelson said the bill constituted an "emergency measure" whose principal purpose was to ensure "protective custody" of the records and tapes. "There is an urgency in the situation now before us," stated Nelson. "Under the existing agreement between the GSA and Mr. Nixon, if Mr. Nixon died tomorrow, those tapes . . . are to be destroyed immediately; it is also possible that the Nixon papers could be destroyed by 1977. This would be a catastrophe from an historical standpoint." Senator Ervin similarly remarked that the bill was in response to an "emergency situation, because some of these documents are needed in the Courts and by the general public in order that they might know the full story of what is known collectively as the Watergate affair." The Senate, however, conspicuously avoided attempts to expand the legislation to cover itself. Stressing the urgency of the moment created by the Nixon-Sampson agreement and the Watergate scandal, Senator Jacob Javits emphasized that "we seek to deal in this particular legislation, only with this particular set of papers of this particular ex-president."[39] While Javits certainly seemed to have a point, his remarks provided a convenient excuse to avoid the larger question of whether the papers and records of all federal officials should be treated similarly.

By the end of September the Senate Government Operations Committee unanimously approved special legislation to repeal the Nixon-Sampson agreement. The bill, introduced by Senator Nelson of Wisconsin, sidestepped the question of ownership of the Nixon materials. As Attorney General Saxbe and others had argued, the papers of past presidents had generally been regarded as their private property. This opinion, indeed, appeared to be backed by ample precedent. But as the *Washington Post* editorialized, there was "no precedent governing the case of a President who has resigned in disgrace to avoid impeachment, and whose former aides and closest associates are under indictment or investigation for a wide range of alleged crimes, many

[38]Spencer Rich, "Plan for Public Access to Nixon Papers Gains," *Washington Post*, 17 September 1974, p. A2.

[39]See *Cong. Rec.*, 93rd Cong., 2nd Sess., 1974, 120, pt. 25: 33848, 33850–33851, 33855, 33857, 33860.

Downloaded from https://prime-pdf-watermark.prime-prod.pubfactory.com/ at 2025-07-01 via free access

of which involve abuse of presidential authority."[40] In addition, the whole question of ownership was being contested in the federal courts. Rather than trying to anticipate a judicial ruling, the Senate committee proposed to place the Nixon tapes and records under federal protective custody. As a precautionary step, it also provided for just compensation to Nixon if the courts decided that the law had wrongly deprived him of his property.[41]

Concurrently, Representative John Brademus, chairman of the Subcommittee on Printing of the Committee of House Administration, and Representative Orval Hansen introduced in the House a measure calling for the establishment of a study commission to examine issues relating to the ownership and disposition of the papers of federal officials. The "issue of the disposition of the Nixon tapes is of immediate urgency," said Brademus. "But the question before this subcommittee is also a much broader one—the problem of the preservation of papers and documents of all elected and appointed Federal officials."[42] Brademus had recognized the obvious. The Nixon case had raised critical issues concerning public interest rights in the records as documents of all government activity. It seemed unreasonable that Congress could apply the legislation to only one branch of government without considering the same standards or principles for itself and other federal officials. As a result, in December 1974 the House passed the Nelson bill, which was amended to establish a study commission as suggested by Representatives Brademus and Hansen. A few days later, the Senate also passed the bill and sent it immediately to President Ford to be signed into law.

Nixon's supporters in the Senate, however, denounced the bill as a "legislative distortion of the Constitution," which constituted a bill of attainder, a breach of the separation of powers doctrine, and a violation of Nixon's privacy and his explicit right to private property without due process. The American Law Division of the Congressional Research Service agreed and raised two additional objections: (1) that it operated "retroactively in possible violation of the ex post facto clause of the Constitution," and (2) that it superseded the Nixon-Sampson agreement in "violation of the obligation of contracts clause."[43] Given the long tradition of private control over presidential records, these appeared to be perfectly plausible objections. But Senator Sam Ervin dismissed them as "constitutional ghosts" and argued that the measure only provided for temporary custody of the materials. Nixon was certainly free, stated Ervin, to resolve the question of ownership and claim just compensation in the courts.[44]

One day following enactment of the Presidential Recordings and Materials Preservation Act, Nixon filed suit for declaratory and injunctive relief against enforcement of the statute on the grounds that it transgressed the federal Constitution. Concurrently, he asked that a special three-judge court be convened to hear the case. When the district court before which the combined actions were pending declined to rule on the request, Nixon petitioned the U.S. Court of Appeals for the District of Columbia to compel action on the conven-

[40]"Presidential Records and the Public Interest," B6.

[41]Graebner, *The Records of Public Officials*, 20–21. Also see "The Disposition of the Tapes," *Washington Post*, 30 September 1974, p. A26.

[42]Final Report of the National Study Commission, 9–10; and U.S. House, Committee on House Administration, *The Public Documents Act*, Hearings, 30 September and 4 October 1974 (Washington, D.C.: Government Printing Office, 1974), 32.

[43]*Cong. Rec.*, 93rd Cong., 2nd Sess., 1974, 120, pt. 25: 33853.

[44]See James Naughton, "Senate Bids Ford undo Nixon Pact and Retains Tapes," *New York Times*, 5 October 1974, p. 14; and Cook, "Private Papers of Public Officials," 316.

Downloaded from https://prime-pdf-watermark.prime-prod.pubfactory.com/ at 2025-07-01 via free access

ing of the special judicial panel. The appeals court denied the petition on the assumption that the lower court would indeed proceed with the Nixon request before ruling on the consolidated cases. In contravention of the wishes of the court of appeals, however, Judge Charles Richey ruled on *Nixon* v. *Sampson*, dismissing Nixon's claims of ownership and supporting the abrogation of the Nixon-Sampson agreement under Title I of the act. The Richey opinion carried some significance since it marked the first judicial ruling to address explicitly the question of ownership of presidential records. Nevertheless, the U.S. court of appeals stayed entry of the judgment to enable Nixon to argue his constitutional claims for ownership and executive privilege before a three-judge district court.[45]

Before the three-judge district court, Nixon's lawyers challenged the constitutionality of Title I, claiming that it violated (1) the separation of powers, (2) presidential privilege doctrine, (3) Nixon's privacy rights, (4) Nixon's First Amendment rights of associational privacy and political speech, and (5) the bill of attainder clause. The court, however, dismissed each of these claims and upheld the constitutionality of the act. Nixon then appealed the case to the U.S. Supreme Court.[46]

