

## BEYOND *NIXON*: THE APPLICATION OF THE TAKINGS CLAUSE TO THE PAPERS OF CONSTITUTIONAL OFFICEHOLDERS

The issue of ownership and control of federal governmental papers<sup>1</sup> has come to the forefront in *Nixon v. United States*.<sup>2</sup> In *Nixon*, the Court of Appeals for the District of Columbia held that the governmental seizure of President Nixon's White House papers subsequent to the Watergate scandal constituted a taking under the Fifth Amendment.<sup>3</sup> Therefore, President Nixon is constitutionally entitled to just compensation.<sup>4</sup> Ultimately, the American taxpayer will foot the bill to compensate President Nixon for this taking.<sup>5</sup>

The amount necessary to compensate President Nixon will be enormous. The Watergate tapes alone are valued at approximately \$2.5 million.<sup>6</sup> Moreover, experts have indicated that prices for a relatively routine letter or memorandum from President Nixon's office range from \$500 to \$5,000.<sup>7</sup>

---

1. Congressional papers include all evidence of a documentary character which is under the control and in the possession of Congress or an individual congressperson. Analogously, judicial papers include all evidence of a documentary character which is under the control and in the possession of the federal courts or individual justices. David Kaye, *Congressional Papers, Judicial Subpoenas and the Constitution*, 24 UCLA L. REV. 523, 524 n.8 (1977). Presidential papers are all "documents, tape recordings, and other materials containing information and communications covering the official, political, and personal matters" of the executive office. *Nixon v. United States*, 978 F.2d 1269, 1270 (D.C. Cir. 1992).

2. 978 F.2d 1269 (D.C. Cir. 1992).

3. *Id.* The Court of Appeals for the District of Columbia held that former President Nixon had a compensable property interest in his presidential papers and that the Presidential Records and Materials Preservation Act, 93-526, § 1, Title I, §§ 101 to 106, 88 Stat. 1695-1698 (1974) (codified as amended in notes to 44 U.S.C. § 2111 (1991)) [hereinafter PRMPA], severely restricted his property rights to these presidential papers thereby constituting a per se taking of that property. *Nixon*, 978 F.2d at 1287.

4. *Id.*

5. *Richard Nixon's Unjust Reward*, N.Y. TIMES, Nov. 19, 1992, at A26.

A Federal Court in Washington adds injury to insult by ruling that Richard M. Nixon is entitled to payment for documents seized when he was forced from the White House. . . . The insult is that Mr. Nixon wins legal title to [the Watergate] documents. . . . The injury is that U.S. taxpayers must pay for the documents that, by any fair view of the law, they already own.

*Id.*

6. Ben Macintyre, *Nixon Due Millions for Tapes*, THE TIMES (London), Nov. 19, 1992, at Overseas News Section.

7. *See Nixon is Owed for Seized Watergate Tapes, Court Rules*, ST. PETERSBURG TIMES, Nov. 18, 1992, at 7A. *See also* Robert Davis, *Court: Nixon Deserves Pay for Papers, Tapes*, U.S.A. TODAY, Nov. 18, 1992, at 1A.

The *Nixon* case has also attracted the attention of the media. Newspaper articles and reports have raged across the country in resentment and protest because of this new bill which taxpayers must add to their increasingly large stack.<sup>8</sup> Less than two months after the *Nixon* decision, the media again sparked public interest in the ownership and control of governmental papers through its extensive coverage of *Armstrong v. Bush*.<sup>9</sup> In *Armstrong*, the court considered whether the Bush Administration could destroy certain computer records connected to the Iran-Contra affair.<sup>10</sup>

Members of all three branches of the federal government have enjoyed a long history of personal ownership of their papers, which rises to the level of granting a property interest in those materials.<sup>11</sup> The contro-

---

8. Individual taxpayers wrote to newspapers across the United States expressing their anger over the *Nixon* decision. See, e.g., *Ruling on Nixon Papers*, L.A. TIMES, Nov. 27, 1992, at B4 ("legal yes, moral no"); *Watergate Materials—Justice was Served over Nixon Documents but the Decision Wasn't Just*, SEATTLE TIMES, Nov. 25, 1992, at A7 ("If the decision of the court served justice under existing law. . . [then] the law should be modified.").

In one such editorial, a taxpayer's disgust is especially evident as the author questions President Nixon's willingness to compensate the United States for the "moral aftermath" of Watergate. See *History's Repeat Offender*, ST. PETERSBURG TIMES, Nov. 24, 1992, at 10A. The author argues that "Nixon was not like every president before him . . ." "Victim's compensation is the real issue here." *Id.*

9. *Armstrong v. Bush*, 810 F. Supp. 335 (D.D.C. 1993).

10. The court held that the Bush Administration could only erase White House and National Security Computer files including E-Mail as long as identical electronic copies of the destroyed information were preserved. *Id.* See also Stephen Labaton, *Court Says Bush Administration Can Erase Files if Copies Are Kept*, N.Y. TIMES, Jan. 16, 1993, § 1, at 8 ("Bush Administration could begin erasing White House and National Security computer files as long as it preserved identical electronic copies of the information it was destroying."); *White House Ordered Not To Erase Discs*, L.A. TIMES, Jan. 15, 1993, at A25 ("The Courts and Congress have never said that the Federal Records Act applies to only one Administration."); *Saving Electronic History*, WASH. POST, Jan. 11, 1993, at A16 (observing that White House messages on electronic mail networks as well as other more substantive records produced on computer terminals are now part of the historical record).

The scandal surrounding the Bush White House files has continued into the Clinton administration. On May 21, 1993, a U.S. District Judge, Charles Richey, held the acting archivist, the Executive Office of the President, and the National Security Council in civil contempt for failing to preserve computer tapes created during the Reagan and Bush administrations. George Lardner Jr., *Administration Loses Ruling on Computer Tapes*, WASH. POST, June 9, 1993, at A17. The Clinton administration scheduled a hearing before the U.S. Circuit Court of Appeals on June 15, 1993 and asked Richey to stay his contempt order while the case is on appeal. *Id.* Judge Richey flatly refused and stated that "a stay would be 'particularly inappropriate in this case' because the defendants caused their own difficulties by transferring almost 6,000 tapes . . . from the White House, which was equipped to make copies, to the Archives, which is not." *Id.* The presidential records in question "include E-mail and logs containing information that Richey said 'historians and others need to know about what essential people in the government knew and when they knew it.'" *Id.*

11. See *infra* notes 33-78 and accompanying text. See also *Nixon*, 978 F.2d at 1277. ("History,

versy surrounding ownership of President Nixon's papers following the Watergate scandal, however, called into question the wisdom of this long history.

A few years after Watergate, Congress enacted the Presidential Records Act of 1978,<sup>12</sup> which was an act designed to regulate the papers of the Chief Executive. This legislation attempted to avoid potential takings cases by Presidents in the future and complemented earlier legislation that regulated administrative agencies.<sup>13</sup> However, Congress has not taken steps thus far to regulate itself or the federal courts regarding congressional or judicial papers.

This Note contends that Congress should extend legislation governing the papers of the President and administrative agencies to itself and to the federal courts. Part I explores common law and historical traditions of personal ownership of papers of the legislative, judicial and executive branches. Part II reviews statutes that regulate the materials of the Chief Executive and administrative agencies. Part III analyzes the court's application of the takings clause to presidential papers in *Nixon v. United States* and then applies the takings concept to the materials of the congressional and judicial branches of the federal government. Part IV concludes that Congress should enact prospective legislation to govern the papers of the congressional and judicial branches in order to avoid the real possibility of a valid takings claim by a perhaps scandalous constitutional officeholder.

## I. CONSTITUTIONAL OFFICEHOLDERS' PROPERTY RIGHTS IN THEIR INDIVIDUAL PAPERS

### A. *General Property Rights and the Takings Clause*

A private property owner possesses several important rights which include the ability to purchase, sell, lease, and bequeath.<sup>14</sup> Traditionally, an owner's power to deny access to property is considered one of the most treasured strands in the bundle of property rights.<sup>15</sup> Although the

---

custom and usage indicate unequivocally that, prior to PRMPA, Presidents exercised complete dominion and control over their presidential papers. . . . [E]very president, or his heir or designated representative, both before and immediately after President Nixon assumed *control* over his presidential papers upon departing office.")

12. See *infra* notes 101-21.

13. The Federal Records Act. See *infra* notes 81-100 and accompanying text.

14. SHELDON F. KURTZ AND HERBERT HOVENCAMP, *AMERICAN PROPERTY LAW* 3 (1987).

15. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982).

exact contours of the term "property" are not clearly defined, it is well settled that the Constitution, while protecting property rights, is generally not a source of property interests itself.<sup>16</sup> Rather, property interests "are created and their dimensions are defined by existing rules or understandings that stem from an independent source. . . ."<sup>17</sup>

Common law recognizes that private property may be acquired through a variety of independent means including the following: (1) descent and purchase;<sup>18</sup> (2) authorship or creation;<sup>19</sup> (3) unhindered possession and use as one's own;<sup>20</sup> and (4) history, custom and usage.<sup>21</sup>

The Constitution plays an extremely important role in defining property rights as well. The Takings Clause of the Fifth Amendment<sup>22</sup> provides that private property cannot be taken for public use<sup>23</sup> without paying the former owner just compensation.<sup>24</sup> A compensable property interest is not limited to real property, but also can apply to personal

16. *Nixon*, 978 F.2d at 1275.

17. See *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1001 (1984) (quoting *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980) (quoting *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972))). See also *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2901 (1992).

