

Presidential Papers and Popular Government: The Convergence of Constitutional and Property Theory in Claims of Ownership and Control of Presidential Records

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PRESIDENTIAL PAPERS AND POPULAR GOVERNMENT: THE CONVERGENCE OF CONSTITUTIONAL AND PROPERTY THEORY IN CLAIMS OF OWNERSHIP AND CONTROL OF PRESIDENTIAL RECORDS†

Jonathan Turley††

This Article addresses the long-standing dispute over the disclosure of presidential papers from historical, constitutional, and philosophical perspectives. Recently, President Bush rekindled this controversy by issuing an executive order that could significantly reduce public access to presidential records. Professor Jonathan Turley uses this controversy to reconsider some of the most fundamental questions of private versus public ownership of presidential papers, and argues that the roots of the ongoing controversy in this area can be found not in constitutional law but in property law. After offering a detailed account of how papers were transferred or bequeathed by presidents as far back as George Washington, Professor Turley argues that historical practice regarding the control of presidential papers reflects a distinctly Lockean and deontological view of property. Although new property concepts took hold in other areas, this view of private ownership remained dominant in the area of presidential papers well into the twentieth century. Professor Turley examines the basis for a proprietary theory of presidential papers under Lockean, Hegelian, and utilitarian perspectives. Ultimately, he concludes that none of these theories offers compelling support for the traditional view of private ownership of these records. After critiquing the Bush order and identifying serious constitutional flaws in its provisions, Professor Turley offers a new conceptual foundation for presidential papers as jus publicum, or inherently public property. As such, he argues, presidential papers currently held by heirs of former presidents should be subject to public protection or even public acquisition.

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†† J.B. and Maurice C. Shapiro Professor of Public Interest Law, George Washington University. Parts of this Article were presented in congressional testimony on the constitutionality of Executive Order 13,233 and the proposed legislation rescinding that executive order. See *infra* note 11. I wish to thank my assistant, Kelly McDermott, for her invaluable assistance during the development of this Article. This Article is dedicated to Aidan James Turley, who was born during the research and writing of this study.

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INTRODUCTION

James Madison once warned that "[a] popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives."¹ Madison's warning is particularly apt in the context of presidential records. No source of information is more illuminating in terms of public policy and governmental abuse than presidential

¹ THE WRITINGS OF JAMES MADISON 103 (Gaillard Hunt ed., 1910).

records. Perhaps for this reason, access to presidential papers has been controversial since the end of the Washington Administration. Historically, every administration has developed a certain reflective hostility to the release of presidential material. In part, this is due to the long-standing view of presidents that confidentiality is essential to the effective operations of the White House. It may also be due to the vulnerability that raw records can pose to the legacy of a former president and his administration. Ultimately, it is a fight between those who wish to preserve a history and those who wish to preserve a legacy.

A recent conflict among the branches of government over access to presidential records has forced these tensions to the surface.² In November 2001, President George W. Bush signed an executive order that significantly changed the process by which the public gains access to the records of a former president.³ Under Executive Order (EO) 13,233, a former president may indefinitely withhold records from the public through the use of executive privilege.⁴ Not only does the order allow the former president to invoke executive privilege throughout his lifetime, it also allows the former president to transfer his authority to invoke the privilege to any third party.⁵ Although purportedly a mere modification of the procedures used to implement the Presidential Records Act of 1978 (PRA),⁶ EO 13,233 effectively rewrites the PRA in its inverse image.⁷ As a result, the order raises fundamental questions about the proper use of executive privilege, the separation of powers, and the control of presidential papers as public property.⁸

² See Jonathan Turley, *An Odious Roadblock to History*, L.A. TIMES, May 5, 2002, at M5.

³ See Exec. Order No. 13,233, 3 C.F.R. 815 (2002).

⁴ See *id.*

⁵ *Id.* at 816, 818. The executive order also adds new grounds to withhold material as attorney-client communications and attorney work-product. See *id.* at 815.

⁶ Pub. L. No. 95-591, 92 Stat. 2523 (codified as amended at 44 U.S.C. §§ 2201-2207 (2000)).

⁷ The Bush order led to the introduction of corrective legislation sponsored by leading Republicans opposed to the order. See Alexander Bolton, *House Republicans Defy Bush on Release of Past Presidential Records*, THE HILL, Oct. 9, 2002, at 3.

⁸ For the purposes of full disclosure, I have not only opposed EO 13,233, but I have also litigated against parties asserting a variety of executive-privilege claims and represented four former U.S. attorneys general in the successful opposition to the so-called "secret service privilege." See *In re Sealed Case*, 148 F.3d 1073 (D.C. Cir. 1998) (serving as counsel for William Barr, Griffin Bell, Edwin Meese, and Dick Thornburgh); see also Susan Schmidt, *Starr Wins Appeal in Privilege Dispute: Secret Service Fears Dismissed by Court*, WASH. POST, July 8, 1998, at A1 (reporting the rejection of the "protective function privilege" by the D.C. Court of Appeals); Jonathan Turley, *Guarding the King, Not His Secrets*, 20 LEGAL TIMES, Feb. 2, 1998, at 27 (criticizing the basis of a secret service privilege); Jonathan Turley, *Nothing Bars Questioning President's Bad Ideas*, L.A. TIMES, Sept. 27, 1999, at B7 (arguing that executive privilege does not bar congressional inquiries into pardon abuses); Jonathan Turley, *Praetorian Privilege*, WALL ST. J., Apr. 27, 1998, at A23 (criticizing the attempt to establish a "secret service" privilege). I also serve as counsel to the workers at Area 51 who defeated claims that the president's inherent authority as commander-in-chief

Given the importance of open government to our political system, controversies over access to presidential records are commonly framed in constitutional terms. The question of access thus becomes a debate between rivaling utilitarian views. First, Congress argues for greater access based on the principle that open government produces better government, because review of presidential records should deter governmental mischief and abuse. In this sense, the twelve-year limit on withholding records serves to hold any miscreants accountable to the public and to history. Public access is also essential for the American people to understand their history and to act as a more educated electorate. Madison's warning about the interrelationship between public information and popular government captures this utilitarian view.⁹ Second, former presidents advance an alternative utilitarian view that secrecy produces more open and frank discussions within the White House. Often couched in separation-of-powers terms, giving presidents greater control over the release of presidential papers ideally avoids any chilling effect on communications between presidents and their advisors in their discussions of public policy.

The utilitarian rationales for and against greater public access tend to produce irreconcilable positions—a constitutional version of a zero-sum game. The controversy forces a choice between two polar values. Although balancing exists in specific areas of the presidential records debate, public policy in the United States shifted dramatically in the 1970s from a position of presidential control to one of public access. This shift occurred with the enactment of the PRA and its proclamation that all presidential records are the property of the American people.¹⁰ Despite this enactment, controversies over control continue to rage between presidents and Congress. The Bush order manifests the depth of this disagreement and the remaining unresolved questions as to the status of former presidents and vice-presidents, the residual use of executive privilege after leaving office, the status of heirs or designees in the control of presidential papers, the continuing right of former presidents or heirs to control pre-PRA records, and the ability of Congress to compel disclosure of presidential papers.¹¹

superceded federal law, thereby compelling compliance with federal law as a secret military facility. See *Kasza v. Browner*, 133 F.3d 1159 (9th Cir. 1998); *Frost v. Perry*, 919 F. Supp. 1459 (D. Nev. 1996); *Doe v. Browner*, 902 F. Supp. 1240 (D. Nev. 1995). See generally Jonathan Turley, *Through a Looking Glass Darkly: National Security and Statutory Interpretation*, 53 SMU L. REV. 205 (2000) (discussing the legisprudential issues raised by national security cases).

⁹ See THE WRITINGS OF JAMES MADISON, *supra* note 1, at 103.

¹⁰ See 44 U.S.C. § 2202 (2000).

¹¹ See generally *Presidential Records Act Amendments of 2002: Hearing on Executive Order 13233 and the Presidential Records Act Before the Subcomm. on Gov't Efficiency, Fin. Mgmt. and*

Although each of these questions can be addressed in a strictly separation-of-powers context, all mask a deeper and older dispute over the true ownership of presidential papers. This Article suggests that the roots of the current controversy can be found not in constitutional but rather property theory. Property theory also offers a conceptual framework that has been lacking in the often confused and conflicting treatment given to presidential papers in the last century. The early conflicts that led to the recognition of private ownership of presidential papers were framed in property terms that reflected the heavy influence of John Locke on the framers and their contemporaries.¹² The Lockean notion of private ownership supported the claims of former presidents that they were entitled to ownership of their records, establishing ownership on a deontological, as opposed to a utilitarian or consequentialist, rationale.¹³ Although it began to decline in the nineteenth century, this absolute, moral view to ownership lasted well into the twentieth century, when more utilitarian rationales began to dominate.¹⁴ The Bush order represents a fascinating hybrid of both the property and constitutional rationales. Although defended in constitutional or utilitarian terms, the Bush order contains elements that originate from the proprietary period, such as its provision for the transferability of executive privilege to heirs or designees.

This Article examines the historical and conceptual development of private and public control over presidential papers. In Part I, the Article discusses the evolution of rivaling concepts of public and private ownership of presidential records. This history includes instances of destruction of presidential papers by former presidents and their heirs.¹⁵ The largely Lockean view that shaped early disputes over these documents created an absolute, deontological claim of private ownership.¹⁶ Part I explores how presidential papers were addressed in the wills and probate decisions of presidents extending back to George Washington. Part I also shows how the Watergate scandal proved to be a catalyst for the reevaluation of the private control of these records and the enactment of the PRA. Part I then analyzes the Bush order and the various points of contention between Congress and the White House over presidential records. In Part II, this Article discusses the property paradigm and how the proprietary theory arose

Intergovernmental Relations of the House Comm. on Gov't Reform, 107th Cong. 400–35 (2002) [hereinafter *Hearings on EO 13233*] (statement of Professor Jonathan Turley).

¹² See Donald L. Doernberg, "We the People": John Locke, *Collective Constitutional Rights, and Standing to Challenge Government Action*, 73 CAL. L. REV. 52, 57 (1985).

¹³ See JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 134 (Thomas I. Cook ed., 1947).

¹⁴ See *infra* notes 68–75 and accompanying text.

¹⁵ See *infra* notes 38–46 and accompanying text.

¹⁶ See LOCKE, *supra* note 13, at 134.

from the Lockean traditions of the eighteenth century and proved resilient against evolving notions of private and public property. Part III explores the constitutional paradigm that emerged after the enactment of the PRA. Part III raises various constitutional flaws in the Bush order, ranging from its provision for the constitutional status of former presidents to the transferability of executive privilege. This Part suggests that the Bush order compels a reexamination of the validity of the assertions of executive privilege by former presidents and their heirs. Part III also challenges the Supreme Court's previous holding that former presidents may continue to assert privilege, and suggests that the transfer of this authority to third parties is unconstitutional. It will be argued that the constitutional rationales for these prerogatives are incomplete because they are derived not from constitutional theories but from early property concepts. In this sense, the rights of transfer and hereditary descent contained in the Bush order represent a convergence of constitutional and property doctrines.

In Part IV, the Article revisits the property basis for the ownership or control of presidential records, showing the inherent flaws of the deontological view advanced by figures such as Justice Joseph Story.¹⁷ When viewed under Lockean, Hegelian, and utilitarian theories, there is little conceptual support for the private property claims that controlled these papers for over two hundred years. On the contrary, Part IV suggests that presidential papers should be viewed as inherently public property, or *jus publicum*. As such, the public claim to these records applies not only to future presidents, but also retroactively applies to records held by the descendants of former presidents. If this property is truly publicly owned, equitable claims of former presidents or heirs should not outweigh that public interest. Therefore, the government could retroactively claim this property as unjustly withheld by private parties. Alternatively, the government could seek a forced transfer under a variation of eminent domain theory. Although such government claims generally apply to land, presidential papers constitute a form of *jus publicum* that could justify a new doctrine of public acquisition for certain types of historical papers or items. Furthermore, a variety of subsidiary rights to public ownership may exist, including a form of inalienable easement to prevent heirs from denying public access to these records or destroying such material. Each of these options stems from the reevaluation of the property basis of ownership. Once stripped of the constitutional rationales that have distorted past analyses, the scope of control over these papers becomes a matter of public policy. To paraphrase Madison, the "means of acquiring" this "popular information" is founded in the

¹⁷ See *Folsom v. Marsh*, 9 F. Cas. 342 (C.C.D. Mass. 1841) (No. 4901), U.S. App. LEXIS 468.

public claim of ownership.¹⁸ These papers are, in this sense, not simply a product of “popular government” but the very essence of citizens’ claims to ownership of the governmental enterprise itself.

I

A QUESTION OF OWNERSHIP: HISTORICAL EVOLUTION OF PRESIDENTIAL PAPERS FROM PERSONAL TO PUBLIC PROPERTY

A. The Historical Assertion and Consequences of Personal Ownership of Presidential Papers

Because the status of presidential papers has been disputed since the end of Washington’s presidency,¹⁹ the Bush order did not create a new controversy as much as rekindle an older one. For much of the United States’s early period as a republic, presidents and Congress assumed that presidential papers were the property of the departing chief executive. Accordingly, departing presidents took all their papers with them into retirement, except those with ongoing significance or application to the government.²⁰ This practice led to a series of historical losses of the greatest magnitude.²¹ For example, Washington left his papers to the control of his nephew, Associate Supreme Court Justice Bushrod Washington, who was aptly described as a man of “little discretion” and “‘hazardous generosity.’”²² In a relatively short period of time, he dispersed Washington’s papers among a wide array of private parties.²³

Because these papers were treated entirely as the former president’s property, it is not surprising to find that presidential papers were devised or distributed in widely different and often idiosyncratic ways. Most of the early presidents transferred their papers as personal property to their heirs, including the first seven presidents: Washing-

¹⁸ THE WRITINGS OF JAMES MADISON, *supra* note 1, at 103.

¹⁹ See Larry Berman, *The Evolution and Value of Presidential Libraries*, in 4 CTR. FOR THE STUDY OF THE PRESIDENCY, THE PRESIDENCY AND INFORMATION POLICY 79, 80 (1981).

²⁰ See *id.* at 81–82.

²¹ See *id.*; Carl McGowan, *Presidents and Their Papers*, 68 MINN. L. REV. 409, 409 (1983); Arnold Hirshon, *The Scope, Accessibility and History of Presidential Papers*, 1 GOV’T PUBLICATIONS REV. 363, 372 (1974). An unpublished history by the National Study Commission on Records and Documents of Federal Officials documents many of these losses. This study is attached in part to the decision in *Nixon v. United States*, 978 F.2d 1269 app. (D.C. Cir. 1992) [hereinafter Historical Appendix].

²² Berman, *supra* note 19, at 80 (footnote omitted).

²³ See *id.* at 80–81.

ton, John Adams,²⁴ Thomas Jefferson,²⁵ Madison,²⁶ James Monroe,²⁷ John Quincy Adams,²⁸ and Andrew Jackson.²⁹ The vast majority of former presidents passed their papers to their heirs in formal wills.³⁰ Notably, in those cases in which presidents died without a provision concerning their presidential papers, their heirs either claimed the archives or received the records automatically.³¹ Often the papers

²⁴ Adams left his papers to his family, which did not transfer possession to the Massachusetts Historical Society until 1905, barring the public's access until the Society received a deed of gift in 1956. See Historical Appendix, *supra* note 21, at 1288.

²⁵ Jefferson left his papers to his grandson, Thomas Jefferson Randolph, who ultimately sold some of the papers to the United States for \$20,000. See *id.*

²⁶ Madison gave away papers during his life as "mementos" and left the remainder to Dolly Madison with the express understanding that she would make "discreet and proper use of them." HERBERT R. COLLINS & DAVID B. WEAVER, *WILLS OF THE U.S. PRESIDENTS* 45 (1976). Faced with pressing financial difficulties, she eventually sold some of the papers to the United States to help support herself. The United States made two purchases in 1837 and 1848, for \$30,000 and \$20,000, respectively. See *id.* at 43. She left the remainder of the papers to her son, Payne Todd, who sold them to a private collector, Mr. James C. McGuire. See Historical Appendix, *supra* note 21, at 1288.

²⁷ Monroe viewed his papers as a financial resource, particularly in the writing of various books. When he died, Monroe left his papers to his son-in-law, Samuel L. Gouverneur, with instructions to divide the profits from the sale of the papers between himself and Monroe's two daughters. The United States bought some of the papers for \$20,000, and the rest remained in the control of the family. See Historical Appendix, *supra* note 21, at 1289.

²⁸ John Quincy Adams left his papers to his family, which transferred them to the Massachusetts Historical Society in 1905. *Id.* He stipulated in his will that his son Charles Francis Adams should take control over his papers and library and "as far as may be in his power keep them together as one library to be transmitted to his eldest son as one property to remain in the family and not to be sold or disposed of as long as may be practicable." COLLINS & WEAVER, *supra* note 26, at 60. In a prescient moment, considering the later loss of the collections of successors such as Harrison and Tyler to fires, Adams further required that the building to house his library be "fire proof[ed]." *Id.* As with his father's papers, they were not made public until 1956 when the Society received a deed of gift. See Historical Appendix, *supra* note 21, at 1289. When the sons of Charles Francis Adams decided to transfer the material to the Society, they attached a fifty-year nondisclosure condition. See COLLINS & WEAVER, *supra* note 26, at 65.

²⁹ Jackson left his papers in a will so badly written and conceived that it resulted in confusion and triggered litigation. Jackson expressly left his papers to Amos Kendall, the Post Master General, to assist in the completion of a biography. See Historical Appendix, *supra* note 21, at 1289. At Kendall's death, Jackson stipulated that they should "pass forthwith" to Francis P. Blair. *Id.* However, he also stated that any material that Kendall did not "use will be kept and restored to [Jackson's] adopted son[,] A. Jackson[,] Jr." *Id.* Due to this conflicting language, the papers were dispersed, forcing the Library of Congress to complete over one hundred different acquisitions to regain most of the documents. *Id.* at 1289-90.

³⁰ As personal property, the papers passed like any other chattel. Notably, no question arose in this proprietary period of the relative rights of the former presidents to possession as opposed to their heirs. See *infra* note 180 and accompanying text. Specifically, Congress made no effort during the period to limit possession of these documents to the president's life span, nor was there any state effort to use inheritance laws to address will transfers of public documents.

³¹ These cases included presidents who had wills lacking specific provisions, such as Taylor, Fillmore, and Kennedy. See Historical Appendix, *supra* note 21 at 1291, 1295-96. The number of these cases appears to be greater but the records are unclear. In many

passed under standard residual clauses in the wills of former presidents.³² The papers of the four presidents who died intestate—Abraham Lincoln, Andrew Johnson, Ulysses Grant, and James Garfield—received similar treatment.³³ A small number of presidents left papers to nonfamily members.³⁴ In other cases, the papers became the property of nonfamily members by default, including those of Presidents Jackson³⁵ and William McKinley.³⁶ Such transfers to nonfamily mem-

cases, widows or heirs received or simply inherited private libraries that included the presidential papers. *See id.* at 1287–97.

³² The majority of former presidents used the standard residual clause, which could reasonably be viewed as including presidential papers because they were treated as personal property. For example, Pierce did not specifically address the status of his presidential papers, but included a clause stating that “[a]ll the rest and residue of my estate of every kind & description whether real personal or mixed, I give devise and bequeath to my Nephew Frank H. Pierce.” COLLINS & WEAVER, *supra* note 26, at 112 (quoting paragraph eighteen of Pierce’s will). Other wills simply left everything to a single individual, alleviating the need for a residual clause. This was the case of Coolidge, who had the shortest will of any president. Known as “Silent Cal,” Coolidge was taciturn to the end. His will simply read: “Not unmindful of my son John, I give all my estate both real and personal to my wife Grace Coolidge, in fee simple.” *Id.* at 186.

³³ *See id.* at 11. As was the case with Harrison, the historical loss of Garfield’s papers was minimal given his brief, two-hundred-day tenure before dying from an assassin’s bullets. Nevertheless, as with some of his presidential brethren, Garfield’s death led to controversy over the inheritance of estate assets. *See Where There’s No Will, There Is a Way*, PLAIN DEALER, Oct. 8, 1998, at 4B (discussing how Garfield’s dying intestate was responsible for “tangling assets for his widow, Lucretia, and five minor children”).

³⁴ Buchanan’s will is one such case. A lifelong bachelor, Buchanan wanted his papers to be published as part of an account of his public life. Accordingly, he added a codicil to his will that stated:

I hereby direct my Executors . . . to place all the papers, correspondence and private and public documents connected with my public life in the hands of my friend, William B. Reed, who having shown to me in my retirement great kindness and in whom I have entire confidence to enable him to prepare such a biographical work I desire.

COLLINS & WEAVER, *supra* note 26, at 118 (quoting the codicil paragraph to the Buchanan will). To this end, Buchanan not only ordered a stipend for Reed, but also a fund for Reed’s wife. *See id.* at 119.

³⁵ *See supra* note 29. The seeds of the controversy were laid earlier due to Jackson’s encouragement of various writers expressing interest in writing on his life by making his original papers available to them. *See* 1 CORRESPONDENCE OF ANDREW JACKSON xix (John Spencer Bassett ed., 1926). Jackson would complain to Polk that he had liberally entrusted friends with material from his library, “but [they] never return them and . . . now when wanted for public good, they cannot be had.” 6 CORRESPONDENCE OF ANDREW JACKSON, *supra*, at 61. This liberal policy of distribution was in contrast to Jackson’s careful archiving of his papers. *See* 1 THE PAPERS OF ANDREW JACKSON xxv (Sam B. Smith & Harriet Chappell Owsley eds., 1980) (noting that as early as 1813, Jackson “began packaging his letters in bundles and writing the name of the correspondent, the date, and a summary of the contents on the outside of the letter fold”). Ultimately, the heirs of Francis P. Blair defeated Jackson’s heirs as the owners of these papers. *See* Historical Appendix, *supra* note 21, at 1289–90.

³⁶ McKinley’s papers presented an interesting twist on this theme. McKinley’s widow and co-executor, Justice Day, gave the papers to McKinley’s former secretary and co-executor, George B. Cortelyou, for proper administration. Ultimately, however, the Cortelyou family acquired sufficient title to give these documents to the Library of Congress with the

bers are the obvious result of those seven presidents either having died without children or having had children who died before them.³⁷ Some presidents used their uncontested ownership over their presidential papers to order them destroyed, including Martin Van Buren,³⁸ Franklin Pierce,³⁹ Grant,⁴⁰ Garfield,⁴¹ Chester Arthur,⁴² and Calvin Coolidge.⁴³ In other cases, the heirs of former presidents destroyed, or attempted to destroy, the papers of Presidents Fillmore,⁴⁴ Lincoln,⁴⁵ and Warren Harding.⁴⁶ Accidental fires or theft resulted in

same type of restrictions commonly imposed by family members. See Historical Appendix, *supra* note 21, at 1293.

³⁷ See COLLINS & WEAVER, *supra* note 26, at 11.

³⁸ Van Buren burned many documents during his term and continued to burn documents after leaving office. His family ultimately donated what remained of his papers to the United States in 1904–05. See Historical Appendix, *supra* note 21, at 1290.

³⁹ Pierce's nephew, Kirk Pierce, sold the few documents that Pierce did not destroy to the Library of Congress. See *id.* at 1291.

⁴⁰ President Grant either destroyed or gave away many of these documents during his term. Ulysses S. Grant III eventually donated the remainder to the Library of Congress. See *id.* at 1292. Notably, Major U.S. Grant III asked President Harding to transfer Grant's letterbooks to the Library of Congress, citing the right of a president and his heirs to "all letters and papers relating to his administration." INDEX TO THE ULYSSES S. GRANT PAPERS, at v–vi (1965) (on file with the Library of Congress).

⁴¹ Garfield was the most determined president in destroying his own records. Garfield reportedly destroyed his papers between the time that he was wounded by an assassin and his eventual death, from July to September 1881. See Historical Appendix, *supra* note 21, at 1292.

⁴² Arthur's papers simply disappeared without explanation until his grandson, Chester Arthur III, informed the government that Arthur had "caused to be burned three large garbage cans, each at least four feet high, full of papers which I am sure would have thrown much light on history." *Id.* Chester Arthur III sold what remained of Arthur's papers for \$7,500. See *id.*

⁴³ After Coolidge learned from the Chief of the Manuscript Division that "it is entirely for you to say what shall be done with [your] papers," he had them destroyed. What remained was largely "unimportant papers," which the Library received with restrictions on access until 1953. *Id.* at 1294.

⁴⁴ Interestingly, Fillmore was "one of the more conscientious collectors of presidential materials." *Id.* at 1291. Fillmore noted that he had preserved his papers to "enable the future historian or biographer to prepare an authentic account of that period of our country's history." COLLINS & WEAVER, *supra* note 26, at 103. After leaving this carefully constructed archive to his son, the son ordered the destruction of his father's correspondence "at the earliest practicable moment" after his own death. The papers survived in an attic because the son's executor did not follow this instruction, and now the papers can be found as part of the Buffalo Historical Society collection. See Berman, *supra* note 19, at 81–82.

⁴⁵ Lincoln's son, Robert Todd Lincoln, inherited these papers. Robert proceeded unilaterally to go through the material and to destroy everything that he deemed "of little value." Historical Appendix, *supra* note 21 at 1291–92. He was reportedly "caught by Mary Butler in the very process of destroying his fathers' [sic] Civil War correspondence." Berman, *supra* note 19, at 82. He then gave the remainder to the Library of Congress, but barred public access. The Lincoln papers remained inaccessible to the public until 1947. Historical Appendix, *supra* note 21 at 1292.

⁴⁶ Harding did preserve his presidential papers. However, after his death, his widow had most of the material destroyed. Mrs. Harding viewed the destruction as necessary to protect her husband's legacy from any taint or negative light. See THE WARREN G. HARDING

the loss of some presidents' papers, such as those belonging to Benjamin Harrison,⁴⁷ John Tyler,⁴⁸ and Zachary Taylor.⁴⁹ Other presidents allowed their papers to be widely dispersed during their lifetimes, including Presidents Madison⁵⁰ and Grover Cleveland.⁵¹ Finally, some presidents bequeathed their papers to public libraries under continuing restrictions on access and use, including Presidents Herbert Hoover, Theodore Roosevelt, William Taft, Franklin Roosevelt, Harry Truman, Dwight Eisenhower, John Kennedy, Lyndon Johnson, Gerald Ford, and Jimmy Carter.⁵² Ten former presidents or their heirs sold presidential papers to either private collectors or to the Library of Congress.⁵³

This history shows a consistent and widespread acceptance of the proprietary theory of presidential papers.⁵⁴ Although most presidents

PAPERS: AN INVENTORY TO THE MICROFILM EDITION 5 (Andrea D. Lentz ed., 1970). She personally designated files and documents for destruction until only two crates remained. *Id.* The majority of the remaining material survived because it was in the White House basement until 1929, when a workman discovered it. These papers, however, then fell under the terms of Mrs. Harding's will, which left her papers and any of her husband's papers to the Harding Memorial Association and barred public access. The Harding papers became available to the public in 1963. See Historical Appendix, *supra* note 21, at 1294.

⁴⁷ Fire destroyed Harrison's papers in his North Bend home in 1858. See Historical Appendix, *supra* note 21, at 1290; McGowan, *supra* note 21, at 412. In terms of presidential papers, the loss was not great, because Harrison died one month after his inauguration—reportedly after he incautiously refused to wear appropriate clothing while riding a horse in the inauguration parade. See COLLINS & WEAVER, *supra* note 26, at 79.

⁴⁸ Some of Tyler's presidential papers and documents from his private library were in Richmond when it burned in April 1865. Other papers remaining in his house were ransacked, stolen, or destroyed during the fighting of the Civil War. See COLLINS & WEAVER, *supra* note 26, at 86.

