Presidential Materials: Politics and the Presidential Records Act

Bruce P. Montgomery

Abstract

President George W. Bush's Executive Order No. 13,233, issued on 1 November 2001, marked the latest attempt by the executive branch to circumvent or otherwise nullify the key provisions of the Presidential Records Act. Congress passed the Presidential Records Act in 1978 in the wake of the Watergate scandals to assure public ownership and control over presidential materials. Nonetheless, starting with the presidency of Ronald Reagan, who was the first president to be covered by the act, the executive branch has repeatedly attacked the statute through various regulatory schemes and overly broad claims of executive privilege. Indeed, with their historical reputations and legacies at stake, presidents have never fully accepted the concept of yielding control over their presidential materials. This article reviews the troubling history of the Presidential Records Act and the implications of the latest attempts to restrict access to presidential papers.

Following the Watergate scandals, Congress passed the 1978 Presidential Records Act (PRA), declaring the records of the presidency to be the property of the American people. Unfortunately, neither that law nor the public's right to know about the activities of their government has dissuaded presidents from attempting to reassert control over their presidential records. Congress enacted the PRA to ensure that future presidents could not permanently obstruct access to or destroy the records of their White House years. The Act's key features are straightforward. While it grants access to some papers five years after a president leaves office, former presidents may withhold sensitive materials, including confidential communications with advisors, for up to twelve years. Thereafter the materials become publicly available without qualification with the exception of those documents falling under national security exemptions. Nevertheless, since passage of the PRA, presidents have invented various legal and regulatory schemes to circumvent, override, or nullify it to reclaim control over their White House materials. Accordingly, in one form or another starting with the presidency of Ronald Reagan, the Act has been under nearly continuous attack.

The most recent attempt to nullify the PRA has been President George W. Bush's 1 November 2001 Executive Order No. 13,233, which erected new barriers to obtaining access to former presidents' White House materials. If left to stand, the Bush order would effectively eviscerate the PRA by allowing former presidents, vice presidents, and their heirs to assert independently based claims of executive privilege, however questionable, to control access to their White House records seemingly in perpetuity. The Bush order is similar to efforts by the Reagan administration to give former president Richard Nixon veto power over the release of his alleged privileged White House materials. Foreclosing disclosure of executive branch communications was also the crux of the controversy in *Armstrong v. Bush* over attempts by White House and National Security Council (NSC) officials to erase computer files documenting eight years of the Reagan presidency. The attempt to reassert unfettered control over presidential materials further served as the central issue in *American Historical Association v. Peterson*, which nullified an eleventh-hour agreement between then U.S. archivist Don Wilson and President George H. W. Bush that gave the president exclusive and continuous control over all "presidential information and all derivative information in whatever form" after he left office. What emerges upon examination of these various cases is an extraordinary pattern of presidential attempts to subvert or nullify the PRA by means of regulatory and legal maneuvering and by reasserting former president Nixon's discredited claims of executive privilege. The purpose behind these efforts, of course, has been to re-establish a president's dominion over his White House materials. In each case, presidential attempts to overthrow the PRA have been contested in the courts by public advocacy groups, historians, and researchers with the aim of ensuring that the records of the presidency remain in the public realm. Indeed, by declaring the records of the presidency to be public property, the PRA has had a turbulent history from the start as the White House, Congress, and judiciary have struggled over the balance of powers and the proper limits of the prerogatives of executive privilege.

Tradition Unbound

The enactment of the PRA stemmed primarily from three factors: 1) the historical tradition of private ownership of presidential papers; 2) the constitutional doctrine of executive privilege as interpreted by the courts in the Watergate scandals; and 3) Congress's response to Watergate and subsequent efforts by President Nixon to assert control over and restrict access to his White House materials.[1] From George Washington through Franklin Roosevelt,

[1] Carl Bretscher, *Presidential Records Act: The President and Judicial Review Under the Records Acts*, 60 Geo. Wash. L. Rev. 1477, 1481 (June 1992).

presidents had always treated their papers as private property. Presidents either purged their papers or left them to their heirs, who in turn sold them for profit, destroyed them, or donated or sold them to one or more libraries, including the Library of Congress. President Franklin D. Roosevelt significantly altered the tradition of private ownership of presidential papers by establishing a new type of institution—the presidential library (with the aim of preserving and making accessible White House materials under the auspices of a federally operated facility built with private funds). While dramatically increasing the preservation of presidential materials, the presidential library system did little to alter the tradition of private ownership because presidents retained discretion over whether to deposit their papers in the federally operated depository.[2]

The tradition of private ownership of presidential papers comported with the notion of executive privilege. Since President Washington, presidents asserted their right to withhold internal communications from Congress and the public to assure the confidentiality of executive branch deliberations, as well as to shield military and diplomatic secrets and ongoing legal investigations. On the whole, the courts accepted the legitimacy of executive privilege by recognizing the principle of the separation of powers and the necessity that each branch must operate with independence from the other. Nevertheless, the courts retained the right of review over claims of this privilege by the executive branch.[3] Not until the Watergate scandals did the exercise of executive privilege—or the right of a president to withhold materials to protect the confidentiality of communications with senior advisors—come under wholesale scrutiny by the courts. In *United States v. Nixon*, the Supreme Court for the first time defined when a president could be compelled to release executive branch materials against his will.[4] Prior to the case, the law defining the permissible scope of executive privilege was "incomplete at best."[5] Although the Supreme Court in earlier opinions had taken a strict constructionist view that the three

[2] See Herbert R. Collins and David B. Weaver, eds., *Wills of U.S. Presidents* (New York: Communications Channels, 1976), 24, 151; Frank L. Schick, Renee Chick, 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, 82, 93, 101; Bruce P. Montgomery, "Nixon's Legal Legacy: White House Papers and the Constitution," *American Archivist* 56 (Fall 1993): 591. See also Carl McGowan, *Presidents and Their Papers*, 68 Minn. L. Rev. 409 (1983).

[3] See Norman Dorsen and John H. F. Shattuck, *Executive Privilege, the Congress and the Courts*, 35 Ohio St. L. J 1, 13–16 (1974); and Bretscher, *Presidential Records Act*, 1482.

[4] See *United States v. Nixon*, 418 U.S. 683 (1974), and Christopher Walter, *Legitimacy: The Sacrificial Lamb at the Altar of Executive Privilege*, 78 Kentucky L. Jour. 817 (1989–90): 818–19. *United States v. Nixon* originated when Special Watergate Prosecutor Leon Jaworski ordered President Nixon to turn over an additional sixty-four tapes. When Nixon refused, Jaworski brought suit in district court, which ruled against the president. Nixon then appealed the decision, and on 24 July 1974, the Supreme Court by a unanimous 8-to-0 vote, ordered the president to turn over the tapes and documents demanded by the special Watergate prosecutor.

[5] Walter, *Legitimacy*, 818.

branches had no business interfering with each other's practices or policies, *United States v. Nixon* replaced this interpretation of the separation of powers with a balancing test.[6] The Court weighed the president's claim of a privilege of confidentiality in executive communications against the constitutional exigencies of the judiciary to carry out the administration of criminal justice. Throughout Watergate, Nixon had maintained that he had an absolute and unreviewable privilege concerning 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, and sensitive national security secrets.[7] The Court thus compelled Nixon to turn over the very tapes and documents to Special Watergate Prosecutor Leon Jaworski that destroyed his presidency.

In addition to redefining the permissible scope of executive privilege, the Watergate crisis resulted in the termination of the tradition of private ownership of presidential materials. Following his resignation from office under threat of impeachment, Nixon signed a depository agreement with the administrator of the General Services Administration (GSA) allowing him almost total discretion over his presidential materials, including the controversial White House tapes. Under the terms of the Nixon-Sampson agreement, Nixon retained legal title to the materials and retained the right not only to control access to them, but also to destroy them if he so desired.[8] Although the agreement appeared highly suspicious in light of the Watergate crisis, it was in keeping with historical precedent. But never was such a claim of ownership of presidential materials made under the shadow of grave suspicion. Tradition aside, Congress acted swiftly to seize Nixon's tapes and records under the 1974 Presidential Recordings and Materials Preservation Act (PRMPA or Materials Act) lest the former president act to destroy the tapes. 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 for their public access.[9] In response, Nixon challenged the Act's constitutionality, arguing primarily that it violated the separation of powers and executive privilege. In *Nixon v. Administrator of General Services* (1977), the Supreme Court rejected Nixon's arguments that the Act violated the separation of powers since both Presidents Ford and Carter had already endorsed it. President Ford signed the Act into law, and President

[6] Patricia L. Spencer, *Nixon v. Administrator of General Services*, 11 Akron L. Rev. 378–79 (Fall 1977).

[7] Alfred Hill, *Testimonial Privilege and Fair Trial*, 80 Columb. L. Rev. 1173, 1179 (October 1980). See also *United States v. Nixon*, 711–12.

[8] Text of the agreement between Richard Nixon and Arthur F. Sampson reprinted in *Congressional Record*, 93rd Cong., 2d sess., 1974, 120, pt. 25:33965.

[9] *Presidential Recordings and Materials Preservation Act, U.S. Code*, vol. 44, secs. 2107 note 3315–3324 (1974).

Jimmy Carter, through his solicitor general, had opposed Nixon's lawsuit.[10] The Court also found the Act to conform to the separation of powers by placing the presidential materials under the control of the U.S. archivist, an executive branch official appointed by the president. Finally, the Court argued that the legal, public, and historical interests in the materials superceded the qualified principle of executive privilege; hence rejecting Nixon's claim that the Act violated his presumptive right of executive privilege.[11]

The PRA: A New Tradition of Public Ownership

The Supreme Court's decision in *Nixon v. Administrator* avoided the larger question of whether presidential materials should be considered public property.[12] The vacuum left by the Court's decision and considerations of executive privilege stemming from Watergate directly shaped both the PRA[13] and subsequent presidential attempts to circumvent the Act. Congress enacted the PRA to prevent another legal crisis surrounding ownership of presidential records by asserting public ownership over presidential materials and ensuring their preservation and public accessibility according to established procedures governing these materials at the end of a presidential administration. In addition, in passing the PRA, Congress tried to resolve the related issue of executive privilege and a president's presumptive right to control access to presidential records.

The PRA provides that the federal government retains complete ownership, possession, and control over all presidential records.[14] The Act obligates an incumbent president to create and manage an adequate documentary record of his administration. The PRA covers all documentary materials after 20 January 1981 produced or received by the president, his immediate staff, or any unit or person in the executive office of the president whose sole function is to advise and assist the president.[15] These documents must relate directly to the execution of the president's constitutional, statutory, or other official duties. The Act excludes personal records or papers, copies of reference mate-

[10] *Nixon v. Administrator of General Services*, 433 U.S. 425, 429, 441 (1977).