18. See *Lynn v. Rainey*, 400 P.2d 805, 811 (Okla. 1964) (observing that the law acknowledges two means to lawful property acquisition: descent and purchase).

19. See *American Tobacco v. Werckmeister*, 207 U.S. 284, 299 (1907) ("[T]he property of the author . . . in his intellectual creation is absolute until he voluntarily parts with the same.")

20. See *Damon v. Secretary of H.E.W.* 557 F.2d 31, 34 (2d Cir. 1977) ("[u]nhindered possession of an item, particularly when accompanied by use of the item as one's own. . . .").

21. See *Nixon*, 978 F.2d at 1276 ("Property interests may . . . be created or reinforced through uniform custom and practice."); *Family Div. Trial Lawyers v. Moultrie*, 725 F.2d 695, 707 (D.C. Cir. 1984) (observing that longstanding "norms and traditions" of the community themselves give rise to property interests protected by the Takings Clause of the Fifth Amendment); *First Victoria Nat'l Bank v. United States*, 620 F.2d 1096, 1103 (1st Cir. 1980) ("[L]aw or custom may create property rights where none were earlier thought to exist. . . .").

22. U.S. CONST. amend. V (" . . . nor shall private property be taken for public use, without just compensation.").

23. *Id.* See also *BARRETT ET AL.*, CONSTITUTIONAL LAW 592-93 (8th Ed. 1989) ("Judicial scrutiny of the public use requirement has been limited.") See also *Hawaii Hous. Auth. v. Midriff*, 467 U.S. 229 (1984) (holding that the "public use" requirement is coterminous with the scope of a state's police powers); *Berman v. Parker* 348 U.S. 26 (1954) (holding that a governmental taking of a private commercial property located in an otherwise blighted area, and a transferring of such property to a private redevelopment agency to build private housing as part of an area redevelopment plan fulfills the public use requirement).

24. See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982).

The historical rule that a permanent physical occupation of another's property is a taking has more than tradition to commend it. Such an appropriation is perhaps the most serious form of invasion of an owner's property interests. . . . [T]he government does not simply take a single "strand" from the "bundle" of property rights; it chops through the bundle, taking a slice of every strand.

*Id.* (citing *Andrus v. Allard*, 444 U.S. 51, 65-66 (1979)).

property.<sup>25</sup> Moreover, while no property owner's right is "absolute,"<sup>26</sup> the Constitution requires compensation even where the taking is based on a significant public interest<sup>27</sup> or where it involves a de minimis physical occupation.<sup>28</sup> Finally, when the government authorizes a physical occupation of property or actually takes title, the taking is considered a *per se* violation of the Fifth Amendment requiring compensation.<sup>29</sup>

Of these common law and constitutional sources, perhaps history, custom and usage is the most prevalent in indicating presidential ownership of White House papers.<sup>30</sup> History, custom, and usage is equally prevalent in indicating personal ownership of the papers of other constitutional officeholders. Historically, not only every President, but also every Member of Congress and federal court judge possessed the right to govern the disposition of his or her own papers.<sup>31</sup> The practical significance of this tradition is grounded in principles of separation of powers.<sup>32</sup>

25. See *Nixon*, 978 F.2d at 1284. See also *United States v. Sperry Corp.*, 493 U.S. 52, 62 n.9 (1989) (distinguishing between currency, which is not governed by the *per se* doctrine because it is fungible, and "real or personal property").

26. See, e.g., 35 U.S.C. §§ 181, 183 (1991) (governing patent applications subject to secrecy orders in the interest of national security).

27. See 35 U.S.C. § 183 (1992) (providing for compensation if patent application is subject to secrecy order); *United States v. Gettysburg Elec. Ry. Co.*, 160 U.S. 668, 685 (1896) ("The power of Congress to take land devoted to one public use for another and a different public use *upon making just compensation* can not be disputed.") (emphasis added).

28. *Loretto*, 458 U.S. at 434-35 ("When the 'character of governmental action' is a permanent physical occupation of property, [past] cases uniformly have found a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner.") (citations omitted).

29. *Nixon*, 978 F.2d at 1284 ("The rationale for the *per se* rule is that actual occupation of property obviates an in-depth factual inquiry to determine whether one's economic interests have been sufficiently damaged as to warrant compensation.")

30. *Id.* at 1269.

31. Patricia L. Spencer, Recent Case, 11 AKRON L. REV. 373, 376 (1977).

32. See *Nixon v. Administrator*, 433 U.S. 425, 441 n.5 (1977). President Madison in . . . reviewing the origin of the separation of powers doctrine, remarked that Montesquieu (the foremost authority on the subject) "did not mean that [governmental branches] ought to have . . . no control over the acts of each other. [Rather, Montesquieu suggests] that where the whole power of one department is exercised by the same hands which possess the whole power of another department, the fundamental principles of a free constitution are subverted." [Further, Justice Story determined that although the] "separation of the three branches is indispensable to public liberty, we are to understand this maxim in a limited sense. [The principle] is not meant to affirm that [the branches] must be kept wholly and entirely separate and distinct, and have no common link of connection or dependence, the one upon the other, in the slightest degree." (citations omitted). *Id.*

See also *Trimble v. Johnston*, 173 F.Supp. 651, 652 (D.D.C. 1959) ("At the foundation of the Federal Government lies the doctrine of the separation of powers among three branches, the legislative, the executive and the judicial departments. With certain specific, express exceptions generally

## B. *History of Presidential Papers*

Of the three governmental branches, the history and tradition of presidential ownership of White House papers is the most colorful and well-documented. Every President before Nixon assumed control of his presidential papers upon departing from office.<sup>33</sup> The tradition began when President George Washington removed his presidential papers to Mount Vernon following his second term.<sup>34</sup> President Washington's papers were later sold to the government.<sup>35</sup> In *Folsom v. Marsh*,<sup>36</sup> Justice Story found that the purchase of presidential materials by the government confirmed that until purchased, the papers were private property.<sup>37</sup>

Presidents following Washington adopted his practice of treating presidential papers as private property by devising them to their heirs.<sup>38</sup> For example, the papers of President James Madison descended to his wife

known as 'checks and balances', each of the three departments is independent of the others. As a corollary, none of them may encroach on the powers of the other two.").

33. *Nixon*, 978 F.2d at 1277 n.20. The one significant exception to this practice was the "Map Room Papers" which related to the conduct of World War II. Those documents and materials remained in President Truman's White House following President Roosevelt's death due to the highly unusual circumstances of the era. *Id.*

34. *Id.* at 1287-88.

President Washington's presidential materials are comprised of about 35,000 documents, 95% of which are currently stored in the Library of Congress. The President initially removed his papers from the White House after his term of office and stored them in his home in Mount Vernon, Virginia. He originally planned to build a permanent storage facility for them, but before completing it, he passed away.

*Id.*

35. In his will, President Washington devised his presidential papers to his nephew, Justice Bushrod Washington, to whom they passed upon his death. On Bushrod's death, most of Washington's presidential papers passed to Congressman George C. Washington, who, in 1834, sold the majority of the papers to the U.S. for \$25,000. *Id.*

36. 9 F. Cas. 342 (C.C.D. Mass. 1841).

37. *Id.* at 345. Justice Story found that Congress purchased the Washington materials at a high price for the benefit of the country from their owner as private and valuable property. Thus, Justice Story determined that "President Washington, therefore, intended them exclusively for public use, as a donation to the public, or did not esteem them of value as his own private property, appears to me to be a proposition completely disproved by the evidence." *Id.*

38. Appellant's Opening Brief at 24, *Nixon v. United States*, 978 F.2d 1269 (D.C. Cir. 1992) (No. 92-5021). President John Adams' materials

remained in his family's archives for decades, until they were transferred to the Massachusetts Historical Society, where they long remained completely closed to the public. President Jefferson, though said to have forwarded papers relating to the business of the executive branch departments to departmental files for retention by the government, took with him his own personal presidential papers, including his presidential correspondence, and this material ultimately passed to his heirs. Similarly, Presidents Madison and Monroe willed their materials to their heirs.

*Id.* (citations omitted).

Dolley upon his death in 1836.<sup>39</sup> In 1848, Mrs. Madison arranged to sell all unpublished manuscript papers to the United States.<sup>40</sup> Considerable controversy resulted from this transaction because Mrs. Madison withheld a significant portion of the President's materials and bequeathed them to her son.<sup>41</sup> Her son ultimately sold the papers to a third party who, in turn, later sold them to the Library of Congress.<sup>42</sup>

Of the first thirty men to hold the presidential office, thirteen, including Adams, Jefferson, Madison and Monroe, made specific bequests of their papers.<sup>43</sup> Congress indicated its acceptance of the presidents' legitimate property interest in their papers when it agreed to purchase the materials from the heirs of at least three of these presidents.<sup>44</sup> In addition, numerous presidents have made gifts of their papers. Some Presidents have made unreserved gifts of their presidential papers to the Library of Congress.<sup>45</sup> However, many of these "gifts" were accompanied by strict instructions or conditions regarding the use and access of the materials.<sup>46</sup>

Arrangements providing for conditional gifts to the Library of Congress developed into the modern practice of exchanging presidential papers not only for conditions on use and access, but also for the care and maintenance of a Presidential library.<sup>47</sup> The first of these exchanges was

---

39. *Nixon*, 978 F.2d at 1288.

40. *Id.* The majority of President Madison's presidential papers were sold for \$25,000.

41. *Id.* Mrs. Madison explained in a letter to the Secretary of State that she construed the terms of the purchase to constitute only those papers written by the President himself. OFFICIAL OPINIONS OF THE ATTORNEYS GENERAL 104-08 (C.C. Andrews ed. 1856) (Opinion of Attorney General Caleb Cushing, April 14, 1855).