⁴⁹ Taylor's son, Richard Taylor, attained the rank of major general in the Confederate Army, and rampaging Union troops destroyed his father's papers when the troops captured his home in St. Charles Parish, Louisiana. The Library of Congress obtained the few remaining documents. See Historical Appendix, *supra* note 21, at 1291.

⁵⁰ Although Dolly Madison would inherit and sell many of his records, Madison gave away significant numbers of papers as mementos. See *id.* at 1288.

⁵¹ Like Madison, Cleveland gave away presidential records as mementos and gifts. See *id.* at 1293.

⁵² Some of these transfers occurred as *inter vivos* gifts at the direction of former presidents rather than as part of a will. For example, only two years before his death, Theodore Roosevelt gave six boxes of papers to the Library of Congress, but stipulated that only he and his designees could see them during his lifetime. A few days after his death, the Library received additional papers, and four more boxes were discovered later in the hayloft of a barn at Oyster Bay. See COLLINS & WEAVER, *supra* note 26, at 163.

⁵³ These include the papers of Presidents Washington, Jefferson, Madison, Monroe, Jackson, Tyler, Polk, Pierce, Andrew Johnson, and Arthur. As discussed below, Nixon also demanded compensation for his records as a takings. See *Nixon v. United States*, 978 F.2d 1269 (D.C. Cir. 1992). To their credit, presidents like Wilson (and their respective first ladies) donated their papers to the Library of Congress. COLLINS & WEAVER, *supra* note 26, at 175.

⁵⁴ One of the few public explanations of this personal ownership by a former president occurred in 1915. Taft explained in a speech that:

recognized the public's interest in these papers, until the middle of the twentieth century they took President Cleveland's view that "if I desired to take [my presidential papers] into my custody I might do so with entire propriety, and if I saw fit to destroy them no one could complain."⁵⁵ Congress and archivists also treated presidential papers as personal property, as evidenced by government purchases of collections.⁵⁶

Over time, a new view emerged that did not deny the claim of personal ownership of some presidential papers, but viewed their sale or destruction as a public wrong.⁵⁷ Although he was not the first president to seek the creation of a presidential library,⁵⁸ Franklin Roosevelt's decision to donate both land and his papers for the establishment of the first presidential library in Hyde Park, New York, symbolizes this shift in thinking.⁵⁹ He did so, however, believing that this was a gift to the American people rather than an obligation.⁶⁰ In

The Executive office of the President is not a recording office. The vast amount of correspondence that goes through it, signed either by the President or his secretaries, does not become the property or a record of the government, unless it goes on to the official files of the Department to which it may be addressed.

The retiring President takes with him all of the correspondence, originals and copies, which he carried on during his administration.

INDEX TO THE WILLIAM HOWARD TAFT PAPERS, at vi (1972) (on file with the Library of Congress).

⁵⁵ Berman, *supra* note 19, at 82 (quoting Cleveland in an 1886 response to a Senate request of documents) (footnote omitted).

⁵⁶ *See id.* at 81 (detailing government purchases such as those of Washington's official papers and his private correspondence for \$25,000 and \$20,000, respectively).

⁵⁷ A president's support for open government and unfettered access to government documents can change when the content of such material becomes known. For example, in 1961, Nixon objected to possible restrictions on information involving the Bay of Pigs debacle under Kennedy. Nixon insisted that "[t]he concept of a return to secrecy in peacetime demonstrates a profound misunderstanding of the role of a free press as opposed to that of a controlled press. The plea for secrecy could become a cloak for error, misjudgements, and other failings of government." Martha Joynt Kumar & Michael Baruch Grossman, *The Refracting Lens: The President as He Appears Through the Media*, in 4 *CTR. FOR THE STUDY OF THE PRESIDENCY*, *supra* note 19, at 102, 107 (quoting an article in the *New York Times*).

⁵⁸ The earliest reference to such a library can be found in a letter from George Washington to James McHenry in which he stated his plan to construct a building "for the accommodation and security of my Military, Civil and private Papers which are voluminous, and may be interest[ing]." 35 *THE WRITINGS OF GEORGE WASHINGTON* 430-31 (John C. Fitzpatrick ed., 1940).

⁵⁹ *See* COLLINS & WEAVER, *supra* note 26, at 203. Other presidents were equally generous, including Lyndon Johnson, who donated his home and two hundred adjoining acres of land (subject to a life estate interest in Lady Bird Johnson). The will expressly turns over all of Johnson's presidential papers to the Lyndon Baines Johnson Library for archiving and public access. Notably, unlike his predecessors, Johnson removed any inheritance claims of his family to the material and gave the gift "without any reservation of any intervening interest or right to the actual possession or enjoyment of said materials in my estate or my family." *Id.* at 267 (citing section nine of Johnson's will).

⁶⁰ H.G. Jones explained the significance of this act:

1938, Roosevelt signed a plan that he called the "Final Disposal" of his papers and, after handing over the library to the government, he immediately began to have material sent to its archives.⁶¹ After Roosevelt, there was an expectation that presidential papers would eventually be placed in a public library or archive.⁶²

After Roosevelt, the view of a civic responsibility rather than a public obligation continued to control the decision to release presidential records.⁶³ Notably, among the presidents following Roosevelt, only Nixon demanded compensation for his records.⁶⁴ All other presidents left their records to the public under a variety of restrictions, including gifts in exchange for publicly supported presidential libraries.⁶⁵ Even when Congress enacted the Presidential Libraries Act,⁶⁶ it did not require presidents to deposit their records in the libraries

Roosevelt made his most significant departure . . . by recognizing the paramount right of the public and by subordinating this private claim to public custody, support, and management under the direction of civil servants governed by professional standards. This . . . fell short of the natural and logical goal. But it was a long, unprecedented step forward that no President thenceforth would be likely to disregard.

H.G. JONES, THE RECORDS OF A NATION: THEIR MANAGEMENT, PRESERVATION, AND USE 147 (1969); see also Berman, *supra* note 19, at 83 (quoting H.G. Jones).

⁶¹ This history is detailed in a later judicial review of Roosevelt's will to determine the status of some of his presidential papers that remained at the White House. See *In re Roosevelt's Will*, 73 N.Y.S.2d 821, 823–25 (Sur. Ct. 1947). The Court found that the papers had been properly given to the American people as an *inter vivos* gift. See *id.* at 825.

⁶² Notably, even after presidential papers were recognized as historical documents that should be given to the government, controversy remained over the timing of such transfers. For example, Margaret Truman was given access to withheld presidential papers to complete her own book on the life of her father—access that gave her a distinct competitive advantage over historians and authors working on similar works. See Berman, *supra* note 19, at 82. But see JOSEPH L. SAX, PLAYING DARTS WITH A REMBRANDT: PUBLIC AND PRIVATE RIGHTS IN CULTURAL TREASURES 85 (1999) (stating that Truman's decision to keep his papers until he completed his memoirs most likely did not deserve the public). Henry Kissinger also received criticism for granting exclusive access to other writers. Alexandra K. Wigdor & David Wigdor, *The Future of Presidential Papers*, in 9 CTR. FOR THE STUDY OF THE PRESIDENCY, *supra* note 19, at 92, 97.

⁶³ Roosevelt certainly created a high standard for presidents with his donation of both land and presidential papers. However, as the foregoing discussion demonstrates, the Administrator of the General Services Administration was incorrect when he declared that it was "unprecedented in American history for a President to leave his papers to the Nation." EDGAR EUGENE ROBINSON, THE ROOSEVELT LEADERSHIP 1933–1945, at 414 (1955).

⁶⁴ See *Nixon v. United States*, 978 F.2d 1269 (D.C. Cir. 1992).

⁶⁵ See Historical Appendix, *supra* note 21, at 1295–97. Presidents Lyndon Johnson and Ford made such gifts in exchange for presidential libraries. See *id.* at 1296. Recently, Nixon's heirs initiated discussions with the government to incorporate their privately operated library into the federal system in exchange for the transfer of Nixon's presidential papers from the federal archives. See Phil Willon, *Nixon Daughters Campaigning to Bring Father's Papers Home*, L.A. TIMES, Jan. 1, 2003, LEXIS, News Library, Lat File. However, due to considerable private funding, Nixon's heirs dismissed the federal financial contribution as being any incentive or consideration for such a merger. See *id.*

⁶⁶ Ch. 859, 69 Stat. 695 (1995) (codified as amended at 44 U.S.C. §§ 2101, 2107–2108 (2000)). Before this Act, presidential libraries were defined as Deeds of Gift due to the private ownership claim.

and, when they chose to do so, they controlled the conditions under which the records would be available to researchers or to the public.⁶⁷ Thus, Congress either did not consider presidential records to be public property or, more likely, it was content to leave the issue unresolved and rely on the good intentions of former presidents.

Nixon brought about a quantum change in the status of presidential papers for the most unexpected of reasons.⁶⁸ Nixon was the catalyst for the Supreme Court's modern articulation of executive privilege and its limits in his struggle with Congress over its investigations and impeachment proceedings.⁶⁹ Less known is the fact that Nixon also caused a reconsideration of the status of presidential documents and the process by which the government acquired and released such documents.⁷⁰ In a modern replay of prior scandals involving the destruction of the Lincoln and Harding presidential papers, Congress discovered an agreement that reasserted not only personal proprietary claims to these papers, but also the right to destroy such property.⁷¹ This so-called Nixon-Sampson agreement ignited a firestorm of criticism.⁷² Arthur Sampson, the Administrator of General Services, signed an agreement with Nixon that recognized Nixon's private property claim over all of his presidential papers.⁷³ This private property included the incriminating tapes recorded in the Oval Office.⁷⁴ Under the agreement, "Nixon could begin to destroy the tape recordings on or after September 1, 1979, so that all of them would be destroyed by September 1, 1984, or following the death of the former President, whichever occurred first."⁷⁵ The resulting controversy led to the enactment of the Presidential Record-

⁶⁷ See 69 Stat. at 696.

⁶⁸ Nixon also tarnished the image of executive privilege for his successors. See Mark J. Rozell, *Executive Privilege and the Modern Presidents: In Nixon's Shadow*, 83 MINN. L. REV. 1069, 1071 (1999) ("President Richard M. Nixon gave executive privilege a bad name . . .").

⁶⁹ See *United States v. Nixon*, 418 U.S. 683 (1974).

⁷⁰ See *Nixon v. Sampson*, 389 F. Supp. 107 (D.D.C. 1975).

⁷¹ *Id.* at 160-62.

⁷² There were two disclosures relating to Nixon's records that infuriated the media and public, and notably, professionals at the National Archives:

[T]he agreement between President Nixon and GSA administrator Arthur Sampson—an agreement arrived at . . . without either the awareness or approval of the National Archives staff—brought the roof down on GSA, once Mr. Nixon's questionable deed of gift for his vice-presidential papers and the massive tax deduction it "allowed" became news. Nor was the Archives consulted later when aides in the Ford White House helped GSA draft another agreement, this one with President Nixon then out of office, for the donation of his presidential tapes and papers—one that would have allowed Mr. Nixon to withhold or destroy vital material had the U.S. District Court not enjoined the GSA . . .

Free the Archives, WASH. POST, July 4, 1981, at A18.

⁷³ See *Sampson*, 389 F. Supp. at 160-62.

⁷⁴ See *id.* at 115-16.

⁷⁵ Berman, *supra* note 19, at 84-85 (footnote omitted).

ings and Materials Preservation Act (PRMPA),⁷⁶ which nullified the Nixon-Sampson agreement and protected the Watergate tapes from destruction.⁷⁷ A challenge from Nixon led to the Supreme Court's constitutional ruling in favor of Congress's right to protect such material from unilateral destruction by a president in *Nixon v. Administrator of General Services*.⁷⁸

The Nixon-Sampson controversy also led to the establishment of a commission to study the issue of presidential records.⁷⁹ The National Study Commission on Records and Documents of Federal Officials ultimately rejected any private proprietary theory of presidential papers. Not only did the Commission recommend that all such papers be treated as public property, it also suggested a fifteen-year time period as a transition period to eventual public release.⁸⁰ Congress and President Carter adopted this position in the enactment of the PRA.⁸¹

The Nixon litigation reveals a transition from a period of reliance on private proprietary claims to reliance on executive privilege as a basis for withholding material. Nevertheless, Nixon made a private proprietary claim, leading to a brief consideration of the issue of title to presidential records in *Nixon*.⁸² Although the Supreme Court declined to hold that presidential records are the property of the public rather than of the president, it strongly suggested that there was a

⁷⁶ Pub. L. No. 93-526, 88 Stat. 1695 (1974) (codified as amended at 44 U.S.C. § 2107 (2000)). The PRMPA ultimately allowed Congress to take "control of approximately 42 million pages of documents and 880 tape recordings, which contained both personal and non-personal records." Catherine F. Sheehan, Note, *Opening the Government's Electronic Mail: Public Access to National Security Council Records*, 35 B.C. L. REV. 1145, 1162 (1994).

⁷⁷ One of the interesting aspects of the PRMPA is the absence of an endorsement of the public property rationale that would later be included in the PRA. Among the various purposes stated in section 104(a), none speak of this public property rationale. See Pub. L. No. 93-526, 88 Stat. 1695, 1696-97 (1974). Instead, Congress spoke of the need to learn the "full truth, at the earliest reasonable date, of the abuses of governmental power" in Watergate as well as other Watergate related matters. *Id.* § 104(a)(1). In fact, the seventh stated purpose refers to "the need to give to Richard M. Nixon, or his heirs, for his sole custody and use, tape recordings and other materials which are not likely to be related to [Watergate] and are not otherwise of general historical significance." *Id.* § 104(a)(7).

⁷⁸ 433 U.S. 425 (1977).

⁷⁹ See Pub. L. No. 93-526, 88 Stat. 1695, 1699 (1974) (codified as amended at 44 U.S.C. §§ 3316-3317 (2000)).

⁸⁰ See Berman, *supra* note 19, at 85. Lester Cappon summarized the Commission's recommendation as follows:

"[A]ll documentary materials made or received by public officials in discharge of their official duties should be recognized as the property of the United States; and that officials be given the prerogative to control access to the materials for up to fifteen years after the end of their federal service."

Id. (footnote omitted).

⁸¹ See Pub. L. No. 95-591, 92 Stat. 2523 (1978) (codified as amended at 44 U.S.C. §§ 2201-2207 (2000)).

⁸² See *Nixon*, 433 U.S. at 445.

compelling public claim to these documents, even against the wishes of a private ownership claim. This suggestion in a footnote would become a catalyst for the enactment of the PRA:

We see no reason to engage in the debate whether appellant has legal title to the materials. . . . It has been accepted at least since Mr. Justice Story's opinion in *Folsom v. Marsh* that regardless of where legal title lies, "from the nature of the public service, or the character of the documents, embracing historical, military, or diplomatic information, it may be the right, and even the duty, of the government, to give them publicity, even against the will of the writers." Appellant's suggestion that the *Folsom* principle does not go beyond materials concerning national security and current Government business is negated by Mr. Justice Story's emphasis that it also extended to materials "embracing *historical* . . . information." *Ibid.* Significantly, no such limitation was suggested in the Attorney General's opinion to President Ford. Although indicating a view that the materials belonged to appellant, the opinion acknowledged that "Presidential materials" without qualification "are peculiarly affected by a public interest" which may justify subjecting "the absolute ownership rights" to certain "limitations directly related to the character of the documents as records of government activity."⁸³

Congress acted quickly to establish that title to this material belongs to the public, a position that was accepted by President Carter and his successors.⁸⁴

B. The Presidential Records Act and the Assertion of Public Ownership over Presidential Papers

Unlike its immediate predecessor, the PRMPA, Congress enacted the PRA with the purpose of "establish[ing] the public ownership of records created by future Presidents . . . in the course of discharging

⁸³ *Id.* at 445-46 n.8 (citations omitted) (emphasis added).

⁸⁴ The Court also seemed to invite the enactment of the PRA in *Nixon* when it noted: An incumbent President should not be dependent on happenstance or the whim of a prior President when he seeks access to records of past decisions that define or channel current governmental obligations. Nor should the American people's ability to reconstruct and come to terms with their history be truncated by an analysis of Presidential privilege that focuses only on the needs of the present. Congress can legitimately act to rectify the hit-or-miss approach that has characterized past attempts to protect these substantial interests by entrusting the materials to expert handling by trusted and disinterested professionals.

Id. at 452-53 (footnotes omitted). The Court further noted that:

Presidents in the past have had to apply to the Presidential libraries of their predecessors for permission to examine records of past governmental actions relating to current governmental problems. Although it appears that most such requests have been granted, Congress could legitimately conclude that the situation was unstable and ripe for change.

Id. at 452-53 n.15 (citation omitted).

their official duties.”⁸⁵ The PRA reflected a general change in the perceived relationship between information and popular government. In the 1960s and 1970s, the public increasingly asserted its interest in accessing the government’s records. This is most evident in the enactment of the Freedom of Information Act (FOIA) in 1966.⁸⁶ Although a judicial exemption from the Act exists for the president,⁸⁷ the FOIA reflects the view that popular government demands public information. Congress’s decision not to remove the exemption for the President reflects a recognition of the inherent problems in requiring the release of information from an administration actively engaged in fluid and often sensitive policy deliberations.⁸⁸ However, after the close of a given administration, these privileges and practical concerns rapidly dissipate, which helps to explain the PRA’s delayed disclosure provisions.

It is important to note that the PRA does not open all records to public review. In fact, the PRA either excludes or subjects to destruction a great deal of material. For example, the PRA does not cover personal records.⁸⁹ Rather, presidential records are “any documentary materials relating to the political activities of the President or members of his staff, but only if such activities relate to or have a direct effect upon the carrying out of constitutional, statutory, or other official or ceremonial duties of the President.”⁹⁰ Even when presidential records are covered by the PRA, Congress imposes a delay in the release of information to protect the immediate confidentiality or sen-

⁸⁵ H.R. REP. NO. 95-1487, at 2 (1978). The PRA clearly states that “[t]he United States shall reserve and retain complete ownership, possession, and control of Presidential records.” 92 Stat. at 2524 (codified as amended at 44 U.S.C. § 2202 (2000)).

⁸⁶ Freedom of Information Act, Pub. L. No. 89-554, 80 Stat. 383 (1966) (codified as amended at 5 U.S.C. § 552 (2000)). Congress amended the Act in 1986 to further strengthen the public’s access to agency records. See Freedom of Information Reform Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207, 3207–48 (codified as amended at 5 U.S.C. § 552 (2000)).

⁸⁷ Although the Act expressly covers the Executive Office of the President, the Court ruled that the Act does not include the Office of the President within its meaning, constructively exempting it from the Act. See *Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 156 (1980).

⁸⁸ This recognition, also found in the PRA, has been stressed in prior cases. See *Armstrong v. Bush*, 924 F.2d 282, 290 (D.C. Cir. 1991) (noting that Congress “sought assiduously to minimize outside interference with the day-to-day operations of the President and his closest advisors and to ensure executive branch control over presidential records during the President’s term in office”).

⁸⁹ See 44 U.S.C. § 2201(2)(B)(ii) (2000). Personal records include “all documentary materials . . . of a purely private or nonpublic character which do not relate to or have an effect upon the carrying out of the constitutional, statutory, or other official or ceremonial duties of the President.” *Id.* § 2201(3). This personal records exemption is narrow, at least in the view of the House Committee approving the PRA. See H.R. REP. NO. 95-1487, at 11–12; James D. Lewis, Note, *White House Electronic Mail and Federal Recordkeeping Law: Press “D” to Delete History*, 93 MICH. L. REV. 794, 809 (1995).

⁹⁰ 44 U.S.C. § 2201(2)(A).

sitivity of the information. Thus, a president can unilaterally demand a delay in the release of information for up to twelve years for material that falls into one of six categories.⁹¹ These categories include material (1) authorized to be kept secret for national security and foreign policy reasons;⁹² (2) relating to the appointment of federal officials;⁹³ (3) "exempted from disclosure by statute";⁹⁴ (4) constituting "trade secrets and commercial or financial information" which is confidential;⁹⁵ (5) constituting confidential communications between the President and advisors concerning requests for advice;⁹⁶ and (6) consisting of personnel and medical files of which disclosure would be an invasion of privacy.⁹⁷ The most relevant category for a review of EO 13,233 is the fifth one—the confidential communications category.

It is also important to understand that the twelve-year limitation under the PRA does not mean that any and all material is then released. To the contrary, Congress incorporated the standards from the FOIA⁹⁸ to allow indefinite withholding of information that falls into eight distinct categories. Congress omitted only one category of information withheld under FOIA—the exemption that covers the most confidential communications.⁹⁹ The remaining exemptions include (1) any national security information that has been classified pursuant to an executive order;¹⁰⁰ (2) information that is "related solely to the internal personnel rules and practices of an agency";¹⁰¹ (3) information that Congress has statutorily exempted from release;¹⁰² (4) trade secrets and other information that would reveal privileged or confidential commercial or financial information;¹⁰³ (5) information that would constitute an invasion of privacy;¹⁰⁴ (6) cer-

⁹¹ Information that does not fall into one of the PRA exemptions becomes public five years after the end of a given administration. *See id.* § 2204(b)(2)(A).

⁹² *Id.* § 2204(a)(1).

⁹³ *Id.* § 2204(a)(2).

⁹⁴ *Id.* § 2204(a)(3).

⁹⁵ *Id.* § 2204(a)(4).

⁹⁶ *Id.* § 2204(a)(5).

⁹⁷ *Id.* § 2204(a)(6).

⁹⁸ Freedom of Information Act, Pub. L. No. 89-554, 80 Stat. 383 (1966) (codified as amended at 5 U.S.C. § 552 (2000)).

⁹⁹ 44 U.S.C. § 2204(c)(1) ("Presidential records shall be administered in accordance with section 552 of title 5, United States Code, except that paragraph (b)(5) of that section shall not be available for purposes of withholding any Presidential record . . ."). The category is a FOIA exemption for "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5) (2000).

¹⁰⁰ *See* 5 U.S.C. § 552(b)(1).

¹⁰¹ *Id.* § 552(b)(2).

¹⁰² *See id.* § 552(b)(3).

¹⁰³ *See id.* § 552(b)(4).

¹⁰⁴ *See id.* § 552(b)(6).

tain law enforcement records;¹⁰⁵ (7) information used by “an agency responsible for the regulation or supervision of financial institutions”;¹⁰⁶ and (8) maps and other geological or geophysical information “concerning wells.”¹⁰⁷

The PRA allows considerable flexibility in both the maintenance and release of information. For example, the PRA does allow for destruction of records, but limits destruction to records “that no longer have administrative, historical, informational, or evidentiary value.”¹⁰⁸ The PRA further requires that the Archivist examine the material and then notify Congress, triggering a sixty-day waiting period to allow for countermanding legislation.¹⁰⁹ The PRA establishes a simple process for the archiving and subsequent public dissemination of all other material.¹¹⁰ With respect to a president’s policies on record-keeping during his or her term, the PRA leaves the matter entirely to his or her own discretion and does not expressly provide for judicial review.¹¹¹

The role of the Archivist, who serves as a sentinel for history, is central to the legislative intent and operation of the PRA. Although the Archivist has no independent authority to challenge a president’s decision, he has the authority to alert others to the loss of valuable material and to delay the destruction so as to allow Congress to act.¹¹² The PRA’s requirement that a president must notify the Archivist of

¹⁰⁵ See *id.* § 552(b)(7). Specifically, this relates to information only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source, (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or (F) could reasonably be expected to endanger the life or physical safety of any individual.

Id.

¹⁰⁶ *Id.* § 552(b)(8).

¹⁰⁷ *Id.* § 552(b)(9).

¹⁰⁸ Presidential Records Act of 1978, Pub. L. No. 95-591, 92 Stat. 2523, 2524 (codified as amended at 44 U.S.C. § 2203(c) (2000)).

¹⁰⁹ See 44 U.S.C. § 2203(d).

¹¹⁰ See *id.* § 2203(f).

¹¹¹ See *Armstrong v. Bush*, 721 F. Supp. 343, 346 (D.D.C. 1989). This gap in the PRA undermines the statute. As *Armstrong* shows, there are compelling circumstances in which judicial review would be appropriate while reserving ample operational flexibility for a president.

¹¹² See 44 U.S.C. § 2203(e).

any destruction of records triggers this sentinel function, at which point the Archivist can issue, if warranted, a written opinion in opposition to such a policy.¹¹³ If the president chooses to ignore the recommendation, then the Archivist may delay any destruction by sixty days and alert Congress to the potential loss.¹¹⁴ Because the Archivist has the express duty to release presidential records “‘as rapidly and completely as possible,’”¹¹⁵ Congress sought “to shield the Archivist from unnecessary pressure . . . from the incumbent President to release embarrassing and inappropriate material concerning a predecessor or rival, and from the predecessor to withhold materials.”¹¹⁶

The Archivist also performs a sentinel function in protecting executive privilege. He must notify a former president of the possible release of any documents that “may adversely affect any rights and privileges which the former President may have.”¹¹⁷ The former president then has thirty days to object to the release, and if the Archivist rejects the claim of privilege, the former president has an additional thirty days to seek judicial relief.¹¹⁸

At the end of his administration, President Ronald Reagan signed EO 12,667, which imposed additional procedures on the archiving and release of records under the PRA.¹¹⁹ Notably, neither President Reagan nor President George H.W. Bush opposed the provisions that the Bush order changed. Rather, President Reagan imposed modest procedural requirements on the Archivist that did not trigger any substantial opposition from the public or Congress. For example, EO 12,667 required the Archivist to “identify any specific materials, the disclosure of which [the Archivist] believes may raise a substantial question of Executive privilege.”¹²⁰ In EO 13,233, President George

¹¹³ See *id.* § 2203(c)(1).

¹¹⁴ See *id.* § 2203(c)-(d).

¹¹⁵ See *Am. Historical Ass'n v. Peterson*, 876 F. Supp. 1300, 1319 (D.D.C. 1995) (citation omitted).

¹¹⁶ H.R. REP. NO. 95-1487, at 8 (1978).

¹¹⁷ 44 U.S.C. § 2206(3) (2000).

¹¹⁸ See 36 C.F.R. § 1270.46(a)-(d) (2002).

¹¹⁹ Exec. Order No. 12,667, 3 C.F.R. 208 (1990). The Reagan Administration had previously triggered litigation in its decision to destroy information contained in the White House computer system, or PROFS system. See *Armstrong v. Bush*, 721 F. Supp. 343, 345 (D.D.C. 1989) (defining PROFS as “an inter-computer communications system”). After various parties sued, a district court denied the White House’s summary judgment motions on the alleged violation of not just the PRA but also the Federal Records Act (FRA), 44 U.S.C. §§ 2101-2118 (1995), and the Administrative Procedures Act (APA), 5 U.S.C. §§ 701(a)(2), 706(2) (1994). See *Armstrong*, 721 F. Supp. at 354-55. The D.C. Circuit, however, ruled that there was no judicial review of the question under either the PRA or the APA. See *Armstrong v. Bush*, 924 F.2d 282, 290, 297 (D.C. Cir. 1991). Ultimately, the court found on remand that the government had violated the FRA. See *Armstrong v. Executive Office of the President*, 810 F. Supp. 335, 342-49 (D.D.C. 1993).

¹²⁰ Exec. Order No. 12,667, 3 C.F.R. at 209. In addition to establishing procedures for a thirty-day notification period for both current and former presidents (in advance of any

W. Bush superseded the Reagan order and established a new system for the handling of presidential records.

C. Executive Order 13,233 and the Reassertion of Unilateral Executive Control over Presidential Papers

Despite its sweeping changes to the PRA, the George W. Bush Administration notably did not question the constitutionality of the PRA. Instead, the Administration presented its executive order as a modification of the procedures used to implement the PRA.¹²¹ By portraying the Bush order as simply tinkering with process, the White House attempted to avoid separation-of-powers challenges. Generally, a president cannot supersede or modify a federal statute through an executive order.¹²² Thus, the threshold constitutional question is whether EO 13,233 only adds a few additional procedures consistent with the statute, as the White House claims,¹²³ or abridges the statute in violation of the Constitution. A brief overview of the changes leaves little doubt that EO 13,233 conflicts with almost every major element of the PRA's statutory scheme. Before turning to the theoretical underpinnings of private and public control over presidential papers, it is important to review how the Bush order departs from the PRA and changes public access to presidential records.¹²⁴

The Bush order would change virtually every substantive provision of the PRA, from the core schedule of release to the roles of the critical players in facilitating that release. In perhaps the most significant change for historians and researchers, the Bush order would alter the stated statutory period for the release of information not otherwise exempted under the PRA. Congress expressly stated that the twelve-year delay was a "buffer period" for confidential communications, balancing the legitimate concerns of the executive branch

disclosure of exempted records), the order specifically identified national security, law enforcement, and deliberative processes as exceptions to disclosure. *Id.* at 208.