[11] *Nixon v. Administrator of General Services*, 451–55.

[12] *Nixon v. Administrator of General Services*, 445.

[13] Bretscher, *Presidential Records Act*, 1483.

[14] U.S. House, *Presidential Records Act of 1978*, 95th Cong., 2d sess. 2 (1978), H. Rep. 95–1487. Presidential records include books, papers, documents, films, maps, sound recordings, computer files, and other materials that are created or received by the president and his aides. This definition excludes personal records unrelated to the president's official duties and official agency records available to the public through the Freedom of Information Act.

[15] *Presidential Records Act of 1978, U.S. Code*, vol. 44, secs. 2201–7 (1978).

rials, or any agency records already covered by the Federal Records Acts (FRA). The PRA also enables the president to exercise discretion over the disposal of any records that have no historical, evidentiary, administrative, or informational value. Nevertheless, prior to the disposal of any records, the president must obtain in writing the views of the U.S. archivist concerning the intended disposal. If the U.S. archivist determines that the materials have enduring value, Congress must be notified and the president must submit disposal schedules to Congress and wait sixty days before disposal. Although neither the archivist nor Congress may veto the president's decision to dispose of records, Congress does have the power to intervene legislatively to prohibit the destruction of certain materials.[16]

While the PRA establishes public dominion over executive branch materials and gives the archivist authority over the disposition of presidential records after a president leaves office, it nevertheless allows former presidents to impose limited restrictions on public access to some of their materials. Specifically, presidents may restrict the availability of presidential materials that fall within six categories for up to twelve years following a president's last day in office. Under the PRA, these restrictive classes of information include materials relating to national defense or security, foreign policy, appointment of federal officials, trade secrets and privileged commercial information, personnel and medical information, and confidential communications between the president and his advisors. During the first five years after a president leaves office, the PRA restricts public accessibility to any materials to permit the National Archives and Records Administration (NARA) the opportunity to gain physical and intellectual control over the materials, to deposit them in a presidential library, and to begin the process of preparing them for public access. After five years, anyone may request access to presidential records according to procedures approximating the Freedom of Information Act (FOIA).

Nonetheless, no materials classified within any of the twelve-year restriction categories may be released. Following the twelve-year restriction, a former president's White House materials become publicly available under FOIA standards, excepting those records covered by FOIA exemptions. The FOIA exemptions, pertaining specifically to classified materials, prohibit disclosure either under the FOIA or the PRA even after the twelve-year restriction expires. The one FOIA exemption not applicable under the PRA is "exemption 5," which covers materials subject to executive privilege. As a result, after twelve years, confidential communications between a president and his advisors become available for public release. Congress believed that twelve years was ample time to protect records containing deliberations between a president and his

[16] *Presidential Records Act of 1978*, sec. 2203 (e).

advisors, and that, after the expiration of this time period, the public interest outweighed any embarrassment that might accompany the public release of materials reflecting the "White House's inner decision making process."[17]

Congress drafted the PRA understanding the critical importance of executive privilege and aiming to avert another Watergate-like crisis by declaring public control and ownership over presidential records and providing specific procedures by which to make them publicly available. But Congress took precautions to balance the need to increase public control and availability of presidential materials with the president's presumptive privilege to withhold internal communications. This attentiveness to the separation of powers principle, however, tilted the balance toward the sanctity of executive privilege over public accountability. Indeed, as later events showed, this tilt toward executive privilege proved to be the Act's Achilles heel, opening the door for successive presidents to attempt to assert overly broad privilege claims to control their presidential materials. The Act may have ended the tradition of private ownership of presidential records, but presidents continued to act as if their papers and records were their own private property.

The Reagan Administration: The PRA Under Attack

Not long after passage of the PRA, the Reagan White House pursued the first opportunity to override the Act. In response to the wishes of former president Nixon and his lawyers, Reagan officials invented a regulatory scheme to protect Nixon's expansive privilege claims over his presidential materials. At immediate issue was Nixon's continuing campaign to block disclosure of his White House records and tapes after his 1977 Supreme Court defeat in *Nixon v. Administrator of General Services*. Following his failed court effort to reclaim ownership of his presidential materials, Nixon launched a legal assault on the rules and regulations governing the processing and accessibility of his White House materials under the Materials Act. If he could not regain ownership over his White House materials, then he could at least block access to them indefinitely as if they were still his own personal property. Indeed, Nixon and his lawyers had vigorously objected to each set of regulations issued by NARA to make his presidential materials publicly available as stipulated by the Materials Act. By 1980, the GSA had issued five different sets of regulations providing for

[17] *Presidential Records Act of 1978*, sec. 2203 (e). Sec. also Bretscher, *Presidential Records Act*, 1484–85, and Testimony of Scott L. Nelson before Subcommittee on Government Efficiency, Financial Management and Intergovernmental Affairs of the House Committee on Government Reform, *Hearing on Oversight of Presidential Records Act*, 6 November 2001, Public Citizen Web site at <http://www.citizen.org/litigation/briefs/FOIAGovtSec/PresRecords/articles.cfm?ID=6427> (1 March 2003).

public access to the records and tapes as Nixon, the Reagan administration, Congress, and the National Archives "struggled, in and out of the federal courts, to determine who had access to what."[18]

In 1985, NARA began to prepare a sixth set of regulations, heralding the imminent release of more than forty million pages of documents and 4,000 hours of tape recordings. To block release of these materials, Nixon's lawyers met privately with top Reagan officials at the Justice Department, then under Attorney General Edwin Meese III. The parties agreed that NARA should respect Nixon's continuing claims of executive privilege over his presidential records and tapes. Subsequently, on 18 February 1986, the Justice Department appeared to foreclose any prospect of releasing the Nixon materials by issuing an extraordinary memorandum concerning the new regulations. The new regulations had been sent to the Office of Management and Budget (OMB) for review under President Reagan's Executive Order No. 12,291, providing OMB's Office of Information and Regulatory Affairs (OIRA) the authority to require and supervise cost-benefit balancing by executive rule-making agencies. Upon receiving the regulations, OIRA asked the Office of Legal Counsel (OLC) in the Justice Department to review the proposed guidelines to determine whether they met the mandate under PRMPA. The forwarding of the regulations was one thing, but what happened next marked a bold attempt to usurp the authority of the National Archives and to frustrate the intent of the Materials Act, the U.S. Supreme Court, and the PRA.[19]

Both the OLC and OIRA claimed Reagan's Executive Order No. 12,291 as a basis of authority to review the regulations and then to impose upon NARA a system of subservience to any claims of executive privilege asserted by former president Nixon. The executive order had prescribed that regulatory action "shall not be undertaken unless the potential benefits to society for the regulations outweigh the potential costs to society."[20] It further prescribed that rule-making agencies must furnish proposed rules and regulatory analyses to OIRA to ensure that a cost-benefit analysis can be carried out. These provisions were ostensibly the reason for OIRA review of the proposed guidelines since Congress mandated the National Archives under the Materials Act to promulgate regulations governing public access to the Nixon records and tapes. The OLC memorandum, however, raised absolutely no question concerning the cost of the regulations, but instead wove an elaborate series of legal claims and directives to the U.S. archivist on how he should respond to them. As the

[18] Seymour Hersh, "A Reporter at Large: Nixon's Last Cover-up" *New Yorker*, 14 December 1992, 83.

[19] U.S. House Subcommittee on Government Information, Justice, and Agriculture of the Committee on Government Operations, *Statement on Behalf of the Office of General Council to the Clerk of the House of Representatives*, 99th Cong., 2nd sess. (29 April 1986), 3.

[20] *Statement on Behalf of the Office of General Council*, 4.

general counsel to the House of Representatives observed, officials outside NARA were using the executive order to assert a novel claim of authority over the proposed regulations when they had no statutory mandate under the Materials Act to do so. In effect, the OIRA and OLC claimed the executive order concerning cost-benefit analysis as a "fig leaf to cover their lack of authority for an attempted seizure of power."[21]As an executive branch agency, NARA could do little but accede to the directive, which the Justice Department drafted on behalf of the White House.

The Justice Department asserted that certain decisions, intentionally vested in the National Archives by Congress, should be taken out of the U.S. archivist's hands. In a written statement prepared for the April 1986 hearings of the Congressional Committee on Government Operations, which was reviewing the contentious Nixon access regulations, Eric R. Glitzenstein of the Public Citizen Litigation Group denounced the directive for requiring the archivist to abide by any claim of executive privilege asserted by Nixon "no matter how groundless the assertion may be as a matter of law, or how wrong it may be as a matter of policy, or how inconsistent it may be with the Materials Act."[22] The memorandum stated that NARA not only will "honor" any claim of executive privilege, but "must and will" treat any claim according to the manner directed by the opinion. The memorandum contained little question that Justice officials intended to make NARA subservient to Nixon's wishes concerning public accessibility to his presidential materials. In so doing, Justice officials attempted to redefine the scope of executive privilege to comport with Nixon's claims of the prerogative. The primary impetus behind the Justice Department's memorandum, however, was not Nixon, but Reagan. By redefining the scope of executive privilege to suit the incumbent, Attorney General Edwin Meese hoped not only to lay the groundwork for Reagan but also for the protection and courtesy of his successors. Writing in the *Wall Street Journal*, historian Stanley Kutler noted that the "Reagan White House well realizes what stakes are involved in the future interpretation of the Presidential Records Act of 1978," which provided for public ownership over presidential materials.[23] Meese's efforts on behalf of Nixon's notions of executive privilege appeared to return the issue to "square one and 1973" when one of Nixon's lawyers flatly declared: "It's for the president alone to say what is covered by executive privilege."[24] Meese now seemed to be offering Nixon the

[21] *Statement on Behalf of the Office of General Council*, 4–6.

[22] Testimony of Eric R. Glitzenstein before the U.S. House Subcommittee on Government Information, Justice, and Agriculture of the Committee on Government Operations, 99th Cong., 2nd sess. (29 April 1986).

[23] Stanley L. Kutler, "Presidential Materials: Nixon's Ghost at Justice," *Wall Street Journal*, 1 April 1986.

[24] Kutler, "Presidential Materials."

protection of the Justice Department while defying the intentions of congressional statutes and Supreme Court opinions delimiting the scope of executive privilege.