42. *Nixon*, 978 F.2d at 1288. Congress ultimately appropriated an additional \$40,000 to complete the purchase of President Madison's presidential papers. Appellant's Opening Brief at 24, *Nixon v. U.S.*

43. *Nixon*, 978 F.2d at 1288-91. President Jefferson bequeathed his materials to his grandson. *Id.* at 1288. President Madison bequeathed his papers to his wife Dolley. *Id.* See also *supra* notes 40-42 and accompanying text. President Monroe bequeathed his papers to his son-in-law. *Nixon*, 978 F.2d at 1289. President Tyler bequeathed his papers to his son and two sons-in-law for publication purposes. *Id.* at 1290. President Fillmore bequeathed the materials to his son. *Id.* at 1291.

44. *Id.* at 1282 (observing that Congress acknowledged the validity of these property dispositions when it purchased presidential papers from the heirs of Jefferson, Madison and Monroe in three separate transactions for a total of \$65,000).

45. Appellant's Opening Brief at 24, *Nixon v. United States*.

46. *Id.* at 26-27. President Lincoln, for example, gave his papers to the Library only on the condition that access to them be severely restricted. President Wilson's papers were obtained through his wife, who made a gift, subject to the condition that the papers were held in trust for her during her lifetime and would be accessible to others only with her authorization. *Id.*

47. *Id.* at 28.

arranged by Franklin Roosevelt, who negotiated an arrangement with Congress in which he gave his White House materials to the United States on condition that the United States maintain them in a library to be built on Roosevelt's estate in Hyde Park, New York.<sup>48</sup> In proposing his library plan to the Archivist of the United States, President Roosevelt based his power to make the conditional arrangement on presidential ownership of the materials.<sup>49</sup>

The Roosevelt tradition was continued by later Presidents subject to the Presidential Libraries Act of 1955.<sup>50</sup> Every President from Franklin Roosevelt through Jimmy Carter, except for Richard Nixon, donated his papers to the United States in exchange for a Presidential Library.<sup>51</sup> The

48. *Id.* at 29. Representative Rayburn, a proponent of the deal in Congress, emphasized the President's ownership of the materials:

These are the private property of Franklin D. Roosevelt, as papers of this sort have been the private property of every President of the United States. He could sell them, of course, for a fancy sum. They would be scattered to the four winds and no student who visited any one part of the United States would ever have an opportunity to see them.

*Id.* at 30.

49. *Id.* at 29.

[The Archivist] wanted to know if the President's papers did not come within the class of official papers. The President replied that following the precedent set up by Washington all Presidents had regarded their Presidential files as their personal property and had always taken them from the White House at the expiration of their terms of office. Pointing the direction of the White House fileroom, he said: "When I came to the White House there was not a scrap of paper in that room; when I retire, I shall not leave a scrap. The room will be swept clean for my successor."

*Id.*

50. Presidential Libraries Act of 1955, Pub.L. No. 84-373, 69 Stat. 695 et seq. (1955) (codified as amended at 44 U.S.C. §§ 2111-2112 (1991)). Under the Presidential Libraries Act of 1955, a President may deposit any of his material with the Archivist of the United States and is free to set restrictions on access to such material. *Id.*

[T]he aim of the Act was to encourage the donation . . . of such materials by giving the government increased flexibility to accept conditional donations or deposits, including gifts conditioned . . . on the maintenance of a presidential library in a facility chosen by the President. . . .

In addition to empowering the government to accept donations of presidential materials subject to any agreeable donor-imposed restrictions, the Act authorized the government to accept donations of library facilities to house presidential documents. . . . Thus, the Act reaffirmed the Roosevelt precedent and created a voluntary presidential library system premised on the President's ownership of their materials and their legal right to dispose of those materials any way they wished.

Appellant's Opening Brief at 33-34, *Nixon v. United States*.

51. *Id.* at 28. Presidents from Roosevelt to Carter have

exercised their property rights by entering into voluntary negotiated agreements to donate their materials in exchange for the United States' agreement to, *inter alia*: 1) provide the substantial benefit of maintaining the materials at taxpayer expense in Presidential libraries at sites selected for the personal convenience of the former Presidents (or their heirs); 2) maintain broad restrictions upon public and even governmental access to the donated materials as required by the former Presidents or their heirs; and 3) assure unlimited access



Presidents have used their ownership of the materials to drive hard bargains, occasionally demanding personal museums as well as prestigious libraries.<sup>52</sup> Often Presidents have reserved the power to withhold portions of their presidential materials.<sup>53</sup>

Congress ratified each library agreement, apparently acknowledging that without such deals, Presidents could freely dispose of their materials as they desired.<sup>54</sup> In hearings held before the passage of the Presidential Libraries Act, Representative Joseph Martin argued in support of the legislation indicating that as is the case with the papers of individual Members of Congress,<sup>55</sup> the papers of the President have always been considered his personal property, both during his incumbency and afterward.<sup>56</sup>

Finally, Presidential ownership of White House papers is further supported by the numerous examples of Presidents intentionally destroying their papers. Presidents Van Buren, Garfield, Grant, Pierce and Coolidge are among those who destroyed significant numbers of their

---

to the original materials for the use and enjoyment of the former Presidents, their heirs, and their designees.

*Id.*

52. *Id.*

53. *Id.*

54. *Id.* at 32 n.24.

The legislative history indicates that Congress was fully apprised of the tradition of presidential ownership, and that the Act's provisions for voluntary donation rested on this foundation. *See, e.g.*, Hearings on H.R. 7545, H.R. 8353, H.R. 8416, H.R. 8890, and H.R. 9129 Before the Executive and Legislative Reorganization Subcomm. of the House Comm. on Expenditures in the Executive Dept's, 81st Cong., 2d Sess. 99-100 (1950) (testimony of Dr. Wayne C. Grover, Archivist of the United States) ("[T]he papers — in fact all of the papers — accumulated in the White House by our Presidents from George Washington to President Herbert Hoover have been removed as personal papers . . . It would be at the discretion of the President whether or not he deposited the papers in the National Archives at all. He could still remove his personal papers from the White House.") The legislative history also makes clear that the power of the Administrator to accept papers with donor-imposed restrictions was felt to be a necessary inducement to the Presidents to part with their valuable property rights. S. REP. NO. 2140, 81st Cong., Sess., *reprinted in* 1950 U.S. C.C.A.N. 3547, 3564.

55. *See infra* notes 60-72 and accompanying text.

56. *See* Hearings on H.J.Res. 330, 331, and H.J.Res. 332, Before the Executive and Legislative Reorganization Subcomm., 84th Cong., 1st Sess. 12-13 (1955). Later, Representative McCormack repeated this language verbatim in his personal statement for the record. *Id.* at 58-59. Other members of Congress although not taking the matter up specifically, assumed presidential ownership as a premise for the legislation. *See, e.g., id.* at 23 (Representative Jonas asking whether it would not be prudent to ensure that title to the documents pass to the United States upon dedication to each Presidential Library so that future heirs of the Presidents might not remove the documents); *id.* at 26 (Representative Moss discussing the difficulties of acquiring title to the materials of already deceased Presidents); *cf.* 84 CONG. REC. 6628 (June 5, 1939).

papers.<sup>57</sup>

In summary, Presidents have tremendous power to dispose of their papers as they see fit. This power has been strengthened by the acquiescence of both the Supreme Court<sup>58</sup> and Congress.<sup>59</sup>

### C. *History of Individual Congressional and Judicial Papers*

The tradition of congressional and judicial papers is not as colorful as the papers of the Executive branch. Members of Congress and the judiciary, however, also retain their materials as private property.<sup>60</sup> This is particularly true of Senate records.<sup>61</sup> Since the late eighteenth century, Senators have regarded their congressional papers as their own private property.<sup>62</sup>

Additionally, the right of access to congressional papers is quite limited.<sup>63</sup> An individual wishing to search the records of the House of Representatives for any period after 1789 must obtain permission from the Clerk of the House to use even the oldest of these documents.<sup>64</sup> Consequently, there is no central depository for the materials of Senators and Representatives.<sup>65</sup>

The absence of a constitutional or statutory right of public access to congressional papers has also been expressed in case law. For example, in *Trimble v. Johnston*,<sup>66</sup> a federal district court declined to require disclosure of Senate papers regarding various payroll accounts and funds disbursements.<sup>67</sup> The court found that Congress must initially determine

---

57. *Nixon*, 978 F.2d at 1279. President Van Buren destroyed a large portion of his presidential correspondence while he was still in office. *Id.* Similarly, President Garfield destroyed many of his presidential materials in the two months between being shot by an assassin's bullet and his death in 1881. President Arthur apparently burned three large garbage cans filled with his papers. *Id.* Presidents Grant, Pierce and Coolidge also had significant numbers of their papers destroyed. *Id.* at 1291-94.

58. *See supra* notes 36-37 and accompanying text.

59. *See supra* notes 44-56 and accompanying text.

60. *See* Arthur S. Miller and Henry B. Cox, *On the Need For a National Commission on Documentary Access*, 44 GEO. WASH. L. REV. 213, 217 (1976).

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. Miller & Cox, *supra* note 60, at 217. The lack of a formal management procedure for congressional records is completely at odds with the complex library system established for the papers of the Executive branch. *See supra* notes 47-53 and accompanying text.

66. 173 F. Supp. 651, 652 (D.D.C. 1959).

