The Presidential Records Act Cannot Supersede a Former President's Authority Over Presidential Papers

Since the founding of the United States, Presidents leaving office have taken custody of their presidential records. That unbroken tradition reflects a principle deeply rooted in private law and the Constitution: the President's records are his personal property because they were prepared by him or for him in furtherance of his official duties. The records also belong to him because the Constitution requires it. A contrary conclusion would impede the duties of the Executive Branch, chill candid dialogue during the President's term in office, and erode the constitutional structure.

For two centuries, Congress did not interfere with this intuitive tradition. Watergate changed that. After President Nixon resigned, Congress took a more active role in the disposition of presidential records. First, through the Presidential Recordings and Materials Preservation Act, Congress stripped Nixon of tapes and records he had planned to destroy. Then, Congress adopted a more permanent solution for future Presidents. The Presidential Records Act now purports to govern where presidential records go and who has access to them. But the Act cannot abrogate the default principle that presidents *own and control their records upon leaving office*.

Congress does not have the authority to claim custody of all former presidents' records. Even if it did, such an expansive claim over presidential records would violate separation-of-powers principles and a President's executive privilege. Hence, the Presidential Records Act's limitations on a former President's control over his presidential records are unconstitutional.

The Presidential Records Act could be read to apply only to presidential papers that the President *voluntarily relinquishes*. That more limited interpretation preserves the historical power of the Executive as well as the procedures Congress has established governing how executive officials handle presidential records. Until the President voluntarily gives his records to the federal government, they remain his alone. Any contrary reading contradicts the text, history, and constitutional structure.

I. History establishes the proprietary nature of presidential records.

A. Since the Founding, Presidents have maintained personal control over their records after leaving office.

"History, custom, and usage indicate unequivocally that, prior to [the Presidential Recordings and Materials Preservation Act], Presidents exercised complete dominion and control over their presidential papers." *Nixon v. United States*, 978 F.2d 1269, 1277 (D.C. Cir. 1992). When President George Washington left office in 1797, he "decided to take all personal and official papers with him, establishing the precedent that a President's papers are personal and not public property." Larry Berman, *The Evolution and Value of Presidential Libraries*, *in* THE PRESIDENCY AND INFORMATION POLICY 79, 80 (Harold Relyea ed., 1981). Washington willed his presidential papers to his nephew, Bushrod Washington, who dispersed the papers among various requesters. *Id.*

Bushrod Washington later arranged with Chief Justice John Marshall and an editor, Jared Sparks, to publish twelve volumes of President Washington's letters. Another editor republished a substantial portion of the letters, which resulted in a case before Justice Joseph Story, sitting as Circuit Justice, to determine whether the republication constituted copyright infringement. *See Folsom v. Marsh*, 9 F. Cas. 342, 345 (C.C.D. Mass. 1841). Justice Story ruled in favor of Sparks and Chief Justice Marshall, holding that the republication was "injurious to the rights of property of the representatives and assignees of President Washington." *Id.* Justice Story rejected the argument that Washington "intended them exclusively for public use, as a donation to the public, or did not esteem them of value as his own private property." *Id.*

Since Washington, presidents have taken custody of presidential records when leaving office. "Most of the early presidents transferred their papers as personal property to their heirs, including the first seven presidents: Washington, John Adams, Thomas Jefferson, [James] Madison, James Monroe, John Quincy Adams, and Andrew Jackson." Jonathan Turley, *Presidential Papers and Popular Government: The Convergence of Constitutional and Property Theory in Claims of Ownership and Control of Presidential Records*, 88 CORNELL L. REV. 651, 657-58 (2003) (footnotes omitted). For presidents who did not provide for their papers in their wills and those who died intestate, "their heirs either claimed the archives or received the records automatically." *Id.* at 658. "Some presidents used their uncontested ownership over their presidential papers to order them destroyed, including Martin Van Buren, Franklin Pierce, [Ulysses] Grant, [James] Garfield, Chester Arthur, and Calvin Coolidge." *Id.* at 660.