The effort was alarming in light of Nixon's overly broad past claims. In 1974, the Supreme Court in *United States v. Nixon* thwarted the president's attempt to claim an absolute and unreviewable right of executive privilege. The high Court again disabused this idea in its 1977 opinion in *Nixon v. Administrator of General Services*. Yet, the Justice Department chose to defer to a former president in apparent defiance of congressional statutes and the Supreme Court. The stakes were high. If the opinion stood, it would undermine the PRA by allowing a former president merely to assert a claim of privilege, no matter how arbitrary, to block indefinitely the release of his White House materials. By essentially nullifying the PRA, the opinion would enable former presidents to control their presidential records again, almost as if they were private property. The opinion would have resurrected part of the Nixon-Sampson agreement in allowing Nixon to dictate control over the accessibility of his White House documents. At the same time, the memorandum went far beyond the Nixon case in providing all presidents broad discretion over access to their presidential materials upon leaving office, an exigency the PRA was specifically designed to avert. Nevertheless, the whole matter of NARA's access regulations to Nixon's presidential materials was tied up in litigation. As a result, Congress appeared to take no specific action, deferring instead to the courts to address Nixon's specific constitutional challenges to NARA's access regulations.

While Congress demurred, the Public Citizen Litigation Group filed a separate suit in the Circuit Court of the District of Columbia to counteract the Justice Department's effort to restrict access to Nixon's presidential materials. In *Public Citizen v. Burke*, the D.C. Circuit held in 1988 that the Constitution does not require the U.S. archivist to defer to a former president's claim of executive privilege as stated in the Justice Department memorandum. According to the court, "to say that the former president's invocation of executive privilege cannot be disputed by the archivist, a subordinate of the incumbent president, but must rather be evaluated by the Judiciary in the first instance is in truth to delegate to the Judiciary the Executive Branch responsibility" to carry out the law. The court ruled that there was "no reason" why the archivist was "constitutionally compelled" to defer to a former president's claim of privilege.[25] The court therefore reasserted the limited scope of executive privilege concerning a former president's control over his presidential materials and upheld the original intent of the PRA, the Materials Act, and earlier Supreme Court rulings. As

[25] See *Public Citizen v. Burke*, 843 F. 2d 1473, 1479 (D.C. Cir. 1988).

a result of the district court's decision, the PRA withstood the first substantial challenge by the White House to nullify it.

Armstrong v. Bush: Further Undermining the PRA

The White House posed a greater challenge to the PRA when Reagan administration officials tried to purge the electronic records of the executive office of the president and the National Security Council shortly before the Bush administration took office. In the remaining days of the Reagan administration in January 1989, the White House moved to erase its computer tapes as part of the transition to the incoming Bush administration. The computer tapes were frequently referred to as PROFS after the name of the NSC's electronic mail system, IBM's proprietary Professional Office System. President Reagan's legal counsel advised White House staff, including the NSC, that the electronic communications should be handled as either federal or presidential records under the FRA or PRA. Because none of the sources of guidance to the White House concerning its obligations under these records statutes—including the *White House Office Staff Manual* or the *File Maintenance Manual*—made any reference to PROFS, the administration sought to destroy the computer tapes. Some of the NSC computer tapes documented the activities of White House officials in the sale of arms to Iran and the diversion of funds to the Contra guerilla force in Nicaragua.[26] These tapes provided critical evidence in the congressional and criminal investigations of the Iran-Contra Affair. As such, the communications, especially between 1986 and 1987, carried considerable political and historical importance.[27]

When news of the intended purge of the computer tapes became public, the American Historical Association, the American Library Association, the National Security Archive (a nonprofit research center), and journalist Scott Armstrong joined with Public Citizen in filing a lawsuit to halt the destruction of the electronic communications. The lawsuit was filed against President Ronald Reagan, President-elect George Bush, the NSC, and the U.S. archivist on 20 January 1989, the last day of the Reagan presidency. The plaintiffs subsequently amended their complaint, dropping their claim against former president Reagan and renaming George Bush in his new capacity as president.[28] The suit contended that electronic messages should be covered under the same

[26] Bretscher, *Presidential Records Act*, 1479.

[27] Page P. Miller, "Insuring the Preservation of Electronic Records," *Chronicle of Higher Education*, 3 February 1993, A44.

[28] Bretscher, *Presidential Records Act*, 1479.

records statutes that apply to other federal and White House records.[29] The Reagan and Bush administrations were the first to use electronic communications extensively to conduct government business.

The case moved slowly through a legal labyrinth of appeals and complaints for more than six years as both the Bush and Clinton administrations repeatedly fought for maximum discretion to control access to their electronic communications in contravention of the PRA and the FRA. The first set of rulings from the district court and the D.C. Circuit Court of Appeals revealed the relative weakness of the PRA concerning judicial review and enforcement pertaining to presidential records. The plaintiffs argued that the president and the NSC failed to maintain and classify PROFS communications as presidential or federal records and to request the written opinion of the U.S. archivist prior to the destruction of the records, as required by the PRA. In addition, the plaintiffs claimed the archivist failed to fulfill his statutory responsibilities in notifying Congress of the president's intent to destroy communications of potential public interest and to assume control of the PROFS records at the end of the Reagan administration.[30] The White House argued, however, that the plaintiffs had no standing in the case since the separation of powers precluded judicial review of the president's compliance with the PRA and FRA. The White House therefore urged the court to dismiss the case or render summary judgment.

Indeed, the issue of judicial review, or whether private litigants could sue the White House to force compliance with relevant records statutes, posed one of the critical points in the case. In 1989, the district court denied the White House motion to dismiss, stating that the plaintiffs could bring action in the courts but only under the Administrative Procedures Act (APA), a statute that allows "private parties the right to seek judicial review of agency actions that have caused them a legal wrong."[31] The court found that both the PRA and FRA rely on administrative action and congressional oversight, rather than judicial intervention, for enforcement. As a result, neither statute permitted a private right of action.[32] The district court nevertheless concluded that the APA provided an alternative means for judicial review concerning compliance with both the PRA and the FRA. In other words, private litigants could sue under the APA to force compliance with the provisions of the PRA and the FRA.

[29] See *Armstrong v. Bush*, 924 F. 2d 282, 288 (U.S. App. D.C., 1991).

[30] The plaintiffs also submitted an FOIA request for copies of the PROFS tapes from the White House and NSC, from the date of installation of the PROFS system to the end of the Reagan administration. See Bretscher, *Presidential Records Act*, 1493.

[31] Bretscher, *Presidential Records Act*, 1491.

[32] *Kissinger v. Reporters Committee for Freedom of the Press*, 445 U.S. 136, 149 (1980). See also Bretscher, *Presidential Records Act*, 1494. The district court noted that the Supreme Court in *Kissinger v. Reporters Committee for Freedom of the Press* held that the FRA and by extension the PRA precluded the private right to bring legal action for violation of these statutes.

Following this decision, the government appealed to the D.C. Circuit Court of Appeals. In a unanimous ruling in 1991, the D.C. Circuit (*Armstrong I*) reversed the lower court's decision in part, affirmed in part, and remanded the case back to the district court for further proceedings.[33] Upon appeal, the administration again moved to dismiss, but the D.C. Circuit, affirming the lower court's opinion not to grant summary judgment, held that the plaintiffs had standing because they were in the "zone of interests" protected by the statutes and that the intent of both the PRA and FRA was to assure that records documenting the history of the U.S. government would be made available to private researchers.[34]

The D.C. Circuit nevertheless undercut the viability of the PRA's provisions concerning the affirmative responsibilities of sitting presidents to maintain their records. The D.C. Circuit held that the PRA shielded not only the president from judicial scrutiny, but the archivist and the NSC as well. The D.C. Circuit concluded that the act constituted one of those "rare statutes that implicitly precludes all forms of judicial review."[35] According to the D.C. Circuit, Congress's intention in drafting the PRA rested in balancing the competing interests of public ownership of presidential records to ensure their preservation and public availability with the principle of the separation of powers. The D.C. Circuit also reasoned that Congress had sought to ensure that interference in the routine operations and activities of the president and his staff would be minimized. The court cited the respective duties assigned to the president and the archivist under the PRA as evidence that Congress specifically meant to incorporate this balance in the act. Under the terms of the PRA, the archivist may only act in an advisory capacity during a president's term in office and has no regulatory authority over the records produced by the White House. The president therefore has complete discretion concerning the creation, preservation, or destruction of his records while he is in office.[36] The D.C. Circuit found that Congress had balanced these conflicting interests by passing a statute that obligated the president to maintain records of his administration, while ensuring that the president had complete discretion over the disposition of those records during his incumbency. The court therefore refused to question congressional intent in drafting the PRA, which, according to the court, seemed to rely on nothing more than a "presidential honor system" to ensure compliance.[37] Based on this reasoning, the D.C. Circuit concluded the PRA

[33] Bretscher, *Presidential Records Act*, 1495, and *Armstrong v. Bush*, 284.

[34] *Armstrong v. Bush*, 287. See also *Comments: Congressional Power vis a vis the President and Presidential Papers*, 32 Duq. L. Rev. 773, 794 (1994).

[35] See Bretscher, *Presidential Records Act*, 1496, and *Armstrong v. Bush*, 290.

[36] *Armstrong v. Bush*, 290.

[37] *Armstrong v. Bush*, 290–91.

wholly precludes judicial scrutiny of an incumbent president's recordkeeping practices.[38] As a result, the D.C. Circuit reversed the lower court's determination that the provisions of the PRA were enforceable under the APA. Nonetheless, all was not lost since the D.C. Circuit concluded that the APA did authorize judicial review of the NSC's recordkeeping procedures and of the archivist's alleged breach of responsibilities under the FRA.[39]

By deciding the PRA precluded judicial review of incumbent presidential recordkeeping procedures and practices, the D.C. Circuit appeared to conclude that while in office the president may exercise near total discretion over whether to comply with the statute without risk of external review or interference. As a result, the D.C. Circuit "theoretically" opened the door for a president to destroy White House materials, no matter what their significance or how incriminating their nature.[40] Nevertheless, this interpretation may be too dire. In past cases, the courts have intervened when finding the interests of the public and judiciary outweigh the presidential prerogative of executive privilege.[41] It also may be reasonably assumed that any extraordinary effort to destroy presidential materials would cause congressional or judicial intervention. After all, Congress immediately intervened to abrogate the Nixon-Sampson agreement, which granted former president Nixon the right to destroy his White House tapes. The D.C. Circuit's opinion also ran against the PRA's provisions imposing an affirmative responsibility on the president to document the performance of his duties and to assure the adequate preservation of presidential records—a point precisely made by the lower court that the

[38] Bretscher, *Presidential Records Act*, 1507–8. The D.C. Circuit reversed the district court's opinion that the Administrative Procedures Act (APA) authorized judicial scrutiny of the president's actions under the PRA. According to the D.C. Circuit, the APA exempted the presidency from judicial review due to the legislative history of the APA, presidential traditions, and the separation of powers principle. Nevertheless, the D.C. Circuit found that the APA did provide private litigants the right to sue federal agencies to compel compliance with the law concerning recordkeeping practices. The presidency's exemption under the APA stemmed largely from it being enacted in 1946, when the presidential tradition of private ownership over White House records was widely recognized. Although concluding that the APA provided no judicial checks specifically on the presidency, the D.C. Circuit did find that the Act authorized judicial review of certain White House offices, including the National Security Council. The D.C. Circuit also found that under the FOIA, private litigants could sue a federal agency, including some White House offices such as the NSC, for improperly withholding records. If the NSC or other agencies attempted to withhold records by categorizing them as "presidential" or by invoking an exemption under FOIA, the statute permits the courts to intervene to inspect an agency's records to determine whether they are being withheld improperly. Under this provision, the courts would need to decide which records constituted federal records under FOIA and FRA and which records comprised presidential records under the PRA. At the same time, the D.C. Circuit held that private litigants could sue the archivist and heads of federal agencies for failing to enforce the terms of the FRA.