67. *Id.*

whether any congressional or governmental records are open for public inspection.<sup>68</sup> The court then concluded that because no constitutional or congressionally created right of public access existed regarding unpublished congressional records, no enforcement mechanism was available to execute public information requests.<sup>69</sup>

Like Presidents, Congressional members have donated important and historically relevant materials to public or private educational facilities.<sup>70</sup> In litigation pertaining to one such donation, the court implicitly agreed that Members of Congress own their congressional materials.<sup>71</sup> These congressional collections are often valued at significant sums.<sup>72</sup>

Federal judges, like Members of Congress and the President, have traditionally possessed their materials as private personal property.<sup>73</sup> Judicial ownership of Supreme Court and other federal judicial papers has been congressionally and judicially ratified.<sup>74</sup>

Since the beginning of the Republic, the decision-making process of the Supreme Court has been cloaked in a veil of secrecy.<sup>75</sup> This secrecy began when Chief Justice Marshall instituted the practice of Justices conferring and arriving at decisions at secret meetings.<sup>76</sup> These decisions would subsequently be announced in open court.<sup>77</sup> Justices today still confer in total secrecy and retain all papers and notes as private

68. *Id.* at 654. Whether government records are open for inspection by the public is: within the legislative power. If the Congress legislates to the effect that certain specified records are to be open to the public, . . . and a person to whom this right is extended . . . is denied access to the records by their custodian, then . . . at the behest of such [denied] person, the courts may act and enforce the [statutory] right of inspection.

*Id.* See generally CHARLES R. MCCLURE, ET AL., UNITED STATES GOVERNMENT INFORMATION POLICIES (1989).

69. *Trimble*, 173 F. Supp. at 655.

70. See *Morrison v. Commissioner of Internal Revenue*, 71 T.C. 683 (1979), *aff'd*, 611 F.2d 98 (5th Cir. 1980). Congressman Morrison of Louisiana donated his collection of congressional papers to Southeastern Louisiana University. This case concerned his ability to take a tax deduction for the donation.

71. *Id.* The Tax Court considered whether the donated materials were a charitable deduction for tax purposes. The Congressman was at all times presumed to own the materials outright. *Id.*

72. *Id.* For example, the estimated value of Congressman Morrison's materials was approximately \$61,100. *Id.*

73. See *supra* notes 30-32 and accompanying text.

74. *Nixon*, 433 U.S. at 539.

75. Arthur S. Miller and D.S. Sastri, *Secrecy and the Supreme Court: On the Need for Piercing the Red Velour Curtain*, 22 BUFF. L. REV. 799 (1973).

76. *Id.* at 808.

77. *Id.* Apparently, "Thomas Jefferson objected to Chief Justice Marshall's habit of 'caucusing opinions' and 'his practice of making up opinions in secret and delivering them as the orders of the court.'" *Id.*

property.<sup>78</sup>

## II. STATUTORY FRAMEWORK GOVERNING PAPERS OF THE EXECUTIVE BRANCH

Congress has altered the historical private ownership of government documents through two statutes: the Federal Records Act (FRA)<sup>79</sup> and the Presidential Records Act (PRA).<sup>80</sup> Each of these acts gives the federal government ownership of government documents. There are several differences, however, in how these statutes regulate the actions of government officials.

### A. *The Federal Records Act*

The FRA established a comprehensive management system for the records of federal agencies.<sup>81</sup> The FRA governs not only the management, but also the creation and disposal of these records.<sup>82</sup> In enacting the FRA, Congress sought to ensure efficient and productive records management, accurate and comprehensive documentation of policies and transactions of the federal government, and judicious preservation and disposal of federal records.<sup>83</sup>

78. *Id.* at 809.

79. 44 U.S.C. §§ 2101, 2901, 3101, 3301 (1991). The FRA is actually a series of separate statutes.

80. See *infra* notes 101-14 and accompanying text.

81. The FRA defines "records" to include:

[A]ll books, papers, maps, photographs, machine readable materials, or other documentary materials, regardless of physical form or characteristics, made or received by an agency of the United States Government under Federal law or in connection with the transaction of public business and preserved or appropriate for preservation by that agency. . . as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the Government or because of the informational value of the data in them.

44 U.S.C. § 3301 (1991).

82. *Armstrong v. Bush*, 924 F.2d 282, 284 (D.C. Cir. 1991). The Freedom of Information Act, 5 U.S.C. § 552 (1988), also put restrictions on administrative agencies. However, this Note will not discuss those restrictions.

83. 44 U.S.C. § 2902 (1991). Section 2902 provides the purposes of chapters 21, 29, 31, and 33 of title 44:

Such records management standards and procedures shall implement the following goals: (1) accurate and complete documentation of the policies and transactions of the Federal Government. (2) Control of the quantity and quality of records produced by the Federal Government. (3) Establishment and maintenance of mechanisms of control with respect to records creation in order to prevent the creation of unnecessary records and with respect to the effective and economical operations of an agency. (4) Simplification of the activities, systems, and processes of records creation and of records maintenance and use. (5) Judicious preservation and disposal of records (6) Direction of continuing attention on records from their initial creation to their final disposition, with particular emphasis on the

Section 2102 of the FRA provides for the independent establishment of the National Archives and Records Administration.<sup>84</sup> The Administration is supervised and directed by the United States Archivist who is appointed by the President.<sup>85</sup> The FRA provides that the Archivist must give recordkeeping guidance to federal agencies by promulgating standards and guidelines dealing with records management.<sup>86</sup> The FRA fur-

prevention of unnecessary Federal paperwork. (7) Establishment and maintenance of such other systems or techniques as the Administrator or the Archivist considers necessary to carry out the purposes of this chapter, and chapters 21, 31, and 33 of title 44.

44 U.S.C. § 2902 (1991). See also *Armstrong*, 924 F.2d at 287 (“[T]he statutory language and legislative history of [the statute] indicate that one of the reasons that Congress mandated the creation and preservation of federal and presidential records was to ensure that private researchers and historians would have access to the documentary history of the federal government.”)

84. 44 U.S.C. § 2102 (1991).

85. 44 U.S.C. § 2103 (1991). From 1934 to 1949, the National Archives was an independent agency of government. However, between 1949 and 1984, the National Archives and Resources Service (NARS) was located within the General Services Administration (GSA). The GSA Administrator appointed the Archivist. S. REP. NO. 373, 98th Cong., 2d Sess. 1 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3865. Historians and Archivists immediately questioned the wisdom of placing NARS within GSA. “In 1963, Senator Mathias expressed strong reservations about ‘the concept that GSA should become the guardian of history as well as the custodian of washrooms, storerooms, and workrooms.’” *Id.* at 6, 3870. Further, James Rhoads, who became Archivist in 1968, stated that “eleven years . . . at the helm of [NARS] thoroughly convinced me that independence from the [GSA] was essential.” *Id.* In the legislative history of the 1984 statute, the committee concluded that NARS is fundamentally incompatible with GSA. Consequently, in 1984 Congress amended the FRA to provide for the independent establishment of NARS and for the President to regain the duty of appointing the Archivist. *Id.* at 22-23, 3886-87.

86. 44 U.S.C. § 2904 (1991). Section 2904 provides:

(a) The Archivist shall provide guidance and assistance to Federal agencies with respect to ensuring adequate and proper documentation of the policies and transactions of the Federal Government and ensuring proper records disposition.

(b) The Administrator shall provide guidance and assistance to Federal agencies to ensure economical and effective records management by such agencies.

(c) . . . the Archivist . . . shall have the responsibility—

(1) to promulgate standards, procedures, and guidelines with respect to records management and the conduct of records management studies; (2) to conduct research with respect to the improvement of records management practices and programs; (3) to collect and disseminate information on training programs, technological developments, and other activities relating to records management; (4) to establish such interagency committees and boards as may be necessary to provide an exchange of information among federal agencies with respect to records management; (5) to direct the continuing attention of agencies and Congress on the need for adequate policies governing records management; (6) to conduct records management studies and, in his discretion, designate the heads of executive agencies to conduct records management studies with respect to establishing systems and techniques designed to save time and effort in records management; (7) to conduct inspections or surveys of the records and the records management programs and practices within and between Federal agencies; (8) to report to the appropriate oversight and appropriations committees of Congress and to the Director of the Office of Management and Budget in January of each year and at other times as the Archivist . . . deems desirable. . . .”

*Id.*

ther stipulates that the Archivist must report annually to Congress regarding the agencies' recordkeeping policies and practices.<sup>87</sup> Moreover, the Archivist must notify Congress of any FRA violations.<sup>88</sup>

The Act requires each federal agency head to create and preserve records containing appropriate documentation of the policies and procedures of the particular governmental agency.<sup>89</sup> In addition, each agency head must create and maintain an active, continuing program to further economic and efficient management of agency records.<sup>90</sup> Each agency head must also establish safeguards against the removal or loss of records he finds essential and compelled by Archivist's regulations.<sup>91</sup>

---

87. 44 U.S.C. § 2106 (1991). Section 2106 provides:

The Archivist must submit to the Congress, in January of each year and at such other times as the Archivist finds appropriate, a report concerning the administration of functions of the Archivist, the Administration, the National Historical Publications and Records Commission, and the National Archives Trust Fund. Such report must describe: (1) program administration and expenditures of funds . . . by the Administration, the Commission, and the National Archives Trust Fund Board; (2) research projects and publications undertaken by Commission grantees, and by Trust Fund grantees, including detailed information concerning the receipt and use of all . . . funds; (3) by account, the moneys [sic], securities, and other personal property received and held by the National Archives Trust Fund Board, and of its operations, including a listing of the purposes for which funds are transferred to the National Archives and Records Administration for expenditure to other Federal agencies. . . .