Over the years, the Department of State and Library of Congress gathered presidential records from former presidents, their families, historical societies, and other sources. Cementing the tradition of presidential ownership, Congress often

appropriated funds to acquire the records. Washington's heirs, for example, sold his official records to the federal government for $25,000 and his private papers for $20,000. Berman, *supra*, at 81. And Andrew Jackson's papers took one hundred separate purchases to acquire. *Id.* In 1886, the Senate requested an executive file from Grover Cleveland during his presidency. Cleveland's response summed up the universal view of presidential records:

> I regard the papers and documents withheld and addressed to me or intended for my personal use and action purely unofficial and private, not infrequently confidential, and having reference to the performance of a duty exclusively mine.… I suppose if I desired to take them into my custody I might do so with entire propriety, and if I saw fit to destroy them no one could complain.

Id. at 82.

B. Congress maintained the practice of presidential control over their records.

Franklin Roosevelt brought about the first significant change in how presidents regarded their records. Recognizing the public's interest in presidential records, Roosevelt advanced the idea of the presidential library. In 1939, Congress passed a joint resolution establishing the Franklin D. Roosevelt Library as part of the National Archives. *See* Act to Provide for the Establishment and Maintenance of the Franklin D. Roosevelt Library, ch. 324, 53 Stat. 1062 (July 18, 1939). Roosevelt deeded land for the library from his family's estate in New York, and private supporters funded the library's construction. Berman, *supra*, at 83. "While Roosevelt was singularly responsible for the precedent-setting decision to build a library for his Presidential materials, the President did not differ from George Washington on the question of ownership. These were Roosevelt's papers—given as a gift to the United States." *Id.*

Roosevelt set a charitable precedent that later presidents followed. After Roosevelt, presidents continued to leave "records to the public under a variety of restrictions." Turley, *supra*, at 663. In 1955, Congress passed the Presidential Libraries Act to "institutionalize the process of building and maintaining libraries for the future." Berman, *supra*, at 83-84. The act "covered only the acceptance of papers and maintenance of facilities, not ownership (to the extent that *anyone* other than the President had a legitimate claim to the papers)." *Id.* at 84. The act did not dictate "what a President *must* do with his papers." *Id.* President Truman, for example, "while personally presiding over the construction of the Harry S Truman Library, excluded his most important papers until the completion of his memoirs." *Id.* at 82.

Time and again, Congress recognized personal ownership of presidential records. "Congress routinely bargained for and purchased presidential papers for

'fancy sums.'" *Nixon*, 978 F.2d at 1282. And when passing the Federal Records Act (FRA) in 1950, Congress distinguished between presidential papers and other government records. "While the FRA made it clear that Congress regarded the ownership of *agency records* to be in the United States, it specifically excepted presidential materials for different treatment." *Id.* at 1283. "History, custom, and usage—relating to former Presidents and to those dealing with former Presidents—indicate unequivocally that presidential papers have been treated as the President's private property." *Id.* at 1284.

C. After Watergate, Congress attempted to assert control over presidential records.

Watergate prompted Congress's interest in presidential records. Upon resigning from the presidency, Richard Nixon directed Government archivists to pack up some 42 million pages of documents and 880 tape recordings of conversations and ship the materials to him in California. *Nixon v. Adm'r of Gen. Servs.* (*Nixon II*), 433 U.S. 425, 430 (1977). The Watergate Special Prosecutor objected, advising President Ford of his need for the materials. The Attorney General advised the President that the historical practice supported Nixon's claim of ownership in the records. After receiving the Attorney General's opinion, the Administrator of General Services, Arthur Sampson, signed an agreement with Nixon, affirming that Nixon "retained 'all legal and equitable title to the Materials, including all literary property rights,' and that the materials accordingly were to be 'deposited temporarily' near appellant's California home in an 'existing facility belonging to the United States.'" *Id.* at 431 (citation omitted). Reflecting the agreements of past presidents, the purpose of Nixon's agreement "was 'to donate' the materials to the United States 'with appropriate restrictions.'" *Id.* at 431-32. The agreement provided that "the tapes 'shall be destroyed at the time of (his) death or on September 1, 1984, whichever event shall first occur.'" *Id.* at 432.