Nixon v. Administrator of General Services

The case of *Nixon* v. *Administrator of General Services* constituted "perhaps the most important constitutional decision of the decade."[47] The Supreme Court acknowledged what Congress and Nixon's many critics readily dismissed—that despite Nixon's ties to the Watergate affair, his case raised a host of genuine constitutional issues. The Court recognized the critical importance of the case in dealing with the relationship between two of the three branches of government. The issues raised in the case, declared the Court, "arise in a context unique in the history of the Presidency and present issues that this Court has had no occasion heretofore to address."[48] At stake was whether and to what extent the legislative branch could intrude on the constitutional prerogatives of the presidency. The critical issue involved whether a congressional statute that directed the seizure of a former president's official papers and records generated during his tenure in office violated executive privilege and the separation of powers' doctrine. For the first time, the Court would rule on the "permissible extent of Congressional authority to regulate the disposition of official records and papers of a former chief executive."[49] Nixon vigorously argued that the act shattered the fundamental prerogatives of the executive branch and might very well serve to cripple the presidency because it would severely compromise confidential and candid communications required for high-level decision making.[50] By addressing Nixon's claims, the Court again faced critical constitutional issues concerning the nature of the separation of powers, executive privilege, and the fundamental rights of privacy, association, and political speech.

In the history of the judiciary, only two other cases touched on the issue of ownership and control of presidential papers, and the courts adjudicated both cases on

[45]See *Nixon* v. *Richey*, Supra note 1, 168 U.S. App. D.C. (1975), 429; Spencer, "*Nixon* v. *Administrator of General Services*," 377.

[46]See *Nixon* v. *Administrator of General Services*, 408 F. Supp. 321 (D.D.C. 1976).

[47]Rowland L. Young, "Supreme Court Report," *American Bar Association Journal* 63 (October 1977): 1446–48.

[48]*Nixon* v. *Administrator of General Services*, 433 U.S. 425 (1977), 888.

[49]Spencer, "*Nixon* v. *Administrator of General Services*," 373.

[50]Spencer, "*Nixon* v. *Administrator of General Services*," 378.

Downloaded from https://prime-pdf-watermark.prime-prod.pubfactory.com/ at 2025-07-01 via free access

the assumption that a president owned the official files of his office. The Courts in *Folsom* v. *Marsh* and *In Re Roosevelt's Will* recognized the tradition of private ownership, but in neither case was the question of ownership of presidential papers squarely addressed. In addition, in *Folsom*, Justice Joseph Story acknowledged a prevailing public interest in presidential documents: "From the nature of public service, or the character of the documents, embracing historical, military, or diplomatic information, it may be the right, and even the duty, of the government to give them publicity, even against the will of the writers."[51] The Court had applied this very principle in *United States* v. *Nixon* to deny then-President Nixon's claim of an inviolable privilege of executive confidentiality.

Justice Story's principle of public interest rights in the records of government activity gained prominence in the 1970s. Congressional enactment of such statutes as the Freedom of Information Act, the Federal Records Act of 1970, and the Privacy Act of 1974 undercut the tradition of private ownership of presidential records by stressing the overriding public interest in the records of government. The final break with tradition came with passage of Title I of the Presidential Recordings and Materials Preservation Act. Together, these statutes reflected an increasing legislative assertion over the records and prerogatives of the executive branch, as well as a retreat from historical precedent concerning presidential control of presidential records.[52]

In fact, Nixon made precisely this argument to claim that Title I patently violated the authority and autonomy of the executive branch. Congress had no power, Nixon said, to direct the GSA administrator, a subordinate official of the executive branch, to prescribe terms governing the disclosure of presidential documents. Moreover, by directing the administrator to seize control of the White House records and tapes, the act transgressed the confidentiality of presidential communications so emphatically recognized by the Court in *United States* v. *Nixon*. Nixon's separation of powers argument rested heavily on the Court's ruling in this case, which stressed the critical importance of the confidentiality of executive communications. In that opinion, the Court stated that this privilege was "fundamental to the operations of Government and inextricably rooted in the separation of powers under the Constitution."[53] Nixon conceded that only incumbent presidents could assert presidential privilege to protect against disclosure of state secrets and sensitive information concerning military or diplomatic matters. But he argued that a broader presidential privilege exists, which survives the termination of the president-adviser relationship "much as the attorney-client privilege survives the relationship that creates it." The former president further asserted that the act's authorization of government archivists to screen the materials itself violated the priv-

[51]See *Folsom* v. *Marsh*, 9 Fed. Cas. 342 (No. 4901) (C.C.D. Mass. 1841), 341; and *In Re Roosevelt's Will*, 73 N.Y.S. 2nd 821, 190 N.Y. Misc. 341 (Sur. Ct. 1947). Also see Final Report of National Study Commission, 5; and Spencer, "*Nixon* v. *Administrator of General Services*," 376.

[52]Spencer, "*Nixon* v. *Administrator of General Services*," 377; *Nixon* v. *Administrator of General Services*, 433 US 425 (1977), 889.

[53]*United States* v. *Nixon*, 418 U.S. 683 (1974), 708. In regard to the presumptive privilege of presidential communications, the Court said the following: "The expectation of a President to the confidentiality of his conversations and correspondence, like the claim of confidentiality of judicial deliberations, for example, has all the values to which we accord deference for the privacy of all citizens and, added to these values, is the necessity for protection of the public interest in candid, objective, and even blunt or harsh opinions in Presidential decision-making. A President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately. These are the considerations justifying a presumptive privilege for Presidential communications."

Downloaded from https://prime-pdf-watermark.prime-prod.pubfactory.com/ at 2025-07-01 via free access

ilege as well as posed a dangerous chilling effect on the ability of future presidents to obtain candid advice necessary to carry out their constitutionally assigned tasks.[54]

On other issues, Nixon said that the act violated his fundamental rights of expression, association, and privacy guaranteed to him by the First, Fourth, and Fifth Amendments. The federal confiscation of the presidential materials and the authorization of government archivists to screen them, Nixon argued, constituted a general warrant approving the search and seizure of his personal communications and an invasion of his constitutionally protected rights of associational privacy and political speech.[55]