*Id.*

44 U.S.C. § 2904 (1991) provides for the general responsibilities for records management.

88. Section 2115 provides for the reporting and correction of violations:

(a) In carrying out their respective duties and responsibilities under chapters 21, 25, 29, and 33 of [title 44], the Archivist and the Administrator may each obtain reports from any Federal agency on the agency's activities under these chapters. (b) When either the Archivist or the Administrator finds that a provision of any such chapter has been or is being violated, the Archivist or the Administrator shall (1) inform in writing the head of the agency concerned of the violation and make recommendations for its correction; and (2) unless satisfactory corrective measures are inaugurated within a reasonable time, submit a written report of the matter to the President and Congress.

*Id.*

44 U.S.C. § 2905 (1991) provides for the establishment of standards for selective retention of records and security measures.

89. 44 U.S.C. § 3101 (1991).

90. 44 U.S.C. § 3102 (1991). Section 3102 establishes the management program. The program, among other things, must provide for the following:

(1) effective controls over the creation and over the maintenance and use of records in the conduct of current business; (2) cooperation with the Administrator of General Services and the Archivist in applying standards, procedures, and techniques designed to improve the management of records, promote the maintenance and security of records deemed appropriate for preservation, and facilitate the segregation and disposal of records of temporary value . . .

*Id.*

91. 44 U.S.C. § 3105 (1991). By § 3105, officials and employees of the agency must know the following:

Finally, the FRA regulates the disposal of federal records.<sup>92</sup> No records may be destroyed or transferred except pursuant to the disposal provisions of the FRA.<sup>93</sup> The Archivist plays a key role in the disposal process.<sup>94</sup> In 1984, the FRA was amended to further strengthen the Archivist's enforcement authority and obligations.<sup>95</sup>

In *Armstrong v. Bush*,<sup>96</sup> the Court of Appeals for the District of Columbia considered the statutory framework of the FRA.<sup>97</sup> The court found that through the FRA, Congress intended to ensure that agencies appropriately document their policies and decisions.<sup>98</sup> The court also determined that Congress intended that agencies develop records management programs to "strike a 'balance between . . . efficient and productive records management and the substantive need for Federal records.'"<sup>99</sup>

---

(1) that records in the custody of the agency are not to be alienated or destroyed except in accordance with sections 3301-3314 of this title, and (2) the penalties provided by law for the unlawful removal or destruction of records.

*Id.*

92. 44 U.S.C. § 3302 (1991) provides for regulations covering lists of records for disposal, procedure for disposal, and standards for reproduction.

44 U.S.C. § 3308 (1991) provides for disposal of similar records where prior disposal was authorized.

44 U.S.C. § 3309 (1991) provides for the preservation of claims by or against the Government until such claims are settled.

44 U.S.C. § 3310 (1991) provides for disposal of records constituting a menace to health, life or property.

44 U.S.C. § 3311 (1991) provides for destruction of records outside the continental United States in time of war or when hostile action seems imminent.

93. 44 U.S.C. § 3314 (1991). *See also supra* note 82.

94. 44 U.S.C. § 3302 (1991). Section 3302 provides:

The Archivist shall promulgate regulations, not inconsistent with [Chapter 33], establishing—1) procedures for the compiling and submitting to him of lists and schedules of records proposed for disposal, 2) procedures for the disposal of records authorized for disposal, and 3) standards for the reproduction of records by photographic or microphotographic processes with a view to the disposal of the original records.

*Id.* *See also Armstrong*, 924 F.2d at 285.

95. *Id.* at 292. The 1984 amendment was promulgated as a direct response to the Supreme Court's decision in *Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136 (1980). In *Kissinger*, the Supreme Court held that the FRA does not contain an implied cause of action allowing private parties to bring suit to recover records that have been unlawfully removed from an agency. Recognizing that this created "the anomalous situation . . . whereby an agency head [had] a duty to initiate action to recover records which he himself [had] removed" Congress amended the FRA to require the Archivist to ask the Attorney General to sue and to notify Congress if the agency head failed to make a similar request of the Attorney General. *See H.R. CONF. REP. NO. 98-1124*, 98th Cong. 2d Sess. 28 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3865, 3894, 3903.

96. 924 F.2d 282 (D.C. Cir. 1991). *See also supra* note 9 and accompanying text.

97. *Armstrong*, 924 F.2d at 284. *See also supra* note 9.

98. *Id.* at 284-85.

99. *Id.* at 292.

Accordingly, the court held that the FRA does not preclude judicial review of agency guidelines, and in this respect, the FRA differs from the Presidential Records Act.<sup>100</sup>

### B. *The Presidential Records Act*

The Presidential Records Act of 1978 (PRA)<sup>101</sup> directs the President to ensure that the activities, deliberations, decisions, and policies that reflect the performance of the President's constitutional, statutory, or other official or ceremonial obligations are appropriately documented and that such records are maintained as "presidential records."<sup>102</sup> The PRA was enacted in response to the Watergate scandal.<sup>103</sup> This prospective<sup>104</sup> legislation, which became effective in 1981, terminated the long-standing historical tradition of private ownership of presidential papers and hence the reliance on presidential volunteerism for the government to acquire control.<sup>105</sup> The Act establishes the public ownership of records created by presidents and their staffs.<sup>106</sup> The PRA also establishes procedures governing preservation and public access to these records at the end of a presidential administration.<sup>107</sup>

The Archivist has important obligations under the PRA. The Archivist's primary responsibility involves placing White House records in a

100. *Id.* The FRA differs significantly from the PRA in several respects and therefore does not preclude judicial review whereas the PRA does. *See infra* note 125 and accompanying text.

101. The PRA is divided into two titles: Title I, 44 U.S.C. § 2111 (1991) and Title II, 44 U.S.C. §§ 3315-24 (1991). Title II establishes the National Commission of Records and Documents of Federal Officials. The scope of this Note is limited to Title I.

102. H.R. REP. NO. 1487, 95th Cong., 2nd Sess. 1 (1978), *reprinted in* 1978 U.S.C.A.N. 5732. "In order for documentary materials involving the political activities of the President or his staff to be considered 'Presidential records' the activities in question must relate to or have a 'direct' effect upon the carrying out of the official or ceremonial duties of the President." *Id.*

103. *Id.* at 5736. "Although the [PRMPA, passed in 1974, *see infra* notes 133-38 and accompanying text,] concerned itself only with the presidential materials of the Nixon Administration, the Court's decision upholding the act nonetheless established principles that [governed the 1978 legislation] dealing more broadly with control of and access to Presidential papers." *Id.*

104. H.R. REP. NO. 1487, *supra* note 102 at 5732-33. The legislation became effective for records created or received during President Reagan's first term which began January 20, 1981. *Id.*

105. *Id.* By revoking the tradition of private ownership of presidential papers, "the preservation of the historical record of future Presidencies would be assured and public access to the materials would be consistent under standards fixed in law. The primary function of presidential libraries remains unchanged. The libraries are to continue to provide information about their holdings and to make records available to researchers upon request on an impartial basis." *Id.*

106. *Id.* at 5733.

107. *Id.* *See also* 44 U.S.C. § 2202 (1991).



presidential library or other federally operated facility.<sup>108</sup> The Archivist must consider that the outgoing President may opt to place mandatory restrictions of up to twelve years on availability to the public of certain kinds of information.<sup>109</sup> Although presidential materials are closed to the public during the term of such a restriction, the materials are accessible to the incumbent President or Congress when necessary.<sup>110</sup> The materials are also accessible under demand of subpoena or other judicial processes.<sup>111</sup>

Congress gave significantly more deference in the implementation of recordkeeping practices to the President under the PRA than to federal agencies under the FRA. This heightened deference is necessary to balance Congress' two competing goals: (1) to establish public ownership of presidential records and ensure the preservation of those records;<sup>112</sup> and, (2) to recognize the separation of powers limitations on legislation regulating the President's daily operations.<sup>113</sup> Congress balanced these competing goals by requiring the President to maintain records documenting the policies and activities of his or her administration, but by leaving the implementation of this requirement in the President's hands.<sup>114</sup>

During his term of office, the President may dispose of any presidential

108. H.R. REP. NO. 1487, *supra* note 102, at 6, *reprinted in* 1978 U.S.C.C.A.N. at 5735.

The Archivist [is] given up to five years from the end of a President's tenure in office to complete archival processing of the records. During this period the Archivist [is] under no legal compulsion to make documents available to the general public. Once processed, the Archivist's determinations whether particular documents [fall] within a mandatory restriction imposed by the former President are not subject to judicial review during the term of the restriction. The Archivist[, however, is] required to establish an administrative appeal procedure which . . . require[s] a written determination within 30 working days on whether access to a record was properly denied on the grounds that it came within a mandatory restriction.

*Id.*

109. 44 U.S.C. § 2204 (1991).

110. H.R. REP. NO. 1487, *supra* note 102, at 5, *reprinted in*, 1978 U.S.C.C.A.N. at 5735.

111. *Id.* Accessibility is "subject to any rights, defenses or privileges that a former or sitting President or others might assert. . . ." *Id.*

112. *Armstrong*, 924 F.2d at 290.

113. *Id.*

114. 44 U.S.C. § 2203 (1991). Section 2203 governs the management and custody of presidential records. § 2203(a) provides:

Through the implementation of records management controls and other necessary actions, the President shall take all such steps as may be necessary to assure that the activities, deliberations, decisions, and policies that reflect the performance of his constitutional, statutory, or other official or ceremonial duties are adequately documented and that such records are maintained as Presidential records pursuant to the requirements of this section and other provisions of law.