Ten days after the public announcement of the agreement, Congress intervened. Outraged at the planned destruction of the tapes, Congress passed the Presidential Recordings and Materials Preservation Act (PRMPA). Turley, *supra*, at 664-65. The PRMPA directed the Administrator of General Services to obtain possession and control of the tapes, "notwithstanding any other law or any agreement." PRMPA, Pub. L. No. 93-526, 88 Stat 1695 (Dec. 19, 1974). The PRMPA generally prohibited the tapes' destruction and made them available to the Watergate Special Prosecutor for use in judicial proceedings, subject "to any rights, defenses, or privileges which the Federal Government or any person may invoke." *Id.* The PRMPA directed the Administrator of General Services to issue regulations governing public access to the tape recordings, outlining various factors the administrator must consider. *Id.*

Nixon challenged the PRMPA's constitutionality on the grounds that it violated (1) the principle of separation of powers; (2) the presidential privilege; (3)

Nixon's privacy interests; (4) Nixon's First Amendment associational rights; and (5) the Bill of Attainder Clause. The Supreme Court ruled that Nixon, even as a former President, had standing to assert those claims. *See Nixon II*, 433 U.S. at 439. But the Court rejected each of Nixon's constitutional claims, ruling that Nixon must comply with the administrator's directions. *Id.* at 484. The Court saw "no reason to engage in the debate whether [Nixon] has legal title to the materials" because "even if legal title is his, the materials are not thereby immune from regulation." *Id.* at 445 n.8.

The PRMPA also established a commission to study the issue of presidential records. The commission rejected the traditional view of presidential records, recommending that "all 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." Berman, *supra,* at 85. Indeed, the commission thought it was "time to bring to an end the tradition that papers generated or received in the conduct of public business belong as a species of private property to Presidents and other public officials." *Final Report of the National Study Commission on Records and Documents of Federal Officials* 3 (Mar. 31, 1977). Congress passed the Presidential Records Act of 1978 (PRA) based on these recommendations.

The PRA declares that the "United States shall reserve and retain complete ownership, possession, and control of Presidential records." 44 U.S.C. § 2202. "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 their official duties.'" Turley, *supra*, at 67 (quoting H.R. Rep. No. 95-1487, at 2 (1978)). To that end, the PRA directs the President to preserve presidential records, and "[u]pon the conclusion of a President's term of office … the Archivist of the United States shall assume responsibility for the custody, control, and preservation of, and access to, the Presidential records of that President." 44 U.S.C. § 2203(g)(1). The Archivist must make the records available to the public "rapidly and completely" and "is authorized to dispose of such Presidential records which the Archivist has appraised and determined to have insufficient administrative, historical, informational, or evidentiary value to warrant their continued preservation." *Id.* § 2203(g)(3), (g)(4).

II. The PRA cannot abrogate the background principle that presidential papers belong to the President.

The proprietary nature of presidential records is supported both by constitutional principles and traditional notions of private property. Historically, private property justifications were the focal point of disputes over presidential papers. Justice Story held that the unlicensed republication of George Washington's papers violated the copyright of those who owned the papers. *See Folsom*, 9 F. Cas. at 345. A New York court upheld a memorandum written by Franklin Roosevelt

bequeathing his presidential papers to the presidential library. *In re Roosevelt's Will*, 73 N.Y.S.2d 821, 825 (Sur. 1947). And most recently, the D.C. Circuit held that the PRMPA constituted a per se taking of Nixon's property in his records. *Nixon*, 978 F.2d at 1284. Fending off private-law claims required reference to private-law defenses.

During most of this period, Congress acquiesced to presidential control over the records. *See* Turley, *supra*, at 686-87. Without competing claims by Congress over presidential papers, presidents had little need to invoke the Constitution to justify their actions. But as Congress began asserting power over presidential papers after Watergate, the constitutional principles moved to the forefront. The PRA's broad regulation of presidential papers poses at least two constitutional problems: first, Congress does not have the power to claim custody of all presidential papers; and second, even if Congress can regulate presidential papers, that regulation cannot impede the authority of the Executive Branch.