Finally, Nixon claimed, the act clearly singled him out for punitive action by authorizing the search and seizure of his papers and personal effects, thereby constituting a bill of attainder. Bills of attainder originated in England as parliamentary acts sentencing named individuals or members to death. They were later leveled against individuals considered disloyal to the crown or state and commonly prescribed such punishments as imprisonment, banishment, and the punitive confiscation of property without due process. In the United States, during and after the Revolutionary War, state governments often seized the property of alleged Tory sympathizers. The framers of the Constitution later proscribed such bills of attainders as a bulwark against tyranny. The true import of the Constitution's bill of attainder clause is that it protects an "individual's procedural rights by prohibiting legislative usurpation of judicial power."[56] In passing the Presidential Recordings and Materials Preservation Act, Nixon accused Congress of acting on the assumption that he had engaged in misconduct, was an unreliable custodian of his own documents, and was thus was deserving of a punitive legislative judgment. The act, contended Nixon, had all the key features of a bill of attainder—a law that singled him out by name, legislatively determined his guilt, and prescribed his punishment without procedural due process.[57]

In 1977, Nixon suffered his most significant defeat when the Supreme Court upheld the constitutionality of the Presidential Recordings and Materials Preservation Act and rejected Nixon's claims of ownership. In affirming the judgment of the three-judge district court, the Supreme Court limited its consideration of Nixon's constitutional claims to the provisions of the act authorizing the administrator to assume custody over the materials and subjecting them to screening by government archivists. The Court thus purposely avoided the larger question of whether or not a president could treat his presidential papers as private property. Nevertheless, the Court's ruling expanded the balancing test originally employed in *United States* v. *Nixon* to the conflicting constitutional interests between Congress and the executive branch. *Nixon* v. *Administrator of General Services* involved a classic contest between the legislative and executive branches of government. The Court not only analyzed the extent of congressional intrusion into the constitutional prerogatives of the presidency but also weighed the extent of this encroachment against the possible overriding aims of Congress to preserve the Nixon materials for legitimate governmental, judicial, and historical reasons.[58]

[54]*Nixon* v. *Administrator of General Services*, 433 U.S. 425 (1977), 889.

[55]*Nixon* v. *Administrator of General Services*, 889–905.

[56]Spencer, "*Nixon* v. *Administrator of General Services*," 381.

[57]See *Nixon* v. *Administrator of General Services*, 433 U.S. 425 (1977), 909–11.

[58]See *Nixon* v. *Administrator of General Services*, 433 U.S. 425 (1977), 707; and Spencer, "*Nixon* v. *Administrator of General Services*," 379–80.

Downloaded from https://prime-pdf-watermark.prime-prod.pubfactory.com/ at 2025-07-01 via free access

The Court rejected Nixon's assertion that the act constituted a violation of the separation of powers. The executive branch, declared the Court, "became a party to the Act's regulation when President Ford signed the Act into law, and the administration of President Carter, acting through the Solicitor General, vigorously supports affirmance of the District Court's judgement sustaining its constitutionality."[59] Nixon's separation of powers argument also rested on a faulty interpretation "inconsistent with the origins of that doctrine, recent decisions of the Court, and the contemporary realities of our political system."[60] Indeed, the Court veered away from a strict constructionist view, embracing instead the more "pragmatic, flexible approach" of James Madison in *The Federalist Papers* and later of Justice Joseph Story.[61] The Court had expressly affirmed this view earlier in *United States* v. *Nixon*, which compelled then-President Nixon to comply with a subpoena to turn over documents and tape recordings to the special Watergate prosecutor. Here the Supreme Court had unanimously rejected a complete division of power among the three branches: "In designing the structure of our Government and dividing and allocating the sovereign power among three co-equal branches, the Framers of the Constitution sought to provide a comprehensive system, but the separate powers were not intended to operate with absolute independence."[62]

In *Nixon* v. *Administrator of General Services*, the Supreme Court concurred with the lower court that Nixon's argument rested on an "archaic view of the separation of powers requiring three airtight departments of government."[63] Moreover, the Court stated that control over the materials had remained with the executive branch, since both the administrator of General Services and the government archivists authorized to screen the records and tapes were executive branch employees.

The Court again cited *United States* v. *Nixon* in denying the former president's claim of presidential privilege. A unanimous Court in that case had recognized the critical importance of the privilege of confidentiality of presidential communications in maintaining candid advice in official decision making, but the Court had ruled that, as with the separation of powers principle, the privilege could not be construed to be absolute.[64] In the case at hand, the Court said, no reason existed to expect that screening of materials by government archivists, whose "record for discretion in

[59]Spencer, "*Nixon* v. *Administrator of General Services*," 888, 890.

[60]Spencer, "*Nixon* v. *Administrator of General Services*," 890–91.

[61]In *Federalist No. 47*, Madison, upon reviewing the origins of the principle of separation of powers, wrote that Montesquieu, the "oracle always consulted on the subject, did not mean that these developments ought to have no partial agency in, or no control over the acts of each other. His meaning, as his own words impart . . . can amount to no more than this, that where the whole power of one department is exercised by the same hands which possess the whole power of another department, the fundamental principle of a free constitution are subverted." See *Federalist No. 47*, in Jacob E. Cook, ed., *The Federalist* (Middletown, Conn.: Wesleyan University Press, 1961), 324, 325–26.

Similarly, Justice Story remarked that when "we speak of a separation of the three great departments of government, and maintain that the separation is indispensable to public liberty, we are to understand this maxim in a limited sense. It is not meant to affirm that they must be kept wholly and entirely separate and distinct, and have no common link of connection or dependence, the one upon the other, in the slightest degree." See Joseph Story, *Commentaries on the Constitution of the United States*, 3rd ed., Vol. 1 (Boston: Little, Brown, 1858), 525.

[62]*United States* v. *Nixon*, 418 U.S. 683 (1974), 707.

[63]*Nixon* v. *Administrator of General Services*, 433 U.S. 425 (1977), 891.

[64]*United States* v. *Nixon*, 418 U.S. 683 (1974), 704–07. With regard to the constitutional principle of presidential privilege, the Court said that "neither the doctrine of separation of powers, nor the need for confidentiality of high level communications, without more, can sustain an absolute, unqualified Presidential privilege of immunity from judicial process under all circumstances." See *United States* v. *Nixon*, 705.

Downloaded from https://prime-pdf-watermark.prime-prod.pubfactory.com/ at 2025-07-01 via free access

handling confidential material is unblemished," would have a substantial chilling effect on executive confidential communications. It ruled that adequate justification existed for the "limited intrusion" into executive confidentiality. The legislative history of the act amply demonstrated that Congress had acted legitimately to preserve the materials for important historical, governmental, and judicial purposes and for restoring public confidence in political processes by facilitating a "full airing of the events leading to Mr. Nixon's resignation."