*Id.*

materials that no longer possess administrative, historical, or evidentiary value.<sup>115</sup> The Archivist may notify Congress of any intent the President has to dispose of the records.<sup>116</sup> If the Archivist chooses to inform Congress, the President must wait sixty days after presenting disposal schedules to the appropriate congressional committees before destroying the records.<sup>117</sup> However, the PRA grants neither the Archivist nor Congress authority to veto the President's decision to destroy the records.<sup>118</sup> Therefore, the PRA allows the President nearly absolute control over presidential materials during his term of office.<sup>119</sup>

Upon the conclusion of the President's term of office, the Archivist takes control of the presidential records and different disposal provisions apply.<sup>120</sup> After giving notice in the Federal Register, the Archivist may dispose of records that have inadequate value to warrant their continued preservation.<sup>121</sup>

### C. *Differences Between the FRA and the PRA*

There are four major differences between the FRA and the PRA. First, although the FRA authorizes the Archivist to promulgate guidelines and regulations to assist agencies in the development of a records

---

115. 44 U.S.C. § 2203(c) (1991). Section 2203(c) provides:

During this term of office, the President may dispose of those of his Presidential records that no longer have administrative, historical, informational or evidentiary value if: (1) the President obtains the views, in writing, of the Archivist concerning the proposed disposal of such Presidential records; and (2) the Archivist states that he does not intend to take any action under (e) of this section.

*Id.*

116. 44 U.S.C. § 2203(e) (1991). Section 2203(e) provides:

The Archivist shall request the advice of the Committee on Rules and Administration and the Committee on Governmental Affairs of the Senate and the Committee on House Administration and the Committee on Government Operations of the House of Representatives with respect to any proposal of Presidential records whenever he considers that: (1) these particular records may be of special interest to the Congress; or (2) consultation with the Congress regarding the disposal of these particular records is in the public interest.

*Id.*

117. 44 U.S.C. § 2203(d) (1991).

118. *Armstrong*, 924 F.2d at 286.

119. *Id.* at 282. Although the President must notify the Archivist before disposing of records and the Archivist may inform Congress of the President's desire to dispose of the records, neither the Archivist nor Congress holds the authority to veto the President's disposal decision. Rather, the provision authorizing the Archivist to inform Congress "is solely for notification though Congress would have its traditional means of voicing objection to particulars in the proposal directly to the President, or ultimately by passing legislation to block the destruction of certain records." *Id.*

120. 44 U.S.C. § 2203(f)(1) (1991).

121. 44 U.S.C. § 2203(f)(3) (1991).

management system, the PRA lacks an analogous provision.<sup>122</sup> Second, the FRA gives the Archivist the authority to inspect agency records and to survey agency records management practices, while again, the PRA lacks such a provision.<sup>123</sup> Third, the FRA requires the Archivist to provide Congress with annual reports on agency recordkeeping policies and practices while the PRA makes no such requirement.<sup>124</sup> Finally, unlike the FRA, the PRA precludes judicial review of policy choices made by the President to implement the PRA.<sup>125</sup>

### III. THE NIXON PAPERS: TAKINGS CLAUSE APPLICABILITY TO PRESIDENTIAL PAPERS

President Nixon left behind approximately forty-two million pages of White House documents and eight hundred and eighty tape recorded conversations when he resigned as President of the United States in 1974.<sup>126</sup> Since that date, President Nixon has engaged in a long and rather complex series of court battles regarding ownership and control of his presidential papers.<sup>127</sup>

---

122. *Armstrong*, 924 F.2d at 290.

123. *Id.*

124. *Id.*

125. In *Armstrong*, the D.C. Circuit considered whether the President is regarded as a Federal agency within the Administrative Procedure Act (APA). *Id.* at 288. The APA definition of the term "agency" notably does not exclude the President: "each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but excludes (A) the Congress; (B) the United States courts; (C) the governments of the territories or possessions of the United States; and (D) the government of the District of Columbia. . . ." 5 U.S.C. § 701(b)(1) (1991). The court found that although the President, unlike Congress and the courts, is not explicitly excluded from the APA definition, he is impliedly excluded. *Armstrong*, 924 F.2d at 289.

The court determined that the textual silence, when read against the backdrop of the legislative history of the APA and the canons of construction pertinent to statutes that implicate the separation of powers, demonstrates that Congress did not intend to subject the President to the APA. *Id.* Further, the D.C. Circuit found that permitting judicial review of the President's compliance with the PRA would upset the sophisticated statutory scheme Congress carefully drafted to adequately balance important competing political and constitutional concerns. *Id.* at 290. Thus, the court held that unlike the FRA, the PRA precludes judicial review. *Id.*

126. *Nixon*, 433 U.S. at 430.

127. Relevant cases subsequent to President Nixon's resignation which are a part of this complex litigation history include: *Nixon v. Sampson*, 389 F.Supp. 107 (D.D.C. 1975), *dismissed*, 437 F. Supp. 654 (D.D.C. 1977) (Nixon's original suit to enforce the terms of the Nixon-Sampson agreement); *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977) (filed while the *Sampson* law suit was pending, it challenged the constitutionality of the PRMPA); *Nixon v. Richey*, 513 F.2d 427, 430 (D.C. Cir. 1975) (ordered the district court to consider the question involved in *Nixon v. Administrator of General Services* before taking further action on the *Sampson* case).

### A. *The Nixon Litigation*

Prior to releasing the presidential materials to President Nixon in 1974, President Ford requested an opinion from the U.S. Attorney General regarding the ownership of the materials.<sup>128</sup> In response, the Attorney General determined that President Nixon fully owned the materials.<sup>129</sup> After receiving this opinion, the Administrator of the General Services Administration (GSA), Arthur Sampson, executed a depository agreement with President Nixon (Nixon-Sampson Agreement) whereby President Nixon retained title to all materials, but agreed to deposit them with the GSA in accordance with the FRA.<sup>130</sup> At this point, the Watergate Special Prosecutor requested a postponement in the implementation of the Nixon-Sampson Agreement.<sup>131</sup> President Nixon then sued to compel specific performance of the Nixon-Sampson Agreement.<sup>132</sup>

Congress enacted the Presidential Recordings and Materials Act of 1974 (PRMPA)<sup>133</sup> while these actions were pending. The primary con-

---

128. Spencer, Recent Case, *supra* note 31, at 373.

129. On September 6, 1974, Attorney General Saxbe issued his formal opinion concluding: Because the principle of Presidential ownership of White House materials has been acknowledged by all three branches of the Government from the earliest times; because that principle does not violate any provision of the Constitution or contravene any existing statute; and because that principle is not inconsistent with adequate protection of the interests of the United States; I conclude that the papers and materials in question were the property of Richard M. Nixon when his term of office ended.

43 Op. Atty. Gen. 1, 7 (1974)

130. Appellee's Opening Brief at 11, *Nixon v. United States*, 978 F.2d 1269 (D.C. Cir. 1992) (No. 92-5021). In the Nixon-Sampson Agreement, President Nixon offered to transfer substantially all presidential materials to Mr. Sampson, Administrator of GSA, for deposit in a government facility near President Nixon's California residence. The materials were to remain in California until a permanent presidential archival depository was established with President Nixon's approval. *Id.* at 11-12. President Nixon stipulated his intent to donate his White House tape recordings effective September 1, 1979. However, President Nixon indicated on that date the Administrator must destroy certain tapes. President Nixon also stipulated that access to all materials, including the tape recordings, would be limited to President Nixon and others authorized by him to obtain access. *Id.*

131. Spencer, Recent Case, *supra* note 31, at 374. Watergate Special Prosecutor, Henry Ruth informed President Ford that he had a continuing need of the Presidential materials for the successful prosecution of pending criminal cases. *Id.*

132. Reporters Comm. for Freedom of the Press v. Sampson 591 F.2d 944 (D.C. Cir. 1978). President Nixon's action to enforce the terms of the Nixon-Sampson Agreement was consolidated with actions by the reporters committee and others attempting to have the materials declared property of the United States and to gain access thereto under the Freedom of Information Act (FOIA). The court held that the PRMPA did not bar processing of the FOIA requests for presidential papers. *Id.*

133. Presidential Recordings Materials Preservation Act, Pub. L. 93-526, § 1, Title I, §§ 101 to 106, 88 Stat. 1695-1698 (1974) (codified as amended at note to 44 U.S.C. § 2111 (1991)).

gressional objectives for enacting the PRMPA were to preserve Watergate materials for immediate use in judicial proceedings and to disclose these materials to the public.<sup>134</sup> However, in its final form, the bill's coverage extended to Nixon's presidential historical materials beyond the immediate need of the legislation for pending criminal proceedings.<sup>135</sup> The PRMPA instructs the administrator of the GSA, and subsequent to the PRMPA 1984 amendment,<sup>136</sup> the Archivist, to gain complete control over all of President Nixon's presidential historical material,<sup>137</sup> including designated tape recordings.<sup>138</sup>

---

134. See Note, *Government Control of Richard Nixon's Presidential Material*, 87 YALE L.J. 1601, 1604 n.16 (1978).

135. *Id.*

136. Presidential Recordings Materials Preservation Act, Pub. L. 93-526, § 1, Title I, §§ 101 to 106, 88 Stat. 1695-1698 (1974) (codified as amended at note to 44 U.S.C. § 2111 (1991)). The 1984 Amendment substituted "Archivist" for "Administrator of General Services." This substitution resulted in the Archivist gaining considerably more responsibilities and obligations.