¹²¹ For a response from the Bush Administration, see Alberto R. Gonzales, *Freedom, Openness and Presidential Papers*, WASH. POST, Dec. 20, 2001, at A43.

¹²² See *Marks v. CIA*, 590 F.2d 997, 1003 (D.C. Cir. 1978).

¹²³ See Mike Allen & George Lardner, Jr., *A Veto over Presidential Papers*, WASH. POST, Nov. 2, 2001, at A1.

¹²⁴ The Bush order heightens concerns about public access because the PRA serves a unique function vis-à-vis record-keeping statutes such as the FRA, 44 U.S.C. §§ 2101–2118, and information-forcing statutes such as the FOIA. Not only does the FRA not cover White House offices, but the Supreme Court has ruled that it intends "not to benefit private parties, but solely to benefit the agencies themselves and the Federal Government as a whole." *Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 149 (1980). The FOIA conversely mandates conditions for release, but does not contain record-keeping standards for the government. See generally Lewis, *supra* note 89, at 795–96 (discussing the lack of record-keeping standards in the FOIA). The PRA strives to serve not the interests of agencies but those of history. It does this through a detailed process for the safe-keeping and dissemination of presidential material.

with the public's need to receive this information.¹²⁵ The executive order would extend this period indefinitely¹²⁶ and, in doing so, violates the very foundation of the PRA.

The Bush order would also materially change the Archivist's statutory role. Despite the decision in *Public Citizen v. Burke*,¹²⁷ on highly analogous claims, the Bush order would transform the Archivist from a central to a bit player in disputes over presidential records. Whereas the PRA allows the Archivist to override an unreasonable assertion of privilege by a former president, the executive order would give the former president an effective veto, even in cases when the incumbent president thinks the assertion is unfounded.¹²⁸ Moreover, in cases of death or disability, the PRA expressly gives the Archivist the authority to exercise the authority of the former president,¹²⁹ whereas the Bush order expressly transfers this authority to the former president's family, even without the former president's approval.¹³⁰ The executive order even changes the Archivist's duty to carry out the insular schedule for review. The Bush order allows a former president ninety days for such review; however, it then enables a president to effectively bar release simply by requesting an extension.¹³¹ A former president can daisy-chain such extensions indefinitely. Once the most active component of the PRA process, the Archivist has a largely pedestrian role under the Bush order. These changes negate the authority that Congress gave the Archivist to control these records, and therefore cannot be accomplished through an executive order.¹³²

The Bush order also materially changes the authority of a former president. In the PRA, Congress declined to give a former president control over presidential records.¹³³ A former president had to yield to the Archivist's judgment or seek judicial relief.¹³⁴ The Bush order modifies the PRA by giving a former president final control over his

¹²⁵ Although it is dangerous to rely too heavily on legislative history, this view emerges repeatedly in the consideration of the proposed act. See, e.g., 124 CONG. REC. 34,895 (1978) (statement of Rep. Brademas) ("[T]he best way to insure that the ideas would be expressed, and also that they would be set down in writing and be available to later researchers, was to permit the institution of a 'buffer period,' so to speak, during which time these materials could be protected.").

¹²⁶ See Exec. Order No. 13,233, 3 C.F.R. 815, 816 (2002).

¹²⁷ 843 F.2d 1473 (D.C. Cir. 1988) (holding that the Archivist was not constitutionally required to acquiesce in a former president's claim of executive privilege to block disclosure of materials).

¹²⁸ See Exec. Order No. 13,233, 3 C.F.R. at 817.

¹²⁹ Presidential Records Act of 1978, Pub. L. No. 95-591, 92 Stat. 2523, 2526 (codified as amended at 44 U.S.C. § 2204(d) (2000)).

¹³⁰ Exec. Order No. 13,233, 3 C.F.R. at 818.

¹³¹ See *id.* at 816.

¹³² See *Marks v. CIA*, 590 F.2d 997 (D.C. Cir. 1978).

¹³³ See *Am. Historical Ass'n v. Peterson*, 876 F. Supp. 1300, 1315 (D.D.C. 1995).

¹³⁴ See 44 U.S.C. § 2204.

records.¹³⁵ Under the executive order, a former president can independently veto the release of material even when the Archivist finds the basis to be unsupported and the incumbent president finds “compelling circumstances” to disagree with the assertion of privilege.¹³⁶ Giving a private citizen—let alone a former president—the continuing right to unilaterally control access¹³⁷ not only violates the PRA, but also raises serious constitutional questions.¹³⁸ A former president is a private citizen and, therefore, cannot compel an executive official to impose improper or unsupported restrictions on public material. The *Burke* court rejected the notion that a former president could supplant the Archivist’s jurisdiction through an assertion of privilege.¹³⁹ Such authority would allow the former president to “gain[] power to withdraw from the Archivist some indefinite portion of the responsibilities that Congress delegated to him.”¹⁴⁰

Furthermore, the Bush order fundamentally changes the legal burden in disputes over the withholding of presidential records.¹⁴¹ Under the PRA, it was the former president’s duty to seek a court order to override the Archivist’s decision to release material after the twelve-year period.¹⁴² EO 13,233 places this burden on the person seeking the material, a burden that likely will discourage most researchers with limited funds.¹⁴³ A former president receives public support for his administrative costs as well as for his library.¹⁴⁴ Moreo-

¹³⁵ See Exec. Order No. 13,233, 3 C.F.R. 815.

¹³⁶ See *id.* at 817. Like much of this executive order, these provisions are maddening in their contradiction. The requirement of an incumbent president’s review proves superfluous given the former president’s ultimate control. See *id.* This is only one example of a chronic inconsistency and lack of cohesion in the executive order.

¹³⁷ See *id.* at 817–18.

¹³⁸ See *Public Citizen v. Burke*, 843 F.2d 1473, 1480 (D.C. Cir. 1988).

¹³⁹ See *id.*

¹⁴⁰ *Id.*

¹⁴¹ There is a legitimate concern over the increasing size of presidential records and the ability of either the incumbent or the former president to fully review this material. Moreover, the Archivist holds a unique position between the two branches in registering and reviewing privilege assertions. The PRA contemplates that a president or former president would review these records separately from the Archivist. See 44 U.S.C. § 2204 (2000). Congress could extend an institutional accommodation by appropriating funds for the establishment of a small office to assist both incumbent presidents and former presidents in this task. This office could significantly reduce the tension over the time periods mandated under the PRA by giving resources and personnel to the executive branch to better utilize the twelve-year buffer period.

¹⁴² See *id.* § 2204(e).

¹⁴³ See Exec. Order No. 13,233, 3 C.F.R. 815, 816, 818 (2002). This shifting of the burden is analogous to former President Nixon’s position that members of the public must show a “particularized need” for access to presidential records. *Nixon v. Freeman*, 670 F.2d 346, 359 (D.C. Cir. 1982). The court rejected this assertion and reaffirmed that the burden was one of non-disclosure—a burden resting with the former president. See *id.* at 356–59.

¹⁴⁴ See *Treasury, Postal Serv. and Gen. Gov’t Appropriations for Fiscal Year 2002: Hearings Before the Subcomm. of the House Comm. on Appropriations*, 107th Cong. 856–57 (2001) (state-

ver, a former president has access to a legion of lawyers who would gladly serve pro bono in any litigation. The PRA does not impose a particularly heavy burden on a former president, but it could be determinative if shifted to a researcher or scholar. Regardless of the public policy implications, this shift materially changes the federal statute.

On the back end of the process, the Bush order introduces an entirely new threshold standard for access to presidential material. Under EO 13,233, "a party seeking to overcome the constitutionally based privileges that apply to Presidential records must establish at least a 'demonstrated, specific need' for particular records, a standard that turns on the nature of the proceeding and the importance of the information to that proceeding."¹⁴⁵ This standard is grafted onto the statute, which requires no such threshold showing for access.¹⁴⁶ Combined with the burden-shifting provision, this standard impermissibly amends a federal statute through an executive order.

The executive order also imposes a curious standard on the incumbent president, who "will concur" with a former president's claim absent "compelling circumstances."¹⁴⁷ The origin of this standard is a mystery. An incumbent president presumably will either agree or disagree with a former president's executive privilege assertion. There is no basis on which to mandate agreement of an incumbent president with an unfounded privilege assertion. Furthermore, the order does not indicate what "compelling circumstances" entail,¹⁴⁸ but the implication is highly disturbing. The executive order mandates that, absent the undefined "compelling circumstances," an incumbent "will support" the claim of a former president "in any forum in which the privilege claim is challenged."¹⁴⁹ Such a forum would presumably include a federal court. The executive order seems to suggest that an incumbent president who seriously questions an assertion of privilege, but

ment of Thurman M. Davis, Sr., Acting Administrator, General Services Administration) (detailing public subsidies of former presidents); see also *Perks for Ex-Presidents*, *BUS. WK.*, Aug. 13, 2001, at 8, 8 (listing public support for "[s]taff, printing, postage, telephone, utilities, supplies, equipment" and office space of former presidents). This public subsidy recently caused an uproar over former president Clinton's initial decision to lease a penthouse in the most expensive area of New York at a cost of over \$800,000 a year. Frank J. Murray, *Clinton Office Search Shifts to Space in Harlem: Amid Intense Criticism over Cost*, *WASH. TIMES*, Feb. 13, 2001, at A1; see also William Douglas, *Swanky 'Penthouse' for Clinton Irks GOP*, *ARK. DEMOCRAT-GAZETTE*, Feb. 1, 2001, at A4 ("The government pays \$285,000 a year for Ronald Reagan's Los Angeles office, \$147,000 for the elder George Bush's Houston office, \$99,000 for Gerald Ford's office near Palm Springs, Calif., and \$93,000 annually for Jimmy Carter's office in Plains, Ga.").

¹⁴⁵ Exec. Order No. 13,233, 3 C.F.R. at 816 (citation omitted).

¹⁴⁶ See *Nixon v. Freeman*, 670 F.2d 346, 359 (D.C. Cir. 1982), cert. denied, 459 U.S. 1035 (1982).

¹⁴⁷ Exec. Order No. 13,233, 3 C.F.R. at 817.

¹⁴⁸ See *Hearings on EO 13233*, *supra* note 11, at 430 (statement of Professor Jonathan Turley).

¹⁴⁹ Exec. Order No. 13,233, 3 C.F.R. at 817.

lacks “compelling circumstances,” must still litigate for its recognition in court. This raises serious ethical, legal, and constitutional questions.¹⁵⁰ Government attorneys cannot file papers containing privilege assertions that they believe are either false or unjustified.¹⁵¹ If ever used, the Bush order would trigger a heated challenge about the responsibility of government lawyers to advance only good faith claims of constitutional privilege.¹⁵²

Finally, the Bush order materially changes the PRA by adding parties who can claim privilege and control access to presidential

¹⁵⁰ The most difficult situation arises when the former president’s attorneys know that the executive branch has determined that a privilege assertion is unfounded or excessive, but the attorneys proceed to argue the opposite to the federal courts without informing the courts of the earlier determination. In the area of candor and disclosure to a court, some view the duty of government lawyers to be higher than that of their civilian counterparts. See *Douglas v. Donovan*, 704 F.2d 1276, 1279 (D.C. Cir. 1983) (“As officers of this court, counsel have an obligation to ensure that the tribunal is aware of significant events that may bear directly on the outcome of litigation. . . . This is especially true for government attorneys, who have special responsibilities to both this court and the public at large.” (citations omitted)). *Id.* In the case of the U.S. Solicitor General, this obligation of candor and good faith argument has led to the inclusion of footnotes in which the Solicitor General expressly states that he does not agree with the position taken by the government in the case. See LINCOLN CAPLAN, *THE TENTH JUSTICE: THE SOLICITOR GENERAL AND THE RULE OF LAW* 51 (1987) (describing such a filing by Acting Solicitor General Lawrence Wallace).

¹⁵¹ See *Douglas*, 704 F.2d at 1279.

¹⁵² Such controversies detract from justified efforts to protect executive privilege. Ironically, I was one of the academics who encouraged the Bush Administration to make the repair of executive privilege a priority after significant losses in the areas of executive privilege and attorney-client privilege under former President Clinton. See Jonathan Turley, *Paradise Lost: The Clinton Administration and the Erosion of Executive Privilege*, 60 MD. L. REV. 205 (2001) [hereinafter Turley, *Paradise Lost*]; see also Jonathan Turley, *Checking the Executive Pulse: Mr. President, Where Is Thy Blush?*, L.A. TIMES, Nov. 19, 1998, at B9 (discussing the shaming and censure of President Clinton); Jonathan Turley, *Clinton Maneuvers Threaten His Office*, NAT’L L.J., Feb. 23, 1998, at A19 (discussing sweeping assertions of executive privilege by the Clintons); Jonathan Turley, *The President and the Damage Done*, LEGAL TIMES, Apr. 20, 1998, at 23, 23 (discussing how executive privilege claims have proven inimical to the office of the president). Given the anemic condition of executive privilege after Clinton’s court losses, it was essential that the Administration choose wisely when and how to defend this vulnerable asset. Instead, the Administration has invoked and fought excessive and unprecedented privilege claims. This has led to a number of losses and subsequent reversals by the Administration that could have been avoided with a more measured and strategic assertion of the privilege. See, e.g., Vanessa Blum, *White House Caves on Privilege Claim: DOJ Turns over Prosecutorial Memos to House Committee*, LEGAL TIMES, Mar. 18, 2002, at 1, 1; Neely Tucker, *Judge Orders White House Papers’ Release*, WASH. POST, Oct. 18, 2002, at A6. Ironically, one of the most impressive victories for the White House was in a case in which executive privilege was not asserted. In *Walker v. Cheney*, 2002 U.S. Dist. LEXIS 23385 (Dec. 9, 2002), the district court ruled that the General Accounting Office could not force the White House to disclose information on the energy task force headed by Vice President Cheney, but did so in a traditional standing analysis. See *id.* at *63–65; see also Richard Simon, *Court Hands Cheney a Win on Disclosures*, L.A. TIMES, Dec. 10, 2002, at A13 (quoting Justice Department spokesperson as describing the case as necessary to protect the president’s “independent decision-making process”).

records.¹⁵³ In perhaps the most baffling element of the executive order, the Bush Administration would extend the authority to family members or designees.¹⁵⁴ Thus, a president could select any designee, including a foreign citizen or a half-wit, to assert the constitutional privilege.¹⁵⁵ Moreover, the executive order allows for family members to designate a representative in the case of “death or disability,” including a series or group of individuals at their sole discretion.¹⁵⁶ Putting aside the obvious policy implications, this would create new authority not just under the PRA, but under federal law. As a general matter, executive privilege rests exclusively with the government and “can neither be claimed nor waived by a private party.”¹⁵⁷ As discussed below, there is no compelling constitutional basis for such a transfer of authority to the heirs of a former president.¹⁵⁸

¹⁵³ See Exec. Order No. 13,233, 3 C.F.R. at 818. There is also a suggestion that the vice president can independently assert executive privilege, *see id.* at 818–19, an extremely controversial position. Even with judicial recognition that presidential advisors can assert executive privilege, *see infra* note 345, this right is clearly derivative and dependent on the president’s assertion of privilege. The Bush order, however, suggests the existence of an independent authority of a vice president to claim privilege and further extends this authority to a former vice president. Thus, presumably a former vice president could bar release regardless of any privilege assertion by the current president or former president. Such a “vice presidential privilege” represents a significant departure from existing case and statutory authority. It would also dramatically expand the concept of executive privilege that the Court has struggled to confine within the constitutional framework. It is difficult to see any textual or original intent basis for a “vice-presidential privilege.” Moreover, such a new privilege would seriously undermine not just the PRA but the general oversight functions of the legislative branch.

¹⁵⁴ See Exec. Order No. 13,233, 3 C.F.R. at 818.

¹⁵⁵ In his influential book, *The Records of the Nation*, H.G. Jones specifically noted that private proprietary theories would support anyone, including the least qualified, in exercising control over these records. See JONES, *supra* note 60, at 162–63. Jones states:

The assumption that the papers of the Presidency are private property leads those who support it into the illogical and quite unconstitutional proposition that a private citizen—perhaps one who never had exercised the office of President or could even be eligible to do so—could decide what papers of the Presidency a subsequent holder of its powers might or might not see.

Id.

¹⁵⁶ Exec. Order No. 13,233, 3 C.F.R. at 818.

¹⁵⁷ *United States v. Reynolds*, 345 U.S. 1, 7 (1953) (footnotes omitted); *see also* Turley, *Paradise Lost*, *supra* note 152, at 212 (asserting that the president cannot invoke the executive privilege as an individual).

¹⁵⁸ See *infra* Part III.A.3. Despite the effort to portray these changes as purely “procedural,” the Bush order dramatically reshapes the PRA and appears to violate the separation of powers doctrine. The use of an executive order to accomplish these goals constitutes what I have previously called “legislative circumvention.” See Jonathan Turley, *A Crisis of Faith: Tobacco and the Madisonian Democracy*, 37 HARV. J. ON LEGIS. 433 (2000). Previous administrations have used either executive orders or litigation to achieve goals that are unattainable through Congress. I previously testified against such legislative circumvention by the Clinton Administration vis-à-vis the courts. See *Examining the Spate of Certain Government Lawsuits Filed Against Different Industries: Hearing Before the Senate Comm. on the Judiciary*, 106th Cong. 21–34 (1999) (statement of Professor Jonathan Turley). EO 13,233

The Bush order places the Bush Administration at the most extreme position in asserting control over these records and requires the most extreme level of judicial accommodation to be upheld. In order to pass constitutional muster, the Bush Administration must establish that (1) executive privilege may be exercised indefinitely by a former president; (2) the right to assert executive privilege may be transferred to a third party by a former president; (3) the right to assert executive privilege may be passed to an heir or designated party upon death or disability; and (4) third parties may designate an individual or group to assert executive privilege when a former president dies or suffers a disability without executing a prior designation.¹⁵⁹ These assertions of executive privilege are extremely dubious and would extend executive privilege beyond any reasonable interpretation of Article II of the Constitution.¹⁶⁰ The Article will return to these specific arguments in Part III. However, these new “rights” reveal the intriguing terms of the convergence of property and constitutional rationales in the “ownership” of presidential papers. As this Article will show, many of the rights asserted in constitutional terms under the Bush order can be traced directly to ownership notions forged in the property theories of the late eighteenth and early nineteenth centuries.

II

THE PROPERTY PARADIGM: LOCKE’S LABOR THEORY AND THE PRIVATE OWNERSHIP OF PRESIDENTIAL PAPERS

It is common for contemporary debates over presidential papers to focus on constitutional issues ranging from executive privilege to the separation-of-powers doctrine to the unitary-executive theory. These constitutional issues are indeed relevant to some of the insular conflicts that have arisen over the control of these records. However, the origins of this controversy (and part of its resolution) arise not from constitutional theory but from property theory. It was only after Congress began to assert public claims to presidential records that the debate over presidential records shifted from a property to a constitutional rationale in justifying the denial of public access.

is another variation on this theme: an attempt to avoid a legislative debate over a highly controversial and questionable change in the law.

¹⁵⁹ See Exec. Order No. 13,233, 3 C.F.R. at 816–19. As noted earlier, the Bush order would also extend the privilege authority to former vice presidents. *Id.* at 818–19. Unless the Supreme Court decides to greatly expand executive privilege, this provision remains wholly unsupported. Moreover, the extension of the privilege to other executive officers would create a different constitutional slippery slope for future controversies. It remains unclear why, if a vice president is entitled to independent executive privilege authority, there is an exclusion of other officers also in the line of succession, such as Secretaries of Defense or State.

¹⁶⁰ U.S. CONST. art. II.

For most of the over two hundred years of disputes over presidential records, ownership claims were framed and defended in property terms. Ironically, certain aspects of the Bush order hearken back to the earlier proprietary period in which presidents and their heirs determined the extent of access to historical papers.¹⁶¹

Until the second half of the twentieth century, there was a dominant view in all three branches of government that presidential papers were the private property of former presidents. Although presidents such as Franklin Roosevelt allowed public access, such access was a gift to the American public, as was the land on which the library exists.¹⁶² This proprietary theory was sufficiently strong for Nixon to advance a compelling case that public seizure amounted to a takings of private property, property that could be sold at considerable profit by former presidents.¹⁶³ Furthermore, such claims were sufficiently strong that Congress repeatedly compensated former presidents in acquiring their papers.¹⁶⁴ As the Bush order demonstrates, a faint proprietary sense to control over these records remains. In fact, one of the reasons that this controversy continues is the failure to consider the question of control in its original property terms. It is in property theory that the original notion of ownership was forged and it is in this area that the public claim of ownership is most compelling.

In tracing the evolution of the proprietary theory, the most obvious early influence came from our predecessor system of governance. At the establishment of the Republic, our only experience with public records derived from a monarchy in which a great number of public things were Crown property, including the papers of the monarch.¹⁶⁵

¹⁶¹ Such disputes are not limited to presidents. President George W. Bush received considerable criticism when he transferred his records as governor of Texas to his father's presidential library, rather than a state-controlled library. See Steven L. Hensen, *The President's Papers Are the People's Business*, WASH. POST, Dec. 16, 2001, at B1. Likewise, former New York Mayor Rudolph Giuliani caused an uproar when, in the final days of his administration, he had his records transferred to a private warehouse. See Celestine Bohlen, *Paper Chase: Whose History Is It, Anyway? The Public's or the Officials'?*, N.Y. TIMES, Feb. 24, 2002, at 3 (quoting one archivist as objecting that the documents constitute "our public heritage . . . and that heritage should be under public control and administration"). The Texas attorney general ultimately ruled that the transfer of gubernatorial papers could not change their status as state property subject to state law. Accordingly, Texas has demanded that the Archivist comply with state rather than federal law in the handling of these documents, including any questions of public access. See Christy Hope, *AG Says Bush Papers Public*, DALLAS MORNING NEWS, May 4, 2002, at 29A. This creates a rather potentially difficult position for the Archivist in carrying out duties under the Texas Public Information Act. Under this ruling, the presidential library will be treated as an "alternative repository" of material controlled entirely by state law. See *id.*

¹⁶² See *In re Roosevelt's Will*, 73 N.Y.S.2d 821, 825-26 (Sur. Ct. 1947).

¹⁶³ See *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425 (1977).

¹⁶⁴ See *supra* notes 20-56 and accompanying text.

¹⁶⁵ The Royal Archives remain the private property of the Royal Family, despite their tremendous historical value. See Richard Tomlinson, *The Hidden Past at Windsor*, THE INDE-

Papers in the King's possession remained his private property, as did papers in the prime minister's possession. Even after World War II, Prime Minister Winston Churchill's heirs asserted private ownership over Churchill's government records and papers.¹⁶⁶ The heirs asserted that they would sell the documents to the highest bidder, private or public.¹⁶⁷ Although there was public outrage over the heirs forcing a country to pay for the records after the sacrifices of its people, the proprietary theory remained firmly accepted.¹⁶⁸ After the heirs stated a willingness to sell to a private bidder, the government eventually paid the heirs for the ownership of some of the most important historical documents from World War II.¹⁶⁹

The proprietary theory, however, appears to be based on more than a simple inherited practice. It can be traced to the dominant view of property rights in the eighteenth century. John Locke's view of property heavily influenced the leaders in the early Republic.¹⁷⁰ One of Locke's main tenets was his labor theory of property, under which an individual acquired a near absolute claim to ownership when he "mixed" his labor with property in its first possession or creation.¹⁷¹ Although Part IV strongly questions the basis of a Lockean ownership claim over presidential papers, early proponents of the

PENDENT, June 21, 1994, at 19. All ministerial papers continue to be the property of the Crown—albeit no longer the personal property of the Royal family. This gives the Crown control not only over the material itself but also over private papers containing material similar to that withheld by the Crown. See Philip Webster, *MPs Query Ban on Chamberlain's Private Diary*, *TIMES* (London), Dec. 12, 1986 ("Experts on public records believe that the Cabinet Office may have discretion to stop the publication of private papers if their contents are thought to contain material similar to that in ministerial papers which are the subject of a ban.").

¹⁶⁶ SAX, *supra* note 62, at 91.

¹⁶⁷ See *id.* Joseph Sax notes that "the heirs planned to keep the copyright, while selling the documents, so they could charge anyone who wanted to quote from them." *Id.*

¹⁶⁸ See *id.* ("The public anger did influence the price the public had to pay," leading the family to accept a lower price in the end).

¹⁶⁹ *Id.* Sax describes the content of this library:

The archive constituted a massive collection stretching over more than sixty years and containing some million-and-a-half pages of material. . . . [In addition to letters and the original handwritten copies of his most famous speeches,] [t]here is a letter in King George VI's own hand describing how he and then-queen Elizabeth watched the bombing of Buckingham Palace during the Blitz; confidential notes from intelligence sources in Germany during the early 1930s describing the rise of Hitler; and a poignant *au revoir* telegram from Edward VIII as he left the throne. Churchill's wartime correspondence with Roosevelt, Stalin, and de Gaulle is there in its entirety. The archive also contained documents stamped in red, "Property of HMG."

Id.

¹⁷⁰ See Doernberg, *supra* note 12, at 57 ("It would be difficult to overstate John Locke's influence on the American Revolution and the people who created the government that followed it." (footnote omitted)).

¹⁷¹ See LOCKE, *supra* note 13, at 134. This view of property offers a powerful natural law basis for property claims under the view that "God, who hath given the world to men in

proprietary theory acted under an absolute, deontological notion of property derived from Locke. The efficiency and equity of public ownership of such documents was virtually ignored in favor of the inherent right of the individual.¹⁷²

Under a Lockean view, the belief of former presidents that they had private ownership over their own records is understandable.¹⁷³ In sharp contrast with contemporary practice, early presidents engaged in a high degree of personal correspondence, often in their own handwriting. Communication with cabinet members, ambassadors, and even foreign leaders was often personal and direct. Moreover, it was not uncommon during the Revolution and in the early Republic for presidents to use personal funds in their public duties.¹⁷⁴ There was a blurred line between public and personal functions in these early administrations. Furthermore, it is important to recall that the White House staff of a president has expanded exponentially over the last century.¹⁷⁵ At the time of the first assertions of a proprietary theory, the staff of the president amounted to only a handful of individuals.¹⁷⁶ Even after the Civil War, President Grant's staff amounted to only six individuals.¹⁷⁷ With such a small staff, presidents had a far

common, hath also given them reason to make use of it to the best advantage of life and convenience." *Id.*

¹⁷² Frederick Schauer has noted this contrast between the utilitarian or consequentialist positions and the deontological positions:

In contrast to utilitarian/consequentialist perspectives, a deontological outlook focuses on the inherent rightness or wrongness of particular actions, regardless of the consequences those actions might produce. . . . Under a deontological theory, although we may sometimes look to consequences or to the public interest, these inquiries can never exhaust the analysis. Some acts might be valued even if in valuing them we detract from what is best for the population as a whole, and other acts might be condemned even if in condemning them we again fall short of optimizing the public welfare.

Frederick Schauer, *The Role of the People in First Amendment Theory*, 74 CAL. L. REV. 761, 769-70 (1986) (footnotes omitted).

¹⁷³ Lockean theory has proven particularly malleable because Locke was not clear as to the precise way that appropriative labor creates private property interests. See Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 YALE L.J. 1533, 1547 (1993).