The Court also noted that any intrusion of executive confidentiality concerned only a very small portion of the 42 million pages of documents, and that the screening process would hardly differ from what occurs in each of the presidential libraries. Nixon had suggested no reason why the statute's screening process would impair confidentiality any more than the same procedure would under the Presidential Libraries Act. In fact, in light of the historical practice of presidential libraries, "past and present executive officials must be well aware of the possibility that, at some time in the future, their communications may be reviewed on a confidential basis by professional archivists." Thus, the Court declared that the expectation of executive communications has "always been limited and subject to erosion over time after an administration leaves office."[65]

The Supreme Court dismissed Nixon's claim that the statute violated his constitutional rights of privacy, speech, and association by providing government custody and screening of his political and private papers. Nixon argued that since certain personal documents not covered under the act, including private intrafamily communications and records arising from his political activities, were intermingled with the rest of the presidential papers, the mere archival screening of these materials would infringe on his First Amendment rights. The screening process, said Nixon, would invade the "private formulation of political thought critical to free speech and association, imposing sanctions upon past expressive activity, and more significantly, limiting that of the future because individuals who learn the substance of certain private communications by [him] . . . will refuse to associate with him."[66] But the Court noted that the provision for archival screening could "hardly differ materially from that contemplated by the appellant's intention to establish a Presidential library, for Presidents who have established such libraries have found that screening by professional archivists was essential."[67] The Supreme Court, moreover, agreed with the district court that the mandated regulations provided by the act would adequately protect Nixon against "public access to materials implicating [his] privacy in political association."[68] The Court declared that the act would not significantly interfere or chill Nixon's First Amendment rights. This concern worried neither President Ford, who had signed the statute into law, nor President Carter, who urged the Court's affirmation of the judgment of the district court. The Court also dismissed Nixon's claim that provisions for government custody and screening constituted a general warrant authorizing search and seizure of his presidential materials. Congress had expressly designed the act to minimize intrusion into the former president's private and personal materials, the Court declared.[69]

As for the former president's claim that

[65]*Nixon* v. *Administrator of General Services*, 433 U.S. 425 (1977), 893, 895–97.

[66]See *Nixon* v. *Administrator of General Services*, 433 U.S. 425 (1977), 905.

[67]*Nixon* v. *Administrator of General Services*, 903.

[68]*Nixon* v. *Administrator of General Services*, 905.

[69]*Nixon* v. *Administrator of General Services*, 902–05.

Downloaded from https://prime-pdf-watermark.prime-prod.pubfactory.com/ at 2025-07-01 via free access

the act violated the bill of attainder clause of the Constitution, the court argued that the statute had permitted Nixon to pursue judicial review and "just compensation" in the courts. The Supreme Court could also find no evidence in the legislative history of the act to indicate congressional desire to single the former president out for punitive action. The court reiterated that ample justification existed to preserve the Nixon materials for prosecutions of Watergate-related crimes and to safeguard the public interest by preserving materials of general historical significance.[70]

Justice Steven's concurring opinion emphasized that, with regard to the bill of attainder clause, Nixon "constituted a legitimate class of one," since he alone among all presidents had resigned his office under unique circumstances and had accepted a pardon for offenses committed while in office. Concurring in part and in judgment, Justice White agreed that the act was not a bill of attainder. Rather, he said, it should be construed as requiring the return to Nixon of all purely private materials, regardless of whether they were of historical significance. Justice Powell, also concurring in part and in judgment, stated that the statute was not a "case in which the Legislative Branch has exceeded its enumerated powers by assuming a function reserved to the Executive under Art. II." Congress had "unquestionably . . . acted within the ambit of its broad authority to investigate, to inform the public, and, ultimately to legislate against suspected corruption and abuse of power in the Executive Branch." Justice Blackmun expressed a view similar to that of Justice Powell but said he fell "somewhat short of sharing the view that [President Carter's] submission, made through the Solicitor General, that the Act serves rather than hinders the Chief Executive's Article II functions, is dispositive of the separation of powers issue." He also said that the act should not "become a model for the disposition of the papers of each President who leaves office at a time when his successor or the Congress is not of his political persuasion."[71] Indeed, the Court deliberately tried to limit its opinion strictly to the Nixon case, and it shunned the broader implications of setting an important precedent for all future presidents and office holders.[72] It is not clear why the Court avoided setting a precedent, unless it feared that such a precedent would be used in future for partisan political purposes that might prove destructive to the political process. The Court's ruling, however, was not unanimous.

In a strongly dissenting opinion, Chief Justice Warren Burger attacked the Supreme Court ruling as a "grave repudiation of nearly 200 years of judicial precedent and historical practice." Burger vigorously asserted that the act indeed violated the separation of powers, Nixon's privacy rights in political and personal communications under the First and Fourth Amendments, and the Constitution's bill of attainder clause. Title I of the statute violated the separation of powers principle because the GSA is a "creature" of the legislative, not the executive, branch of government, said Burger. The Act also represented an attempt by Congress "to exercise powers vested exclusively in the President—the power to control files, records, and papers of the office, which are comparable to the internal workpapers of Members of the House and Senate." Burger argued that Nixon's privacy rights and the extraordinary need for executive confidentiality far outweighed governmental interests in preserving historically significant papers and tape record-

[70]*Nixon* v. *Administrator of General Services*, 912.

[71]*Nixon* v. *Administrator of General Services*, 917–18, 925, 921. Also see Young, "Supreme Court Reports," 1447–48.

[72]Spencer, "*Nixon* v. *Administrator of General Services*," 385.

Downloaded from https://prime-pdf-watermark.prime-prod.pubfactory.com/ at 2025-07-01 via free access

ings for posterity. Burger predicted that Title I "may well be a ghost at future White House conferences," as presidential advisers refrain from giving their candid advice on the affairs of state for fear of unwarranted disclosure. Lastly, Title I clearly constituted a bill of attainder, he said, because it "was special legislation singling out one individual as the target."[73]

Justice Rehnquist also dissented, stating that "today's decision countenances the power of any future Congress to seize the official papers of an outgoing President as he leaves the inaugural stand. In so doing, it poses a real threat to the ability of future Presidents to receive candid advice and to give candid instructions. This result, so at odds with our previous case law on the separation of powers, will daily stand as a veritable sword of Damocles over every succeeding President and his advisors."[74] These dissenting views, while powerfully questioning the majority decision, failed to lift the veil of public mistrust shrouding Nixon. The critically important issues involved in the case tended to be ignored by both the media and Washington observers.