[39] See Bretscher for interpretation of the D.C. Circuit Court's decision, *Presidential Records Act*, 1497–1501.

[40] Bretscher, *Presidential Records Act*, 1504.

[41] This point is illustrated in the Supreme Court rulings in both *United States v. Nixon*, which held that the president's right to executive privilege must yield to judicial need in the administration of criminal justice, and in *Nixon v. Administrator of General Services*, which held that Nixon's claims of executive privilege were overriden by the public's right to know about the events of Watergate. See also Bretscher, *Presidential Records Act*, 1504.

D.C. Circuit overturned upon appeal. In addition, there seemed little reason why the D.C. Circuit should shield the U.S. archivist from judicial scrutiny under the PRA. The Act mandates only that the archivist promote the preservation of presidential materials and make them publicly accessible, neither of which interferes with presidential authority or with the exercise of executive privilege.

The judicial nullification of the incumbent president's affirmative obligations under the PRA opened the way for further White House attempts to reassert control and limit access to its presidential materials, even as the case continued to wind its way through the courts. While the U.S. archivist and the heads of federal agencies, including the NSC, could be sued by private litigants under the APA and FOIA concerning the improper handling or withholding of federal records, or for failing to enforce relevant records statutes, the president was immune from judicial interference, except under the most extraordinary of circumstances.

On remand, U.S. District Court Judge Charles R. Richey was therefore limited to examining only the roles of the U.S. archivist and the NSC concerning the preservation and disposition of the electronic records of the Reagan and Bush administrations. On 6 January 1993, Richey ruled that the computer tapes containing copies of electronic messages by members of the Reagan and Bush administrations must be preserved like other government records, with the exception of those considered to be presidential materials as defined under the PRA.[42] As a result, Richey specifically barred the Bush administration from erasing the computer records and directed the U.S. archivist to preserve backup tapes containing copies of messages produced by officials in the NSC and other executive branch units. In his ruling, Richey criticized the current White House records guidelines as inadequate, arbitrary, capricious, and contrary to law in permitting the destruction of records contrary to the Federal Records Act."[43] Richey also ruled that the U.S. archivist had failed to fulfill his statutory duties under the FRA. Although the White House had notified the U.S. archivist of its intent to delete the computer files, the archivist had failed to take action. In his opinion, Richey expressed considerable concern that the Bush administration was about to erase records of "tremendous historical value," especially when such records had potentially great importance in revealing who was involved in a particular decision, what they knew, and when they knew it. Such information had already proved crucial to the Iran-Contra and Watergate investigations of past administrations. "When left to themselves," Richey stated, "agencies have a built-in incentive to dispose of records relating

[42] *Armstrong v. Bush*, 810 F. Supp. 335, 342–50 (D.C. 1993).

[43] John O'Neil, "Judge Tells White House to Save Computer Tapes," *New York Times*, 7 January 1993, and Michael York, "Court Bars Destruction of Records," *Washington Post*, 7 January 1993.

to their mistakes."[44] Nevertheless, the White House urged Richey to rule that the computer messages in the PROFS system failed to fit the definition of a record under federal law and thus did not have to be preserved. Richey disagreed, ruling that the computer messages did in fact meet the everyday understanding of a record and accordingly directed the National Archives to save the computer messages.

Richey had already issued a temporary restraining order several weeks prior to his January 6 ruling to prevent the Bush administration from destroying the computer records, but Justice Department lawyers stated at a December 1992 hearing that after the order had expired, they intended to start destroying records. In response, Richey warned the administration as well as Justice Department lawyers that they could face civil and criminal action if they improperly disposed of the electronic messages.[45]

In defiance of Richey's orders, the Bush administration indicated that it would begin destroying White House and NSC computer tapes. As a result, on 15 January 1993 Richey issued a second order in seven days forbidding the erasure of the electronic messages before President Bush left office. Behind the Bush administration's defiance was the grave concern that its computer files would become available to the incoming Clinton administration. According to the Bush White House, however, the NSC had planned on deleting its computer records to provide a clean slate for the incoming administration of President-elect Clinton. Richey had ordered the National Archives one week earlier to prevent the erasure of NSC data and other computer records in the executive office of the president. To try to foreclose the chance of its computer files falling into Democratic hands, the Bush White House asked the court for a stay of the ruling, contending that the court was impeding "the present administration's ability to leave office with its records dispatched to appropriate federal document depositories consistent with the law." Richey found this argument "incomprehensible" since there was a significant difference between paper copies of White House computer messages, memos, and electronic mail and the electronic records in question "because the paper copies do not necessarily disclose who said what to whom and when." Richey also rejected White House claims that preserving millions of computer messages would disrupt the orderly transition of power between the administrations of President Bush and President-elect Clinton. Richey therefore refused to lift his order directing the White House and the U.S. archivist to take immediate measures to ensure that the nonpresidential federal records on the computers and backup tapes

[44] York, "Court Bars Destruction of Records."

[45] York, "Court Bars Destruction of Records."

be preserved.[46] Specifically exempted from Richey's orders were presidential records, which the D.C. Circuit Court of Appeals had ruled were not subject to judicial control.

The Bush White House wasted little time in immediately filing an emergency appeal with the U.S Court of Appeals on the same day of the Richey ruling. The next day, January 16, a federal appeals panel (*Armstrong II*) held that the Bush administration could begin erasing White House and NSC computer records as long as identical electronic copies of the records were made and preserved. The ruling essentially bolstered Richey's previous two orders while at the same time modifying them. The Bush administration argued in its appeal that Richey's orders threatened to "deprive President Bush of important confidentiality protections" as well as imposing a burden on the Clinton administration by preventing Bush aides from "presenting the incoming administration with a computer system that is ready for immediate use."[47] The more plausible reason stemmed from Republican concern that the computer files would fall into the hands of the incoming Clinton administration. Nevertheless, it appeared that Bush could remove the computer files legally without destroying them as part of his presidential records and deposit them in his presidential library. This scenario, however, would still provide for the public accessibility of confidential communications, including incriminating evidence relating to the Iran-Contra scandal, after twelve years under the PRA, which was an eventuality Bush and his top aides most likely wanted to avoid. It was better, therefore, to execute an agreement to give Bush unbridled discretion over the disposition of the computer files, including the right to destroy them at will.

Bush-Wilson Agreement

During the night of 19 January 1993, in the waning hours of the Bush presidency, officials wiped out the files of the White House computers, in defiance of Judge Richey's December and January rulings, but in accordance with the U.S. Court of Appeals opinion. The hurried operation also was made possible by an agreement signed close to midnight on 19 January by the archivist of the United States, Don W. Wilson, that gave President Bush exclusive control over the computerized records of his presidency, as well as all "derivative information." In accordance with the court of appeals ruling, backup tapes were made of data on the mainframe computers, and a special task force carted off more

[46] See George Lardner, Jr., "Judge Warns White House About Erasing Computers," *Washington Post*, 15 January 1993; "White House Ordered Not to Erase Discs," *Los Angeles Times*, 15 January 1993; and Stephan Labaton, "Judge Sees Plan by White House to Defy Orders and Purge Data," *New York Times*, 15 January 1993.

[47] Stephan Labaton, "Court Says Bush Administration Can Erase Files if Copies Are Kept," *New York Times*, 16 January 1993.

than 5,000 tapes and hard drives to the National Archives. Wilson, a 1987 Reagan appointee, said he had delegated the task of complying with the court orders to his acting deputy archivist, Raymond A. Mosley. Wilson said he never saw the Bush agreement until the night of 19 January, was unfamiliar with its terms, and signed it only upon the advice of archives general counsel Gary L. Brooks. White House officials had refused to release any materials to the U.S. archivist until the agreement was signed.[48]

The Bush-Wilson agreement raised further doubts about the efficacy of the then fifteen-year-old Presidential Records Act, which claimed that a former president's records belonged to the people. The agreement went far beyond the permissible scope of the PRA in giving the ex-president exclusive legal control of "all presidential information and all derivative information in whatever form" that was in the computers. The agreement also gave Bush veto power in retirement to review all the backup tapes and hard drives at the National Archives to ensure that all presidential materials would be kept secret. Bush could even order the U.S. archivist to destroy the tapes and hard drives.[49] Indeed, the Bush-Wilson agreement appeared to be history repeating itself, reminiscent as it was of the September 1974 Nixon-Sampson agreement that gave former president Nixon ownership and control over his White House tapes and records, including the right to destroy the tapes if he so desired. The agreement seemed to signal that the PRA had been reduced to an inconsequential act that could be ignored, circumvented, or overridden at the president's discretion. Many were concerned that the Bush administration would purposely comingle "presidential" and "agency" records to claim almost everything as presidential and therefore block public access to the materials.[50] Under the agreement, this strategy would allow ex-president Bush to prevent judicial review of alleged presidential materials, block access to the backup tapes and hard drives, and destroy them at will.

Under questioning by Democratic representative Steny H. Hoyer of Maryland at a House hearing, Mosley gave the impression that the agreement was nothing new and served merely to provide for the orderly and systematic access to materials covered by the court order. Mosley stated that the National Archives had already entered into a similar arrangement with former president Reagan. The agreement that Reagan signed, however, did not grant him "exclusive control" over the covered materials. Instead, the Reagan agreement stated that once the Iran-Contra investigations were over, access to his materials should be governed by the applicable laws covering presidential and federal

[48] Labaton, "Court Says Bush Administration Can Erase Files if Copies Are Kept."

[49] Labaton, "Court Says Bush Administration Can Erase Files if Copies Are Kept."