¹⁷⁴ Congress offered little in terms of support for early presidents. For example, Washington had one staff assistant, Lawrence Lewis, who was paid out of his personal funds. David Wise, *Why the President's Men Stumble*, N.Y. TIMES MAG., July 18, 1982, at 14. Later presidents also paid for such salaries and it was not until Jackson that the government supplied the first publicly supported clerk. *Id.* This may explain in part why Jefferson left the White House in debt after paying \$10,000 for wine alone during this term. See *CNN Today: President's Salary Has Remained Constant Since 1969* (CNN television broadcast, May 24, 1999), LEXIS, News Library, Allnws File.

¹⁷⁵ See NAT'L STUDY COMM'N ON RECORDS AND DOCUMENTS OF FED. OFFICIALS, FINAL REPORT 13 (1977) [hereinafter FINAL REPORT].

¹⁷⁶ See *id.*

¹⁷⁷ *Id.*

greater role in the creation of presidential papers and a more personal connection with their content.

The proprietary theory of presidential papers found further support in the traditional notion that there is an inherent "bundle" of rights that attaches to legitimately held property.¹⁷⁸ This bundle encompasses many of the rights asserted over presidential papers, including "claim-rights to possess, use, manage, and receive income; powers to transfer, waive, exclude, and abandon; liberties to consume or destroy; and immunity from expropriation without compensation."¹⁷⁹ Once defined as private property under the labor theory, an individual had virtually absolute control in terms of exclusion and commercial exploitation. Thus, when a former president left office, his papers often passed to his heirs as a family archive subject to preservation, destruction, or sale in the family's interest.¹⁸⁰ Given the often heavy sacrifice of former presidents in terms of diminished income and lost opportunity costs, the sale of letters and records was thought of as a legitimate enterprise, particularly when sold to benefit private museums or foundations associated with the former presidents.¹⁸¹

The Lockean view of these claims was particularly evident in a decision over the ownership of Washington's papers. At issue in *Folsom v. Marsh*¹⁸² was a controversy that not only put these property claims to the test but also presented some interesting questions of personal politics for the Supreme Court itself. As previously noted, Washington left his papers to his nephew, Associate Justice Bushrod Washington.¹⁸³ Bushrod Washington then entered into an arrangement with Supreme Court Chief Justice John Marshall and editor Jared Sparks to publish some of the material.¹⁸⁴ When another publisher used this material as public property, the case of these two

¹⁷⁸ See generally JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY 86 (3d ed. 1993); CAROL M. ROSE, PROPERTY AND PERSUASION: ESSAYS ON THE HISTORY, THEORY, AND RHETORIC OF OWNERSHIP 11–12 (1994).

¹⁷⁹ Stephen R. Munzer, *Kant and Property Rights in Body Parts*, 6 CAN. J.L. & JURIS. 319, 320 (1993).

¹⁸⁰ There were exceptions, such as the two Roosevelts, who viewed their papers as requiring proper archiving, and provided for their papers' transfer or collection with stipulations. See *supra* notes 52, 59 and accompanying text. Hoover also supplied a detailed will that delineated the relative claims of the Herbert Hoover Foundation and the Herbert Hoover Presidential Library. See COLLINS & WEAVER, *supra* note 26, at 191–92 (quoting sections four and five of Hoover's will).

¹⁸¹ This view was reinforced by the fact that presidents like Jefferson were pushed into debt or forced to incur personal expenses in covering costs during their terms. See *supra* note 174. Likewise, first ladies like Dolly Madison were left with little or no resources except the sale of presidential papers. See *supra* note 26.

¹⁸² 9 F. Cas. 342 (C.C.D. Mass. 1841) (No. 4901), U.S. App. LEXIS 468.

¹⁸³ Berman, *supra* note 19, at 80.

¹⁸⁴ *Id.* at 80–81.

justices ended up before a third justice, Justice Story, sitting as a circuit justice.¹⁸⁵ Story ruled in favor of Bushrod Washington and his claims of ownership, rejecting suggestions that Washington “intended [his papers] exclusively for public use, as a donation to the public, or did not esteem them of value as his own private property.”¹⁸⁶ Absent such a “donation,” Story viewed Washington as simply an author who could transfer property rights in his writings to any person of his choosing.¹⁸⁷ Although Story implicitly recognized some potential public claim to presidential papers, the nonpublication of which would injure the nation,¹⁸⁸ he viewed the writings as demonstrably private property even when they dealt with public affairs:

Unless, indeed, there be a most unequivocal dedication of private letters and papers by the author, either to the public, or to some private person, I hold, that the author has a property therein, and that the copyright thereof exclusively belongs to him. Then as to [letters of business as opposed to] . . . literary compositions . . . [m]any letters of business also embrace critical remarks and expressions of opinion on various subjects, moral, religious, political and literary . . . the author may not intend, nay, often does not intend them for publication; and yet, no one on that account doubts his right of property therein, as a subject of value to himself and to his posterity.¹⁸⁹

What is striking about Justice Story’s ruling is that he structured the entire decision on property, rather than constitutional, principles. It was not the status of the author as president, but rather the president as an author that determined the outcome in *Folsom*. In this sense, Story’s approach represents a more normative interpretation of Locke’s labor theory—a creator should be rewarded for his labor.¹⁹⁰ This approach stands in contrast to the emphasis of contemporary

¹⁸⁵ See *Folsom*, 9 F. Cas. at 344.

¹⁸⁶ *Id.* at 345.

¹⁸⁷ See *id.* at 345–46.

¹⁸⁸ Justice Story does not clearly decide the question of the public claim over purely official correspondence; rather, he leaves open the possibility of dominant public claims:

In respect to official letters, addressed to the government, or any of its departments, by public officers, so far as the right of the government extends, from principles of public policy, to withhold them from publication, or to give them publicity, there may be a just ground of distinction . . . from the nature of the public service, or the character of the documents, embracing historical, military, or diplomatic information, it may be the right, and even the duty, of the government, to give them publicity, even against the will of the writers. But this is an exception in favor of the government, and stands upon principles allied to, or nearly similar to, the rights of private individuals, to whom letters are addressed by their agents, to use them, and publish them, upon fit and justifiable occasions.

Id. at 347.

¹⁸⁹ *Id.* at 345–46.

¹⁹⁰ See Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287, 296 (1988).

claims regarding presidential papers that stress the need for ownership, or at least control, as a prerequisite for the generation of these papers. Some commentators have suggested that, absent such control, presidents and presidential advisors are less likely to produce presidential papers of significance.¹⁹¹ These arguments parallel an instrumental interpretation of the labor theory that property rights are needed to produce socially beneficial labor.¹⁹²

Although it is unsurprising to see a Lockean influence in claims over early presidential records, it is remarkable how little this view has changed with the evolving views of property.¹⁹³ Gradually, the Lockean view of property gave way to a utilitarian view that emphasizes social over individual values in the creation and regulation of property.¹⁹⁴ Whereas Lockean theory establishes property ownership as a natural right that preexisted society, utilitarians view property as a socially created and socially contingent concept.¹⁹⁵ Jeremy Bentham has dispensed with any Lockean notions of natural property rights: "Property and law are born together, and die together. Before laws were made there was no property; take away laws, and property ceases."¹⁹⁶ As definitions of property began to evolve and subject more areas to government regulation or public property claims, the proprietary theory of presidential papers remained distinctly Lockean.¹⁹⁷ Outside of the presidential papers context, property became increasingly viewed as "an evolving concept . . . the product of social context, human relationships, value judgments, government policies,

¹⁹¹ In a sense, the president can be viewed as a Lockean "first possessor," a status that scholars like Richard Epstein have emphasized in explaining Lockean claims to property. See RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 10–11 (1985).

¹⁹² See Hughes, *supra* note 190, at 299.

¹⁹³ For a discussion of the evolution of these theories in the context of cultural property, see Patty Gerstenblith, *Identity and Cultural Property: The Protection of Cultural Property in the United States*, 75 B.U. L. REV. 559 (1995).

¹⁹⁴ Despite the heavy influence of Locke, some early voices espoused a more utilitarian view of property, not the least of which was Jefferson. See GREGORY S. ALEXANDER, *COMMODITY AND PROPRIETY: COMPETING VISIONS OF PROPERTY IN AMERICAN LEGAL THOUGHT 1776–1970*, at 27 (1997) (distinguishing Jefferson's notion that "society creates property rights and ought continually to control them" from the traditional Lockean theory).

¹⁹⁵ See *id.* This is not to imply that Lockean theory regards property as completely devoid of all social influence. See *id.* at 391 n.7.

¹⁹⁶ JEREMY BENTHAM, *THE THEORY OF LEGISLATION* 113 (C.K. Ogden ed., Richard Hildreth trans., 1931).

¹⁹⁷ It has also been noted that cultural property claims are often based on a Hegelian personality theory, a theory that former presidents could invoke to a more limited extent. See Gerstenblith, *supra* note 193, at 568. Scholars such as Margaret Radin have defined such a claim as distinguishing between "property that is particularly important to the self-realization and fulfillment of an individual's personality, and 'fungible property' as property held by an individual primarily for its economic or use value." *Id.* (quoting Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 959–61 (1982)).

and private action."¹⁹⁸ This shift was evident in the nineteenth century and, by the early twentieth century, the new Hohfeldian view took hold in law schools and the courts.¹⁹⁹ This new property concept repudiated the rigid Blackstonian view of a bundle of rights with its attendant physicality and absolute characteristics.²⁰⁰ Public policy, rather than a deontological view, emerged as the foundation for property.²⁰¹

Presidential papers, however, appeared insulated from these changing views by the tradition dating back to Washington.²⁰² What is particularly impressive is not only that these papers were viewed as private property, but also that they remained immune from some limited public claim of access or use.²⁰³ Although federal courts allowed a broad range of public interference with private property before the so-called "takings revolution" under the Rehnquist Court, no similar balancing existed for presidential papers.²⁰⁴ Moreover, although former presidents could be recognized as the legitimate property owners of their papers, subject to governmental interference in special circumstances,²⁰⁵ the presidents and their heirs controlled public access

¹⁹⁸ Gerstenblith, *supra* note 193, at 568.

¹⁹⁹ See generally Kenneth J. Vandavelde, *The New Property of the Nineteenth Century: The Development of the Modern Concept of Property*, 29 *BUFF. L. REV.* 325 (1980). Two of the most powerful voices in support of the new property concept were Wesley Newcomb Hohfeld and Thomas Grey. See Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 *YALE L.J.* 710 (1917); Wesley Newcomb Hohfeld, *Some Fundamental Legal Conditions as Applied in Judicial Reasoning*, 23 *YALE L.J.* 16 (1913); Thomas C. Grey, *The Disintegration of Property*, in *PROPERTY* 69 (J. Roland Pennock & John W. Chapman eds., 1980).

²⁰⁰ Vandavelde, *supra* note 199, at 329.

²⁰¹ One early twentieth century recognition of this change can be found in Justice Louis Brandeis's dissent in *International News Service v. Associated Press*, 248 U.S. 215, 250 (1918):

[T]he fact that a product of the mind has cost its producer money and labor, and has a value for which others are willing to pay, is not sufficient to ensure to it this legal attribute of property. The general rule of law is, that the noblest of human productions—knowledge, truths ascertained, conceptions, and ideas—become, after voluntary communication to others, free as the air to common use. Upon these incorporeal productions the attribute of property is continued after such communication only in certain classes of cases where public policy has seemed to demand it.

Id.; see also Vandavelde, *supra* note 199, at 357–65.

²⁰² See Sax, *supra* note 62, at 83.

²⁰³ The Lockean view, in its most rigid and absolute sense, ignores alternative theories like those of John Rawls that propose the need for some level of wealth distribution in a just society. See JOHN RAWLS, *A THEORY OF JUSTICE* 277–79 (1971). Rawls discusses taxation and levy systems as needed "gradually and continually to correct the distribution of wealth and to prevent concentrations of power detrimental to the fair value of political liberty and fair equality of opportunity." *Id.* at 277.

²⁰⁴ See, e.g., *Folsom v. Marsh*, 9 F. Cass 342 (C.C.D. Mass. 1841) (No. 4901), U.S. App. LEXIS 468 (recognizing presidential papers as private property).

²⁰⁵ This absence of a limiting principle may be due to the paucity of litigation in this area. Private libraries as a whole granted access when necessary to incumbent presidents,

and preservation entirely. Even when faced with repeated cases of incumbent presidents seeking “permission” from private libraries to read important state documents, the proprietary theory remained unbridged.²⁰⁶ It remained Lockean in its most deontological sense and immune from more utilitarian notions of property.

This proprietary theory persisted even as the role of the president and the character of presidential papers changed. With the expansion of the executive branch, presidential papers became increasingly central in governance and policy.²⁰⁷ No longer private correspondence, these records were the leading edge of public policy. At the same time, concepts of private property in the United States were moving away from the more absolute view of ownership that was common in the late eighteenth and early nineteenth centuries. The government’s ability to interfere with private property increased, and greater public claims over private property were allowed under takings jurisprudence.²⁰⁸ As Part IV demonstrates, the government began to assert outright public ownership or to impose significant restrictions on different forms of property that had historical or archeological importance. Likewise, in the corporate context, courts accepted the ownership of papers and material generated by a company’s employees.²⁰⁹ Despite these changes, former presidents as-

out of a sense of public duty. Had a library refused such access, it would have risked a negative ruling generally on the status of these papers and, at a minimum, a recognition of a right of governmental access.

²⁰⁶ See *infra* notes 384–89 and accompanying text.

²⁰⁷ See FINAL REPORT, *supra* note 175, at 14–16 (explaining the different types of presidential files and the presidential library system).

²⁰⁸ As Part IV discusses, a distinction also has been drawn in cases such as *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992), and *Andrus v. Allard*, 444 U.S. 51 (1979), between real and personal property, the latter receiving less protection from regulatory takings. In *Andrus*, the Court permitted extreme restrictions on private property—including the sale of the items—reasoning that they were outside of the takings clause. The Court noted:

Suffice it to say that government regulation—by definition—involves the adjustment of rights for the public good. Often this adjustment curtails some potential for the use or economic exploitation of private property. To require compensation in all such circumstances would effectively compel the government to regulate by *purchase*. “Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law.”

Andrus, 444 U.S. at 65 (citation omitted).

²⁰⁹ One of the most analogous doctrines is the “hired-to-invent rule,” in which an employee’s inventions are presumed to belong to the employer, even in the absence of an express transfer of such rights. See *Banks v. Unisys Corp.*, 228 F.3d 1357, 1359 (Fed. Cir. 2000) (“[W]here an employee is hired to invent something or solve a particular problem, the property of the invention related to this effort may belong to the employer.”). An analogy can be drawn to a person elected and compensated as president to conduct the specific tasks involving the invention or modification of policy. Although admittedly a loose analogy, private employers have prevailed in recovering the value of work that was invented, or even inspired, in their employ. The most extreme form of such ownership was recognized recently in *DSC Communications Corp., N/K/A Alcatel USA Inc. v. Brown*. In

serted personal ownership of their own papers in the late twentieth century.²¹⁰

When the courts faced the proprietary theory again in the 1970s and 1990s, the property claims of the former presidents received full support subject to Congress's statutory authority. In *Nixon v. United States*,²¹¹ the former president argued that the PRMPA constituted a taking of his property under the Fifth Amendment.²¹² Reversing the trial court, the D.C. Court of Appeals found that Nixon had indeed been deprived of his "property" without compensation.²¹³ This decision arose from the historical practice of Congress, which recognized a protected expectation of property rights.²¹⁴ This ruling raises a number of unresolved questions regarding the public's claim to presidential papers after the enactment of the PRA. As discussed below, the proprietary view of presidential records was a theory that should have been rejected during the early Republic.²¹⁵ Although it is understandable that private correspondence was, and continues to be, private property, presidents generated records of governance and policy in the employ and under the authority of the American people. The failure of Congress to assert such public ownership until 1978 was the result of uncertainty and a degree of disinterest. It was simply easier for Congress to purchase some records. In fact, many members during the early twentieth century no doubt held property views that were consistent with the claims of former presidents. Moreover, there was simply no great interest in congressional preservation of contemporary presidents' records. Although the United States was not disinterested to the degree described by de Tocqueville,²¹⁶ there was little interest in the need for a general archive.²¹⁷ When Congress purchased presidential records, its purpose was generally to preserve the records of historical figures or periods, rather than to create an archive of the daily operations of the White House.²¹⁸ Despite this

this action, the company prevailed in breach-of-contract and declaratory judgment claims with respect to a former employee's idea that was never written down but allegedly was conceived during his employment. See Erica Lehrer Goldman, *Court Says Firm Owns Idea in Worker's Head*, LEGAL TIMES, IP Section, Oct. 14, 2002, at 8.

²¹⁰ See *supra* note 64 and accompanying text (discussing Nixon's demand for compensation for his presidential papers).

²¹¹ 978 F.2d 1269 (D.C. Cir. 1992).

²¹² See *id.* at 1270.

²¹³ *Id.* The cost to the public to retain possession of these papers remains unclear but it is known that the Nixon family refused a proposed \$26 million settlement, \$11 million of which would go to the Nixon Library itself. SAX, *supra* note 62, at 88.

²¹⁴ See SAX, *supra* note 62, at 83.

²¹⁵ See *infra* Part IV.

²¹⁶ See ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 192 (J.P. Mayer & Max Lerner eds., George Lawrence trans., 1966); *infra* note 459 and accompanying text.

²¹⁷ See McGowan, *supra* note 21, at 412-13.

²¹⁸ See *id.* at 411.

lack of interest and the expectations created by years of acquiescence, Congress could have made a compelling public ownership claim to these records at any point in its history. Institutional apathy, rather than an independent conceptual foundation, sustained the proprietary theory.

Considering this historical spectrum, it would be unfair to characterize President George W. Bush's position as analogous to the position of those presidents asserting private proprietary claims to presidential records. President Bush appears to accept the constitutionality of the federal law that makes these documents public property and subject to public dissemination.²¹⁹ However, by giving both former presidents and their designated heirs a veto over the release of documents, President Bush has created a new quasi-proprietary claim for former presidents and their heirs with a degree of unilateral control. With the exception of the right to sell or destroy material, this new approach affords a degree of private control that has not existed since the demise of the private proprietary theory.

III

THE CONSTITUTIONAL PARADIGM: EXECUTIVE PRIVILEGE AND THE STATUS OF FORMER PRESIDENTS IN THE ASSERTION AND TRANSFER OF EXECUTIVE PRIVILEGE

The Constitution was never the source of the proprietary theory that first gave presidents presumed claims of ownership over presidential papers. Although it generally recognizes property rights, the Constitution does not create property rights and, as shown, these early claims were largely devoid of constitutional rationales.²²⁰ However, the Constitution does protect property interests that are created by statute or common law.²²¹ Accordingly, the public seizure of the Nixon papers could be viewed as a taking, but only after finding a property right created by an independent source.²²² The sources commonly cited for the proprietary theory are tradition and the legitimate expectation of ownership derived from that tradition.²²³ This tradition began with a distinctly deontological view of property. It was not a constitutional but a moral claim of ownership that prevailed in early cases and secured general recognition in both the courts and

²¹⁹ See *supra* Part I.C.

²²⁰ See *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577 (1972) ("Property interests . . . are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.").

²²¹ See *id.*

²²² See *Nixon v. United States*, 978 F.2d 1269, 1275–76 (D.C. Cir. 1992).

²²³ See *SAX*, *supra* note 62, at 83.

Congress.²²⁴ In the twentieth century, the basis for control over presidential records evolved to include more utilitarian or consequentialist rationales for control, particularly in the form of executive privilege.²²⁵ Although Nixon's heirs would continue to invoke property claims, the most common argument for control over access to the records was the need to preserve the confidentiality of communications in the White House and avoid a chilling effect on such communications.²²⁶ President George W. Bush's executive order introduced an interesting hybrid of these two paradigms.²²⁷ Based on the utilitarian rationales of executive privilege, the Bush order creates a type of constitutional proprietary interest that can pass to heirs and designees. The Bush order would substantially alter the status of former presidents and their residual authority vis-à-vis Article II of the Constitution. Therefore, it is important to address the specific constitutional controversies raised by the Bush order before returning to the question of public ownership of presidential records.

A. The Executive Privilege and the Constitutional Basis for Denial of Public Access to Presidential Papers

In enacting the PRA, Congress recognized the newly defined principle of executive privilege, but expressly sought not to expand the privilege with respect to the control of presidential records.²²⁸ Congress developed the PRA in the aftermath of the *Nixon* cases, in which the Supreme Court rejected that President's extreme concept

²²⁴ See *supra* notes 182–92 and accompanying text.

²²⁵ Executive privilege is not alone among rights that arguably advance utilitarian or consequentialist rationales. See, e.g., Frederick Schauer, *Commensurability and Its Constitutional Consequences*, 45 HASTINGS L.J. 785, 793 (1994) (“Consequentialist constitutional rights strategically create individual rights not because of the intrinsic importance of the rights, but because, in the long run, creating and enforcing those rights will be the best for the public interest.”).

²²⁶ See generally Gerald Weñäuffer, *Justifying Secrecy: An Objection to the General Deliberative Privilege*, 65 IND. L.J. 845, 866–90 (1990) (discussing and criticizing the chilling-effect rationale).

²²⁷ Historically there was some overlap between the property and constitutional elements. Presidents such as Jackson denied Congress access to papers with a mix of property and constitutional prerogatives. Jackson resisted congressional inquiries for such records during his term. In a characteristic exchange, he denied access to records related to the removal of funds from the Bank of the United States:

I have yet to learn under what constitutional authority that branch of the Legislature has a right to require of me an account of any communication. . . . [M]ight I be required to detail to the Senate the free and private conversations I have held with those officers on any subject relating to their duties and my own.

Archibald Cox, *Executive Privilege*, 122 U. PA. L. REV. 1383, 1403 (1974) (footnote omitted).

²²⁸ See Presidential Records Act of 1978, Pub. L. No. 95-951, 92 Stat. 2523, 2526 (codified as amended at 44 U.S.C. § 2204(c)(2) (2000)) (“Nothing in this Act shall be construed to confirm, limit, or expand any constitutionally-based privilege which may be available to an incumbent or former President.”).

of executive privilege and held that the privilege is qualified.²²⁹ The language of the Bush order strongly suggests a view of executive privilege that is almost Nixonian in its scope and breadth.²³⁰ The Bush Administration advanced this view of privilege after a series of losses not only in the Clinton Administration, but also after early losses by the Bush Administration.²³¹ The fight over presidential papers, however, promises to prove far more significant in its potential impact on executive privilege. The conflict raises three basic issues that deserve individual treatment. First, the Bush order raises the issue of a former president's right to assert executive privilege as a general matter. Second, the Bush order may force the Court to explain its earlier indications that executive privilege is a constitutional authority that diminishes with time. At issue is whether Congress may statutorily create a presumption that, after twelve years, executive privilege claims over confidential communications are no longer compelling. Third, the Bush order raises an issue concerning the transferability of executive privilege from a former president to a third party.

1. *The Curious Constitutional Status of the Former President*

Executive privilege has long occupied an uncertain place in constitutional law. The privilege remains relatively recent in its articulation by the Supreme Court, though it can be traced to the very first administration of Washington.²³² The Court has recognized this privilege with considerable reservation as to its scope and duration of use, noting that an executive privilege claim of a former president is facially less compelling than that of an incumbent president.²³³ How-

²²⁹ See *United States v. Nixon*, 418 U.S. 683, 713 (1974).

²³⁰ See *supra* note 152. The Bush Administration has advanced the view of inherent authority in a variety of areas that can only be described as extreme. Particularly in the area of national security, the Administration has advanced claims that appear inimical to the doctrine of separation of powers. See Jonathan Turley, *Tribunals and Tribulations: The Antithetical Elements of the Military Justice System in a Madisonian Democracy*, 70 *GEO. WASH. L. REV.* (forthcoming February 2003).

²³¹ See *supra* note 152.

²³² See Turley, *Paradise Lost*, *supra* note 152, at 207. However, the term "executive privilege" can be traced back only to the Eisenhower Administration. See Rozell, *supra* note 68, at 1069.

²³³ In *Nixon v. Administrator of General Services*, 433 U.S. 425, 448 (1977), the Court noted:

It is true that only the incumbent is charged with performance of the executive duty under the Constitution. And an incumbent may be inhibited in disclosing confidences of a predecessor when he believes that the effect may be to discourage candid presentation of views by his contemporary advisers. Moreover, to the extent that the privilege serves as a shield for executive officials against burdensome requests for information which might interfere with the proper performance of their duties, . . . a former President is in less need of it than an incumbent. In addition, there are obvious political checks against an incumbent's abuse of the privilege.

Id. at 448 (citations omitted).

ever, the Court recognized the right of a former president to assert executive privilege after he has returned to the status of a private citizen.²³⁴ Although this is widely viewed as a settled question, the extension of executive privilege to former presidents is far from an obvious conclusion. There is a strong argument that executive privilege should be tied directly and exclusively to the office of the president. Under this theory, when a president returns to the status of a private citizen, he loses the authority that attended his prior official status. It would then be entirely the incumbent president's responsibility to protect the confidentiality of the office through the assertion of privilege over the papers of prior presidents. Such a rule emphasizes the unique aspect of the American president as a citizen vested with unrivaled power for only a relatively short period of time. That power attaches to the office and the immediate officeholder.

This bright-line rule is far more appealing than the Court's rationale for extending privilege to former presidents. In *Nixon v. Administrator of General Services*, the Court adopted the Solicitor General's following argument:

"This Court held in *United States v. Nixon* . . . that the privilege is necessary to provide the confidentiality required for the President's conduct of office. Unless he can give his advisers some assurance of confidentiality, a President could not expect to receive the full and frank submissions of facts and opinions upon which effective discharge of his duties depends. The confidentiality necessary to this exchange cannot be measured by the few months or years between the submission of the information and the end of the President's tenure; the privilege is not for the benefit of the President as an individual, but for the benefit of the Republic. Therefore the privilege survives the individual President's tenure."²³⁵

The Court's analysis is premised on the false notion that absent a privilege authority in a former president, sensitive records would lose their constitutional protection. However, the privilege would survive an individual president's tenure, because it would be transferred to the incumbent president to use to the extent that it "benefit[s] . . . the Republic."²³⁶ Allowing a former president to depart with an active privilege authority creates the ultimate constitutional slippery slope problem with courts trying to determine when a privilege is fresh or stale.

Defenders of the current rule insist that only the former president is in a unique position to evaluate the copious record for sensi-

²³⁴ See *id.* at 449.

²³⁵ *Id.* at 448-49 (quoting the Solicitor General's brief).

²³⁶ *Id.* at 449.

tive material.²³⁷ However, this argument strains under analysis. First, a former president does not ordinarily review this material; rather his aides perform such a review. The same guidelines and delegated review could be given to the government attorneys by an incumbent president. Second, nothing prevents an incumbent president from enlisting the assistance of a former president in the review of material or the determination of proper assertions of privilege. However, the former president must rely on the incumbent's determination concerning the need to assert the privilege. Obviously, such a rule would expose a former president to the discretion of an incumbent who may be from a rival party or otherwise hostile to the former president's interests. Yet, the American people elected the incumbent president to serve as chief executive and to make all of the determinations necessary for the protection of the country and the Constitution. If the privilege is "not for the benefit of the president as an individual"²³⁸ but rather for the office, then the incumbent president occupies the best position to judge the needs of the office.²³⁹ Finally, particularly after a twelve-year period, no one is in a better position to judge the continued sensitivity and confidentiality of communications than the incumbent president. Although a former president may have a strong view about the sensitivity of a communication, the privilege protects the real over the impressionistic needs of the office. Only the incumbent has the full knowledge to judge the contemporary effect of a release on the executive branch's operations.

Although the Court in *Nixon v. Administrator of General Services* discussed a former president's rights, it failed to consider the possibility of a defined and guaranteed "buffer period."²⁴⁰ The fact that a former president has the statutory right to withhold material for twelve years without the possibility of a challenge should alleviate any need for a post-service privilege.²⁴¹ The Court could easily hold that such a period is compelled not only by statute but by Article II of the U.S.