Title II

The Presidential Recordings and Materials Preservation Act had also provided for the establishment of the National Study Commission on Records and Documents of Federal Officials. Title II of the act directed the commission to study governmental traditions and current practices concerning the control, disposition, and preservation of official files, and to "make recommendations to Congress and the President for appropriate legislation, rules, and processes with respect to such control, disposition, and preservation."[75] Although Nixon contested Title I in the courts, the commission had convened on March 1974 and had launched an exhaustive investigation into the record-keeping practices in the White House, the judiciary, and Congress. The commission also held public hearings and panel discussions in San Francisco, Chicago, and Washington, D.C., eliciting the opinions of historians, constitutional scholars, journalists, and archivists, as well as former government officials.

By January 1977 the commission had concluded its investigation and drafted its final report. The commission had quickly discovered during its investigation that little consensus existed concerning the question of the control and disposition of federal records. Historian Arthur Schlesinger, Jr., noted that much of the difficulty stemmed from the problem of balancing conflicting concerns: "the citizen's interest in honest and timely disclosure; the government's interest in the protecting both of the national security information against premature release and of confidential counsel against partisan exploitation; the reporter's interest in instant news; the historian's interest in a rich and revealing record; the individual's interest in his right to privacy."[76] By the time the commission released its report nearly three years after Nixon's resignation, however, many of these concerns had subsided into obscurity. The Watergate controversy was over, Nixon had retreated from public office into the courts, and the public had turned its attention to other issues of pressing national interest.

In the end, the seventeen-member commission could agree on only one funda-

[73]*Nixon* v. *Administrator of General Services*, 433 U.S. 425 (1977), 929, 931, 935, 949.

[74]*Nixon* v. *Administrator of General Services*, 954.

[75]See Final Report of the National Study Commission, 20.

[76]Quoted in Nelson, *The Records of Federal Officials*, 21. Many of the difficulties encountered and the recommendations put forth by the National Study Commission were anticipated in 1975 by the Forty-Eighth American Assembly held at Arden House, Harriman, New York. See "The Records of Public Officials: Final Report of the Forty-Eighth American Assembly," *American Archivist* 38 (July 1975): 329–37.

Downloaded from https://prime-pdf-watermark.prime-prod.pubfactory.com/ at 2025-07-01 via free access

mental issue—ownership. Commission members uniformly concurred that all "documentary materials made or received by Federal officials, including the President, in connection with their constitutional or statutory duties should be the property of the United States."[77] The commission concluded that it was time to end the tradition of treating the records and papers of government officials as personal property. This principle, said the commission, should apply equally to the president, Congress, and the judiciary. Agreement on the need for public ownership, however, left the commission entangled in a web of difficult questions. Should the papers of members of Congress, the federal judiciary, and the president be treated equally? Would public ownership mean immediate access? If so, would such immediate access impoverish the historical record as public officials felt compelled to destroy sensitive materials? If the papers were declared public property, then for how long, if at all, could a president control access to them to alleviate the chilling effect of immediate access?[78]

The commission, however, failed to agree on these and other issues and wrote a final report comprising a majority report signed by fifteen members and an alternate report signed by two members, including the commission's chairman, Herbert R. Bronwell. Despite the broad disagreement between the authors of the majority and alternate reports, the commission released its report to meet the prescribed deadline. Shortly thereafter, the U.S. Supreme Court upheld the constitutionality of the Presidential Recordings and Materials Preservation Act.[79]

Since the Court had limited its opinion strictly to the papers of former President Nixon, it failed to resolve the ambiguous situation surrounding the papers and records of federal officials in general. Any such resolution of the problem would have to come through congressional action. As a result, Congress passed the Presidential Records Act, which was signed by President Carter on 4 November 1978. The statute declared the papers and records of all future presidents after 19 January 1981 to be the property of the federal government. Congress once again, however, exempted itself from a measure it applied only to the presidency. This act of self-exemption was an outright repudiation of the National Study Commission's report, which had strongly recommended that the records of all federal officials be treated equally. Moreover, the statute marked a further legislative assertion over the internal workings of the executive branch. Nevertheless, the Presidential Records Act conclusively reversed approximately two hundred years of tradition of private control over presidential records. Nixon's White House years had severely crippled public confidence in the executive branch to the point where a president and his records might be the subject of a Miranda warning. The other two branches of government, however, retained the public trust and engendered little concern over the disposition of their records. As a result, the apparent inequality of the act raised few questions beyond those vigorously posed by Nixon and his lawyers.

A Return to the Courts

With the 1977 Supreme Court decision, Nixon lost all hope of ever winning private ownership over his presidential materials. The Court's opinion, however, contained a glaring loophole, which Nixon's lawyers would shrewdly exploit to block release of the tapes and documents. In its ruling upholding the Presidential Recordings and Materials Preservation Act, the Court

[77]See Final Report of the National Study Commission, 65.

[78]Nelson, *The Records of Federal Officials*, xviii.

[79]See Final Report of the National Study Commission for a full reading on the differences between the majority and alternate reports.

Downloaded from https://prime-pdf-watermark.prime-prod.pubfactory.com/ at 2025-07-01 via free access

avoided addressing the act's provisions requiring the GSA to issue regulations providing for public access to the Nixon materials. The Court reasoned that it could not review the constitutionality of guidelines that had not yet been promulgated. Thus the Court left open the way for Nixon to contest the constitutionality of any future archival rules that, on the one hand, would have to fulfill congressional intent concerning public access and, on the other, would have to protect Nixon's legitimate rights of privacy, speech, and association.

Soon after the Supreme Court defeat, Nixon's lawyers began an aggressive two-pronged campaign in the courts and in the National Archives to win cash compensation for the White House records and to delay public release of the tapes and documents. In 1980, the National Archives assumed official custody and control over the Nixon materials, and, in conformance with the Presidential Recordings and Materials Preservation Act, Congress ordered the government agency to develop guidelines for their public release at the earliest reasonable date. At the same time, Nixon again returned to the federal courts seeking "just compensation" under the Presidential Recordings and Materials Preservation Act. The former president also claimed he was owed damages for deprivation of his constitutional rights of privacy, speech, and association.[80]

While the case was pending, Nixon's lawyers deftly maneuvered to interpret what the "earliest reasonable date" would be. In this endeavor, they effectively kept the National Archives from publicly releasing any tapes and documents. Throughout the 1980s, their efforts succeeded in curbing the disclosure of the vast majority of the Nixon tapes that had been painstakingly processed and prepared for public release. By limiting to a trickle the release of the White House materials, Nixon was "winning one of the most significant battles of his life after Watergate." Not only was he keeping the public blind to the full story of his White House years, but he did so in defiance of the "clear intent of Congress and the Supreme Court."[81]