[50] Labaton, "Court Says Bush Administration Can Erase Files if Copies Are Kept."

records.[51] The Bush-Wilson agreement was not disclosed to the courts, Congress, or the public until 28 January after the last White House tapes had arrived at the National Archives. The agreement in effect overrode the PRA in governing access to White House records of former presidencies. Wilson had signed the agreement at the National Archives in the presence of lawyers from the White House and National Security Council. Controversy surrounding the agreement intensified when Wilson announced that he was resigning as U.S. archivist to head the Bush Center at Texas A&M University, which also would serve as home of the new Bush Presidential Library.[52]

Bush-Wilson Agreement in Court: A Triumph for the PRA

In response to the eleventh-hour agreement, several historical, library, and research organizations filed suit on 14 December 1994 to block the arrangement between former U.S. archivist Wilson and former president Bush granting the president control over electronic records created by officials of the White House and the Office of Policy Development during his administration. The plaintiffs in *American Historical Association, et al. v. Peterson* included Public Citizen, the American Historical Association, the American Library Association, the Organization of American Historians, the Center for National Security Studies, the National Security Archive, journalist Scott Armstrong, and researcher Eddie Becker. The plaintiffs asked the court to declare the Bush-Wilson agreement null and void and to enjoin Acting U.S. Archivist Trudy Peterson from implementing the agreement. According to the plaintiffs, the agreement violated the PRA and Article II of the United States Constitution. The plaintiffs further charged that the U.S. archivist's decision to enter into the agreement was arbitrary, capricious, an abuse of discretion, and contrary to law under the APA. Michael Tankersley, lead counsel for the plaintiffs, denounced the agreement as a "blatant violation of the law. The Presidential Records Act was specifically enacted to prevent presidents from making private arrangements to thwart access to records concerning their administrations."[53]

The defendants, Acting Archivist Trudy Peterson later joined by former president Bush, contended that the president's decision to enter into the agreement was immune from judicial review and that the plaintiffs could not obtain relief under Article II of the Constitution. The issue of judicial review, of course, was the critical issue in two prior D.C. Circuit Court of Appeals rulings in the

[51] Labaton, "Court Says Bush Administration Can Erase Files if Copies Are Kept."

[52] Labaton, "Court Says Bush Administration Can Erase Files if Copies Are Kept."

[53] Public Citizen, *American Historical Association v. National Archives and Records Administration*, Press Release, 14 December 1994.

Armstrong case, which made it clear that an incumbent president had nearly total discretion over the disposition of his White House records. The defendants were now attempting to use this same rationale—that a president's treatment of his presidential records was immune from judicial control—to legitimate the Bush-Wilson agreement. The critical difference now involved whether a former president—a private citizen—could control access to his presidential materials after leaving office in contravention of the PRA.

In March 1995, U.S. District Court Judge Charles Richey gave the PRA its most significant legal victory since its 1978 enactment. Richey found that Wilson's actions concerning the agreement were, in fact, subject to judicial review and that the agreement could not be upheld under the PRA and Article II of the Constitution. Richey also concluded that Wilson's "decision to enter into the agreement, notwithstanding the provisions of the PRA, was arbitrary, capricious, an abuse of discretion, and contrary to law."[54]

According to Richey, the Bush-Wilson agreement violated the PRA in three respects. First, the PRA mandates that the U.S. government retain complete ownership, possession, and control over presidential records.[55] Accordingly, the provision allows no government official to execute agreements granting ownership or control over presidential records to any person or entity other than the United States. Nevertheless, the Bush-Wilson agreement constituted a bold attempt to give former president Bush exclusive legal control of all presidential information on the backup tapes and hard drives. Second, although the agreement granted former president Bush exclusive legal control of the materials, the PRA mandates that the U.S. archivist assume custody of the presidential records and make them publicly available as "rapidly and completely as possible consistent with the provisions of the Act."[56] The agreement violated this provision by allowing former president Bush to control access to presidential information and by classifying materials that constitute "presidential records" under the Act as personal records of the ex-president. Third, the agreement violated the PRA's requirement that after the transfer of presidential records to the archivist at the end of the president's term, the materials may be removed or destroyed only if the archivist determines that they have no enduring value and only after public notice is given in the federal register at least sixty days in advance of their proposed disposition.[57] Despite this provision, under the Bush-Wilson agreement former president Bush could dispose of the materials without restriction and without prior public notice. Accordingly, Richey concluded

[54] *American Historical Association v. Peterson*, 876 F. Supp. 1300, 1320 (D.D.C. 1195).

[55] *Presidential Records Act of 1978*, sec. 2202.

[56] *Presidential Records Act of 1978*, sec. 2203 (f) (1).

[57] *Presidential Records Act of 1978*, sec. 2203 (f) (3).

that the agreement violated the PRA. "To hold otherwise," Richey stated, "would be to find that an agreement between the president and certain officials of the Executive Branch, signed on the last day of the administration, may supercede an act of Congress; such a motion, of course, is unsupportable."[58]

As with previous rulings in the already long and tangled history surrounding *Armstrong*, one of the central issues involved judicial review. According to Richey, the prior appeals court rulings in *Armstrong I* and *II* precluding judicial scrutiny of an incumbent president's recordkeeping procedures and practices were irrelevant concerning the Bush-Wilson agreement.[59] Richey reasoned that *Armstrong I* did not prohibit judicial review of all decisions concerning the PRA. Indeed, the appeals court found that the president could not "designate any materials he wishes as presidential records, and thereby exercise virtually complete discretion over it . . . notwithstanding the fact that the material does not meet the definition of presidential records under the PRA."[60] Based on this reasoning, the *Armstrong II* court found that judicial review was allowable pertaining to the guidelines in determining what is and what is not a presidential record.[61]

Richey further denied the defendants' claim that judicial review was unavailable on three counts. First, although the defendants argued that former president Bush's decision to classify certain categories of presidential records as personal records subject to his control following his term of office was not reviewable, Richey found that the PRA's legislative history made it clear that defining the types of documentary materials as either presidential or personal records was at the very heart of the Act. Second, Richey noted a critical distinction in the PRA between terms for the disposal of presidential records during a term of office from those governing the disposal of presidential records after a term of office. Although the Act grants sitting presidents discretion to dispose of presidential materials with no enduring value, the PRA mandates the U.S. archivist to assume responsibility for the custody, control, preservation, and access to the president's White House materials at the end of his term. The Act therefore provides an unambiguous distinction between an incumbent president's disposal of presidential records while in office and the archivist's disposal of presidential records following a term of office. According to Richey, "the Bush-Wilson agreement on its face constitute[d] an opting out of the provisions of the PRA governing the archivist's disposal of presidential records following

[58] *Presidential Records Act of 1978*, sec. 2203 (f) (3).

[59] *Armstrong I refers to Armstrong v. Bush*, 924 F. 2d (U.S. App. D.C., 1991), and *Armstrong II* refers to *Armstrong v. Executive Office of the President*, 303 U.S. 1 F. 3d (D.C. Cir. 1993).

[60] *Armstrong v. Executive Office of the President*, 1293–94.

[61] *Armstrong v. Executive Office of the President*, 1294. See also *American Historical Association v. Peterson*, 16.

his term of office."[62] The appeals court decisions in both *Armstrong I* and *II* had demonstrated that judicial review of the president's compliance with the PRA did not extend to the preservation and disposal of records after a president left office.

Finally, Richey stated that the defendants ignored that the Bush-Wilson agreement intended to give former president Bush—a private citizen—exclusive and continuous control over the disposition of presidential records. In fact, no provision in the PRA allows a former president to exercise total control over presidential records after leaving office. The Act enables a president to impose only limited access restrictions on certain categories of presidential records and mandates that he must do so before his term ends. The defendants' arguments on the scope of judicial review appeared to be an attempt to return the law to where it was prior to 1978 when Congress had enacted the PRA. Before this time, former presidents exercised control over their presidential records after they left office, including the exclusive right to destroy, donate, deposit, sell, or restrict public access to their presidential materials through private agreements.[63] Richey found that the Bush-Wilson agreement, in effect, circumvented congressional enactment of the PRA, which was passed in part to bar future accords or private arrangements like the Nixon-Sampson agreement. Richey concluded that it "bordered on the absurd to posit that Congress—in passing a statute to preclude former presidents from disposing of presidential records at will, and affording a president no discretion to restrict access to records after leaving office—intended that a former president's post-term decisions regarding disposal of such records be immune from judicial review."[64]

Richey also observed that the U.S. archivist's compliance with the mandates of the PRA was at issue. Although previous *Armstrong* decisions had precluded judicial review of the president's compliance with the Act during his term of office, they failed to address the availability of judicial scrutiny concerning the archivist's compliance with the PRA following the transfer of presidential materials to NARA at the end of the president's term. Richey found that there was "no statutory provision committing the control of presidential records after the president's term ends to the nonreviewable discretion of the former president. Indeed, the PRA does not commit this issue to the discretion of any official, let alone a private citizen, but binds the archivist to follow express procedures in preserving and disposing of presidential records upon receipt" of the materials after a president's term in office.[65]

[62] *American Historical Association v. Peterson*, 17.

[63] *American Historical Association v. Peterson*, 19. See also *Nixon v. United States*, 978 F 2d 1269 (C.A.D.C. 1992).

[64] *American Historical Association v. Peterson*, 17.

[65] *American Historical Association v. Peterson*, 19.

Finally, Richey held that the Bush-Wilson agreement conflicted with Article II of the Constitution. The agreement essentially subordinated former archivist Wilson and his successors to the discretion of former president Bush, now a private citizen, while Article II of the Constitution vests in the incumbent president the authority to direct the actions of current executive officials. In fact, the Bush-Wilson agreement, giving such discretion to former president Bush, was completely contrary to President Clinton's constitutional responsibility and duty. Accordingly, Richey found that former president Bush had no constitutional authority to direct the actions of the archivist, a duly appointed executive branch official under President Clinton. Richey therefore found that the Bush-Wilson agreement, which purported to make the archivist subservient to former president Bush's direction concerning his presidential records, conflicted with Article II of the Constitution.[66]

Richey's ruling represented an important legal triumph for the PRA. The previous rulings in *Armstrong* made it clear that the president retained broad, if not complete, discretion over the disposition of his presidential materials while in office. Yet, Richey's opinion on the Bush-Wilson agreement reasserted the relevancy of the Act, which seemingly had been rendered ineffective by the two appeals court rulings in *Armstrong I* and *II*. Richey's opinion in *American Historical Association v. Peterson* rationalized the necessity of judicial review in assessing the guidelines in determining what is and what is not a presidential record. It also clarified that broad presidential discretion concerning the disposition of presidential records did not extend to a former president after leaving office. The ruling further clarified the role of the archivist as being subordinate only to sitting presidents, not to former presidents. More important, the Richey ruling served to protect the most meaningful part of the PRA governing the disposition of presidential materials after a president has left office. The Bush-Wilson agreement essentially constituted a grave threat to this aspect of the Act, which was worrisome after the *Armstrong* decisions had watered down its provisions concerning the incumbent president's responsibilities to maintain an adequate documentary record of his administration. Nevertheless, as future events proved, these findings did little to halt further White House attempts to expand the scope of executive privilege to extend to former presidents the right to exercise maximum control over access to their presidential materials.