²³⁷ See *Hearings on EO 13233*, *supra* note 11, at 471–85 (statement of Todd Gaziano, Director, Center for Judicial and Legal Studies, the Heritage Foundation), available at <http://www.fas.org/sgp/congress/2002/042402gaziano.html> (stating that "[i]t is possible, even likely, that only [the former president] is aware of the sensitive nature of many presidential documents from his administration").

²³⁸ See *Nixon*, 433 U.S. at 449.

²³⁹ This is precisely what occurred in the testimony of former president Ronald Reagan when he deferred to the judgment of President George H.W. Bush as to those areas which demanded privilege assertion. See Rozell, *supra* note 68, at 1106–07 (quoting Reagan's attorneys as deferring to President Bush "with respect to issues of executive privilege concerning national security or foreign affairs that may arise during the taking of the videotaped testimony").

²⁴⁰ See *Nixon*, 433 U.S. at 448–49.

²⁴¹ One remaining question is whether an incumbent president should be able to override the decision of a former president by ordering the release of the materials. In my opinion, he should be able to order such a release.

Constitution.²⁴² The decision to trigger the twelve-year period, however, should occur as an official act before the president leaves office. This order should remain subject to the countervailing authority of the incumbent who could order the release of the materials before the twelve-year period expires.²⁴³ There is certainly no reason why executive privilege should be protected against the judgment of a successor chief executive.

It is unlikely that the Supreme Court will fundamentally rethink its view of lingering privilege authority for former presidents. However, the current controversy is the inevitable result of the Court's ill-conceived and ambiguous treatment of this issue. In the event that the Court continues to reject a bright-line rule, questions will remain regarding the meaning of a former president's time-sensitive privilege authority.

2. *The Temporal Dimension to Executive Privilege*

Once former presidents have a residual authority to exercise executive privilege, the constitutional difficulties deepen with the need to define the temporal character of that residual right. The Court held in *Nixon v. Administrator of General Services* that executive privilege is time-sensitive.²⁴⁴ Although the Court accepted that a former president can raise an executive privilege claim,²⁴⁵ it noted that this claim diminishes with time: "The expectation of the confidentiality of executive communications thus has always been limited and subject to erosion over time after an administration leaves office."²⁴⁶ The only question that remains is the rate of this decline. Congress clearly believed that twelve years was ample time for the confidentiality of communications to recede to the point that public disclosure overrides confidentiality.²⁴⁷ The fact that some confidential communications

²⁴² U.S. CONST. art. II.

²⁴³ An executive order could then create a process by which former presidents would receive assistance in asking that documents be withheld after the twelve-year period.

²⁴⁴ See *Nixon*, 433 U.S. at 451.

²⁴⁵ The Court has never fully defined this residual authority despite the fundamental questions that it raises over the meaning and basis of executive privilege. Moreover, the Court has never fully addressed the countervailing theory that when a president returns to the status of a private citizen, he loses the authority that attended his prior official status. In *Nixon v. Administrator of General Services*, the Court simply adopted the conclusory argument of the Solicitor General that such residual authority was necessary for the "benefit of the Republic." See *id.* at 449.

²⁴⁶ *Id.* at 451; see also *Nixon v. Freeman*, 670 F.2d 346, 356 (D.C. Cir. 1982) ("Although there is no fixed number of years that can measure the duration of the privilege, it is significant that no public access will occur until at least eight years after the event disclosed.").

²⁴⁷ The changes by the Bush Administration primarily concerned one category of records. In enacting the PRA, Congress chose not to exempt confidential communications by failing to incorporate FOIA's § 552(b)(5) exemption. See 5 U.S.C. § 552(b)(5) (2000).

would remain privileged after twelve years is the premise underlying EO 13,233.²⁴⁸ This raises the question as to whether a federal court could hold that, contrary to the Bush order, all unclassified confidential records are presumptively unprivileged after a twelve-year period. This was clearly the presumption Congress enacted in the PRA. Furthermore, given the ability of a former president to seek a court order, the PRA suggests that this is a rebuttable presumption. If one accepts the Court's recognition of a former president's residual authority, then there are ample reasons to support the presumption that such documents become unprivileged after twelve years.

It is undisputed that some communications may prove embarrassing for a president or an advisor. This is particularly the case for younger presidents such as Clinton and George W. Bush, who will live long after the release of their records. However, a former president's assertion of executive privilege after such a long period would seem to require some compelling showing that, absent a longer period, frank communications within the White House would be seriously impaired—a claim that would be difficult to maintain. A president's ability to assert executive privilege over confidential communications stems from the practicalities of managing the executive branch. The Supreme Court has recognized that a president requires a degree of frank and open discussion that is only truly guaranteed by confidentiality.²⁴⁹ On a practical level, it is hard to imagine that the average official would feel chilled by the thought of a possible release of material twelve years after the end of a president's term in office. Certainly, no official can assume that such dissemination will not occur, because at the time the official makes a confidential communication, there is no guarantee that the former president will even invoke privilege over that communication. Likewise, because these communications concern matters of public policy, any statement made in the White House is subject to a degree of dissemination within the executive branch or, subject to challenge, a demand from a congressional oversight committee. Even with respect to classified information, material once considered "eyes only" can be downgraded and given wider dissemination. Moreover, as more and more former presidents

The Bush Administration initially justified EO 13,233 on the need to protect national security. See Allen & Lardner, *supra* note 123. However, as already noted, there is protection for national security because both the PRA and the FOIA exemptions specifically cover information "properly classified pursuant to . . . Executive order." 44 U.S.C. § 2204(a)(1)(A)–(B) (2000); 5 U.S.C. § 552 (b)(1)(A)–(B) (2000). The national security protections expressly bar the release of national security information during and after the twelve-year period. When the ensuing controversy clarified this point, the Bush Administration acknowledged that its primary concern was confidential communications, not classified material.

²⁴⁸ See *supra* notes 141–43 and accompanying text.

²⁴⁹ See *Nixon*, 433 U.S. at 448–49.

and staff publish books, few staffers can logically assume absolute confidentiality beyond the end of the presidential term, let alone for twelve years.

Putting aside the question of any true chilling effect, the question remains whether it is good for society to allow a former president to continue to evoke the executive privilege beyond twelve years. Just as there is a benefit to protecting confidentiality during and after a term, there are clear benefits to guaranteeing public access after a reasonable "buffer period." Public review offers some limited deterrent for federal officials in discussing and shaping public policy. Although the Supreme Court did not want a Damocles sword of immediate disclosure dangling from a thread during a president's term, there is value to officials performing their tasks with some expectation of eventual historical or public review. A twelve-year period seems to be a fair compromise between these objectives. It is long enough to guarantee protection against disclosure during an administration and after its termination. However, it is short enough that any given official can expect to be alive when public review of her records occurs. There is considerable historical value in allowing the release of these documents when the participants of these communications are still alive and available for interview. The delay in the release of the papers of presidents such as Lincoln results in the inability of contemporary historians to use the documents as the basis for informed review and research. The Bush order increases the likelihood of such periods not only by extending the right of a former president to withhold material, but also by allowing that privilege to be transferred to heirs or designees.²⁵⁰

²⁵⁰ See Exec. Order No. 13,233, 3 C.F.R. 815, 818 (2002). The possible transfer of this privilege as part of a will returns this dispute to its property origins. If the property right is based on some Lockean natural rights theory, the right of the president to control its use can run indefinitely (subject to common law rules such as the Rule Against Perpetuities). This was precisely the basis for Blackstone's criticism of extending a natural rights theory to inheritance. See 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 10 (London 1765-1769) (cited and discussed in Adam J. Hirsch & William K.S. Wang, *A Qualitative Theory of the Dead Hand*, 68 IND. L.J. 1, 15 (1992) ("For, naturally speaking, . . . if [a man] had a right to dispose of his acquisitions one moment beyond his life, he would also have a right to direct their disposal for a million of ages after him; which would be highly absurd and inconvenient.")). Even after such proprietary concepts were set aside with the PRA, it is difficult to see the legitimacy of control of such material by inheritance to heirs. It is also unclear why society should accept such a transfer to an heir. There is no cognizable constitutional claim in the right to control the privilege after death, like a constitutional dead hand doctrine. Rather, Congress can clearly nullify the effect of any transfer by will. Analogously, inherited property has long been viewed as subject to less protection than property held during one's life. See *Magoun v. Ill. Trust & Sav. Bank*, 170 U.S. 283, 288 (1898) ("The right to take property by devise or descent is the creature of the law, and not a natural right—a privilege, and therefore the authority which confers it may impose conditions upon it."). Death would seem, at a minimum, a natural limiting point even if one accepts that executive privilege authority may be transferred during one's life time.

On balance, the public's interest in a predictable schedule of disclosure is more compelling than the executive branch's interest in avoiding any chilling effect. One can certainly debate the ideal "buffer period,"²⁵¹ but at some point the ability of a former president to assert executive privilege must be viewed as presumptively, if not absolutely, expired. In a society that values open government, twelve years is a relatively long time to accommodate the interests of the executive branch.²⁵² If there is a time limit on executive privilege as suggested by the Supreme Court, then executive privilege should expire for documents that former presidents can withhold, in some cases for sixteen years. It is perhaps a forlorn hope that the Supreme Court will clarify the time-erosion of executive privilege or the curious status of former presidents. This is one area, however, that demands clarity and ideally a bright-line rule. The uncertainty over both the extension of executive privilege and the status of former presidents creates a tension not found in the Constitution itself. Even though the Supreme Court has support for its view that executive privilege is inherent in the structure of the Constitution, it has repeatedly failed to articulate conceptual or practical limitations to this doctrine. The Court missed the opportunity in 1977 to create a bright-line rule that would terminate the use of executive privilege at the end of a president's term.²⁵³ This would have tethered the privilege directly to the executive office, which it is designed to protect, and not the former officeholder. The current controversy only reemphasizes the error

²⁵¹ In fact, some archivists have suggested that the twelve-year period is not consistent with the standard twenty-year delay common in their field. Carl M. Cannon, *For the Record*, NAT'L J., Jan. 12, 2002, at 90, 96 (quoting an historian conceding that "[t]welve years is not in line with archival requirements for other government records, which [are] in the 25-to-30-year range").

²⁵² In addition to questioning the twelve-year buffer period, there has been criticism of the PRA's twenty-day period for a former president to seek a judicial order to prevent release of the material. See *Hearings on EO 13233*, *supra* note 11, at 473-74 (statement of Todd Gaziano, Director, Center for Judicial and Legal Studies, the Heritage Foundation). During the hearing on the 2002 amendments to the PRA, Mr. Gaziano suggested that a longer period may be necessary to avoid an unconstitutional limitation on the exercise of a presidential power. See *id.* at 474. In reality, however, the twenty-day period is misleading if considered in isolation. First, these are twenty working days that do not include weekends or holidays. Thus, at a minimum, a former president has twenty-four days to prepare a challenge. Second, this twenty-day period will run after an initial twenty-day period for review. This preceding period also excludes weekends or holidays. Thus, at a minimum, a former president has forty-eight days or more. Third, these two periods are subject to a discretionary extension by the Archivist of an additional twenty working days. Thus, this minimum forty-eight-day period is likely to be extended to a seventy-two-day period. Finally, these three preceding periods will follow a twelve-year period for a former president to review these documents. This amounts to twelve years plus a potential forty-eight to seventy-two days for the review of material and the filing of a claim in federal court. See *id.* (supplemental statement of Professor Jonathan Turley).

²⁵³ See *Nixon*, 433 U.S. at 448-49.

committed in 1977 and the need for a new interpretation of a former president's constitutional privileges.

3. *The Transferability of Executive Privilege to Third Parties*

The controversy over EO 13,323 also raises the long-neglected issue of the ability to transfer executive privilege to third parties. It is difficult to trace the origins of the theory that a former president can transfer executive privilege to a third party. In reality, there is no support for this theory in the history or structure of the Constitution. However, because people have historically treated presidential papers as personal property, questions of control were simply matters of property law and probate.²⁵⁴ Although executive privilege can be traced to the very first administration, it was not until the Nixon Administration that the Supreme Court fully articulated this doctrine and has never recognized a distinct right of transfer.²⁵⁵ Over the course of history, there was only one case that addressed an attempted transfer of the discretionary authority to withhold papers from public review to a third party.²⁵⁶ The case involved the papers of Franklin Roosevelt, and arose shortly after his death.²⁵⁷ In a memorandum, the former president created a committee of three persons²⁵⁸ to "examine his personal papers, and select those which, in their opinion, should never be made public and those which should remain sealed for a prescribed period of time."²⁵⁹ It is difficult to determine whether Roosevelt foresaw this committee as preventing the disclosures of embarrassing or privileged material²⁶⁰ or, more likely, both

²⁵⁴ See *supra* notes 178-80 and accompanying text. Even presidents with a historical bent such as Wilson declined offers to create private or public archives of their papers in favor of determining the future of their papers in their wills. See 1 INDEX TO THE WOODROW WILSON PAPERS, at v (1973) (on file with the Library of Congress).

²⁵⁵ See Turley, *Paradise Lost*, *supra* note 152, at 207.

²⁵⁶ See *In re Roosevelt's Will*, 73 N.Y.S.2d 821 (Sur. Ct. 1947).

²⁵⁷ See *id.* at 823-24. The lawsuit did not reflect any adversarial element or dispute. Rather, this friendly lawsuit intended to confirm the status of the presidential papers remaining at the White House. See *id.* at 826-27.

²⁵⁸ The committee consisted of Samuel I. Rosenman, Harry L. Hopkins, and Grace G. Tully, "or the survivors thereof." *Id.* at 826. Rosenman formally intervened with a notice of appearance as "an interested party." *Id.* at 827. Rosenman served as one of Roosevelt's chief speechwriters, though he also held the title of special counsel (later known as White House Counsel). See Michael Ruby, *The Last White House Counsel?*, U.S. NEWS & WORLD REP., Mar. 21, 1994, at 98, 98 (stating that Roosevelt created the White House Counsel position as "a spot to park Samuel Rosenman, a New York judge and longtime political confidant who also was one of FDR's principal speechwriters"). Known as "Sammy the Rose" by Roosevelt, Rosenman was one of his closest advisors and would later become a New York judge. Richard J. Margolis, *Government Was the Solution*, N.Y. TIMES, June 16, 1985, at 41.

²⁵⁹ *In re Roosevelt's Will*, 73 N.Y.S.2d at 826.

²⁶⁰ Confidentiality was clearly a concern among some presidents. For example, Theodore Roosevelt wanted to preserve his papers for their historical use but stressed that "they comprised highly confidential papers, that they could not be made public during his life."

types of disclosures.²⁶¹ This case, however, stood at the twilight of the proprietary period and at the dawn of the constitutional period of presidential records. The state judge viewed the matter as one purely of property law, giving no significance to the nature of the papers in determining their status.²⁶² The case involved both a will that disposed of Roosevelt's personal property and a memorandum that promised to give Roosevelt's papers to the library.²⁶³ The court ruled that the memorandum was a valid *inter vivos* gift of personal property, which included papers that had not been transferred to the library.²⁶⁴ With respect to the committee, the court notably rejected the assertion by one of its members that he was a necessary or proper party to the lawsuit.²⁶⁵ The court ruled that the Archivist of the United States had discretion whether to consider the advice of the committee and that such a matter was "an administrative question for the Government of the United States and its Archivist, and not a judicial question for th[e] Court."²⁶⁶ However, the case is notable for what is absent: there is no mention of a constitutional dimension to the question of control over the records.

As constitutional rationales supplanted property rationales, the question of possession turned to privilege. The notion that a former president has authority to transfer executive privilege to third parties appears to be based in part on the ability of a president to transfer or limit such authority within an administration. Thus, a president may bar officials from asserting executive privileges, such as the deliberative process privilege, or allow such a privilege to be asserted by "an appropriately qualified designee."²⁶⁷ Because a president may give or deny executive officials the ability to assert forms of executive privilege, it appears fully transferable or delegable. However, to the extent that officials may assert privilege in the name of a president, this is a

1 INDEX TO THE THEODORE ROOSEVELT PAPERS, at viii (1969) (on file with the Library of Congress).

²⁶¹ The selection of Roosevelt's closest political advisor, Harry Hopkins, and his secretary, Grace G. Tully, suggests the former, while the selection of the White House Counsel Samuel Rosenman, may suggest the latter. See *infra* note 278 and accompanying text. In all likelihood, Roosevelt foresaw both functions in this trusted committee and believed that some material might be withheld under some type of privilege rationale.

²⁶² See *In re Roosevelt's Will*, 73 N.Y.S.2d at 825-27.

²⁶³ See *id.*

²⁶⁴ See *id.* at 826.

²⁶⁵ See *id.* at 827.

²⁶⁶ *Id.*

²⁶⁷ *In re Grand Jury Subpoena*, 218 F. Supp. 2d 544, 552 (S.D.N.Y. 2002). In Nixon's case, some members of Congress attempted to limit assertions to the president. This legislation, which ultimately failed, was meant to address the uncertainty of who was making such assertions and to curtail the use of controversial assertions. See MARK J. ROZELL, PRESIDENTIAL POWER, SECRECY, AND ACCOUNTABILITY 67 (2d ed. 2002). A presidential advisor's ability to claim executive privilege was reinforced in *In re Sealed Case*. 121 F.3d 729 (D.C. Cir. 1997).

practice required by the sheer logistics of governing, with multiple cases and hearings raising issues of privilege. The officials asserting privilege are agency heads carrying out official duties in the name of an incumbent president. Such delegations by a president could certainly be made with regard to the papers of a former president. Each administration has a continuing duty to protect privileged material and the privilege authority would continue to be exercised by an executive official with the consent of a sitting president. However, the transfer of privilege authority by a former president to a private party raises a materially different context. The former president is not serving in any constitutional office and his delegation is to a person outside of the executive branch who is neither an agency head nor someone commonly defined as an "appropriately qualified designee."²⁶⁸

Other possible justifications for the theory of transferability are equally problematic. For example, the theory could be defended on the basis of the historical use of designated third parties to control presidential papers before the enactment of the PRA. However, although papers were subject to sale or destruction by such individuals, they were not exercising executive privilege but merely proprietary claims over the papers. The former president transferred a property interest rather than a constitutional power to designate heirs or parties. The theory of transferability can also be found in the language of the PRA itself. The PRA states: "Upon the death or disability of a President or former President, any discretion or authority the President or former President may have had under this chapter shall be exercised by the Archivist unless otherwise previously provided by the President or former President in a written notice to the Archivist."²⁶⁹ The reference to a previous written notice is ambiguous but suggests a basis for the transfer of authority despite the obvious constitutional problems raised by such a transfer. A federal court likely would construe this provision narrowly so as to avoid finding it unconstitutional.²⁷⁰ Never-

²⁶⁸ *In re Grand Jury Subpoena*, 218 F. Supp. 2d at 552.

²⁶⁹ Presidential Records Act of 1978, Pub. L. No. 95-591, 92 Stat. 2523, 2526 (codified as amended at 44 U.S.C. § 2204(d) (2000)).

²⁷⁰ See *Hooper v. California*, 155 U.S. 648, 657 (1895) ("The elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality."); see also *NLRB v. Catholic Bishop of Chi.*, 440 U.S. 490, 500 (1979) (stating that congressional acts should be interpreted so as not to violate the Constitution); *Int'l Ass'n of Machinists v. Street*, 367 U.S. 740, 749-50 (1961) (stating the courts should construe statutes to avoid constitutionality questions); *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 341 (1936) (Brandeis, J., concurring) (stating that courts should not assess the constitutionality of a statute "unless obliged to do so" (quoting *Blair v. United States*, 250 U.S. 273, 279 (1919))); *Crowell v. Benson*, 285 U.S. 22, 62 (1932) (stating the principle that courts should construe a statute to avoid the constitutionality question). This long-standing principle of statutory construction recognizes that courts must assume Congress will be advancing a constitutional purpose. *Edward J. DeBartolo Corp. v. Fla. Gulf Coast*

theless, the Bush order can be viewed as expanding on this poorly drafted provision.

If history is a guide, then the former first ladies are the most obvious beneficiaries of the transferability of authority to assert executive privilege, because they have been the most common recipients of presidential papers prior to the enactment of the PRA.²⁷¹ With some first ladies living into their nineties, such authority could be exercised for decades²⁷² under the guidance of unofficial advisors.²⁷³ Some first ladies may be entirely unsuited for this task. For example, Mary Todd Lincoln's lifetime of mental illness led to her institutionalization.²⁷⁴ Likewise, other first ladies ranging from Julia Grant to Florence Harding to Hillary Clinton have been involved in prior scandals that could influence their use of executive privilege over the release of embarrassing or even incriminating documents.²⁷⁵ Of course, there is no guarantee that the transfer of this constitutional authority would even be confined to the immediate family of a former president. Six

Bldg. & Const. Trades Council, 485 U.S. 568, 575 (1988) ("This approach . . . also recognizes that Congress, like this Court, is bound by and swears an oath to uphold the Constitution. The courts will therefore not lightly assume that Congress intended to infringe constitutionally protected liberties or usurp power constitutionally forbidden it.").

²⁷¹ See *infra* notes 272–75 and accompanying text.

²⁷² Former first lady Sarah Polk lived forty-two years after her husband's death, until the age of eighty-eight years. See COLLINS & WEAVER, *supra* note 26, at 92.

²⁷³ The oldest former first lady was Bess Truman, who lived to ninety-seven. Albin Krebs, *Bess Truman Is Dead at 97; Was President's 'Full Partner'*, N.Y. TIMES, Oct. 19, 1982, at 1. She is followed by Mary Scott Harrison, who died at ninety, though she was the second wife of Benjamin Harrison and did not serve as first lady. *Id.* Harrison is followed by Edith Wilson, who died at eighty-nine. *Id.* The living former first ladies are likely to vie for this distinction, including Lady Bird Johnson, who is ninety at the time of this publication.

²⁷⁴ Mary Todd Lincoln was notorious for hysterical bouts and intense paranoia, including the belief that she was being pursued by someone seeking to remove wires from her left eye. Linda Wheeler, *125 Years Later, Mary Todd Lincoln's Mental State Stirs Diagnostic Debate*, WASH. POST, Feb. 15, 2001, at MS14. Her oldest son sought and received guardianship over the former first lady in 1875. See MARK E. NEELY, JR. & R. GERALD MCMURTRY, *THE INSANITY FILE: THE CASE OF MARY TODD LINCOLN* 14–26 (1986). She was ultimately released with the help of the first woman lawyer, Myra Bradwell, and proceeded to leave the country for France. See Patricia Bamattre-Manoukian, *America's First Woman Lawyer, the Biography of Myra Bradwell*, 35 SANTA CLARA L. REV. 1107, 1112–13 (1995) (book review).

²⁷⁵ See Carl Sferrazza Anthony, *First Ladies, Third Degree: Hillary Clinton's Predecessors in the Hot Seat*, WASH. POST, Mar. 24, 1994, at C1, C8. Such conflicts are obviously not limited to first ladies. For a former president who experienced a scandal, it is likely that some of his or her top aides also would be implicated. These are also the same close circle of advisors that are most likely to be designated as representatives in the handling of records, as evidence by Roosevelt's committee. The controversy over the Reagan records is illustrative. When President George W. Bush asserted privilege and withheld the Reagan records, it was immediately noted that his father and other top officials (including Secretary of State Colin Powell and Defense Secretary Donald Rumsfeld) could be embarrassed by the disclosures relating to the Iran-contra scandal. See, e.g., Carl M. Cannon, *For the Record*, NAT'L J., Jan. 12, 2002, LEXIS, News Library, Ntljnl File (discussing allegations of an effort to use privilege to avoid the release of facts embarrassing to the Bush family and close aides).

presidents have died without any children, and a seventh outlived his children.²⁷⁶ At its most extreme application, EO 13,233 would allow the transfer of the authority to use executive privilege to an incompetent distant relative or even a foreign citizen. Under the Bush order, a president can even designate any individual or set up a type of constitutional trust designating trustee holders of the privilege until a descendant reaches the age of majority.²⁷⁷ Likewise, as demonstrated by the Franklin Roosevelt memorandum, a president could designate a committee of individuals.²⁷⁸ The ability to make such a transfer contradicts the main justification for recognizing lingering executive privilege authority in a former president—the greater familiarity of a former president with his own records so he can isolate sensitive material. Under the transferability theory, a president could “retire” from such ongoing responsibilities upon leaving office. Moreover, with the passage of over a decade, the ability and memory of a former president is likely to decline in terms of a meaningful review. Whether performed by an incumbent administration or the staff of a former president, this review will likely be done by designation.

The transferability theory is a repellant concept for a government system whose core values include the rejection of hereditary claims of power and the trappings of monarchical systems.²⁷⁹ The status of a former president is one of the most distinguishing characteristics of

²⁷⁶ COLLINS & WEAVER, *supra* note 26, at 11. The seventh president was Franklin Pierce, who lost all three sons as infants or young children. *Id.* at 108–09. His presidential papers passed as part of his will’s residual clause to his nephew. *Id.* at 109. Ultimately, they were sold in 1903 to the Library of Congress. *Id.*

²⁷⁷ See Exec. Order No. 13,233, 3 C.F.R. 815, 818 (2002). Trusts have been a favorite device of presidents to retain some control over the passage of their estate interests. John Adams created the first such trust as part of his will. See COLLINS & WEAVER, *supra* note 26, at 36.

²⁷⁸ The Roosevelt committee reflects the variety of individuals who can be given such authority. Roosevelt appointed his long-time secretary Grace Tully, who had training as a secretary without any background in constitutional, legal, or national security areas. See Marjorie Hunter, *Grace Tully, 83, a Secretary to Franklin Roosevelt, Dies*, N.Y. TIMES, June 16, 1984, at 28; Joseph D. Whitaker, *Grace Tully, Secretary, Confidante of FDR, Dies*, WASH. POST, June 16, 1984, at B4 (noting that Tully received an honorary doctorate from Salem College in West Virginia). The other two members, Samuel Rosenman and Harry Hopkins, did hold relevant official positions in the administration, though Hopkins later faced suspicion as an alleged KGB source. See Glenn Frankel, *KGB Defector’s Book Revives British Spy Debate*, WASH. POST, Oct. 18, 1990, at A38 (discussing how a book on the release of KGB files “claims that Harry L. Hopkins, President Franklin D. Roosevelt’s closest personal adviser, met regularly with a senior Soviet intelligence officer during World War II and served as an unwitting ‘agent of major significance’ for the Soviets”). It is notable that, under the terms of the memorandum, Ms. Tully could have survived as the only person with this authority. See *In re Roosevelt’s Will*, 73 N.Y.S.2d 821, 826 (Sur. Ct. 1947).

²⁷⁹ It is also an interesting point of comparison to the Rawlsian view of the need to restrict inheritance to “prevent concentrations of power detrimental to the fair value of political liberty and fair equality of opportunity.” RAWLS, *supra* note 203, at 277. Here, the concentration of wealth in the form of control over presidential papers works as a direct limitation on political action and discourse.

the Madisonian democracy. There is a curious moment in this system when an individual is transformed from the most powerful leader in the world into a mere citizen. From our earliest debates, the United States has resisted efforts to give presidents or former presidents the trappings of a monarchy, rejecting even the smallest symbol of such monarchical authority. In an earlier academic piece, I recounted the debate over whether writs should be issued in the name of the president or in the name of the people of the United States.²⁸⁰ Madison and others rejected the call from John Adams to issue writs in the name of the president.²⁸¹ Senator William Maclay referred to such views as the “‘old leaven’” of an earlier royal period.²⁸² Although not well known, this debate reflects a fundamental change brought about by the revolution in the status of the chief executive. The attempt to extend executive privilege not only for the life of former presidents but also to his heirs is precisely the type of “old leaven” that Maclay and others opposed in the First Congress.²⁸³

The transfer of the power to assert executive privilege to designated family members not only magnifies the fundamental conflicts between EO 13,233 and our constitutional system, it also creates the opportunity for endless controversy. As noted earlier, relatives acting by such designation committed the greatest abuses during the private proprietary period.²⁸⁴ Destruction of material often resulted from sheer ignorance or simple recklessness.²⁸⁵ Some relatives literally cut

²⁸⁰ Jonathan Turley, “From Pillar to Post”: *The Prosecution of American Presidents*, 37 AM. CRIM. L. REV. 1049, 1064–66 (2000).