Nixon's lawyers orchestrated this delaying action by filing repeated federal court petitions against the National Archives, claiming that the archival review process and regulations governing the release of tapes and documents violated executive confidentiality and Nixon's privacy rights. These were the very same constitutional issues Nixon had raised repeatedly in earlier court cases, including before the Supreme Court itself. With the approbation of the National Archives, Nixon also hired a team of surrogates to monitor closely the work on the White House materials. Moreover, in a clear indication of their political clout, Nixon's lawyers convinced senior officials in the Justice Department to draft a new administrative rule compelling the National Archives to honor any claims of executive privilege made by Nixon. This maneuver was significant because, if the rule were unchallenged, Nixon would gain the right to restrict any document or tape and the "burden would be on the Archives to challenge his claim." The Reporters Committee for Freedom of the Press and Ralph Nader's Public Citizen, however, successfully challenged in court the Justice Department's interference, arguing that the new regulation clearly violated congressional intent.[82]

In 1991, the U.S. district court issued a ruling on Nixon's case claiming cash compensation for the seizure of his White House

[80]*Nixon* v. *United States*, 1991 WL 294835 (D.D.C.), 1; also see Seymour M. Hersh, "Nixon's Last Cover-Up: The Tapes He Wants the Archives to Suppress," *The New Yorker*, Vol. 14, December 1992, 76–95.

[81]Hersh, "Nixon's Last Cover-Up," 79–80.

[82]Hersh, "Nixon's Last Cover-Up," 86–87.

Downloaded from https://prime-pdf-watermark.prime-prod.pubfactory.com/ at 2025-07-01 via free access

materials. Nixon's lawyers had argued that "as was the case with every President of the United States preceding and succeeding him through January 19, 1981," the former president was the lawful owner of the materials and must be compensated for being deprived of his rights. Nixon claimed that by passage of the Presidential Records Act of 1978, Congress recognized that those presidents who held office before 20 January 1981 owned their presidential materials.[83]

In presiding over the case, Judge John Garrett Penn of the U.S. District Court of the District of Columbia ruled that Nixon's claims were invalid, and thus he was not owed any government compensation. Nixon only "held those materials as a trustee for the American people," Penn declared. Presidential papers, said Penn, are "unique" and difficult to compare with other types of property. "To argue that these materials were the sole property of the President is simply without merit." Even assuming that Nixon did hold title to the materials, which he decidedly did not, said the judge, "the Act amounts to nothing more than a regulation restricting the use or disposition of the property, rather than a taking of property." Judge Penn agreed with the Supreme Court in *Nixon* v. *Administrator of General Services* that the American public had an overriding interest in the papers regardless of the status of the legal title of the materials. The judge further stated that "almost from the beginning, Congress recognized that the papers were important to the nation and began to appropriate funds to purchase the papers of the early Presidents." In sum, concluded Penn, Nixon "does not have legal title to the materials in question, and the plaintiff only held these materials as a trustee for the American people."[84]

Nixon immediately appealed the decision. In an extraordinary opinion that contravened all previous judicial opinions, a panel of the U.S. court of appeals by a 3 to 0 vote overturned the ruling of the lower court. The court of appeals said that Nixon indeed was owed compensation by the federal government under the "taking clause" of the Fifth Amendment, which proscribes the seizure of private property by the government without just compensation. "Upon reviewing the long and unbroken history relating to the use, control and disposition of presidential papers, we are convinced that Mr. Nixon had a well-grounded expectation of ownership," declared the court. "In light of this history, we hold that Mr. Nixon, like every President before him, had a compensable property interest in his presidential papers." The court referred the case back to U.S. district court Judge John Garrett Penn to determine the worth of the estimated 42 million items of documents and tapes, which manuscript specialists have said will be valued in the millions of dollars.[85]

As a postscript, the government now has the option of seeking a retrial before the panel, requesting a full hearing by the appeals court, or appealing the case to the U.S. Supreme Court.[86] Nixon has lost all hope of ever reclaiming his presidential materials and, with it, the possibility of ever controlling the truth of his White House years. But for the foreseeable future, Nixon has compensated for his considerable loss by adroitly maneuvering to block release of the vast portion of his presidential tapes and records. His legal campaign is notable for its ironies, contradictions, and unin-

[83]*Nixon* v. *United States*, 1991 WL 294835 (D.D.C.), 1; See also "Judge Says Nixon Doesn't Own Presidential Papers," *New York Times*, 15 December 1991, p. 32.

[84]*Nixon* v. *United States*, 1991 WL 294835 (D.D.C.), 23–27; "Judge Says Nixon Doesn't Own Presidential Papers," 32.

[85]Michael York, "Court Rules for Nixon on Records," *Washington Post*, 18 November 1992, p. A1.

[86]York, "Court Rules for Nixon on Records."

Downloaded from https://prime-pdf-watermark.prime-prod.pubfactory.com/ at 2025-07-01 via free access

tended consequences. One of the supreme ironies is that Nixon, who had resigned the presidency to avoid impeachment for violating the Constitution and obstructing justice, has tried for nearly twenty years to use the Constitution as a means to reclaim his White House materials. Further, in his attempt to adopt the historical tradition of private presidential ownership to lay claim to his White House materials, Nixon instead provided cause for the reversal of that tradition in favor of public dominion over the records of the presidency. And while the Supreme Court rejected Nixon's constitutional claims for ownership, the Court left open the way for him to use some of the very same constitutional arguments to block release and access to the majority of his presidential records. Indeed, Nixon's repeated lawsuits have all but succeeded in compelling a federal agency—the National Archives—to serve as his own private custodian. In another contradiction, although Congress has exhibited an awareness of the pubic interest rights in government records, it has repeatedly demonstrated a conspicuous sanctimony in enacting in relation to the records of the presidency legislation which it would not apply to itself.

Above all else, Nixon's legal odyssey has generated a plethora of federal court cases that have raised the most critical of constitutional issues dealing with the jurisdictional limits of the three branches. His campaign has compelled the Supreme Court itself to clarify and define the permissible scope of the separation of powers principle and the presidential privilege of confidential communications. In so doing, the Court appears to have jettisoned once and for all an archaic view of the Constitution as allowing three airtight compartments of government with absolute and inviolable constitutional powers. From here on, Nixon's legal legacy is likely to be examined in considerable depth when disputes over such separation of powers arise.