PRA v. Executive Order No. 13,233

The Richey court's decision in support of the PRA was short-lived. On 1 November 2001, President George W. Bush issued Executive Order No. 13,233,

[66] *American Historical Association v. Peterson*, 21.

giving former and sitting presidents broad authority to withhold records from the public. The executive order was premised on a greatly expanded notion of the presidential prerogatives of executive privilege. According to Scott L. Nelson, an attorney for Public Citizen, the executive order was surprising in its sweeping violation of the PRA and in exceeding the "bounds of legitimate protection of executive privilege" in giving a former president the "power to veto public releases of materials by the National Archives."[67] Many of the issues raised by Bush's order had already been dealt with in previous court cases, most recently by Judge Richey's ruling nullifying the Bush-Wilson agreement. Nonetheless, it was as if this opinion and past Supreme Court rulings delimiting the scope of executive privilege concerning presidential materials and defining the obligations of the U.S. archivist under the PRA had never been made, settled, or resolved. Most troubling of all was that the Bush executive order attacked the most effective and meaningful part of the PRA concerning the mandated availability of presidential materials after a president left office and after the expiration of the twelve-year restriction rule. The courts had already considerably weakened the PRA by permitting sitting presidents almost complete discretion regarding the disposition of their White House records. Now at stake was whether former presidents, vice presidents, and their designated representatives—private citizens—could indefinitely frustrate the letter and spirit of the Act, congressional intent, and past Supreme Court opinions.

At immediate issue were 68,000 pages of records from the Reagan years. The records were eligible to be made public in January 2001 after the PRA's twelve-year restriction period had expired. Before leaving office, President Reagan invoked the maximum twelve-year restriction period concerning all categories of his White House materials permitted under the PRA. Reagan left office on 20 January 1989, and his materials became available for public release on 20 January 2001, the first time in the history of the PRA that presidential materials became publicly accessible under the provisions of the Act.

In the intervening twelve years, the Reagan Library operating under NARA in Simi Valley, California, publicly released approximately 4.5 million pages of documents in response to FOIA requests. NARA also withheld materials subject to the twelve-year restriction period imposed by Reagan under the PRA. The materials comprised approximately 68,000 pages of records, including confidential communications between former president Reagan and George Bush the elder, who at the time served as vice president, as well as other close advisors. Under the PRA, confidential communications are covered by the twelve-year restriction provision and become publicly available without qualification

[67] See Testimony of Scott L. Nelson, Public Citizen Web site.

after its expiration.[68] In January 2001, after twelve years, NARA moved to release the 68,000 pages of records to the public as required under the PRA. Accordingly, NARA advised the White House in February of their impending release, giving formal notice as mandated by an executive order issued by President Reagan before he left office. In response to NARA's notification, White House Counsel Alberto Gonzales three times deferred their public disclosure ostensibly to enable the Bush administration to review the materials under the Reagan executive order. More than nine months passed beyond the January expiration date for releasing the Reagan presidential documents before the Bush White House issued its new executive order on 1 November 2001.

The Bush order, entitled "Further Implementation of the Presidential Records Act," went considerably beyond Reagan's executive order in attempting to nullify congressional intent to make presidential papers available within a reasonable time period and in granting former presidents the right to restrict access indefinitely to their White House materials. The Bush order once again raised the specter of the Nixon-Sampson agreement and subsequent White House attempts to maximize presidential control over presidential records, if not signifying an outright effort to return the law to the tradition of private ownership over presidential materials. Reagan's Executive Order No. 12,667 had provided that, before NARA could release any presidential materials, it must give at least thirty days notice to both the incumbent and former presidents to assert privilege claims that may prevent the release of the materials. The Reagan order was predicated on the principle that if a former president asserted executive privilege to prevent the release of materials, NARA could still make the materials publicly available if the archivist—subject to the direction of the sitting president—rejected the claim of privilege. In such a case, the former president would need to seek judicial relief to continue to press his claim of privilege.[69] This provision comported with *Nixon v. Freeman* in which the D.C. Circuit Court of Appeals held that the burden for seeking judicial review of privilege claims that were administratively denied rested with the former president.

Although Reagan's order allowed the president to identify and review any specific materials before publicly releasing them, the Bush administration pursued a different strategy. Rather than examining the records in question, the Justice Department began reviewing legal and constitutional issues raised by their potential release with the aim of expanding the scope of privilege

[68] See the editorial "Cheating History," *New York Times*, 15 November 2001; Emily Eakin, "Presidential Papers as Smoking Guns," *New York Times*, 13 April 2001; Ben Gose and Dan Curry, "Historians Attack Bush Executive Order on Presidential Records," *Chronicle of Higher Education*, 16 November 2001, A27; Francine Kiefer, "A Fight Brews Over Ex-President's Papers," *Christian Science Monitor*, 6 November 2001; and Testimony of Scott L. Nelson, Public Citizen Web site.

[69] Testimony of Scott L. Nelson, Public Citizen Web site.

claims to allow the president absolute control over access to his White House materials in perpetuity. The Bush order thus superseded the previous order by inventing new procedures and standards governing executive privilege claims by former and sitting presidents after the expiration of the twelve-year restriction rule. The order broadly defined the scope of executive privilege of ex-presidents and vice presidents in addition to incumbent presidents concerning their presidential and vice presidential materials. The materials covered under the order not only included confidential communications between the president and his close advisors, but also common-law attorney-client and attorney work-product privileges, deliberative process privileges, as well as the state secrets privilege. In addition, in contravention to the provisions of the PRA, which provide for the availability of presidential materials after twelve years, the Bush order asserted that any "party seeking to overcome the constitutionally based privileges that apply to presidential records" must be justified by some demonstrable "specific need for particular records."[70] This provision resurrected Nixon's previously rejected claims of executive privilege in *Nixon v. Freeman* in which the court rejected his contention that the public had to show a "particularized need" for access to his presidential materials.

The Bush order reversed the fundamental principle of public access underpinning the PRA, which provides for the systematic release of presidential materials after twelve years through FOIA requests. It superseded an 18 January 1989 Reagan order (Executive Order No. 12,667) with a requirement that a FOIA request for access must demonstrate a justifiable or "specific need." The new order provided that in the absence of "compelling circumstances," the incumbent will agree to any privilege claim by a former president seeking to bar public access to his presidential materials.[71] The order also provided that even if the incumbent president disagrees with a former president's claim of privilege, the U.S. archivist may not make the materials publicly available without the former president's consent or unless a final nonappealable court order compels their release. If the former president agrees to permit access to his presidential materials, the incumbent president nevertheless may override his wishes and keep them closed. As a result, only when both the former president and the incumbent president authorize access may the archivist make presidential records publicly available. The Bush order also created an unprecedented vice presidential executive privilege, granting former vice presidents for the first time the right to control the release of their vice presidential records. It also extended these constitutionally based privileges to a designated representative or family members upon the death or disability of former presidents

[70] Bush Executive Order No. 13,233 may be seen at the Public Citizen Litigation Group Web site at <http://www.citizen.org/litigation/briefs/FOIAGOVTSEC/articles.cfm?ID=7116> (1 March 2003).

[71] Bush Executive Order No. 13,233, sec. 3 (d) (i).

and vice presidents.[72] In brief, the Bush order expanded executive privilege beyond the incumbent president to past presidents, their heirs, and even to vice presidents, seemingly in perpetuity.

White House officials defended the order as a way to protect against the release of information that may threaten national security as well as facilitate the release of presidential documents. At a 1 November news conference, the same day that the order was issued, White House spokesman Ari Fleischer said that under the new order more information would be forthcoming to the public, that it would "help people get information," and that it would be made available through a much more orderly process. "I think what you're going to see is an orderly process that results in the release of information, except in those rare instances in which there is an already recognized exception in the law." Fleischer justified the incumbent's right under the order to veto the release of materials after twelve years by stating that there very well could be a decision by a former president who has been out of office for twelve years to release certain documents that have national security implications. A previous president or "administration that is not currently in power would not be as aware as a current administration of ongoing national security issues," stated Fleischer, "so the [order] provides for an ability of a current administration to review" a decision by a former president.[73]

But many historians, archivists, public advocacy groups, and others strongly disagreed that the order was necessary to protect national security. " 'These documents have no bearing on national security, or on information that may be of use to terrorists,' said Bruce Craig, director of the National Coordinating Committee for the Promotion of History, an umbrella group representing more than 60 organizations. 'There are already exemptions that keep that kind of information locked up.' "[74] Steven Aftergood of the Federation of American Scientists Project on Government Secrecy said, "We are not talking about protecting national security information or properly classified documents that otherwise are exempt . . . this is a whole other claim and creates suspicion that once national security, privacy, and other statutory restrictions are lifted, all that is left to protect is potential embarrassment." Vanderbilt University historian Hugh Graham denounced the order as "a real monster . . . far worse than the 1989 Executive Order it would replace." Graham who long had an interest in the release of the Reagan presidential materials also stated he was "surprised by such broad overreaching by the Bush White House. They would reverse an act of Congress with an executive decree." Public Citizen condemned the order as "blatantly unlawful top to bottom." In hearings before the

[72] Bush Executive Order No. 13,233, sec. 10.

[73] Gose and Curry, "Historians Attack Bush Executive Order on Presidential Records."

[74] Gose and Curry, "Historians Attack Bush Executive Order on Presidential Records."