A. Congress does not have the authority to claim custody of all presidential papers.

"The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803). Because Congress "can claim no powers which are not granted to it by the constitution," Congress can regulate presidential papers only to the extent the regulation furthers an enumerated or implied legislative power. *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 326 (1816).

The Supreme Court has not identified an enumerated legislative power that covers expansive congressional regulation of presidential papers. In Nixon's case against the PRMPA, the Court briefly mentioned that by preserving presidential papers, the PRMPA "may be thought to aid the legislative process and thus to be within the scope of Congress' broad investigative power." *Nixon II*, 433 U.S. at 453. If that is correct, then the regulation of presidential papers resembles Congress's subpoena power, which "must be related to, and in furtherance of, a legitimate task of the Congress." *Watkins v. United States*, 354 U.S. 178, 187 (1957). The PRMPA arguably furthered Congress's legislative function because "Congress repeatedly referred to the importance of the materials to the Judiciary in the event that they shed light upon issues in civil or criminal litigation." *Nixon II*, 433 U.S. at 453-54. And the PRMPA established a committee tasked with investigating and recommending legislation regarding presidential papers. *See* PMPRA § 202; Burman, *supra*, at 85.

Justice Powell's concurring opinion provided more detail on Congress's power. Powell wrote that the "Court has recognized inherent power in Congress to pass appropriate legislation to 'preserve the departments and institutions of the general government from impairment or destruction, whether threatened by force or by corruption.'" *Nixon II*, 433 U.S. at 499 (1977) (Powell, J., concurring). Powell thought

that this "inherent power" included the power to restrict the political activities of civil servants, punish bribery, make executive documents publicly available, and "to inquire into and publicize corruption, maladministration or inefficiency in agencies of the Government." *Id.* (citations omitted). Thus, he concluded that in enacting the PRMPA, "Congress unquestionably has acted within the ambit of its broad authority to investigate, to inform the public, and, ultimately, to legislate against suspected corruption and abuse of power in the Executive Branch." *Id.* at 498.

Both the majority and Justice Powell found support for the PRMPA in the existing regulation of executive documents. The majority observed "abundant statutory precedent for the regulation and mandatory disclosure of documents in the possession of the Executive Branch." *Id.* at 445 (maj. op.) (citing FOIA, the Privacy Act, Government in the Sunshine Act, census data, and tax returns); *see also id.* at 499 (Powell, J., concurring). In dissent, Chief Justice Burger pointed out that "[n]o one challenges Congress' power to provide for access to records of the Executive Departments which Congress itself created. But the Freedom of Information Act, the Privacy Act of 1974, and similar measures never contemplated mandatory production of Presidential papers." *Id.* at 513 (Burger, C.J., dissenting). If the PRMPA is constitutional, it is only on the thin reed that it was enacted under Congress's power to investigate in furtherance of its legislative duties.

The PRA's sweeping claim over all presidential papers does not pass constitutional muster. "Unlike its immediate predecessor, the PRMPA, Congress enacted the PRA with the purpose of 'establishing the public ownership of records created by future Presidents in the course of discharging their official duties.'" Turley, *supra*, at 666-67 (cleaned up). Congress sought the Watergate records in the PRMPA at least in part to facilitate legislation on the subject going forward. *See* PMPRA § 202; Burman, *supra*, at 85. But the PRA claims no legislative or investigative purpose for taking the records. *Cf. Watkins*, 354 U.S. at 187.

Moreover, the PRA asserts "ownership" of presidential papers, not merely access to them. 44 U.S.C. § 2202. And the sweeping, mandatory public disclosure provisions have no bearing on future legislation. *Id.* § 2203(f) (The Archivist has an "affirmative duty to make such records available to the public as rapidly and completely as possible."). Public interest in presidential papers cannot by itself justify congressional regulation, as "there is no congressional power to expose for the sake of exposure." *Watkins*, 354 U.S. at 200.