²⁸¹ *See id.* at 1065.

²⁸² *Id.* (citation omitted).

²⁸³ H.G. Jones attributes earlier claims of private ownership over presidential records to “a lingering vestige of the attributes of monarchy, not an appropriate or compatible concept of archival policy for the head of a democratic state to adopt.” JONES, *supra* note 60, at 155.

²⁸⁴ *See supra* notes 44–46 and accompanying text.

²⁸⁵ Past disputes over the wills of former presidents highlight the ease with which disputes can both occur and work against the presumed intention of the former president. A combination of greed and poor legal drafting has led to heavy historical losses. For example, Polk clearly wanted his home and its possessions to pass to the state and to become a public resource and museum. *See* COLLINS & WEAVER, *supra* note 26, at 94. Childless, he only wanted to guarantee that his wife, Sarah Polk, could remain in their home and enjoy their assets until her own death. *Id.* Poor drafting of the will defeated this intention because it included a clause that stated that the house could be occupied by “one of my blood relations, bearing the name of Polk . . . deemed worthy, and a proper person to occupy the house.” *Id.* (quoting paragraph five of the Polk will). This clause led to a terrible end for both the historical presidential site and his legacy. When Sarah Polk died in 1891, fifty-five separate claimants went to court to challenge any transfer to the state and to assert their ownership claims. George Zepp, *Relatives Broke the Will President Polk Intended to Preserve His Mansion*, TENNESSEAN, July 10, 2002, at 3B. They prevailed on the basis of this clause and the house was sold. *See id.* The claimants received an average of \$373, with some receiving as small as a 1/758th share. *Id.* A developer tore down the house and ultimately replaced it with a YWCA and some apartment buildings. *Id.*

the papers in pieces for distribution as souvenirs.²⁸⁶ The Bush order also opens up the possibility of legal challenges over who has the right to exercise a former president's executive privilege.²⁸⁷ A case in point is the current fight between the daughters of former President Nixon over his library.²⁸⁸ There is no reason why the bequeathed privilege could not also become an object of intrafamilial litigation.²⁸⁹ This is particularly the case when the Bush executive order leaves open the possibility that "the family of the former President may designate a representative (or series or group of alternative representatives, as they in their discretion may determine) to act on the former President's behalf."²⁹⁰ In cases of multiple children, it is common for no child to receive a dominant legal position. However, even standard transfers of pre-PRA presential records that avoided suggestions of favoritism or a lack of parental faith created a potential nightmare of rivaling interests and judgments.²⁹¹ Tyler's will is an example of such a standard presidential conveyance:

²⁸⁶ Such destruction occurred out of an effort to satisfy a desire for any material in the hand of a president. Thus, relatives like George Washington Parke Curtis wrote:

I am now cutting up fragments from old letters & accounts, some of 1760 . . . to supply the call for Any thing that bears the impress of his venerated hand. One of my correspondents says send me only the dot of an i or the cross of a t, made by his hand, & I will be content.

McGowan, *supra* note 21, at 412 n.21 (quoting an April 17, 1857 letter from George Washington Parke Curtis to John Pickett). Interestingly, the same type of senseless destruction occurs in the art world for increased profits. Paintings by Sassetta, Rogier van der Weyden, Jan van Eyck, and Jackson Pollock have been cut into pieces and sold separately. SAX, *supra* note 62, at 7-8.

²⁸⁷ Past presidents are subject to the same personality and interfamily feuds as ordinary citizens, but a constitutional power and presidential papers would now be in the balance. Five presidents have been survived by a widow and children from an earlier marriage, "a situation which can have its own special tensions." COLLINS & WEAVER, *supra* note 26, at 11. Reagan will be the sixth. Harrison supplied the most worrisome precedent because Harrison's first wife, Caroline Scott Harrison, died during his term. *See id.* at 147. After leaving office, Harrison married Mary Scott Lord Dimmick, the niece of Caroline Harrison and a former White House secretary. *Id.* The Harrison children from the first marriage refused to attend the wedding, remaining estranged due to the second marriage. *Id.* One could easily see a legal feud in such a circumstance over who should exercise executive privilege authority, particularly between the children of Caroline Scott Harrison and Mary Scott.

²⁸⁸ *See* Faye Fiore & Geraldine Baum, *2 Nixon Sisters, 1 Big Feud*, L.A. TIMES, Apr. 23, 2002, at A1. The Nixon controversy also involves allegations that relatives with publishing and speaking interests are trying to retain control over documents, precisely the past concern with respect to privately held libraries. *See id.* Recently, the Nixon daughters reached a settlement during court-ordered mediation. *See* Willon, *supra* note 65, at 6. With the support of former president Ford, the Nixon families are now lobbying to transfer the Nixon presidential papers from their current location at the National Archives facility in Maryland to a new Nixon presidential library. *See id.*

²⁸⁹ *See* Turley, *supra* note 2.

²⁹⁰ Exec. Order No. 13,233, 3 C.F.R. 815, 818 (2002).

²⁹¹ A few presidents notably dealt with these special circumstances in their family in the distribution of assets. For example, Truman left only five dollars to his son, John Ross Truman, because the son was in a Catholic seminary and, under a vow of poverty, could

I constitute and appoint my sons Robert, John and Tazewell Tyler, and my son David G. Tyler and my sons-in-law James Sample and William Waller, my Literacy Executors bequeathing to them for revision and publication if they shall think proper, all such of my papers as related to my own times and relate either to my own Biography or to public affairs. My collection of autographs and all my private papers not relating to public affairs I give my wife.²⁹²

If the will had attached the transfer of executive privilege authority to the transfer of presidential papers, six people would have claim to its assertion.

An even more distressing scenario would occur with a president no longer deemed competent. The Bush order would allow the family to act without the approval of a living but disabled former president.²⁹³ Under this scenario, family members could claim the right to exercise a constitutional privilege based solely on their familial relationship to the former president, without any independent judgment of their competence in performing such an important public policy function.²⁹⁴ It would even be possible for the family to take a former president to court to establish a disability and override his assertion of privilege.²⁹⁵ For example, if Reagan were to insist that he could still perform this function despite the progression of his Alzheimer's disease,²⁹⁶ his family could conceivably seek a judicial order transferring this right to the former first lady or to one of his children as part of a comprehensive order of guardianship.²⁹⁷ Likewise, as was the case with Mary Todd Lincoln, a first lady could be involuntarily placed under the guardianship of a family member.²⁹⁸ If the first lady had the authority to exercise the privilege, there could be a legal dispute as to whether there was a transfer of authority to her guardian.

not keep the money for his own use. See COLLINS & WEAVER, *supra* note 26, at 233. Likewise, Fillmore expressly dealt with an antenuptial agreement with his wife in his will. *Id.* at 104 (printing section six of the Fillmore will).

²⁹² *Id.* at 88 (quoting paragraph five of Tyler's will).

²⁹³ See Exec. Order No. 13,233, 3 C.F.R. at 818. The relevant provision reads: In the absence of any designated representative after the former President's death or disability, the family of the former President may designate a representative (or series or group of alternative representatives, as they in their discretion may determine) to act on the former President's behalf for purposes of the Act and this order, including with respect to the assertion of constitutionally based privileges.

Id.

²⁹⁴ See JONES, *supra* note 60, at 162–63 (discussing how the notion of a proprietary right in the papers can lead to an unqualified individual exercising control).

²⁹⁵ The disability of former president Reagan is an obvious example of the type of circumstance in which this provision could be triggered. See Kenneth T. Walsh, *On the Job: Four Former Presidents on Power, Peril, and Conflict*, U.S. NEWS & WORLD REP., Mar. 4, 2002, at 70 (describing Reagan's incapacity due to Alzheimer's disease).

²⁹⁶ See *id.*

²⁹⁷ Exec. Order No. 13,233, 3 C.F.R. at 818.

²⁹⁸ See *supra* note 274 and accompanying text.

The transfer of the authority to assert executive privilege by will or designation carries a faint notion of the original proprietary theory of presidential papers. However, this transfer is difficult to square with the constitutional period establishing public ownership.²⁹⁹ The generally accepted principle is that former presidents no longer own these papers and, when invoking executive privilege over confidential communications, they are theoretically protecting their former office, not themselves.³⁰⁰ Thus, to the extent that papers do not contain such confidential communications, neither the former president nor his heirs has a basis to restrict access after the twelve-year period. However, if they do contain such communications, the former president can no more transfer the authority to invoke executive privilege than he can control unprivileged documents. Both the privilege and the records belong to the public and are nontransferable. Assuming the Court continues to hold that “the privilege is not for the benefit of the President as an individual, but for the benefit of the Republic,”³⁰¹ it is difficult to see how it could be transferred like an ottoman to the heirs of a former president.³⁰² It is a theory that lacks both constitutional and policy merit.

B. The Convergence of Constitutional and Property Theories in the Status of Presidential Papers as “Constitutional Property”

Putting aside the serious questions of constitutional interpretation, the Bush order reveals an intriguing mix of utilitarian and deontological elements. The Bush order is defended in the constitutional and utilitarian terms of executive privilege.³⁰³ The need to protect confidentiality from the chilling effect of public disclosure supports extended nonpublic control. The expanded role of former presidents is defended in terms of their greater familiarity with these records and greater ability to detect sensitive subjects.³⁰⁴ The order, however, expands on the prerogatives formed in the proprietary period. The right of former presidents and their heirs to dictate conditions for disclosure harkens back to the period in which such control was an inalienable right.³⁰⁵ Thus, although President Bush is not asserting a deontological claim to these papers, he is using utilitarian rationales to protect rights that stem from proprietary entitlements.

299 See *supra* notes 82–84 and accompanying text.

300 See *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 448–51 (1977).

301 *Id.* at 449 (quoting the Solicitor General's brief).

302 See Turley, *supra* note 2.

303 See Allen & Lardner, *supra* note 123.

304 See *supra* Part III.A.1.

305 See *supra* Part I.A.

As discussed above, it is difficult to articulate a compelling constitutional basis for a residual executive privilege authority, extended temporal use of the privilege, and its transferability to third parties.³⁰⁶ Proponents defend these “rights” in conclusory terms as simple extensions of an incumbent president’s executive privilege.³⁰⁷ Such rights of transfer and hereditary descent find little support in constitutional terms because they originate from the proprietary theory of the eighteenth century. When viewed in property terms, such rights make perfect sense. If a president has a property right to these papers, then this right continues after his term and extends to the full period of possession.³⁰⁸ Moreover, this right includes the entitlements of exclusions and transfer.³⁰⁹ If a president dies intestate or without a will stipulation as to the inheritance of these papers, they pass as simple chattels to the widow or his descendants.³¹⁰ Later, with the paradigm shift to a constitutional rationale, this property right of exclusion was recast as a constitutional right of executive privilege.³¹¹ The prior cases of exclusion could be understood as early invocations of privilege. Likewise, because the privilege attached to the right to control these papers, the right to transfer control of these papers to third parties also meant the right to transfer the authority to invoke the privilege.³¹² Thus, although the Constitution does not create property rights, this is a case in which property rights would be constitutionally mandated. As shown in the next subpart, there is no clear basis for a property claim in these papers as a theoretical or legal matter. Yet, ensconced in Article II’s implied powers, residual property claims continued to be asserted in the Bush order and, to some degree, recognized in the PRA.³¹³

One reason that the proprietary theory remained unchanged is that it stemmed from an absolute theory of ownership. Accordingly, if a former president were to have an absolute property interest in his papers, then this interest could be passed to his heirs.³¹⁴ The right to designate an individual or heir to exercise control was recognized for over two hundred years.³¹⁵ Thus, it is possible that the long-recognized ability to transfer control of these papers resulted in the PRA’s vague reference to a “written notice” on the exercise of executive priv-

³⁰⁶ See *supra* Part III.A.

³⁰⁷ See Exec. Order No. 13,233, 3 C.F.R. 815, 817 (2002).

³⁰⁸ See Gordon, *supra* note 173, at 1552–54.

³⁰⁹ See *id.* at 1550.

³¹⁰ See *supra* notes 32–33 and accompanying text.

³¹¹ See *supra* Part III.B.

³¹² See *supra* note 30 and accompanying text.

³¹³ See *supra* Part III.A.2.

³¹⁴ See *Folsom v. Marsh*, 9 F. Cas. 342 (C.C.D. Mass. 1841) (No. 4901), U.S. App. LEXIS 468.

³¹⁵ See *supra* Part II.

ilege after a former president's death or disability.³¹⁶ If this is the case, then the PRA misconstrued the prior transferability right by confusing a property right with a constitutional right. The right of transfer was a mere property right that allowed papers to pass in ownership, and the right to exclusion was central to the concept of property ownership. Blackstone defined ownership as "that sole and despotic dominion . . . over the external things of the world, in total exclusion of the right of any other individual in the universe."³¹⁷ The concept of ownership of presidential papers included the right to exclude anyone for any reason. The attachment of a constitutional right to a transfer was not part of this original property concept.

The Bush order asserts the transferability of executive privilege for the first time.³¹⁸ The order supports this proposition, however, under a utilitarian rationale. It is extremely difficult to see the utilitarian value of allowing the transfer of executive privilege to an individual who may be intellectually or emotionally ill-equipped for such a task. Given the ability of a sitting president to review such material with a competent staff, the right of transfer offers little benefit to the office itself. This right of transfer is emblematic of a property and not a constitutional interest—an interest that originates in a deontological, not a utilitarian rationale.

The utilitarian rationale is also weak when applied to the residual authority of a former president in the use of executive privilege. The suggested chilling effect after twelve years would seem to demand more than a conclusory statement.³¹⁹ At least one former president has already indicated that there is no need for the added protections under the Bush order.³²⁰ It is certainly not self-evident that officials will act in a materially different fashion knowing that their communications are subject to release twelve years after the end of an administration. Moreover, as noted earlier, it is far from clear that the involvement of the former president after twelve years is necessary for the protection of privileged material.³²¹ Because the former presi-

³¹⁶ See Presidential Records Act of 1978, Pub. L. No. 95-591, 92 Stat. 2523, 2526 (codified as amended at 44 U.S.C. § 2204(d) (2000)).

³¹⁷ 2 BLACKSTONE, *supra* note 250, at 2. Like presidents, other influential figures have used this right to secure, with varied success, the ultimate exclusion through destruction of their papers. For example, Franz Kafka ordered his papers, diaries, and manuscripts burned upon his death, but the person charged with the task refused to comply with the order, resulting in a tremendous literary and historical boon. See SAX, *supra* note 62, at 46.

³¹⁸ See Exec. Order No. 13,233, 3 C.F.R. 815, 818 (2002).

³¹⁹ See *Developments in the Law: Privileged Communications*, 98 HARV. L. REV. 1450, 1612 (1985) (noting the absence of empirical support for the claimed chilling effect on executive officials in arguments for executive privilege).

³²⁰ See Allen & Lardner, *supra* note 123 (quoting opposition from former President Clinton).

³²¹ See *supra* notes 237–39 and accompanying text.

dent must delegate this authority to aides, this is a task that can be done by an incumbent administration.³²² A former president could then be consulted, but the incumbent president alone would exercise the authority over executive privilege. Ultimately, the Bush order struggles to defend rights and privileges that developed during the proprietary period under a new utilitarian approach. The order is unsuccessful because rights based on an absolute property theory do not have great utilitarian value. The continued rights of former presidents to exercise either ownership or control over these records must be addressed on the basis of their origin—as extensions of property theory.

IV

THE PROPERTY PARADIGM RECONSIDERED: THE PUBLIC CLAIM TO OWNERSHIP OF PRESIDENTIAL PAPERS

The controversy over the public ownership of presidential records began at the end of Washington's presidency and continues to the presidency of George W. Bush. As noted above, during this span of time there has been a shift from a property paradigm to a constitutional paradigm in the denial of access to records. Yet throughout this period, the various rationales for ownership asserted by either private or public claimants have lacked a certain conceptual clarity. The foundational principle can be found only by returning to the origins of the property theory debate. It is the theories of property that offer a new understanding of public ownership of future presidential records, and possibly of past presidential records currently claimed by the former presidents' heirs.

The common refrain in modern cases is that the PRA answers the question of public ownership. For this reason, the court in *Nixon v. United States*³²³ considered only the property claims of pre-PRA presidents. For post-PRA presidents and their successors, there was no further legitimacy to private property claims after Congress declared these records to be the property of the American people.³²⁴ Although this rationale is attractive as a simple means of resolving future disputes, it leaves unresolved questions even without disturbing the precedent established by former presidents. If there were a legitimate private property right to these papers before the enactment of the PRA, then the mere extinction of that right by Congress would not necessarily put the controversy to rest. If Congress could avoid impli-

³²² See *supra* notes 237–39 and accompanying text.

³²³ 978 F.2d 1269, 1277 n.19 (D.C. Cir. 1992).

³²⁴ See Presidential Records Act of 1978, Pub. L. No. 95-591, 92 Stat. 2523, 2524 (codified as amended at 44 U.S.C. § 2202 (2000)).

cating the Takings Clause³²⁵ by simply declaring private property to be nonprivate property, then there would be little possibility of constitutional takings.³²⁶ Therefore, the question is when can Congress legislatively convert presumed property into nonproperty. Although statutory law is superior to common law, there are obvious limitations. Clearly, Congress could not mandate that any publication (including books) by a president in office is public property.³²⁷ If Congress can declare presidential records to be public property, there must be something in the character of the writings and the conditions of their creation that afford a foundation for a public property claim.³²⁸ There must be something inherently public about the documents that preexisted the enactment of the PRA. However, this basis would seriously undermine the original property claim of presidents by suggesting that this material is the product of public service and public information. One possible alternative explanation is that by legislatively claiming public ownership, the loss of control of this material became a precondition for executive employment. Presidents who took the oath after the enactment of the PRA accepted the conditions of the office contained in that law. However, this theory suggests a type of implied waiver that is equally problematic: If presidents do have a true property interest in their writings, then it is difficult to see how Congress can require a waiver of a property right as a condition for accepting a constitutional office.

A reevaluation of the property interest in these documents provides the most compelling basis for the PRA. Under this view, presidents did not and cannot own these papers because they were always public property, regardless of the failure to recognize that public ownership. This failure of the government to claim ownership allowed past presidents to sell and transfer the property. It further created difficulties of retroactive application of public ownership.³²⁹ However, as discussed below, there exists a compelling basis for the public to claim a property interest in both pre-PRA and post-PRA records of former presidents.

³²⁵ U.S. CONST. amend. V.

³²⁶ See THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 524 (Boston, Little, Brown & Co. 1871).

³²⁷ See FINAL REPORT, *supra* note 175, at 3 (discussing Congress's power to make statutory declarations regarding public ownership).

³²⁸ See *id.* (focusing on the manner in which records come into existence).

³²⁹ The PRA is expressly prospective, not retroactive. See 44 U.S.C. § 2204 (2000).

A. The Property Basis for Public Ownership of Presidential Records

The seeds of the modern controversy over public ownership of presidential records can be traced to Justice Story's ruling in *Folsom*.³³⁰ Story acknowledged that these documents could be public in nature, but treated the matter as a straightforward property question.³³¹ The analysis turned on the intentions of Washington the author, not the president.³³² This approach ignored the fact that the value of these documents was high precisely because of their official content and their creation in the course of official duties.³³³ Thus, it was public service that gave rise to these documents and their subsequent value. Although Story could have viewed Washington as a mere agent of the public or adopted a public property rationale, his decision reflected the heavily Lockean view that reigned supreme during the early Republic.³³⁴ This approach ignored more limited concepts of the president's property interest as the creator of a document. There are various alternative property concepts that could give a president some interest but not sole interest in these papers. These range from a type of life estate interest³³⁵ in presidential papers to the more novel concept of the *droit moral*, a legally protected interest of a creator or artist in their creations after sale to private individuals.³³⁶ Of course, the *droit moral* is primarily designed to prevent destruction, the very right claimed by some former presidents and their heirs. As previously

³³⁰ 9 F. Cas. 342 (C.C.D. Mass. 1841) (No. 4901), U.S. App. LEXIS 468.

³³¹ See *id.* at 347.

³³² See *id.* at 345–46.

³³³ This distinguishes other objects of historical and cultural interest that are not the product of the president's office. For example, the wills of former presidents contain items of historical interest, such as a cane Benjamin Franklin gave Washington. See COLLINS & WEAVER, *supra* note 26, at 17. Likewise, Jackson's will bequeathed a set of pistols that General Lafayette had originally given to Washington. See *id.* at 69–70. Even assuming that the government asserted a cultural interest in acquiring certain private items, it would have to pay compensation in an involuntary exchange because there is no basis for a public ownership claim. See *supra* note 327 and accompanying text.

³³⁴ See *Folsom*, 9 F. Cas. at 345.

³³⁵ In fairness to Story, the property theories of his time were fairly rigid and absolute. To fashion a new concept such as a life estate interest in presidential documents would have required a sharp departure from both legal doctrine and judicial tradition. Nevertheless, there is a conspicuous absence of any serious consideration of the public's rivaling property interest or the possibility of a more limited property interest in a former president. See *id.* at 347 (discussing the government's interests).

³³⁶ SAX, *supra* note 62, at 21 (“[D]roit moral recognizes that artists retain a continuing interest in their work . . . [based on the idea that] to deform artists' work is to present them to the public as creators of something that is not their own and in that way to subject them to criticism for work they have not done.”). This right has been recognized in other nations such as Germany as “urheberpersönlichkeitsrecht” and, to a lesser extent, in some American states. See ANTHONY D'AMATO & DORIS ESTELLE LONG, INTERNATIONAL INTELLECTUAL PROPERTY ANTHOLOGY 8 (1996).

noted, it was not preservation, but possession, that proponents of the proprietary theory claimed.

Like Justice Story, the Framers would have likely viewed the question of presidential papers from a Lockean perspective. The absolute, deontological basis of this property right can trump even reasonable restrictions on private ownership arising from rivaling public interests.³³⁷ On closer examination, however, the claim of first acquisition under a labor theory appears a bit forced. Locke based his labor theory on the simple notion that “[w]hatsoever then he removes out of the state that nature hath provided and left it in, he hath mixed his labour with, and joined to it something that is his own, and thereby makes it his property.”³³⁸ It is certainly true that extending into the late eighteenth century, presidents had extremely small staffs and, accordingly, could claim a more personal sense of creation and ownership than their successors.³³⁹ However, presidential papers always involve the mixing of a variety of individuals’ labor, not just a president’s efforts. More importantly, the basis of labor theory is the notion of resources left “in common” and then transformed into private property through first acquisition.³⁴⁰ Presidential papers derive from information and resources that are already publicly owned and, therefore, not held “in common” in a Lockean sense. A president uses authority, personnel, and resources given by the public to create these documents.³⁴¹ Therefore, it is public labor that is mixed in the creation of this property, not solely individual labor. In this respect, presidential papers highlight a gap in Lockean theory. As Carol Rose has observed, “without a prior theory of ownership, it is not self-evident that one owns even the labor that is mixed with something else.”³⁴² In the case of presidential papers, both the labor and the object of the labor are arguably owned by the public and not the possessor. This public ownership directly undermines the premise of the labor theory

³³⁷ Such deontological claims can be traced back to Immanuel Kant, though the more relevant theories for this discussion are the labor and personality theories of property. See generally Robert G. Olson, *Deontological Ethics*, in 2 THE ENCYCLOPEDIA OF PHILOSOPHY 343 (Paul Edwards ed., 1967) (providing the definition of deontological ethics).

³³⁸ LOCKE, *supra* note 13, at 134.

³³⁹ See FINAL REPORT, *supra* note 175, at 13.

³⁴⁰ LOCKE, *supra* note 13, at 134.

³⁴¹ The president’s role in some of these documents raises the long-debated question of what constitutes a “mixing” of labor under Locke’s theory. Robert Nozick raised the absurd potential of this debate:

[W]hy isn’t mixing what I own with what I don’t own a way of losing what I own rather than a way of gaining what I don’t? If I own a can of tomato juice and spill it in the sea so that its molecules (made radioactive, so I can check this) mingle evenly throughout the sea, do I thereby come to own the sea, or have I foolishly dissipated my tomato juice?

ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 174–75 (1974).

³⁴² Carol M. Rose, *Possession as the Origin of Property*, 52 U. CHI. L. REV. 73, 73 (1985).

that “[t]he labour of his body and the work of his hands . . . are properly his.”³⁴³ Moreover, a president does not create from something “he removes out of the state that nature hath provided,”³⁴⁴ but rather develops material supplied by his staff or presidential predecessors.³⁴⁵ Putting aside the fact that the creation of many records actually occurs without direct involvement of the president, a president works in an area already heavily tilled and worked by others.³⁴⁶

The unique position of the president undermines normative Lockean principles that the Supreme Court has emphasized.³⁴⁷ Locke based his theories on the belief that “[t]he great and chief end . . . of men’s uniting into commonwealths and putting themselves under government is the preservation of their property.”³⁴⁸ Here, the property is the product of that government itself, through the president, to whom it gives unique powers and awards as its chief executive. The collateral benefits of government leadership counteract the traditional view of the courts in guaranteeing the fruits of property creation. Often laced with Lockean notions, the Court has stressed the need to protect property claims in intellectual property because of the commitment of labor to produce an object or design.³⁴⁹ The Court has noted that “[s]acrificial days devoted to such creative activities deserve rewards commensurate with the services rendered.”³⁵⁰ However, in this context, the office of the presidency itself is the “reward[] commensurate with the services rendered.”³⁵¹ The compensation of a

³⁴³ LOCKE, *supra* note 13, at 134.

³⁴⁴ *Id.*

³⁴⁵ Notably, the scope of executive privilege arguments (and therefore the scope of PRA privilege assertions) has been extended to include “communications authored or solicited and received by those members of an immediate White House adviser’s staff who have broad and significant responsibility for investigating and formulating the advice to be given the President on the particular matter to which the communications relate.” *In re Sealed Case*, 121 F.3d 729, 752 (D.C. Cir. 1997).

³⁴⁶ This same problem occurs under an alternative Lockean approach based on the “value-added” notion of property interests. Under this theory, an individual is entitled to such an interest because his labor has added value to what was once without value in nature. See LOCKE, *supra* note 13, at 141. For a discussion of the normative and instrumental justifications for intellectual property, see generally Huges, *supra* note 190, at 305. The problem with the application of a value-added theory is that the president is not taking something from the state of nature, but material to which government staff and agencies have added value in the form of advice and collection. Although it is true that a president’s imprimatur adds value, it is his office or official position that adds value, leading one to question whether the individual or the public has added this value.

³⁴⁷ In his study of intellectual property, Justin Hughes has noted the strong normative premise that underlies such cases. See Hughes, *supra* note 190, at 303.

³⁴⁸ LOCKE, *supra* note 13, at 184.

³⁴⁹ See generally Gordon, *supra* note 173, at 1538–39 (discussing the influence of Lockean theories on courts’ holdings and language).

³⁵⁰ *Mazer v. Stein*, 347 U.S. 201, 219 (1954).

³⁵¹ *Id.*

president in advance of and after his labor undermines both a normative and instrumental interpretation of the labor theory.