137. PRMPA § 101(b)(3), 44 U.S.C. § 2111 (1991). See also Note, *supra* note 134, at 1603. The Act adopts the definition of historical materials found in the Presidential Libraries Act of 1955 which includes anything in the President's possession of "historical or commemorative value" but is restricted to the period of the Nixon Presidency (January 20, 1969 - August 9, 1974). *Id.*

138. The relevant section provides:

(a) Notwithstanding any other law or any agreement or understanding made pursuant to section 2111 of title 44, U.S.C. any Federal employee in possession shall deliver, and the Archivist of the United States shall receive, obtain, or retain, complete possession and control of all original tape recordings of conversations which were recorded or caused to be recorded by any officer or employee of the Federal Government and which—

(1) involve former President Richard M. Nixon or other individuals who, at the time of the conversation, were employed by the Federal Government;

(2) were recorded in the White House or in the office of the President in the Executive Office Buildings located in Washington D.C.; Camp David, Maryland; Key Biscayne, Florida; or San Clemente, California; and

(3) were recorded during the period beginning January 20, 1969 and ending August 9, 1974.

(b)(1) Notwithstanding any other law or any agreement or understanding made pursuant to section 2111 of title 44 U.S.C., the Archivist shall receive, retain, or make reasonable efforts to obtain, complete possession and control of all papers, documents, memorandums, transcripts, and other objects and materials which constitute the Presidential historical materials of Richard M. Nixon, covering the period beginning January 20, 1969 and ending August 9, 1974.

(2) For purposes of this subsection, the term 'historical materials' has the meaning given it by [44 U.S.C. § 2101]. PRMPA § 101, 44 U.S.C. § 2111 (1991).

Since the passage of the PRMPA, the U.S. has retained complete possession and control of President Nixon's materials. Appellant's opening Brief at 12-13, *Nixon v. United States*. Section 102 of the Act provides that no one may destroy tape recordings or other presidential materials, except with the Archivist's permission. PRMPA, § 102, 44 U.S.C. § 2111 (1991). Section 102 also gives President Nixon and his designated agents access to the papers. *Id.*

Under the PRMPA the Archivist must create and issue regulations necessary to ensure the protection of presidential materials. PRMPA, § 103, 44 U.S.C. § 2111 (1991). Additionally, the statute requires the Archivist to submit a report to Congress proposing and explaining regulations that

In *Nixon v. Administrator*,<sup>139</sup> Nixon sought declaratory and injunctive relief against enforcement of the PRMPA. The U.S. Supreme Court found the PRMPA constitutional and rejected all of President Nixon's constitutional arguments which included separation of powers,<sup>140</sup> privacy right,<sup>141</sup> equal protection,<sup>142</sup> and executive privilege.<sup>143</sup> The Court held that although President Nixon possessed some First Amendment rights to his personal papers, simply granting custody of the presidential

---

grant public access to presidential materials. PRMPA, § 104, 44 U.S.C. § 2111 (1991). Further, the PRMPA regulations provide for screening of President Nixon's materials to determine which material to permanently retain. See Note, *supra* note 134, at 1604.

Although both the PRMPA and the PRA regulate the creation, destruction and public access of presidential papers, fundamental differences exist between the two statutes. First, the GSA narrowed the coverage of the PRMPA to exclude President Nixon's vice-presidential papers and records of private organizations stored within the Executive branch. *Id.* at 1608. Conversely, the PRA includes vice-presidential papers in its regulatory realm. See 44 U.S.C. § 2207 (1991). In addition, the PRMPA expressly provides for judicial review, granting exclusive jurisdiction to the D.C. District Court in section 105. 44 U.S.C. § 2111 (1991). As previously noted, in *Armstrong v. Bush*, the D.C. Appellate Court held that the PRA precluded such judicial review. See *supra* note 125.

139. 433 U.S. 425 (1977).

140. See *supra* note 32 and accompanying text. 433 U.S. at 441. The PRMPA does not violate separation of powers principles because the executive branch became a party to the regulations of the PRMPA. This occurred when President Ford signed the PRMPA's provisions into law and when President Carter's administration urged affirmance of the trial court judgment upholding PRMPA's constitutionality. Moreover, the PRMPA does not violate the separation of powers doctrine because the control of the presidential materials remains in the person of the Administrator of the GSA and the Archivist. *Id.*

141. *Id.* at 455. See *Nixon v. Freeman*, 670 F.2d 346 (1982), *cert denied*, 459 U.S. 1035. PRMPA regulations included the creation of archival centers where members of the public could listen to copies of certain tape recordings made by the former president. The court found that this provision did not violate the former president's constitutional privacy right. The regulation directed archivists to identify and return to the former president private or personal material. The provision also created a procedure for asserting constitutionally based objections to all public access. The court found that because there was no broad privacy right regarding the former president's life while in office, the archival listening center regulation would not result in the public listening to recordings implicating the former president's privacy rights. *Id.*

142. *Nixon*, 433 U.S. at 471-72. There is a rational basis for different treatment given to other former presidents with respect to their papers and treatment afforded President Nixon under the PRMPA. The validity of the difference in treatment is partially due to the fact that papers of the former president's predecessors were already deposited in presidential libraries, whereas President Nixon's papers were not so deposited. The difference is also legitimate because there is an adequate basis to conclude that the former president might not be a completely reliable custodian of the presidential materials due to the conditions under which he left the Executive Office. Therefore, the PRMPA did not deny equal protection to the former president. *Id.*

143. *Id.* at 446. Three objectives provided adequate justification for the limited intrusion into presidential privilege resulting from the provisions of the PRMPA: 1) establishing regular procedures to regulate the preservation of presidential materials for legitimate historical and government purposes; 2) restoring public confidence in the political process by preserving materials for a full

papers to the Administrator of the GSA and permitting their archival screening did not render the statute facially unconstitutional.<sup>144</sup> However, the Court expressly declined to determine whether President Nixon held legal title to the materials.<sup>145</sup> Consequently, the Supreme Court refused to rule on the takings issue in *Nixon v. Administrator*.<sup>146</sup>

After almost two decades of intense litigation, the courts finally addressed the takings issue in *Nixon v. United States*.<sup>147</sup> Upon reviewing the long and robust history of the presidential ownership of White House papers,<sup>148</sup> the Court of Appeals for the District of Columbia determined that President Nixon held a well-grounded expectation of ownership. The court found that mutually explicit understandings created a property interest through history, custom and usage, and thus President Nixon possessed a compensable property interest in the materials.<sup>149</sup> Consequently, the court determined that the PRMPA constituted a per se taking of presidential property because it effectively destroyed the most integral characteristics of ownership.<sup>150</sup> The court concluded that President Nixon deserves the constitutionally-mandated remedy of just compensation.<sup>151</sup>

The court reaffirmed that although a great public interest may justify a taking, it does not convert a taking into a mere regulation.<sup>152</sup> In this case, the court determined the rights President Nixon retained in the presidential materials were so nominal and fragmented that his original

---

airing of events leading to Nixon's resignation; and, 3) understanding how those political processes had operated in order to gauge the necessity for remedial legislation. *Id.*

*See also* Kaye, *supra* note 1, at 525. Congress possesses a similar privilege to the Executive privilege. The express constitutional provisions that determine Congress' right to maintain the confidentiality of its materials are contained in Article I. The publication clause, the immunity from arrest clause, and the speech and debate clause are the most pertinent. Each of these clauses has, at one time or another, provided support for congressional claims of privilege over internal materials. *Id.*

144. 433 U.S. at 465-68.

145. *Id.* at 439.

146. *Id.* at 445 n.8. The court saw "no reason to engage in the debate whether [President Nixon] has legal title to the materials." *Id.*

147. 978 F.2d 1269 (D.C. Cir. 1992).

148. *See supra* notes 33-56 and accompanying text.

149. *Nixon*, 978 F.2d at 1284.

150. *Id.* at 1287.

151. *Id.* The Appellate court reversed the district court, 782 F. Supp. 634 (D.D.C. 1991) (holding the PRMPA did not constitute a taking of President Nixon's White House material), and remanded to set compensation. *Id.*

152. *Id.* at 1284-87.

property interest was effectively decimated.<sup>153</sup>

The court reasoned that a per se taking may occur even when a former property owner retains some rights of access.<sup>154</sup> The test the court applied in determining a per se taking is whether the former owner's access rights preserved the essential economic use of the surrendered property.<sup>155</sup> The court indicated that, under the PRMPA, President Nixon maintained the right to utilize his papers, presumably for his own autobiographical and historical work and research.<sup>156</sup> However, due to the PRMPA, President Nixon lost any bargaining power he had regarding his presidential papers.<sup>157</sup> Significantly, President Nixon lost the power to freely dispose of his papers.<sup>158</sup>

Most importantly, the Court of Appeals for the District of Columbia found that the PRMPA completely abolished President Nixon's right to unilaterally exclude others from the materials.<sup>159</sup> The court determined that the PRMPA deprives President Nixon of this property right because he had lost the ability to prevent any person from viewing or using his presidential papers.<sup>160</sup> The court indicated that the privileges conferred to President Nixon regarding the presidential materials were not substantively different from the privileges enjoyed by anyone else.<sup>161</sup>

The court resolved that the PRMPA severely restricted President Nixon's property rights in his presidential papers.<sup>162</sup> Thus, the court concluded that the PRMPA resulted in a per se taking and President Nixon is entitled to just compensation.<sup>163</sup>

---

153. *Id.* The court determined that the rights granted to Nixon were so minute that they cannot be equated with property. Thus, the PRMPA constitutes a per se taking of Nixon's property. *Id.*

154. *Id.* at 1285. See *Lucas*, 112 S. Ct. at 2895 (taking when owner was prohibited from any economic use of the land); *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 831-32 (1987) (taking when owner required to grant public easement across property in exchange for building permit).