Finally, while the PRMPA asserted control of specific, identifiable papers, the PRA claims control over all papers of the *office of the President* in perpetuity. But the Constitution, not Congress, created the office of the President. *See Nixon II*, 433 U.S. at 513 (Burger, C.J., dissenting). That Congress can regulate documents in other parts of the Executive Branch says nothing about whether Congress can regulate the papers of the Chief Executive, the constitutional equal of Congress. *Cf id.* at 445 (maj.

op.); *id.* at 499 (Powell, J., concurring). In asserting broad ownership over presidential papers, the PRA is unlike any other congressional regulation of executive records.

B. Congress's regulation of presidential papers cannot impede the functions of the Executive Branch.

Even if Congress has the power to regulate presidential papers, that regulation must not impede the authority of the Executive Branch. "[I]n determining whether the Act disrupts the proper balance between the coordinate branches, the proper inquiry focuses on the extent to which it prevents the Executive Branch from accomplishing its constitutionally assigned functions." *Nixon II*, 433 U.S. at 443 (maj. op.). The disruption takes two primary forms: executive privilege and separation of powers.

Starting with privilege, "courts have traditionally shown the utmost deference to Presidential responsibilities" that flow from Article II. *United States v. Nixon* (*Nixon I*), 418 U.S. 683, 710 (1974). Even though the Constitution does not contain "any explicit reference to a privilege of confidentiality," the privilege "is constitutionally based" to the extent it "relates to the effective discharge of a President's powers." *Id.* at 711. That is, the "privilege of confidentiality of Presidential communications derives from the supremacy of the Executive Branch within its assigned area of constitutional responsibilities." *Nixon II*, 433 U.S. at 447. "[I]nformation subject to executive privilege deserves 'the greatest protection consistent with the fair administration of justice.'" *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019, 2032 (2020) (quoting *Nixon I*, 418 U.S. at 715). The executive privilege can be overcome only by a "demonstrated, specified need" for the information requested. *Nixon I*, 418 U.S. at 713. Moreover, "the privilege survives the individual President's tenure," or else the President "could not expect to receive the full and frank submissions of facts and opinions upon which effective discharge of his duties depends." *Nixon II*, 433 U.S. at 447 (citation omitted).

The PRA violates former presidents' executive privilege. Congress cannot abrogate executive privilege without a "demonstrated, specified need," or else it would impede the "effective discharge of a President's powers." *Nixon I*, 418 U.S. at 711, 713. That is, Congress cannot claim custody over all presidential records by default, and Congress bears the burden of demonstrating a specific need for presidential materials. The PRA shifts that burden to the President, turning traditional constitutional principles on their head. *See* 44 U.S.C. § 2204(e) ("The United States District Court for the District of Columbia shall have jurisdiction over any action initiated by the former President asserting that a determination made by the Archivist violates the former President's rights or privileges.").

The PRA goes far beyond the PRMPA in abrogating former presidents' executive privilege. The PRA's broad regulation of all presidential records contrasts sharply with the PRMPA's targeted regulation of the Watergate tapes. *See* PRMPA §

104(a). The Watergate tapes were the subject of a national scandal, and Nixon had signed an agreement mandating their destruction. Congress sought the Watergate records at least in part to facilitate legislation on the subject going forward. *See* PMPRA § 202; Burman, *supra*, at 85. For all these reasons, the PRMPA at least arguably showed a "demonstrated, specific need" for the Watergate records it claimed. *But see Nixon II*, 433 U.S. at 518 (Burger, C.J., dissenting) (reasoning that the PRMPA intrudes on executive privilege because it "requires that persons not designated or approved by the former President will review all Presidential papers").