There is also the problem of private ownership in terms of Locke's proviso and nonwaste or nonspoilage condition. Despite his theory of first acquisition, Locke believed that there must remain "enough and as good left in common for others."³⁵² This is difficult, if not impossible, to ensure in the area of presidential papers under a private ownership theory. The claim of former presidents may entirely deprive the public of the full extent of wealth generated in the body of presidential papers. Presidential papers are a unique resource, the withholding of which can prevent or diminish the ability of others to create important historical, political, and social products.³⁵³ Not only does an accumulation of this form of property run afoul of the proviso, but it also ultimately conflicts with the very essence of the Lockean property claim—the no harm principle. Wendy Gordon has noted that Locke viewed a laborer as having a property interest on the "assumption that to take the product of the laborer's effort is to cause harm to the laborer."³⁵⁴ Because Locke viewed the law of nature as proscribing such harmful acts, he believed that everyone must respect the property interest of the laborer. However, when an individual accumulates property to the point of denying the right of others to what is in common, the laborer causes harm. In such a circumstance, Gordon has argued, "the common must prevail [because] [w]ere the result otherwise, the natural law would grant laborers a claim right to do harm, reversing Locke's first law of nature that no harm be done."³⁵⁵ In the context of presidential papers, the accumulation of an administration's records is absolute for pre-PRA archives. It would potentially be as extreme under the Bush order. The result is hard to square with Locke's view regarding accumulation of property vis-à-vis the common property.

The control of such papers, either through a proprietary theory or privilege assertion, functions like a monopoly interest. A rough analogy can again be drawn to the Lockean concept of "waste." Locke believed that property rights should not extend to the right to commit

³⁵² LOCKE, *supra* note 13, at 134 ("[L]abour being the unquestionable property of the labourer, no man but he can have a right to what that is once joined to, at least where there is enough and as good left in common for others.").

³⁵³ Wendy Gordon defines a violation of the proviso that seems particularly apt for many historians and presidential scholars: "A person who wants access is entitled to complain only if he is worse off (in regard to the common) when he is denied access than he would have been if the item had never come into existence." Gordon, *supra* note 173, at 1562–63.

³⁵⁴ *Id.* at 1561.

³⁵⁵ *Id.*

waste.³⁵⁶ Accumulation of personal property can lead to waste when the possessor allows resources of value to be destroyed or go unused for productive purposes. Waste is viewed as a violation of the Law of Nature.³⁵⁷ The natural right to accumulation is, therefore, “bounded by the person’s capacity to use it before it spoils.”³⁵⁸ The same can be said of the accumulation of presidential papers and records.³⁵⁹ As previously noted, such waste has occurred in private collections of presidential papers, including the wanton destruction of papers with tremendous public importance.³⁶⁰ For these reasons, although Locke certainly created a strong belief in private property, it remains a problematic basis for claiming presidential papers as private property.³⁶¹

Hegel’s personality theory provides an alternative deontological basis for private ownership.³⁶² Many presidents viewed these papers as constituting highly personal and sensitive accounts of their thinking or emotive responses to public policy issues. Therefore, private ownership of the papers was essential for presidents to express themselves.³⁶³ However, this view stemmed less from an executive privilege viewpoint than from a sense of personal ownership in the Hegelian sense. Even Justice Story’s analysis reflects a vague notion of a personality theory describing these papers as an extension of the president himself as an author.³⁶⁴ These papers become an “expression of the will, a part of personality.”³⁶⁵ Like the Lockean theories, the Hegelian view offers a deontological basis for ownership based ultimately upon

³⁵⁶ See LOCKE, *supra* note 13, at 136 (“Nothing was made by God for man to spoil or destroy.”).

³⁵⁷ See *id.* at 139–40; see also Hughes, *supra* note 190, at 299 (discussing Lockean theory that “[t]o allow goods to perish after appropriating them—and thereby removing them from a state in which others could have made use of them—violates ‘the Law of Nature’”).

³⁵⁸ John Stick, *Turning Rawls into Nozick and Back Again*, 81 *Nw. U. L. Rev.* 363, 389 n.133 (1987).

³⁵⁹ Locke’s description of waste seems appropriate for former presidents who destroyed or neglected their records. Locke noted that “if [properties] perished in his possession without their due use, if the fruits rotted or the venison putrified, before he could spend it, he offended against the common law of nature, and was liable to be punished.” LOCKE, *supra* note 13, at 140.

³⁶⁰ See *supra* notes 38–46 and accompanying text.

³⁶¹ An analogy can be drawn to the limitation on Lockean claims to intellectual property protections. See Gordon, *supra* note 173, at 1551.

³⁶² Cf. Hughes, *supra* note 190, at 290 (“Properly elaborated, the labor and personality theories together exhaust the set of morally acceptable justifications of intellectual property.”).

³⁶³ See *supra* Part I.A.

³⁶⁴ See *Folsom v. Marsh*, 9 F. Cas. 342, 345–47 (C.C.D. Mass. 1841) (No. 4901), U.S. App. LEXIS 468. Stewart Sterk has noted that “[f]or Hegel, property is the means by which personality is objectified.” Stewart E. Sterk, *Rhetoric and Reality in Copyright Law*, 94 *MICH. L. REV.* 1197, 1240 (1996). The notion of “personality objectified” captures one aspect of the proprietary theory of presidential records: the view that these documents run to the very core of the leader’s persona.

³⁶⁵ Hughes, *supra* note 190, at 333.

a moral right. According to Hegel, “[a] person has the right to place his will in anything The thing thereby becomes [his].”³⁶⁶ This Hegelian view offers a basis for a right to presidential papers by the president as the original appropriator because, as Hegel noted, “if I have the whole use of the thing, I am its owner; and beyond the whole extent of its use, nothing remains of the thing which could be the property of someone else.”³⁶⁷ Hegelian theory also avoids the difficult issue of the condition of first acquisition, which is the question of original public ownership. In this sense, Hegelian property claims “focus[] on where a commodity ends up, not where and how it starts out.”³⁶⁸

Although Hegelian theory clearly captures some of the past sentiments expressed in favor of the proprietary theory, presidential records do not offer a compelling basis for a Hegelian claim. Mere possession does not afford the possessor a valid Hegelian claim, despite the fact that Hegel’s definitions seem open to such an abusive interpretation:

[T]he connection between personality and property is open-ended. A person could claim a personality stake in any material object, meaning that the personality justification is liable to excessive claims. It is a theory that allows Virginia Woolf to claim a room of her own, but also allows Louis XIV to claim the 2,697 rooms of Versailles.

This subjectivity causes unhealthy identifications with property that should not give rise to legitimate property claims.³⁶⁹

Hegel argued “that self-identifications with property were destructive.”³⁷⁰ Moreover, claims of possession were legitimate only to the extent that they did not prevent others from the possibility of acquiring property.³⁷¹ Therefore, Hegel implicitly held a view similar to Locke’s proviso.³⁷² The proprietary theory presents precisely this barrier to others’ ability to acquire and create property.³⁷³ Former presidents have claimed the right to prevent others from seeing or copying

³⁶⁶ G.W.F. HEGEL, *ELEMENTS OF THE PHILOSOPHY OF RIGHT* § 44, at 75–76 (Allen W. Wood ed., H.B. Nisbet trans., 1991) (observing that “everyone has the right to make his will a thing . . . or to make the thing his will, or, in other words, to supersede the thing and transform it into his own”).

³⁶⁷ *Id.* § 61, at 90.

³⁶⁸ Radin, *supra* note 197, at 987 (noting that Hegelian claims are inherently “subjective” and are not based on “the objective arrangements surrounding production of the thing”); *see also* Hughes, *supra* note 190, at 335 (quoting Radin).

³⁶⁹ Hughes, *supra* note 190, at 335.

³⁷⁰ *Id.*

³⁷¹ *See id.* at 336.

³⁷² *See id.*

³⁷³ Judge Alex Kozinski described this danger in his dissent in *White v. Samsung Electronics America, Inc.*, 989 F.2d 1512, 1513 (9th Cir. 1993) (Kozinski, J., dissenting). After noting the general dangers of “reducing too much to private property,” Kozinski noted:

material essential to understanding history and generating historical and political accounts. Thus, even though a president might claim an original document, the refusal to allow a copy deprives others of the very building block for the creation of new property.³⁷⁴ To use Justin Hughes's analogy, former presidents could suggest a personality theory claim to all rooms at Versailles to occupy, rent, or raze at their sole discretion. Finally, Hegelian property theory is far more fluid than the past absolute claims of presidential property. Not only is the actual identification of former presidents to this property debatable, but that identification also diminishes with time or forms of abandonment.³⁷⁵ Much of these papers are "possessed" only for the purpose of control. Presidents have little practical knowledge of most individual documents beyond their categorical identification. However, these documents remain archived and denied to individuals who have intense interest in their use. For these reasons, presidential claims of ownership and control find limited support in Hegelian theory.

The most recognized modern basis for property rights is the utilitarian theory. Utilitarian theories do not automatically favor public ownership claims because private ownership may be the most socially efficient approach in a given area. Hardin's *Tragedy of the Commons* demonstrates how private property can yield an efficient and wealth-maximizing result for society.³⁷⁶ Certainly, private collectors of presidential papers have proven to be socially advantageous in this sense. Private collectors tend to increase the preservation of records because they create a market for them, thereby creating incentives for their

Overprotecting intellectual property is as harmful as underprotecting it. Creativity is impossible without a rich public domain. Nothing today, likely nothing since we tamed fire, is genuinely new: Culture, like science and technology, grows by accretion, each new creator building on the works of those who came before. Overprotection stifles the very creative forces it's supposed to nurture.

Id.

³⁷⁴ Hegel believed that, even when one copied a piece of art, that copy was a distinct product of the copier's intellect and will. See HEGEL, *supra* note 366, § 68.

³⁷⁵ See *id.* § 64. The concept of abandonment is noted here simply to reflect the non-static and dynamic aspect of Hegelian property theory in contrast to the absolute property notions that characterize some past presidential claims. Even when a president legitimately possesses property, a property claim may be lost or transferred to a third party due to the relative positions or actions of the parties vis-à-vis the objects. Hohfeld has stressed this fluidity of ownership in his writings on abandonment:

Thus, X, the owner of ordinary personal property 'in a tangible object' has the power to extinguish his own legal interest . . . through that totality of operative facts known as abandonment; and—simultaneously and correlatively—to create in other persons privileges and powers relating to the abandoned object,—e.g., the power to acquire title to the latter by appropriating it.

WESLEY NEWCOMB HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS* 51 (Walter Wheeler Cook ed., 1923).

³⁷⁶ See Garrett Hardin, *The Tragedy of the Commons*, 162 *SCIENCE* 1243, 1244 (1968).

preservation in the best possible condition. Indeed, Congress did not have an interest in a general presidential archive until recently.³⁷⁷ The purchases of presidential records by Congress did not reflect so much an interest in general preservation as it did an interest in the identification of historically important papers that might be lost or damaged through private transfers.³⁷⁸ In the absence of a general government-run archive, private collectors and family archives served as meaningful protection for presidential records.³⁷⁹ However, this does not mean that a utilitarian view would necessarily define presidential records as the “property” of an individual. An interesting analogy can be drawn to John Stuart Mill’s view of land under the labor theory. Mill rejected the idea that land, as opposed to the produce of the land, could be legitimately claimed as the property of individuals against the interest of the commons.³⁸⁰ Mill noted that “[t]he essential principle of property being to assure to all persons what they have produced by their labour and accumulated by their abstinence, this principle cannot apply to what is not the produce of labour, the raw material of the earth.”³⁸¹ In the same fashion, presidential records can be viewed as the *terra firma* of the executive branch—the raw material used in making governmental decisions.³⁸² A president who takes these records and produces a book is clearly creating something new and distinct. However, the records themselves are the most basic element of government.³⁸³

Despite the efficacy of prior private ownership in preserving some records, the utilitarian view heavily favors public ownership claims. Presidential documents contain important public information not

³⁷⁷ See Presidential Records Act of 1978, Pub. L. No. 95-591, 92 Stat. 2523 (codified as amended at 44 U.S.C. §§ 2201–2207 (2000)).

³⁷⁸ See *supra* notes 216–18 and accompanying text.

³⁷⁹ Likewise, private ownership and later executive privilege claims could be justified on a utilitarian basis because the former president generates these papers and records due to the assurance of his control over them. Locke emphasized the value of private property in increasing “the common stock of mankind.” LOCKE, *supra* note 13, at 139. Conversely, the restriction or denial of both property rights and executive privilege rights may decrease both the amount and the quality of presidential papers.

³⁸⁰ See JOHN STUART MILL, PRINCIPLES OF POLITICAL ECONOMY 233 (W.J. Ashley ed., 1909).

³⁸¹ *Id.* at 229–30.

³⁸² Likewise, as cultural property, these records are the foundation of social, intellectual, and political development. The United Nations has stressed this catalytic influence in calling cultural property the “‘key to [a people’s] identity and the source of their inspiration.’” Jodi Patt, Note, *The Need to Revamp Current Domestic Protection for Cultural Property*, 96 Nw. U. L. REV. 1207, 1207 (2002) (quoting from the website of the United Nations’s Educational, Scientific, and Cultural Organization). Removing and denying access to presidential records is analogous to an excavation of cultural property and a removal of a common area.

³⁸³ Alternatively, in a Rawlsian sense, these records are the “means of production” that cannot be owned under a labor theory. RAWLS, *supra* note 203, at 285.

only for historians and citizens but also for successor presidents. However, under the proprietary theory, heirs of former presidents have successfully denied such access.³⁸⁴ For example, the Kennedy Administration faced a serious dispute with France over past promises made by President Eisenhower regarding nuclear deterrence.³⁸⁵ The Eisenhower Library owned the telegram in question. The Kennedy Administration petitioned for access to this important government document, but Dwight Eisenhower's son, John, refused to allow access unless the Administration satisfied his stated demands.³⁸⁶ The Administration refused and the material remained in the library.³⁸⁷ Likewise, Presidents Lyndon Johnson and Ford had to petition for access to documents with relevance to ongoing governmental operations.³⁸⁸ The discretionary control over documents material to the operation of the government presents the most compelling example in which private ownership can overcome the "greatest good for the greatest number."³⁸⁹

By giving former presidents a twelve-year buffer period, private ownership is not necessary to serve the most commonly expressed utilitarian need: reducing or eliminating any chilling effect on White House communications.³⁹⁰ Time has long been viewed as the "sol-

³⁸⁴ The heirs of former presidents have routinely denied access to presidential papers despite objections that such denials were barriers to history. In a dispute over access to Garfield's papers, one journalist raised a public ownership notion. In a June 27, 1903 letter, journalist Murat Halstead objected that "there is a great deal of history that would be valuable to the country; and it is a question worthy of the gravest consideration whether it does not largely belong to the country." INDEX TO THE JAMES A. GARFIELD PAPERS, at ix (1973) (on file with the Library of Congress).

³⁸⁵ SAX, *supra* note 62, at 82.

³⁸⁶ *Id.*

³⁸⁷ *Id.*

³⁸⁸ *Id.*

³⁸⁹ See JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 11–12 (J.H. Burns & H.L.A. Hart eds., 1970) ("By the principle of utility is meant that principle which approves or disapproves of every action whatsoever, according to the tendency which it appears to have to augment or diminish the happiness of the party whose interest is in question . . .").

³⁹⁰ It appears that some in Congress believe that the twelve-year buffer period serves two utilitarian needs. First, the buffer period protects any reasonable concerns over confidentiality. Second, it serves the public's interest in encouraging officials to write down important information for its historical value. Both utilitarian purposes are evident in a statement by leading PRA sponsor, Representative Brademas:

[Congress] sought to encourage the free flow of ideas within the executive branch by allowing the President to restrict access to his Presidential material for a period of not longer than 12 years. It was our view that the threat of immediate disclosure of Presidential material upon the end of a President's term in office could well have a chilling effect on the willingness of his staff to express potentially controversial views, a process vital to the President for the proper conduct of his office. In our view, the best way to insure that the ideas would be expressed, and also that they would be set down in writing and be available to later researchers, was to permit the

vent" for such confidentiality concerns, and there is no reason to view twelve years as being insufficient for such purposes.³⁹¹ There is also no clear benefit from private as opposed to public archives. With federal funding for a general archive of presidential papers, as well as the establishment of a presidential library system, presidential records are no longer wantonly destroyed or dispersed. These public measures have thus deprived private collections of their principal social benefit. What remain are the least beneficial elements of private ownership of presidential papers—dispersion, destruction, or alteration.

Even before the establishment of a general federal archive, private ownership did not protect a surprising amount of material. Both the original private ownership (the former presidents) and the common secondary owners (heirs) did not always view these documents in market terms for their economic or historic value.³⁹² Presidents and their heirs could clearly have sold these documents for some profit, rather than destroy them. No rational actor would destroy an item of value that could be sold at a profit, except if the presence of "tastes" or soft variables supplied a different type of benefit in destruction.³⁹³ These tastes are often highly personal and directly at odds with the public value of the documents. For Nixon, the destruction of incriminating material was of tremendous personal value. In fact, the personal value in the destruction of the records to Nixon was directly proportional to the public's value in preservation, due to a shared view of the importance of the records in evaluating his presidency.³⁹⁴ Ironically, putting aside the public-spirited presidents (and heirs) who simply gave their papers to the public, private ownership worked best

institution of a "buffer period," so to speak, during which time these materials could be protected.

124 CONG. REC. 34,895 (1978) (statement of Rep. Brademas).

³⁹¹ Alexander Bickel made this reference in his discussion of Supreme Court secrecy. See ALEXANDER M. BICKEL, *THE UNPUBLISHED OPINIONS OF MR. JUSTICE BRANDEIS*, at viii (1957) ("It is in part—and, I am persuaded, in the largest part—a problem of which time is the solvent.").

³⁹² See *supra* notes 38–46 and accompanying text.

³⁹³ Some destruction, however, may be not only rational but also wealth-maximizing. As noted earlier, some presidential papers have been cut up for greater distribution. See *supra* note 286 and accompanying text. In addition, such techniques have been used in the art world to sell fragments for a higher profit. See *supra* note 286.

³⁹⁴ One of the individuals central to Nixon's ultimate resignation clearly articulated this point. Archibald Cox noted that Nixon's attempted use of executive privilege to retain control of these documents reveals the abuse and costs of denying public access:

Ability to control what information to disclose and when to disclose it is a potent political weapon. The evidence finally released by President Nixon just prior to his resignation made it abundantly clear that executive privilege had been used not to protect the Presidency, but to hide misconduct of the President himself.

Cox, *supra* note 227, at 1433; see also Rozell, *supra* note 68, at 1123 (discussing President Clinton's use of the executive privilege).

for those presidents or heirs who were most opportunistic in the sale of their papers.³⁹⁵ The presence of tastes for destruction or concealment, however, created a highly inefficient result for society throughout U.S. history.³⁹⁶

The creation of presidential papers in the course of public employment offers a clear and compelling basis for public ownership, not unlike a private company's ownership rights over the creations of its employees. It is the public character of these documents that makes them so valuable. Though a private letter by Washington, for example, may be extremely valuable, as a general matter letters that are connected to official acts or policies, rather than private letters, are the most valuable records on the private market.³⁹⁷ The government has long asserted legitimate interests in analogous areas. For example, historic or archaeological discoveries on public land are public property regardless of finders' efforts to locate such property.³⁹⁸ The discovery and recovery of such items clearly stem from the labor and ingenuity of the finder, but they are still subsumed within public ownership and cultural property. Such cultural ownership claims underlie a host of statutes protecting antiquities,³⁹⁹ his-

³⁹⁵ The combination of both the unquestioned historical value and personal ownership of these papers led in some cases to openly opportunistic conduct. Faced with difficult financial periods, Dolly Madison was accused of withholding material from the sale to the Library of Congress for private sales, a controversy cited in later transactions. See *INDEX TO THE THOMAS JEFFERSON PAPERS*, at ix (1976) (on file with the Library of Congress).

³⁹⁶ An analogy can be drawn to the potential social costs of allowing "early creators" and their heirs to control later creative uses or variations. Gordon notes:

One cannot assume that early creators or their heirs would consent to the use of property by others to create new intellectual products if the first creators had control of these necessary prior resources. Some owners might consent to others' use without demanding compensation. Some might agree to compensated use. But others might refuse to sell altogether or charge more than the new creators can afford.

Gordon, *supra* note 173, at 1556–57 (footnotes omitted).

³⁹⁷ This distinction was drawn by a federal committee that returned private papers to Jefferson's heirs despite their obvious historical value. See *INDEX TO THE THOMAS JEFFERSON PAPERS*, *supra* note 395, at xiii (quoting the determination of the Committee on the Library that various letters should be returned due to their "private character").

³⁹⁸ See Gerstenblith, *supra* note 193, at 596–97.

³⁹⁹ Antiquities Act of 1906, Pub. L. No. 209, 34 Stat. 225 (codified as amended at 16 U.S.C. §§ 431–433 (2000)). This Act criminalizes the destruction of "any object of antiquity" on federal lands without federal approval. See 16 U.S.C. § 433. However, the Act's vagueness and later court rulings rejecting its full application undermined its criminal enforcement. See Christine A. Klein, *Preserving Monumental Landscapes Under the Antiquities Act*, 87 *CORNELL L. REV.* 1333, 1340 n.31 (2002). Notably, the Act suggests that antiquities in private hands can be destroyed as the private property of the owners. See 16 U.S.C. § 431.

toric sites,⁴⁰⁰ archeological sites,⁴⁰¹ and Native American graves.⁴⁰² One such law, the Abandoned Shipwreck Act of 1987,⁴⁰³ mandates a claim of title of ownership to the public where private property claims were once common.⁴⁰⁴ International agreements, such as the 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property,⁴⁰⁵ reflect this cultural claim. The Convention expressly protects “property relating to history . . . to the life of national leaders, thinkers, scientists and artists and to events of national importance.”⁴⁰⁶ Likewise, it pro-

⁴⁰⁰ National Historic Preservation Act, Pub. L. No. 89-665, 80 Stat. 915 (1966) (codified as amended at 16 U.S.C. §§ 470–470w-6 (2000)). Perhaps the best known of these statutes, the National Historic Preservation Act designates buildings and sites of historical interest in the National Register. Significantly, the Act focuses on buildings and sites rather than objects of historical value. *See* 16 U.S.C. § 470.

⁴⁰¹ Archaeological Resources Protection Act of 1979, Pub. L. No. 96-95, 93 Stat. 721 (codified as amended at 16 U.S.C. §§ 470aa–470mm (2000)). The successor to the Antiquities Act of 1906, this Act criminalizes a host of actions related to the removal or destruction of archeological resources on federal land, continuing the sharp delineation of things “owned” by the government, as opposed to private collectors, for the purposes of protection. *See id.*

⁴⁰² Native American Graves Protection and Repatriation Act, Pub. L. No. 101-601, 104 Stat. 3048 (1990) (codified at 25 U.S.C. §§ 3001–3013 (2000)). Once again, this Act reveals a clear distinction between public and private collections. The Act covers only private museums receiving federal grants. *See id.*

⁴⁰³ Pub. L. No. 100-298, 102 Stat. 432 (codified at 43 U.S.C. §§ 2101–2106 (2000)). This Act establishes federal ownership of all shipwrecks in national and state waters. 43 U.S.C. § 2105(a). It then gives states title to the wrecks in their waters. *Id.* § 2105(c).

⁴⁰⁴ Such assertions can be made under the National Stolen Property Act, 18 U.S.C. § 2314 (2000), when nations have enacted appropriate vesting statutes. *See* *United States v. McClain*, 593 F.2d 658, 671 (5th Cir. 1979); *see also* Patty Gerstenblith, *The Public Interest in the Restitution of Cultural Objects*, 16 *CONN. J. INT’L L.* 197, 216 (2001) (“The primary principle is that legislation may vest ownership of antiquities in the national government, regardless of whether the government has ever had actual possession of the objects. Such ownership legislation is recognized as an act inherent in the notion of sovereignty . . .”).

⁴⁰⁵ Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Nov. 14, 1970, art. 1, 96 Stat. 2350, 823 U.N.T.S. 232 [hereinafter *Convention on Cultural Property*]. The Hague Convention of 1954 expressly dealt with the destruction of cultural property as a matter of international importance. *See* *Convention for the Protection of Cultural Property in the Event of Armed Conflict*, May 14, 1954, preamble, 1956 U.N.T.S. 240, http://www.unesco.org/cultural/laws/hague/html_eng/page1.shtml (establishing that “damage to cultural property belonging to any people whatsoever means damages to the cultural heritage of all mankind”). The UNIDROIT Convention on the International Return of Stolen or Illegally Exported Cultural Objects also attempts to further curb the private market for cultural property. *See* Final Act of the Diplomatic Conference for the Adoption of the Draft UNIDROIT Convention on the International Return of Stolen or Illegally Exported Cultural Objects, June 23, 1995 [hereinafter *UNIDROIT Convention*]. Another international measure touching on historical objects is the United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 3. This Convention establishes an international cultural claim in shipwrecks found in international waters, requiring preservation of archaeological finds.

⁴⁰⁶ *Convention on Cultural Property*, *supra* note 405, at 234 (citing art. 1(b)).

fects “rare manuscripts . . . documents and publications of special interest . . . singly or in collections.”⁴⁰⁷

On a conceptual basis, it is difficult to justify the long-held view of private ownership. The proprietary theory has primarily continued as a matter of historical practice and expectation. As it has in other areas,⁴⁰⁸ the enactment of the PRA effectively put such expectation-based claims to rest with the clear assertion of public ownership. However, the lack of a conceptual basis for the proprietary theory supports the denial of compensation for post-PRA records. Moreover, the question of whether the public could retroactively claim pre-PRA records remains unanswered, and it is to that question that the Article now turns.

B. The Alternative Rationales for the Retroactive Application of Public Ownership over Pre-PRA Presidential Records

The status of post-PRA records presents a relatively clear theoretical question, unlike the status of pre-PRA records. Courts explicitly and Congress implicitly still recognize the private property claims of presidents before Reagan.⁴⁰⁹ Accordingly, heirs to former presidents, such as Kennedy’s heirs, continue to restrict access to presidential records and retain the authority to sell these papers to private or public collectors.⁴¹⁰ As previously suggested, the property claims by these heirs are suspect on any grounds other than historical practice and expectation. The property claims made by former presidents and their heirs seem the very illustration of John Stuart Mill’s observation that misguided laws “have made property of things which never ought to be property, and absolute property where only a qualified property ought to exist.”⁴¹¹ This raises the question whether Congress can retroactively claim property it has implicitly treated as private property.⁴¹² Assuming that heirs are unwilling to part with such documents, there are two alternative methods for the involuntary ac-

⁴⁰⁷ *Id.* at 236(citing art. 1(h)).

⁴⁰⁸ An analogy can be drawn to Congress’s decision to claim all title and ownership of shipwrecks under the Abandoned Shipwreck Act of 1987. 43 U.S.C. §§ 2101–2106. Although such shipwrecks were not in the possession of private owners, the enactment suddenly recognized a long dormant public ownership right.

⁴⁰⁹ The PRA’s prospective language avoids this issue. However, Congress’s past purchases of records and the decision not to retroactively declare public ownership support these private property claims.

⁴¹⁰ See Berman, *supra* note 19, at 86.

⁴¹¹ MILL, *supra* note 380, at 208–09.

⁴¹² Obviously, this involves a relatively small amount of material because most pre-PRA records have been either purchased or voluntarily transferred to the government. For example, the privately operated Nixon library does not contain any presidential papers. See Willon, *supra* note 65, at 6. Despite the relatively small body of affected records, a discussion of pre-PRA records raises some different and interesting dimensions of public claims to historically or culturally important documents.

quisition of these records by Congress: outright seizure as public property or an assertion of eminent domain theory for historical documents.

1. *Direct Public Acquisition*

The most obvious method of acquiring presidential records retroactively would be to declare them public property and acquire them without compensation. This obviously would contradict the analysis of *Nixon v. United States*.⁴¹³ However, if presidential papers are indeed public property, then it is unclear why the passage of time should bar their recovery. As the rightful owner, the public is entitled to replevin of property wrongfully acquired. Absent a recognition of an original property right, these heirs would have to argue that the government's failure to assert its ownership bars the retroactive claim because of laches⁴¹⁴ or estoppel.⁴¹⁵ However, reliance on such concepts ignores the unique status of public property and the government's duty to protect the public fisc. The Supreme Court made this point in *United States v. California*:

The Government, which holds its interests here . . . in trust for all the people, is not to be deprived of those interests by the ordinary court rules designed particularly for private disputes over individually owned pieces of property; and officers who have no authority at all to dispose of Government property cannot by their conduct cause the Government to lose its valuable rights by their acquiescence, laches, or failure to act.⁴¹⁶

⁴¹³ 978 F.2d 1269, 1277 (D.C. Cir. 1992).