In the future, any conclusions historians and others may make of the controversial Nixon years will depend largely on the completeness and accessibility of his White House files. The full story of the Nixon presidency has yet to be told. As a profession charged with safeguarding the documentary record and historical memory of government and society, the archival community has an important stake in this case. What the Nixon legal odyssey has unfortunately demonstrated so far is that a single individual, a former president of the United States, still has the power to subvert congressional intent and conceal historical truth. Nixon's extraordinary success has come at the expense of one of the archival profession's fundamental missions—promoting the public's right to know. Although this mission must also countenance the right to privacy, the balance when concerning official presidential papers must be weighed in favor of publicity. In the past fifty years the presidency has assumed enormous powers and presented numerous opportunities for abuse. Presidents of both parties have been accused of abusing the powers of their office while concealing the record of their activities under the guise of national security. The disposition of presidential records has again surfaced recently with the PROFS case, the attempt by Bush administration officials to destroy computer tapes, including electronic mail, containing highly significant information relating to the Iran-Contra affair, the investigation of Manuel Noriega, and the role of the White House in making billions of dollars worth of loans to Iraq prior to the Persian Gulf War.[87]

[87]In January 1989, the American Historical Association and the American Library Association joined the Public Citizen Litigation Group in filing a lawsuit to prevent White House and National Security Council officials from destroying computer records, including electronic mail communications. The case was named after the electronic mail system used by the National Security Council—the Professional Office System (PROFS). The case moved slowly through the courts

Downloaded from https://prime-pdf-watermark.prime-prod.pubfactory.com/ at 2025-07-01 via free access

What the Nixon and the PROFS case demonstrate is that the archival community, and indeed all its allied professions, must be ever vigilant in helping to ensure that American citizens have all the requisite information to make informed decisions regarding the activities of their government. On the nature of education, James Madison wrote that a "popular government, without popular information, or the means of acquiring it is but a prologue to a Farce or a Tragedy; or, perhaps, both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors must arm themselves with the power which knowledge gives."[88] The American republic has had its share of tragedy stemming from government illegality, secrecy, and abuse of power. Archivists have always played an important, albeit obscure, role in the enterprise of promoting the public's right to know. But this role is also contingent on the need to speak out on issues of vital historical concern. When controversy first erupted in 1974 over the disposition of the Nixon tapes and records, the Society of American Archivists rejected a resolution calling for the papers of all federal officials to be public property. The SAA quietly disagreed with the American Historical Association, the American Political Science Association, and the Reporters Committee for Freedom of the Press over the magnitude of the Nixon case and whether the Presidential Libraries Act sanctioned the Nixon-Sampson agreement. The archival community "found itself on the sidelines" as their colleagues in related fields challenged Nixon's constitutional claims of ownership over his White House materials.[89] In light of recent revelations concerning the status of the Nixon project and alleged mismanagement at the National Archives, however, the SAA Council has unequivocally voiced its concern regarding an agency that most broadly represents the

due to repeated appeals and complaints. The government's position throughout the case was that the computer tapes did not constitute historical records, although the tapes had provided significant evidence in the Iran-Contra hearings and in the investigation of Manuel Noriega, the former Panamanian dictator accused of aiding and abetting the infiltration of drugs into the United States. The computer tapes, albeit classified, are also presumed to contain highly significant information concerning the role of the White House in making billions of dollars worth of loans to Saddam Hussein prior to Iraq's invasion of Kuwait in 1990. The National Archives supported the government's position by officially stating that electronic mail computer tapes were not federal records. Judge Charles R. Richey of the U.S. District Court for the District of Columbia ruled otherwise, stating for the first time that the Federal Records Act applied to electronic messages. See the Archives Listserv (electronic bulletin board on Internet) press release issued by Page Putnam Miller, director of the National Coordinating Committee for the Promotion of History, 12 January 1993. See also John O'Neil, "Judge Tells White House to Save Computer Tapes," *New York Times*, 7 January 1993, p. A15; Stephen Labanton, "Judge Sees Plan by White House to Defy Orders and Purge Data," *New York Times,* 15 January 1993, pp. A1, 18; John O'Neil, "Some Bush White House Tapes Lost, Archivists Say," *New York Times,* 14 March 1993, p. A25; and the article by David Bearman in this volume.

[88]Gaillard Hunt, ed., *The Writings of James Madison, 1819–1836*, vol. 9 (New York: G. P. Putnam's Sons, 1910), 103.

[89]When controversy first erupted over the disposition of the Nixon tapes and records, SAA rejected a resolution calling for the papers of all federal officials to be public property. The SAA leadership and the American archival profession had considered the resolution hastily conceived, politically biased, a threat to the Society's tax-exempt status, and a possible violation of the Hatch Act. Instead, the SAA passed a resolution pledging that it would study the issue, and SAA Council issued a "heavily qualified resolution supporting the principle of public ownership." SAA opposed the position taken by the American Historical Association, the American Political Science Association, the Committee for the Freedom of the Press, and other groups that challenged the concept that the Presidential Libraries Act sanctioned the terms of the Nixon-Sampson agreement. While the archival community took a neutral position on the Nixon case, their colleagues in related professions 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." See Cook, "Private Papers of Public Officials," 318.

Downloaded from https://prime-pdf-watermark.prime-prod.pubfactory.com/ at 2025-07-01 via free access

archival profession.[90] The SAA resolution stands as an important acknowledgement of the profession's larger mission in safeguarding the historical record of the national government. The National Archives, the most visible of archival institutions, has painstakingly preserved and prepared for release a large portion of the Nixon materials. Under the direction of a new archivist of the United States, it must now seek vigorously to ensure their public release.

[90]See "SAA Resolution on the National Archives and Records Administration," *Archival Outlook*, March 1993, 4.

Downloaded from https://prime-pdf-watermark.prime-prod.pubfactory.com/ at 2025-07-01 via free access