155. 978 F.2d at 1286. The court found that "the right of access retained by Mr. Nixon is but a thin reed among those associated with the ownership of presidential papers." *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.* The court affirmed that "the right to exclude other individuals from private property is perhaps the quintessential property right. Without this right, one's property interest becomes very tenuous since it is then subject to the whim of others—an interest more akin to a license than to ownership." *Id.* (citations omitted).

160. *Id.*

161. *Id.*

162. *Id.* at 1287.

163. *Id.*



*B. Impact of Nixon on the Congressional and Judicial Branches*

As noted above, individual members of the congressional and judicial branches of the federal government also have a personal property interest in their materials.<sup>164</sup> Both branches have a long and unbroken history of private ownership of their papers.<sup>165</sup> Consequently, this history creates distinct property rights both for Members of Congress and federal judges in their congressional and judicial materials, respectively.<sup>166</sup>

Realistically, the only way the public can gain access to these historically significant documents is through congressionally promulgated legislation.<sup>167</sup> Public pressure is paramount in this process. Only intense and powerful constituent influence will result in public ownership of these papers and consequently full public access.<sup>168</sup> However, such public pressure is possible and indeed likely due to the massive publicity of the *Armstrong* case. Moreover, this pressure will mount because enraged American taxpayers may soon pay a hefty price to President Nixon, a man whose administration's negative effects still mar American politics.<sup>169</sup>

Finally, the primary policy reason for the public gaining full access to congressional and judicial materials is that fundamentally, information is a crucial societal resource.<sup>170</sup> The First Amendment protects freedom of speech and the rights of the American people to petition government.<sup>171</sup> Furthermore, Americans have a lengthy legal tradition regarding the government's responsibility to ensure the flow of information.<sup>172</sup>

The well-reasoned takings analysis in *Nixon* can be easily expanded to

164. See *supra* notes 60-78 and accompanying text.

165. See *supra* notes 60-78 and accompanying text.

166. See *supra* note 21 and accompanying text..

167. See *supra* notes 63-65 and accompanying text.

168. See *supra* notes 8-10 and accompanying text.

169. See *supra* notes 5, 8. See also LOUIS W. KOENIG, *THE CHIEF EXECUTIVE* 75 (1975). ("The Nixon pardon. . . was a stark contradiction of the democratic ideal of equal justice.")

170. See Miller & Cox, *supra* note 60, at 216. ("Open information engenders healthy debate and criticism. Recognition of a right to know what government is doing through free access to government information can be traced back to the formative years of the American Republic.") See also McCLURE, ET AL., *supra* note 68, at 77.

171. McCLURE, ET AL., *supra* note 68, at 116 ("The Constitution establishes the government's function as an information collector and disseminator. . .").

172. *Id.* See also Miller & Sasri, *supra* note 75, at 822 ("In a polity that considers itself democratic, secrecy should be the exception and openness disclosure the rule. Only if it can be demonstrated that there is a pressing public need for secrecy—as in certain national security matters—should [secrecy] be permitted. . .").

include the congressional and judicial branches of the federal government. Like the President, Members of Congress as well as federal judges possess a deep, historically-rooted property interest in their valuable materials.<sup>173</sup> However, currently, no statute provides for public ownership or access to congressional or judicial materials. Therefore, under the present system, the only means of obtaining access to these materials would be through a congressional statute similar to the PRMPA.<sup>174</sup>

If Congress enacts prospective legislation within the near future, it can avoid the takings issue presented by the promulgation of the PRMPA.<sup>175</sup> However, if Congress postpones enacting the necessary legislation until an immediate need for the papers arises, such legislation would undoubtedly result in a per se taking of an individual congressional member's or federal judges's private property.<sup>176</sup> Consequently, the Constitution would require just compensation. The final result would involve the American taxpayer forfeiting millions of dollars to compensate a perhaps scandalous constitutional officeholder.<sup>177</sup>

#### IV. PROPOSAL FOR EXPANDING LEGISLATION REGULATING THE EXECUTIVE BRANCH TO THE CONGRESSIONAL AND JUDICIAL BRANCHES

Congress has taken a step in the right direction in enacting legislation providing for ownership and control of the executive branch materials.<sup>178</sup> However, in response to the *Nixon* case, Congress should take additional steps toward better public information by expanding legislation currently governing the papers of the executive branch to the congressional and judicial branches.<sup>179</sup>

Like the FRA, the PRA and the PRMPA, legislation governing the congressional and judicial branches should establish a comprehensive management system including provisions for the creation and disposal of records.<sup>180</sup> However, of the three statutes governing papers of the execu-

---

173. See *supra* notes 60-78 and accompanying text.

174. See *supra* notes 133-38 and accompanying text.

175. See *supra* notes 126-46 and accompanying text.

176. See *supra* note 29.

177. See *supra* notes 3-7 and accompanying text.

178. See *supra* notes 79-121 and accompanying text.

179. See Spencer, Recent Case, *supra* note 31, at 386. The author indicated that legislation of the type proposed in this Note would constitute a positive result from *Nixon v. Administrator*, 433 U.S. 425 (1977).

180. See *supra* note 81.

tive branch, legislation governing congressional and judicial material should be most like the PRA in order to avoid Fifth Amendment takings.

The PRA explicitly provides for complete governmental ownership of the presidential materials. If the government owns the materials outright, no legitimate takings claim can arise. However, Congress must enact *prospective* legislation to govern itself and the courts in order to remove the expectation of property ownership, and thus withstand individual takings claims.

Additionally, like the PRA, legislation governing other branches of government should explicitly preclude judicial review.<sup>181</sup> This new legislation should not require annual congressional reports or Archivist regulations.<sup>182</sup> Annual congressional reports, Archivist regulations and judicial review would not provide effective regulating devices for congressional and legislative papers. A better system of checks and balances was already implicitly established by the PRA.<sup>183</sup>

The PRA establishes executive, legislative, and judicial checks and balances. First, in accordance with the PRA, the President appoints the Archivist who plays a key role in management and disposal of presidential papers.<sup>184</sup> This executive check should remain equally as prominent for the regulation of congressional and judicial papers. Second, the PRA also establishes a congressional check through the Archivist.<sup>185</sup> The Archivist may inform Congress if he believes material the President wants to dispose of is historically important.<sup>186</sup> The PRA allows Congress sixty days to enact legislation preventing disposal of the records in question.<sup>187</sup> Proposed congressional and judicial legislation should adopt this congressional checking system. Congress can check the other two branches in this fashion rather than requiring administratively burdensome annual congressional reports by the executive and judicial branches.<sup>188</sup> Finally, under the PRA, the judiciary maintains a check through the use of its subpoena power rather than direct judicial re-

---

181. See *supra* notes 125, 138 and accompanying text. Conversely, both the FRA and the PRMPA provide for judicial review.

182. See *supra* notes 86-87, 138. Both the FRA and the PRMPA provide for congressional reports and Archivist regulations.

183. See *supra* notes 101-21 and accompanying text.

184. See *supra* notes 108-09 and accompanying text.

185. See *supra* notes 115-21 and accompanying text.

186. See *supra* notes 115-16 and accompanying text.

187. See *supra* note 117 and accompanying text.

188. See *supra* notes 87, 138 and accompanying text.

view.<sup>189</sup> This check permits the judiciary to access historically relevant information in the event of a Watergate-type scandal.

Further, the same in-office freedom that applies to the Chief Executive under the PRA should apply equally to the congressional and judicial branches. Under the PRA, while the President is in office, he possesses virtually complete control over his papers.<sup>190</sup> This control is subject only to the checks of the other two branches which are essentially reserved for drastic or emergency situations.<sup>191</sup>

A fairly large appropriation of funds must accompany this legislation. However, in the wake of *Nixon*, the American public will likely acquiesce to an appropriation for the meaningful and legitimate purpose of increased public information.<sup>192</sup> Also, proposed legislation can reduce overall costs by departing from the PRA's provision regarding the ability of Presidents to restrict public access to their materials upon leaving office.<sup>193</sup>

Like the FRA, statutes governing the management of congressional and judicial papers should not contain provisions allowing Members of Congress and judges to limit access to their individual materials after leaving office. The administrative costs of archival management for one individual, the President, are significantly less than the same costs for hundreds of congressional members and federal judges. Furthermore, the need for restricted access is not as prevalent because no elaborate library system has been instituted for individual members of Congress and the Judiciary.<sup>194</sup>

## V. CONCLUSION

This Note has demonstrated that congressional members and federal judges hold the same property interest in their individual papers that Presidents held prior to the Nixon litigation and passage of the PRMPA. Therefore, a Fifth Amendment taking will result if the government develops a need to seize these congressional or judicial materials through legislation. Both public policy and a desire to avoid a takings situation similar to the *Nixon* case should encourage Congress to promulgate nec-

---

189. See *supra* note 111 and accompanying text.

190. See *supra* note 119 and accompanying text.

191. See *supra* notes 186-89 and accompanying text.

192. See *supra* notes 170-72 and accompanying text.

193. See *supra* note 109 and accompanying text.

194. See *supra* note 65 and accompanying text.

essary prospective legislation to regulate its own materials as well as those of the judicial branch. Further, due to the excessive negative publicity of *Nixon*, the American taxpayer should strongly support this measure. Taxpayers must begrudgingly pay President Nixon today. However, through pressure on their elected officials, the public should secure a favorable result for the future.

*Jennifer R. Williams*