⁴¹⁴ Laches is particularly attractive because it stems from the principle that compensation should be "denied to one who has unreasonably and inexcusably delayed in the assertion of a claim." *Brundage v. United States*, 504 F.2d 1382, 1384 (Ct. Cl. 1974); see also *Solomon R. Guggenheim Foundation v. Lubell*, 569 N.E.2d 426, 428-29 (N.Y. 1991) (discussing use of laches against the museum, which sought the return of a stolen Chagall painting). Applying this theory to presidential records, presidential heirs could claim both an unreasonable delay in the government's claim assertion and prejudice to their interests. Cf. *Costello v. United States*, 365 U.S. 265, 282 (1961) (listing the requirements necessary to prove laches). However, negligence and prejudice occur routinely with the government's often belated responses. In part due to the slow pace of government responses, laches has been held inapplicable to the government. Thus, the government continues to have the authority to act in defense of public claims and public property. See *id.* at 281; see also *Guaranty Trust Co. v. United States*, 304 U.S. 126, 132 (1938) (discussing the origins of the rule that a sovereign is exempt from the operation of laches).

⁴¹⁵ Presidential heirs can claim that the government not only knew of its property claim but also that they relied on its prior position to their detriment—for example, in the form of private library costs or insurance. However, there is a real question of how the heirs were made worse off by being given possession of these records. More importantly, estoppel would not run against the government in such cases because of its sovereign status. See *United States v. Georgia-Pacific Co.*, 421 F.2d 92, 100 (9th Cir. 1970).

⁴¹⁶ 332 U.S. 19, 40 (1947).

As noted earlier, the misconstruction of the question of presidential papers ownership was due in part to the early tendency to treat these records in the same fashion as other chattels. Presidential records, however, like other forms of public property, cannot be acquired due to the passage of time. The basis of this claim can be traced back hundreds of years to the principle of *nullum tempus occurrit regi* ("time does not run against the king").⁴¹⁷ Under this principle, adverse possession does not run against the government so that possession—even uncontested possession—cannot transform public property to private property.⁴¹⁸ Although courts have recognized that such government immunity is "sometimes of odious application," it is viewed as "incidental to sovereignty, and necessary to preserve against negligence or cupidity."⁴¹⁹ The use of equitable doctrines such as estoppel or laches is particularly difficult if the government acts in a sovereign, not a proprietary function.⁴²⁰ Despite its failure to protect the property adequately over the course of two hundred years, the government, nevertheless, has a continuing duty to protect both the public claim of ownership to, and the public property found in, presidential records.

It is precisely negligence and cupidity that appear to sustain the lingering property claims of presidential heirs. For example, these heirs can point to past instances of governmental compensation given to other private owners for presidential papers.⁴²¹ This argument, however, does not materially advance the private ownership claim. The fact that third parties have been unnecessarily enriched in the past does not support a claim for further unjust enrichment. Moreover, to the extent that any government official previously recognized a

⁴¹⁷ 9 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 246–47 (George Sharswood ed., 1870) ("Nullum Tempus Occurrit Regi has been the standing maxim upon all occasions; for the law intends that the king is always busied for the public good, and therefore has not leisure to assert his right within the times limited to subjects."); see also Carl C. Risch, Comment, *Encouraging the Responsible Use of Land by Municipalities: The Erosion of Nullum Tempus Occurrit Regi and the Use of Adverse Possession Against Municipal Land Owners*, 99 DICK. L. REV. 199–200 (1994) (discussing this maxim).

⁴¹⁸ After the removal of the monarchy in the United States, this doctrine became *nullum tempus occurrit reipublicae*. BLACKSTONE, *supra* note 417, at 247 n.6; Risch, *supra* note 417, at 199.

⁴¹⁹ *Lessee of Cincinnati v. First Presbyterian Church*, 8 Ohio 298, 309–10 (Ohio 1838), 1838 Ohio LEXIS 51.

⁴²⁰ See *FDIC v. Harrison*, 735 F.2d 408, 411 (11th Cir. 1984).

⁴²¹ See *supra* note 218 and accompanying text. There is also the question of private owners such as museums or private collectors who purchased these papers in good faith. However, it could be argued, as a matter of fundamental property law, that these private individuals cannot acquire better title than the original sellers. If the presidential heirs lacked good title, they could not transfer good title to the private owner. By analogy, the fact that someone sells an individual one hundred acres of the Yosemite National Park does not mean that the new "owner" has legitimate title. Rather the individual has a legal claim against the seller.

private claim to public property, the official was acting outside of his or her authority.⁴²² The government does not lose a protected property interest through actions taken without authority.⁴²³ If these records were legitimately public property, then these heirs have enjoyed years of benefit from property that did not rightfully belong to them. Though the government cannot demand reimbursement, it can demand the return of the property.⁴²⁴ Congress could also take the lesser step of restricting the rights of private owners by prohibiting the transfer or destruction of these records.

It is striking that Congress has not asserted greater public claims over these records, even if Congress and the courts continue to recognize a private ownership claim. Congress can recognize private ownership and still assert a public interest in restricting those ownership rights in the transfer, sale, or alteration of the material. Thus, in *Andrus v. Allard*,⁴²⁵ the Supreme Court held that the prohibition on the sale of bald eagles or bald eagle parts was not a taking under the Fifth Amendment.⁴²⁶ The Court held that private owners retained property value in such items and that the prohibition on sale did not deprive them of their property.⁴²⁷ Given the history of destruction and loss associated with privately held presidential papers, Congress could raise a similar claim even under a private ownership theory.

If Congress claimed retroactive ownership of presidential papers currently held by private parties,⁴²⁸ an equitable question would remain as to whether compensation should be paid to the small number of presidential heirs or private owners in light of the government's

⁴²² An analogy can be drawn to *Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380, 385 (1947), in which the Court ruled against the estoppel claim of two farmers to whom a government official falsely represented that their wheat crop had federal insurance.

⁴²³ Officers of the government cannot dispose of its property without authority. See *United States v. California*, 332 U.S. 19, 40 (1947). It is interesting that one of the rationales for barring the use of estoppel in cases against the government is that it "discourages individuals who feel aggrieved by onerous statutes and regulations from resorting to collusion with government officials, perhaps through bribery, in order to secure favorable official misrepresentations that would bind the government in future litigation." Fred Ansell, Comment, *Unauthorized Conduct of Government Agents: A Restrictive Rule of Equitable Estoppel Against the Government*, 53 U. CHI. L. REV. 1026, 1034 (1986). An analogy could be drawn to the danger surrounding presidential records when a former president or presidential heirs can secure statements or decisions in support of their private property claims, at the expense of the public fisc and interest.

⁴²⁴ One lingering question is the contractual claims that the heirs who gave their papers to the government with restrictions could raise. The agreement setting out these restrictions could be viewed as consideration not only for the papers, but also for any legal claims the government could raise in court.

⁴²⁵ 444 U.S. 51 (1979).

⁴²⁶ *Id.* at 66.

⁴²⁷ *Id.*

⁴²⁸ Once again, a retroactive claim for papers accepted by the Library of Congress under contract restrictions raises the separate contractual issue inapplicable to third parties or private libraries.

negligence in its prior position.⁴²⁹ In light of the expectations created by the government's long-held position, Congress should appropriate funds for such compensation. However, this would be a purely discretionary, rather than mandatory act.

2. *Involuntary Acquisition with Compensation*

If there is no retroactive claim of ownership, then the government could offer compensation for those pre-PRA records held by heirs or third parties.⁴³⁰ The question then turns to whether, faced with a refusal to sell these records, the government could force a transfer. This alternative method of acquiring presidential records would be an involuntary variation on the common law rules governing eminent domain of real property. The Framers clearly anticipated the use of public acquisition or eminent domain authority because the Fifth Amendment guarantees compensation for such acts.⁴³¹ Congress also has the authority to alter or acquire property through its broad legislative powers under the Necessary and Proper Clause.⁴³² In fact, in its takings jurisprudence, the Court has drawn a distinction between real and personal property. In *Lucas v. South Carolina Coastal Council*,⁴³³ the Court noted that in the area of "personal property, by reason of the State's traditionally high degree of control over commercial dealings, [owners] ought to be aware of the possibility that new regulation might even render [the] property economically worthless (at least if the property's only economically productive use is sale or manufacture for sale)."⁴³⁴ This observation suggests that, at least in the sale or transfer of presidential records, there may be more leeway

⁴²⁹ The question of governmental ownership of records held by private collectors becomes particularly difficult with private collectors who purchased records and papers from a former president, or heirs, or bona fide subsequent owners. The fact that the government effectively released these records without objections removes notions of unlawful possession or receipt of stolen goods. See, e.g., *United States v. Portrait of Wally*, 105 F. Supp. 2d 288, 290 (S.D.N.Y. 2000) (refusing to find that a painting had been stolen during World War II under the common law rule that an object is not stolen if, before being purchased or possessed by the current owner, it passed through the hands of the original owner or the government).

⁴³⁰ An interesting comparison can be drawn to international standards that attempt to protect good faith purchasers. Even in the case of stolen property, the UNIDROIT Convention mandates that:

The possessor of a [stolen] cultural object . . . shall be entitled, at the time of its return, to payment by the requesting State of fair and reasonable compensation, provided that the possessor neither knew nor ought reasonably to have known at the time of acquisition that the object had been illegally exported.

UNIDROIT Convention, *supra* note 405, at art. 6(1).

⁴³¹ U.S. CONST. amend. V.

⁴³² *Id.* at art. I, § 8, cl. 18.

⁴³³ 505 U.S. 1003 (1992).

⁴³⁴ *Id.* at 1027–28.

for Congress to act without compensation.⁴³⁵ Certainly, assuming that the government does not already own this property, Congress has the authority to acquire presidential records with compensation.

Nevertheless, at the outset, there exists an obvious risk in such an approach. Applying this doctrine to presidential papers raises legitimate concerns regarding government abuse and endangers the foundation for private ownership of works ranging from art pieces to historical items. As Thomas Cooley noted in his *Treatise on the Constitutional Limitations*, many cases exist "in which the property of some individual owners would be likely to be better employed or occupied to the advancement of the public interest in other hands than in their own; but it does not follow from this circumstance alone that they may be rightfully dispossessed."⁴³⁶ Given the value of some documents and the intense competition of museums and other institutional entities, there is considerable danger of rent-seeking and abuse in the use of eminent domain over historical art and papers. For that reason, it would be a mistake to claim the right of forced transfer of documents whenever the government deems them either to have historical value or, to use Richard Ely's theory, to have been denied their socially optimal use.⁴³⁷ Rather, presidential papers are inherently public property due to the conditions of their creation, their subject matter, and their necessity for the full development of historical accounts and public policy. A narrow doctrine could be applied to such records to preserve a vital component of U.S. history.

Since Roman times, there has been a recognition of a distinct property category that was inherently public.⁴³⁸ *Jus publicum* has been used to define the appropriate scope of government claims over land and to justify encroachment on otherwise private interests.⁴³⁹ For ex-

⁴³⁵ For example, the Court could craft a ruling along the lines of *Andrus v. Allard*, 444 U.S. 51 (1979), in which the Court upheld extreme restrictions on the sale of objects containing parts of eagles or other endangered species, including bird parts acquired before the enactment of the Migratory Bird Treaty Act. Notably, the Court found that such laws did not entirely destroy the value of the property because the owners may exhibit the items or use them in other ways. See *id.* at 66. The Court, however, declined to look at the extent of the diminution of value absent an actual governmental removal of the items, but warned that "loss of future profits—unaccompanied by any physical property restriction—provides a slender reed upon which to rest a takings claim." *Id.*

⁴³⁶ COOLEY, *supra* note 326, at 587. For a discussion of Cooley and the abuse of eminent domain powers, see Donald J. Kochan, "Public Use" and the Independent Judiciary: Condemnation in an Interest-Group Perspective, 3 TEX. REV. L. & POL. 49 (1998).

⁴³⁷ See 2 RICHARD T. ELY, PROPERTY AND CONTRACT IN THEIR RELATIONS TO THE DISTRIBUTION OF WEALTH 475-83 (1914).

⁴³⁸ See Carol Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. CHI. L. REV. 711, 713 (1986).

⁴³⁹ The theory of *jus publicum* also supports another analogous concept—the inalienable easement. Under a public trust theory, certain land is so inherently public that "even if alienated, these lands would continue to be impressed with the public 'trust.'" *Id.* at 728. A similar claim could be raised with regard to presidential papers: denying the right of

ample, it has long been accepted that there are some right-of-ways and waterways that are inherently public and subject to the exercise of eminent domain.⁴⁴⁰ Just as eminent domain can nullify “‘natural monopolies’” in land,⁴⁴¹ a similar doctrine could be used to nullify constructive monopolies in historic documents. It is the very public importance of these documents that allows heirs to extract high prices for access or purchase. Thus, such a rule is necessary “to prevent private owners from capturing the ‘rent’ created by ‘publicness’: any values above opportunity costs were due to the increasing scale return of public use, and belonged to the public that created them.”⁴⁴²

Although the extension of this theory beyond real property is subject to debate, it is worth considering whether some limited forms of historical documents and relics might also constitute forms of *jus publicum*. Such a theory, however, may only give the public a legitimate basis for restricting private ownership, not forcing transfers. As previously noted, an established federal law grants public ownership over historic and archaeological items found on public lands.⁴⁴³ Other forms of private property raise more difficult questions and increase the danger of a “slippery slope” in public claims over privately held property. For example, the owners of a piece of art can burn,⁴⁴⁴ mutilate,⁴⁴⁵ or change their property.⁴⁴⁶ Joseph Sax has argued for a greater level of public control in the private possession of important

private owners to bar access or, in the worst historical claims, to destroy records. This position represents a middle ground between totally private and totally public ownership.

⁴⁴⁰ See *id.* at 723–30.

⁴⁴¹ *Id.* at 771.

⁴⁴² *Id.*

⁴⁴³ See *supra* notes 398–404 and accompanying text.

⁴⁴⁴ Just as with presidential papers, owners have burned or destroyed major works of art. After Winston Churchill’s death, his widow burned a portrait of her husband painted by Graham Sutherland because she found the painting to be unflattering. See SAX, *supra* note 62, at 37. Notably, the Parliament, not the Churchill family, had commissioned the painting. See *id.* The Rockefeller family destroyed a mural by Diego Rivera because it contained an image of Lenin. See *id.* at 14–15. One of the leading French art collectors of the nineteenth century, Groult, ordered that his entire collection be burned upon his death. See *id.* at 7. Japanese businessman, Ryoei Saito, expressed a similar intent. Saito bought Renoir’s *Au Moulin de la Galette* and van Gogh’s *Portrait of Dr. Gachet* for a total of \$160 million, locked them away in a warehouse, and announced his intention (later withdrawn) to have the paintings cremated with him at his death. See *id.*

⁴⁴⁵ One such example was an owner’s use of a Toulouse-Lautrec for target practice. See *id.* The bullet-scarred picture was later sold. See *id.*

⁴⁴⁶ Sax describes the continuous altering of one painting to fit the changing image of one family. See *id.* Sax quotes the following account from Julius Held:

[The dispute] “concerned a picture of a man portrayed with two children on one canvas, his wife on another. When his wife died, he married again, but his second wife objected to these portraits. The portrait of the first wife was put away in a smokehouse. . . . On the portrait of the husband, the second wife had the children of the first marriage painted over so that they disappeared. When the second wife died, the picture came to the oldest son of the first marriage who had himself and his younger sister restored.

“objects” with great social value, though he recognizes that such public claims must be limited:

There are many owned objects in which a larger community has a legitimate stake because they embody ideas, or scientific and historic information, of importance. For the most part it is neither practical nor appropriate that these things be publicly owned. . . . The conjunction of legitimate private and public interests, however, suggest that ordinary, unqualified notions of ownership are not satisfactory for such objects.⁴⁴⁷

Sax proposes a prohibition on destruction of such works as well as a guarantee of access or “at least a presumption against grants of exclusive access to particular individuals (such as authorized biographers or favored researchers).”⁴⁴⁸ Sax’s approach, however, may sweep too far unless he identifies the pieces worthy of such protection. The destruction or alteration of a typical family portrait or photograph may be boorish and wasteful, but nevertheless should remain a matter of private concern. Yet, our society routinely makes decisions as to property with historical importance, such as in the historic preservation of homes and land. For example, it is difficult to see why Grant Wood’s home, but not his famous painting *American Gothic*, can be given historic preservation status.⁴⁴⁹ Although private ownership of such art must be accepted, the countervailing public interest in the property should set restrictions on the use of such property.⁴⁵⁰

In some important respects, presidential records are distinguishable from other privately held items.⁴⁵¹ First, these documents were created in the public context of the presidency. Like artifacts found

Later the picture came into the possession of a son of the second wife who promptly covered them up again.”

Id. (quoting Julius Held).

⁴⁴⁷ *Id.* at 9.

⁴⁴⁸ *Id.* at 9–10.

⁴⁴⁹ This creates the bizarre situation in which the public would prevent even the most modest alteration of Wood’s home, but would allow the destruction of the piece of art that made him a historical figure (and gave the home its historical status).

⁴⁵⁰ Such restrictions have existed for privately held property with great public importance. For example, relics are legitimate private property, but are subject to restrictions. Joseph Sax describes these restrictions:

[B]ecause relics were not mere objects, but part and parcel of the person of the saint, their fate was believed to affect all the faithful. . . . Though private ownership and use was recognized, owners were required to protect the relics in various ways—for example, by safeguarding them from danger (not displaying them when going into battle), or by depositing them in a secure and appropriately dignified place such as a religious institution.

Id. at 6.

⁴⁵¹ One could make a similar argument for some court documents that the heirs of Supreme Court Justices currently hold. It is hard to see how public access to such documents would impair the judicial function or why such documents should be deemed private property. In the past, critical documents have been lost or restricted by former Justices or their heirs. In one case, a collection of court material (including seventy letters

on public land, labor removed them from the public realm to private ownership.⁴⁵² Second, these papers have a unique status as historical documents because they constitute the very gateways for historical and policy research. Without some documents, entire areas may be inaccessible for meaningful public review. One of the most attractive aspects of the eminent domain analogy is its ability to avoid the problem of “hold outs.”⁴⁵³ Proponents of eminent domain justify it in part “as permitting acquisition of necessary private properties at a price reflecting fair market value, rather than the ‘rent’ that each private owner might otherwise extract.”⁴⁵⁴ Past private owners of royal and parliamentary documents have demanded similar rent.⁴⁵⁵ Moreover, pre-PRA heirs have extracted a variety of benefits from their control of access, ranging from highly restricted rules on use to alleged favoritism in the selection of historians.⁴⁵⁶ By compelling a transfer under a variation of eminent domain, the heirs or third parties would receive full market-rate compensation for the documents but not the power to regulate historical review or tailor a legacy. The result would be technically “Pareto optimal” as it would dramatically improve the position of the public by not placing the seller in a worse position.⁴⁵⁷

from Justice Oliver Wendell Holmes) was found in a trunk owned by the granddaughter of Chief Justice Melville Fuller. *See id.* at 96.

⁴⁵² *See supra* notes 337–46 and accompanying text.

⁴⁵³ *See* ROBERT COOTER & THOMAS ULEN, *LAW AND ECONOMICS* 192–93 (1988); RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 48–49, 55 (3d ed. 1986); Rose, *supra* note 438, at 750.

⁴⁵⁴ Rose, *supra* note 438, at 750; *see also* Lawrence Berger, *The Public Use Requirement in Eminent Domain*, 57 *OR. L. REV.* 203, 239–40 (1978) (discussing the monopoly factor).

⁴⁵⁵ *See supra* notes 166–69 and accompanying text.

⁴⁵⁶ Such allegations have been levied against historians such as Arthur Schlesinger, Jr., whose pro-Kennedy views resulted in his extensive access to presidential records, while the family denied access to less “reliable” historians. *See* Andrew Ferguson, *The Myth Machine: Nearly 40 Years After JFK’s Death, Kennedys Command the Stage*, *TIME*, Aug. 13, 2001, at 34, 35. Further, critics see the “preferential access” given to Schlesinger and other favored historians as the reason that critical historical areas have not received wide review, leading to calls to “uncage” these documents. *See* Max Holland, *The Docudrama that Is JFK*, *THE NATION*, Dec. 7, 1998, at 25, 25. Historians accuse the Kennedy library of active manipulation of historical accounts by denying or restricting access: “‘They pick and choose their favorites,’ says a ‘friendly’ historian. ‘If they think you’re up to something they don’t like, there’s a lot of material that’s going to be off limits.’” Ferguson, *supra*, at 34. Critics accuse family members like Jackie Kennedy Onassis of actively “monitoring the flow of information out of the Kennedy Library” and “vetting” historical publications. *Id.* Similar complaints have been made with regard to the Nixon library, which has been “mocked for its pro-Nixon tilt.” Willon, *supra* note 65, at 6. With the Nixon library seeking control of Nixon’s presidential papers, such alleged bias raises serious concerns over access.

⁴⁵⁷ *See generally* A. MITCHELL POLINSKY, *AN INTRODUCTION TO LAW AND ECONOMICS* 7 n.4 (1983) (explaining the Pareto optimal position). Clearly, involuntary sellers can argue that market rates are not sufficient given their desire to decline that level of compensation offered by the government. However, one need not consider soft variables in such forced transfers.

What would not be compensated would be the soft variable of controlling and shaping a legacy.⁴⁵⁸

Presidential papers raise significant questions regarding the traditional limits on eminent domain as applied to realty. Though few historical items or relics offer such a basis as *jus publicum*, presidential records are an example of property that should be viewed in the same way as a historical site or a vital right-of-way. Permitting successive generations of third-party owners to control these documents effectively gives a family a toll road to regulate public access to entire areas of the public's history and policy development. Absent an outright claim of public ownership, the government has an interest to preserve this narrow category of documents from opportunistic or destructive treatment by third parties.

CONCLUSION

When one considers the copious amounts of records and documents produced each day in the federal government, it is hard to imagine that at the beginning of the Republic, the country had a reputation for the reckless disregard of records and documentation. Alexis de Tocqueville noted in his masterpiece, *Democracy in America*, that:

[In America, no one] bothers about what was done before his time. No method is adopted; no archives are formed; no documents are brought together, even when it would be easy to do so. When by chance someone has them, he is casual about preserving them. Among my papers I have original documents given to me by public officials to answer some of my questions. American society seems to live from day to day, like an army on active service.⁴⁵⁹

Today, the very suggestion that public officials give original documents in response to inquiries is enough to send the most stalwart archivist into a fetal position.⁴⁶⁰ Perhaps the most valuable of such documents are presidential papers. Although agencies generate important material in the execution of policy, it is from presidential pa-

⁴⁵⁸ In the case of the Kennedys, the control exercised over access to information appears more intended to preserve the myth of Camelot. See Ferguson, *supra* note 456, at 34. The Kennedy library partially abandoned its commitment to preserving history in favor of maintaining the myth, when it actively favored historians such as Schlesinger. See *id.* Ironically, it was President Kennedy who noted that "[m]ythology distracts us everywhere. For the great enemy of the truth is very often not the lie: deliberate, contrived, and dishonest. But the myth: persistent, persuasive, and unrealistic." *Id.* at 35.

⁴⁵⁹ DE TOCQUEVILLE, *supra* note 216, at 192.

⁴⁶⁰ In support of de Tocqueville's view of American priorities, it should be noted that it was not until the creation of the Manuscript Division in the Library of Congress in 1897 that the United States even had a location to keep such records. See Sax, *supra* note 62, at 84.

pers that historians can divine the genesis of policy.⁴⁶¹ As the interest in these documents has increased, their value as property has increased in proportion to that interest. Both historians and heirs value these documents for what they reveal about the development of policy and government actions. For some heirs, these documents serve as a valuable commodity to be sold to the highest bidder. For others, they offer a way of controlling or suppressing historical reviews of an administration.⁴⁶² Still others view the value of ownership as the right to destroy the papers to preserve a legacy.⁴⁶³ Many heirs may have identified with the explanation of President Harding's widow's decision to destroy his papers: "We must be loyal to Wurr'n and preserve his memory."⁴⁶⁴

The recent controversy over the Bush order reveals not only the different uses of this property, but the absence of a cohesive theory of ownership. In the shift toward a constitutional paradigm, conflicting utilitarian rationales for control have muddled the debate over presidential papers. In fairness to the Bush Administration, the conceptual basis for the exercise of either private or public ownership of presidential papers was mired in contradiction and ambiguity long before

⁴⁶¹ Of course, archives of presidential records can reveal everything from the most inconsequential (such as an order from Lyndon Johnson to move a White House toilet for a better sitting position) to more intriguing items (such as a note to Jack Valenti from John Steinbeck suggesting use of a napalm grenade during the Vietnam War). See Berman, *supra* note 19, at 89. However, some documents can become the catalyst for major political and historical changes. The Pentagon Papers are the ultimate example of how documents, aggressively withheld by an administration, can contain matters of enormous public importance. See *N.Y. Times Co. v. United States*, 403 U.S. 713 (1971). It is interesting that, after defending the Administration's argument that the release of these documents endangered national security, former Solicitor General Erwin N. Griswold admitted that "I have never seen any trace of a threat to the national security from the [Pentagon Papers'] publication. Indeed, I have never seen it even suggested that there was such an actual threat." Erwin N. Griswold, *Secrets Not Worth Keeping*, WASH. POST, Feb. 15, 1989, at A25.

⁴⁶² Heirs may view the role of a private presidential library as a method of preserving a tailored legacy as opposed to an accurate history. The Nixon family, for example, believes that his "library's role should be to polish the legacy of the only president who resigned to avoid impeachment." Martin Kasindorf, *Family Fight Stains Efforts to Burnish Nixon's Legacy*, USA TODAY, Apr. 30, 2002, at 3A. This view creates a temptation to suppress material that reveals less than "presidential" characteristics. See *id.* (noting that the Nixon family "struggle[s] to defend a record clouded by the Watergate scandal and by vulgar remarks [including anti-Semitic slurs] that keep cropping up on secretly recorded White House tapes periodically made public by the National Archives").

⁴⁶³ This view is, of course, not limited to presidential heirs. In what was viewed as a terrible historical loss, Princess Margaret had a large amount of the Queen Mother's private papers and letters burned to prevent them from ever becoming public. See Christopher Morgan, *Queen Mother's Papers Destroyed*, SUNDAY TIMES (London), June 21, 1998, at 1. This is something of a tradition in the history of the highly secretive Royal Family. Invaluable collections such as the papers of Queen Victoria and Edward VII were burned as disposable private property. See Nick Craven, *History on the Bonfire*, DAILY MAIL (London), June 22, 1998, LEXIS, News Library, Mail File.

⁴⁶⁴ SAX, *supra* note 62, at 82 (quoting President Harding's widow); see also COLLINS & WEAVER, *supra* note 26, at 179 (giving an account of the destruction).

its arrival. From the earliest dispute over Washington's papers, there was a failure to address the basic claims of ownership of either the public or private collectors. This Article attempts to offer some foundation for that debate. Although certain provisions of the Bush order are facially unconstitutional, they highlight this confusion on a conceptual level that has reigned in this area for over two hundred years. They also offer an intriguing microcosm to explore basic notions of ownership and how those notions changed from the eighteenth to the twenty-first century. With the maturation of the United States, Americans have come to cherish their historical legacy to an extent that might surprise someone like de Tocqueville. Americans now understand that an archive is not some dead zone of boxed documents, but is part of a nation's active search for self-meaning. These documents are part of an American legacy that defines not only a prior administration, but also a people. Presidential records are the most vital form of *jus publicum* because they serve as the very gateway for the exploration of public policy—the only true manifest destiny of a free people.