Appendix
Chronology of Events

24 July 1974	The U.S. Supreme Court in the case of *United States* v. *Nixon* compels President Nixon to turn over selected tapes and records to Special Watergate Prosecutor Leon Jaworski. One of the tapes contains the "smoking gun"—an Oval Office conversation between Nixon and H. R. Haldeman on 23 June 1972—that conclusively implicates Nixon in the Watergate conspiracy.
9 August 1974	President Richard M. Nixon resigns from office under threat of impeachment. On leaving office, Nixon directs government archivists to pack his White House records and ship them to him in San Clemente, California.
15 August 1974	The office of the special Watergate prosecutor advises President Gerald Ford of the continuing need of the Nixon presidential materials for the Watergate trials. The government assumes temporary custody of the tapes and records.
22 August 1974	President Ford requests an opinion from Attorney General William Saxbe concerning the issue of ownership of the Nixon presidential materials and the responsibilities of the Ford administration with respect to subpoenas or other court orders requiring production of these materials.
6 September 1974	Attorney General Saxbe issues written opinion stating that former President Nixon rightfully owns his White House materials. The opinion, however, advises that the materials should be subject to court orders and subpoenas.
7 September 1974	Following Saxbe's opinion, Nixon signs depository agreement with Administrator of General Services Arthur F. Sampson, allowing the former president almost total control over his White House materials. The Nixon-Sampson agreement is publicly announced on 8 September, arousing immediate suspicion that Nixon will seek to destroy documents and tapes necessary for the investigation of the Watergate scandal and to subvert a true understanding of other controversial events of his White House years.
10 September 1974	Columnist Jack Anderson files application with the General Services Administration (GSA) under the Freedom of Information Act (FOIA) seeking access to materials covered by the Nixon-Sampson agreement.
18 September 1974	Announcement of the Nixon-Sampson agreement causes the introduction of S. 4016 by thirteen senators in the U.S. Senate. The legislation is designed to abrogate the Nixon-Sampson agreement and to seize temporary custody and control of the Nixon materials.
2 October 1974	Lillian Hellman and other members of the Committee for Public Justice also file an application with the GSA under FOIA, but limit it to the tape recordings of the White House and Executive Office.
4 October 1974	S. 4016 passes the Senate and goes to the House of Representatives.

Downloaded from https://prime-pdf-watermark.prime-prod.pubfactory.com/ at 2025-07-01 via free access

17 October 1974	Nixon files suit against Arthur F. Sampson and the GSA in district court, seeking specific enforcement of the Nixon-Sampson agreement.
21 October 1974	Columnist Jack Anderson again moves to intervene in the case to prevent implementation of the Nixon-Sampson agreement. The Watergate special prosecutor moves to intervene to protect the interests of his office concerning the records and taped conversations needed for the Watergate trials. In response to these motions, Judge Charles R. Richey of the U.S. District Court of the District of Columbia issues a temporary restraining order prohibiting implementation of the Nixon-Sampson agreement. The court also consolidates the Nixon action with the other suits in the case of *Nixon* v. *Sampson*.
24 October 1974	Lillian Hellman and other members of the Committee for Public Justice bring suit against the government and former President Nixon for declaratory and injunctive relief, seeking access to specific tape recordings. The Hellman plaintiffs move to consolidate their action with *Nixon* v. *Sampson*. On 31 October, the court consolidates the case of Lillian Hellman et al. with those of other plaintiffs.
9 December 1974	The House of Representative passes final version of S. 4016 to abrogate the Nixon-Sampson agreement.
19 December 1974	President Ford signs into law final version of S. 4016, otherwise known as the Presidential Recordings and Materials Preservation Act. Title I of the act dissolves the Nixon-Sampson agreement and directs the GSA to assume immediate custody of the Nixon presidential materials, to make them available for use in judicial proceedings, and to develop regulations providing for their public access. Title I also provides for "just compensation" to Nixon if the courts decide he was wrongly deprived of his personal property. Title II establishes the National Study Commission on Records and Documents of Federal Officials to "study the control, disposition, and preservation of records and documents produced by or on behalf of Federal officials."
20 December 1974	Nixon brings suit in district court to enjoin enforcement of Title I of the Presidential Recordings and Materials Preservation Act on the grounds that it transgresses the federal Constitution. The case is assigned to Judge Charles Richey, before whom the case of *Nixon* v. *Sampson* is still pending. At the same time, Nixon's lawyers request that a three-judge court be convened to hear and determine Nixon's constitutional claims.
31 January 1975	Judge Richey issues ruling on *Nixon* v. *Sampson*, dismissing Nixon's claims of ownership and supporting the abrogation of the Nixon-Sampson agreement under Title I of the Presidential Recordings and Materials Preservation Act. The U.S. Court of Appeals for the District of Columbia stays entry of the judgment to allow a three-judge district court to hear Nixon's constitutional claims. Nixon's lawyers contend that Title I violates (1) the separation of powers, (2) the presidential privilege doctrine, (3) Nixon's privacy rights, (4) Nixon's First Amendment rights of association and political speech, and (5) the bill of attainder clause.

Downloaded from https://prime-pdf-watermark.prime-prod.pubfactory.com/ at 2025-07-01 via free access

7 January 1976	The three-judge U.S. District Court for the District of Columbia rejects each of Nixon's challenges to the constitutionality of Title I of the act. Nixon immediately appeals the decision to the U.S. Supreme Court in the case *Nixon* v. *Administrator of General Services*.
31 March 1977	The National Study Commission on Records and Documents of Federal Officials issues final report endorsing the principle that all "documentary materials made or received by Federal officials, including the President, in connection with their constitutional or statutory duties should be the property of the United States."
28 June 1977	On direct appeal, the Supreme Court affirms judgment of the lower court in *Nixon* v. *Administrator of General Services*. Thus Nixon loses the case for ownership of his White House papers. The Court's opinion, however, does not address the act's provisions requiring the GSA to issue regulations providing for public access to the Nixon materials. The court reasons that it cannot review the constitutionality of guidelines not yet promulgated. This loophole clears the way for Nixon's repeated challenges to the constitutionality of any future archival rules that, on the one hand, will have to fulfill congressional intent concerning public access and, on the other, will have to protect Nixon's legitimate rights of privacy, speech, and association.
4 November 1978	President Jimmy Carter signs into law the Presidential Records Act, which declares the papers and records of all future presidents after 19 January 1981 to be the property of the federal government. The act signifies a repudiation of the National Study Commission's report, which advised that the records of all public officials be treated equally.
19 December 1980	Nixon files suit in federal court under Title I, claiming he is owed damages for being deprived of his constitutional rights of privacy, speech, and association.
1980s	Nixon files repeated federal court petitions against the National Archives, successfully blocking public release of his White House tapes and records. Nixon claims that NARA's archival rules governing public access violate executive confidentiality and his privacy rights.
13 December 1991	Judge John Garrett Penn of the U.S. district court denies Nixon's claims for cash compensation under the Presidential Recordings and Materials Preservation Act. Nixon appeals the decision.
17 September 1992	A federal appeals court rules that Nixon must be compensated for the government's seizure of his White House tapes and records. The decision, issued by a unanimous three-judge panel of U.S. Court of Appeals for the District of Columbia, reverses the ruling of the federal district court. The case is returned to Judge Penn to determine the amount of compensation owed to Nixon.

Downloaded from https://prime-pdf-watermark.prime-prod.pubfactory.com/ at 2025-07-01 via free access