House Subcommittee on Government Efficiency, Financial Management, and Intergovernmental Relations, Anna Nelson, historian at American University, concurred that "this executive order seeks to protect a wide variety of mere confidential communications that a sitting president would not like to see released to the public."[75]

In addition, at a forum in Manhattan convened to discuss the Bush order and attended by several hundred people, Robert A. Caro, the Pulitzer Prize–winning author of a multivolume biography of Lyndon B. Johnson, summed up some of the critical difficulties of the Bush order for researchers. "If you want to challenge the executive order, the historian must ask for specific detailed things. The Johnson Library has thirty-four million pieces of paper. Unless you've been through it, you can't possibly know what's in there." The historians Arthur M. Schlesinger, Jr. and Richard Reeves also appeared at the forum, which was sponsored by PEN American Center, the Association of American Publishers, and the Authors Guild Foundation, to condemn President Bush's order.[76] Caro's point also was echoed by Reeves, one of four historians who testified before the House Subcommittee on the subject. During his testimony Reeves said he sent copies of his books on Presidents Kennedy and Nixon to George W. Bush. "I said that they might be worth something someday as artifacts," Reeves told the lawmakers, "because it would be impossible to write them under his new order."[77]

The Bush order also caused bipartisan concern in Congress. On 6 November, just days after Bush issued his executive order, Representative Steven Horn (R) of California, head of the Subcommittee on Government Efficiency, Financial Management, and Intergovernmental Relations, convened hearings on the order. At the hearings both Horn and Representative Doug Ose, also a California Republican, questioned officials from the Justice Department and the National Archives about the legality of the order and its practical implications. Ose voiced his concern on the language of the order, which appeared to expand the number of exemptions a president may use to

[75] Internet posting <Archives@Listserv.Muohio.edu> from Holly Hodges, National Coordinating Committee for the Promotion of History, Update, Vol. 7, no. 45, 1 November 2001.

[76] Eakin, "Presidential Papers as Smoking Guns." Caro related a personal anecdote concerning his research in the Johnson papers to illustrate his point. If he had not had the freedom to rummage through the Johnson presidential papers one day in 1980, he never would have found a faded telegram containing the words: "Hope checks arrived in due form and on time." The telegram proved to be the smoking gun. It revealed the mystery surrounding a critical episode in Johnson's career, when in the period of only one month, he went from being largely an inconsequential junior congressman to a politician besieged by calls from ranking Democrats. In following the paper trail, Caro concluded that the secret to Johnson's sudden rise to power was his access to money in the form of campaign contributions from wealthy Texas oilmen. Caro would not have been able to make this discovery if the Bush order had been in effect, requiring a researcher to make detailed requests for specific information.

[77] Linda Kulman, "Who Owns History? Historians and the Bush Administration Wrangle Over Access to Presidential Records," *U.S. News & World Report,* 29 April 2002, 51.

obstruct release of presidential materials. Edward Whalen, an acting assistant attorney general, said that the order did no such thing, but admitted that it included new language that described exemptions that include "communications of the president or his advisors" and "legal advice or legal work." Nevertheless, Whalen said that these provisions would not alter the way the PRA would be carried out. Ose disagreed, "I think this order greatly expands the privileges of the president in violation of the spirit and letter of the Presidential Records Act." Two ranking Democrats in the House, Henry A. Waxman of California and Janice D. Schakowsky of Illinois, also condemned the order. "The executive order violates the intent of Congress and keeps the public in the dark," they wrote in a letter to Bush.[78]

Initially, the Bush administration seemed stung by the negative response to the order. With 2002 congressional elections approaching, the White House launched a public relations counter-offensive to respond to the growing public criticism surrounding the executive order. In a show of goodwill, on 3 January 2002, the White House released 8,000 papers at the Reagan Library. At the same time, Gonzales opened up back-channel communications with scholarly associations, including those who filed suit against the White House, with the aim of reassuring them that the administration was not attempting to initiate a cover-up. Gonzales also invited a delegation of scholars, archivists, and journalists to his White House counsel's office for a meeting. The meeting, however, took place with deputy counsel Bret M. Kavanaugh, who, while expressing a sincere desire to work with the groups represented, nevertheless conveyed the message that the White House had no intention of backing down on the order. Despite Kavanaugh's expression of goodwill and promise of openness, scholars remained concerned. "Kavanaugh's promise of openness reminds me that the promise is predicated not on law, but merely on goodwill," stated Robert J. Spitzer, president of the Presidency Research Group of the American Political Science Association. Graham was more strident. "They're trying to get the monkey off their back. But it's not going to get us off their backs."[79]

Public Advocacy Groups and Historians Seek to Overturn the Bush Order

Just weeks after the Bush administration issued its executive order, Public Citizen filed suit in federal court in Washington to overturn the president's executive decree. Public Citizen filed suit on behalf of the American Historical Association, the Organization of American History, the Organization of

[78] Gose and Curry, "Historians Attack Bush Executive Order on Presidential Records."

[79] See Carl M. Cannon, "Nixon's Revenge," *National Journal* 34, no. 2 (12 January 2002): 95.

American Historians, the National Security Archive, the Reporters Committee for Freedom of the Press, and historians Hugh Graham and Stanley Kutler. The suit sought to compel NARA to act according to the provisions of the PRA and to make publicly available 68,000 pages of records of former president Reagan that should have been released in January 2001.[80] The lawsuit did not target President Bush, who issued the order, but the officer and agency charged with implementing it, namely U.S. Archivist John Carlin and NARA. The suit was directed against subordinate executive branch officers and agencies to ensure judicial review of the case.

Public Citizen contended that the Bush order not only violated the terms of the PRA, but also of Article II of the Constitution. These arguments were precisely the same as those made in earlier court cases in *Public Citizen v. Burke* and *American Historical Association v. Peterson*. In both cases the courts held unambiguously that the archivist could not withhold records upon a mere assertion of executive privilege by a former president. Nonetheless, by issuing the executive order, the Bush Justice Department attempted to do what the courts had already denied and presumably settled. The Justice Department acted as if no judicial precedent existed whatsoever in rejecting the notion of giving a former president absolute discretion over access to his presidential materials and subordinating the archivist, an executive branch officer, to his binding assertions of privilege, regardless of their validity. Despite the courts having settled these matters, the Bush Justice Department not only resurrected Nixon's rejected arguments on executive privilege, but considerably expanded upon them as well.

Indeed, the Bush order is notable in demonstrating the continuing pattern of presidential attempts to nullify or circumvent the PRA in direct contravention of prior court rulings and congressional intent. As noted previously, the PRA provides for the public disclosure of confidential communications between a former president and his advisors after twelve years except when those records are subject to a valid claim of privilege banning their public release. In keeping with the Act's provisions, NARA's regulations provide that a former president may assert executive privilege concerning his White House materials, but that the records nevertheless will be publicly disclosed if the archivist determines the privilege claim has no validity. Congress also assured in drafting the Act that it did nothing to limit or expand any constitutionally based privilege that may be available to an incumbent or former president.

Nevertheless, according to Public Citizen, the Bush order fundamentally inverted this "statutory and regulatory scheme" by giving former presidents veto power over the release of their materials by the mere assertion of privilege, no

[80] Public Citizen, "Public Citizen Sues to Block Implementation of Executive Order on Presidential Records," Press Release, 28 November 2001.

matter how groundless the claim. As a result, the order violated the terms of the PRA by permitting the withholding of materials even when a former president's privilege claim was illegitimate or otherwise had no merit. Public Citizen also argued that the order considerably broadened constitutionally based privileges despite the PRA's prohibition against doing so. Further, prior precedent-setting opinions by the Supreme Court and the D.C. Circuit Court of Appeals in *Nixon v. Administrator of General Services* (1977), *Nixon v. Freeman* (1982), and *Public Citizen v. Burke* (1988) held that privilege claims did not automatically mandate that the archivist "bow" to any privilege claims by a former president.[81] By requiring the archivist to do so, according to Public Citizen, the Bush order not only expanded the scope of constitutionally based privilege claims, but also subverted the fundamental intent of the PRA by directing the archivist to "withhold records that are required by the act to be released."[82]

Although the Supreme Court acknowledged a former president's right to assert privilege claims in *Nixon v. Administrator*, the Court nevertheless stressed that a former president cannot obstruct access to his White House materials merely by invoking a privilege claim.[83] If *Nixon v. Administrator* left any doubts on this point, they should have been answered by the D.C. Circuit's opinion in *Nixon v. Freeman* and *Public Citizen v. Burke*, both of which dealt with the implementation of legislation governing Nixon's White House materials. In *Nixon v. Freeman*, the court considered Nixon's challenges to NARA's regulations permitting access to his presidential records and tapes. Nixon contended that researchers had to show a "particularized need" for access to his materials regarding conversations with his advisors.[84] The D.C. Circuit, however, flatly rejected Nixon's argument. The court held that the constitutional privilege eroded with the passage of time, that it was proper for NARA to disclose presidential materials to the public, and that the burden for seeking judicial enforcement of privilege claims, if administratively denied, rested with the former president.[85] As a result, *Freeman* contravened the notion that a former president's privilege assertions must be reflexively honored and placed the burden on the former president to establish how particular disclosures would violate executive privilege. Nevertheless, despite these rulings, the Bush Justice Department predicated its new executive order on Nixon's discredited claims of executive privilege.

[81] See *Nixon v. Administrator of General Services*, 1035; *Nixon v. Freeman*, 670 F2d 346 (D.C. Cir.), cert. Denied, 459 U.S. 1035 (1982); and *Public Citizen v. Burke*, 1473.

[82] See *American Historical Association v. National Archives and Records Administration*, Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Summary Judgment, 8 February 2002.

[83] *Nixon v. Administrator of General Services*, 448–9.

[84] *Nixon v. Freeman*, 356.

[85] *American Historical Association v. National Archives and Records Administration*, 9.

The D.C. Circuit in *Public Citizen v. Burke* further underscored the opinion in *Freeman*. The case involved a challenge to a directive issued by the Reagan administration's office of legal counsel, which ordered the U.S. archivist to abide any claim of privilege by former president Nixon unless otherwise ordered by incumbent president Reagan. The Justice Department argued that the directive's provisions were required by the constitutional doctrine of executive privilege as defined in *Nixon v. Administrator*. Nonetheless, the D.C. Circuit rejected this argument, stating that it "found no support of OLC's constitutional argument in *Nixon v. General Services Administrator*."[86] The court further observed that its decision in *Freeman* had already rejected the argument that the Constitution compelled the archivist to respect a former president's claim of privilege without regard to its validity. Accordingly, Public Citizen argued that in light of the rulings in *Nixon v. Administrator*, *Nixon v. Freeman*, and *Public Citizen v. Burke,* the Bush order constituted an attempt to expand the scope of executive privilege in violation of the clear terms of the PRA by requiring the archivist to abide by any privilege claim by a former president without regard to its merit or legality.[87]

In its lawsuit, Public Citizen also contended that the order violated Article II of the Constitution in two ways. First, by relinquishing authority to former presidents to control access to their presidential materials in contravention of the PRA, the order subverted Article II's mandate that the executive branch "take care that laws be faithfully executed." Second, the order ran counter to Article II by subordinating the archivist, a duly appointed official of the U.S. government, to privilege claims by a former president, vice president, or a designated representative, thereby constraining the archivist from publicly disclosing any materials even if the incumbent president opposes that claim. The order therefore deliberately subordinated the archivist to the binding directives of private citizens who hold no government office.[88] The courts had already dealt with this specific issue in *American Historical Association v. Peterson*, which held that the Bush-Wilson agreement improperly ceded control over the archivist's release of presidential records to former President Bush.

One of the more striking features of the Bush order was that it manufactured an independent, constitutionally based privilege for vice presidents. The order afforded former vice presidents the same power to direct the archivist to block public access to their records that is given to former presidents. The nature of executive privilege for presidential communications recognized by the Supreme Court in *United States v. Nixon* and *Nixon v. Administrator* is limited specifically to presidential decision making and stems from the "separation of

[86] *Nixon v. Administrator of General Services*, 1479.

[87] *American Historical Association v. National Archives and Records Service*, 10.

[88] *American Historical Association v. National Archives and Records Service.*

powers principles and the president's unique constitutional role."[89] The Bush order, however, empowered a former vice president to obstruct access to his vice presidential materials by merely asserting a vice presidential claim of privilege that has no basis in the Constitution and that does not even exist.

The order also extended this extraordinary veto power far beyond the lifetimes of presidents and vice presidents by allowing it to be exercised by their representatives after they are deceased or become incapacitated. These representatives could be designated not only by presidents and vice presidents before their deaths or the onset of their disabilities, but also by family members at any time.[90] The order provided that any claim of privilege made by these representatives be honored exactly as claims made by a former president. As a result, these privilege claims constituted binding directives to the archivist to restrict public access to records, regardless of their legal validity. This provision, more than any other, constituted an attempt to resurrect the tradition of private ownership over presidential records by creating a new constitutionally based privilege that could be assigned or bequeathed to descendents as if it were a personal property right. It ran counter to the fundamental precept on which the PRA is based—that the records of the presidency of the United States are the property of the republic. Indeed, according to Public Citizen, this provision was even "more offensive" to Article II of the Constitution, ceding as it did authority to control access to presidential materials to individuals outside of the executive branch and outside government and subordinating the archivist to the binding directives of private citizens who never held government office. In addition, there appeared to be no basis in the Constitution permitting the extension of a presidential privilege to designated representatives or family members of a former president and vice president. The constitutionally based privilege is an exclusive right of the president alone given his unique role in government.

Congress Tries to Rescue the PRA

Yet, despite judicial precedent barring former presidents from exercising unfettered discretion over their presidential materials and the creation of novel new forms of executive privilege that have no basis in the Constitution, the Bush administration steadfastly defended the order, saying that it was merely intended to create an orderly process for releasing presidential records. President Bush insisted that the order struck an appropriate balance by permitting both "historians to do their jobs" and the government "to protect state

[89] *American Historical Association v. National Archives and Records Service*, 14.

[90] *Presidential Records Act of 1978*, sec. 2203 (e).

secrets."[91] Nevertheless, on 8 March 2002 the White House released the bulk of the 68,000 pages of Reagan's confidential papers, except for 150 pages covering political and judicial nominations that remained closed. Many scholars attributed the release of the documents to legal pressure by Public Citizen, which said it would continue its lawsuit to overturn the Bush order. The historian Richard Reeves, who was writing a biography of President Reagan, stated that withholding such files may be justifiable out of concerns for privacy. Nevertheless, he called Bush's order a "tremendous threat to the things I'm working on."[92] Stanley Kutler, a University of Wisconsin history and law professor who led the 1992 lawsuit to gain access to the Nixon tapes, exhibited less patience: "Do we want history dictated to us by officialdom?"[93] According to Anne Womack, a White House spokesperson, the remaining 150 pages from the Reagan papers remain under review for national security concerns. "We appreciate the need to make documents available as quickly as possible for study, for transparency. But [we] also need to take into consideration the rights of former and incumbent presidents"[94]

But to many critics, this argument carried little validity. In April, Representative Horn introduced legislation to nullify the Bush order by amending the PRA. In a written statement, Horn said that the president's decree "violates the letter and spirit" of existing law on presidential records. Twenty Democrats and two Republicans, including Representative Dan Burton of Indiana, the hard-line conservative chairman of the House Committee on Government Reform cosponsored the bill.[95] In March, Horn had issued a "Dear Colleague" letter requesting cosponsors for his bill, which aimed to "fix a serious but readily solvable problem in the implementation of the Presidential Records Act of 1978." Horn's letter also contained a copy of the draft bill entitled "The Presidential Records Act Amendments of 2002."[96]

The bill requires the U.S. archivist to provide advance notice of twenty working days to the former and incumbent president before disclosing presidential records according to the terms of the PRA. After the twenty-day period, the archivist would release the materials unless the former or incumbent president asserted a privilege claim. The claim of executive privilege, however, specifying the records to which the claim applies and describing the nature of the privilege claim, would have to be made in writing and signed by the former or

[91] Eakin, "Presidential Papers as Smoking Guns."

[92] Eakin, "Presidential Papers as Smoking Guns."

[93] Kulman, "Who Owns History?"

[94] Kulman, "Who Owns History?"

[95] Eakin, "Presidential Papers as Smoking Guns."

[96] Eakin, "Presidential Papers as Smoking Guns."

incumbent president. If the former president asserts a privilege claim, the archivist must withhold the records for another twenty working days, permitting the former president to seek judicial enforcement of his claim as afforded under the PRA. Following the end of the twenty days, the archivist would publicly release the materials unless a court ordered their continued closure. The burden of establishing a privilege claim would thus be placed back on the former president. If the incumbent president asserts executive privilege, the archivist would withhold the records unless or until the incumbent president decided otherwise or a nonappealable court order directed their public release. The bill makes several "conforming changes" to the PRA's provisions. It recognizes both that privilege claims are limited to former or incumbent presidents and cannot be delegated to their representatives and that vice presidents cannot assert independently based claims of privilege. Finally, the bill nullifies the Bush order.[97]

In essence, the bill recognizes what prior court rulings have already established in delimiting the scope of executive privilege regarding the disposition of presidential materials. It also attempts to strengthen the most significant aspect of the PRA concerning the disposition of presidential records after a president leaves office and after the expiration of the twelve-year restriction period when most presidential records, including a president's confidential communications with advisors, become publicly available without qualification. Finally, it restores the fundamental duties of the U.S. archivist under the PRA concerning his responsibilities in handling White House records after a president leaves office.

Conclusion

Given the history of the PRA, the question arises whether the Horn bill, if enacted into law, will make any difference in dissuading presidents from attempting to reassert control over their White House materials by means of expansive assertions of the doctrine of executive privilege. The long record of presidential attempts to thwart the PRA would seem to argue otherwise. Presidents have always had a vested interest in shaping and controlling their historical legacies, protecting their reputations, and claiming their presidential records as their own. The history of the PRA so far has shown that presidents have been willing to ignore, sidestep, or nullify an act of Congress and prior court rulings with the aim of reasserting absolute discretion over access to their White House materials. Indeed, Nixon's long shadow has haunted the PRA from the beginning. From his 1974 resignation to his death, Nixon waged an

[97] National Coordinating Committee for the Promotion of History, *NCC Washington Update*, vol. 8, no. 10, 15 March 2002.

extraordinary campaign to reclaim and control access to his presidential papers. Nixon and the Watergate scandals may have produced a new tradition of public ownership over presidential materials, but Nixon's crusade seems to have begun a more dubious tradition as well. Indeed, since the PRA's enactment, presidents have continuously used Nixon's lavish assertions of executive privilege, however discredited by the courts, to try to override or overthrow an act of Congress. Although the Horn bill, if enacted, will nullify the Bush order, it will likely do little or nothing to alter this new tradition of presidential behavior with respect to the PRA. The instinct for presidents to invent legal and regulatory schemes to reassert dominion over their presidential records with the aim of protecting their reputations and historical legacies may simply be too powerful. In the end, the viability of the PRA appears to rest with Congress's willingness to intervene to check presidential attempts to nullify the act and to ensure that presidential materials remain in the public realm.

But presidential efforts to subvert the PRA seem indicative of much larger forces at play. In some ways they are part of a broader battle waged between a Congress intent on oversight and successive presidential administrations that believe that executive branch authority and prerogatives have been considerably eroded since the Vietnam War and the Watergate scandals. Indeed, the intellectual roots of this struggle stem from the immediate post-Nixonian era when Congress enacted sweeping new laws and institutional arrangements aimed at reasserting its constitutional prerogatives and checking executive power. Following the crises of Watergate, Vietnam, and the disclosure of the CIA's massive involvement in domestic intelligence activities, Congress imposed upon the presidency stringent new reporting requirements, intelligence oversight committees, and specific restrictions on executive operations in foreign affairs. Congress also dramatically altered federal information policy, providing for greater openness to the records of executive agencies through a series of amendments liberalizing the FOIA over White House objections. Nonetheless, as subsequent events showed, most notably the Iran-Contra Affair during the Reagan years, the legacy of the post–Vietnam-Watergate era perhaps has had less to do with these statutes than with the executive's repeated efforts to circumvent Congress's elaborate regulatory strictures. The impetus has been to reassert executive authority and the presidential prerogative of executive privilege.

The more recent controversy surrounding the Bush executive order to grant sitting presidents, former presidents, and family members an expansive privilege to restrict public disclosure of past presidential records is but one of many issues in the ongoing struggle over the balance of power. The struggle by the administration of George W. Bush has taken place on many fronts, including the dispute over whether Tom Ridge, the homeland security director, should testify before Congress, the lawsuit by the General Accounting Office

for documents about Vice President Cheney's energy task force, and threats by a Senate committee to subpoena the Bush administration for information about its contacts with Enron, the collapsed energy trading company.[98] At the same time, after the September 11 terrorist attacks in New York and Washington, President Bush has been assertive in using his unilateral presidential powers to create military tribunals through a presidential order rather than seeking legislation from Congress. The Bush order appears to be part of this much larger effort to strengthen the presidency and the presidential prerogatives of executive privilege. In the case of the Bush order, however, the attempt to reassert executive power seems to be a grave overreaction to the perceived notion of the erosion of executive authority at the expense of the public's right to know about the activities and history of its government. If left unchecked, the Bush order would give free reign to former presidents and vice presidents to exercise national amnesia pertaining to the most embarrassing or incriminating moments of their White House years. Even their family members and heirs could exercise such power, creating a kind of family dynasty of private overseers or censures over the recorded history of the United States government. Establishing such a dynastic system by presidential decree would not only seem to run counter to many of the most fundamental tenets of a constitutional democracy, but also to the concept that public records serve the most critical function of holding government accountable in a democratic society.

[98] See Alison Mitchell, "Cheney Rejects Broader Access to Terror Brief," *New York Times*, 20 May 2002.