In addition, the PRMPA provided a mechanism to balance its interest in the records with the interests of the President. The majority in *Nixon II* relied on the district court's finding that Nixon's claim of privilege applied to only a fraction of the documents at issue, and it noted that the Administrator of General Services still had the opportunity to preserve Nixon's privilege claims by promulgating regulations under the act. *See id.* at 449-51. Chief Justice Burger regarded that protection as meaningless. *See id.* at 518 (Burger, C.J., dissenting). But Nixon's privilege claims were arguably preserved through regulations that effectively delegated questions of presidential privilege to the Department of Justice's Office of Legal Counsel. *See Pub. Citizen v. Burke*, 843 F.2d 1473, 1477 (D.C. Cir. 1988). Even if those protections were sufficient, the PRA stands in sharp contrast by sticking the President with the burden of justifying his claim of privilege in court. 44 U.S.C. § 2204(e).

The Constitution's separation of powers also limits Congress's authority over presidential records. In resolving separation-of-powers disputes, the Court "takes a 'considerable impression' from 'the practice of the government,'" *Trump*, 140 S. Ct. at 2035 (quoting *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 401 (1819)). And as far as presidential papers go, the practice of government is settled: "presidential ownership of White House papers has been widely assumed by members of all three branches of government." *Nixon*, 978 F.2d at 1282. Representative Joseph Martin accurately summed up the practice when speaking in support of presidential libraries:

> [T]he Office of the Presidency, like the offices of the Members of Congress and the Supreme Court, are constitutional offices, having separate and independent status in our governmental system, and that every President since George Washington has considered that this separate and independent status of the Office extends to and embraces the papers of the incumbent of the Office. Thus, as is the case with the papers of individual Members of Congress, the papers of the President have always been considered to be their personal property, both during their incumbency and afterward.
>
> This has the sanction of law and custom, and has never been authoritatively challenged.

Id. at 1281 (quoting Hearings on H.J.Res. 330, 331, and H.J.Res. 332, Before the Executive and Legislative Reorganization Subcomm., 84th Cong., 1st Sess. 12-13 (1955)).

Nixon II falls short in its separation-of-powers defense of the PRMPA. The majority upheld the PRMPA in part because neither President Ford nor President Carter supported the claim that the PRMPA intruded on the Executive Branch's authority. *Nixon II*, 433 U.S. at 441 (maj. op.). But that reasoning "patently ignores *Buckley v. Valeo*," in which the Court found a separation-of-powers violation "in the face of the fact that President Ford had signed the bill into law." *Id.* at 512 (Burger, C.J., dissenting); *see Buckley v. Valeo*, 424 U.S. 1, 118-24 (1976). The Court also found it "relevant that the Act provides for custody of the materials in officials of the Executive Branch and that employees of that branch have access to the materials only 'for lawful Government use, subject to the (Administrator's) regulations.'" *Nixon II*, 433 U.S. at 443 (maj. op.) (quoting PRMPA § 102).

But the Court did not explain why that was a constitutionally significant limitation. "Separation of powers is fully implicated simply by Congress' mandating what disposition is to be made of the papers of another branch," it does not depend "on the identity of the custodians" who will control the papers. *Nixon II*, 433 U.S. at 510 (Burger, C.J., dissenting). Congress can no more mandate that the President hand over his papers to an executive agency than could the President order a Senator to hand over her papers to another Senator.

Worse still, the majority in *Nixon II* ignored the historical tradition of presidential ownership of White House records. The majority "saw no reason to engage in the debate whether appellant has legal title to the materials" because it thought Congress could regulate the materials regardless of who ultimately held title to them. *Id.* at 445 n.8 (maj. op.). But under historical practice, title and control were synonymous—the President has absolute authority over his papers *because* they are his papers. In place of the historical test, the majority asked whether the seizure of the Watergate records was "unduly disruptive of the Executive Branch." *Id.* at 445. That made-up test once again ignored *Buckley v. Valeo*, in which the Court "unanimously found a separation-of-powers violation without any allegation, much less a showing, of 'undue disruption.'" *Id.* at 512 (Burger, C.J., dissenting). The majority opinion in *Nixon II* fails to provide a reasoned defense of the PRMPA as consistent with the Constitution's separation of powers.

The PRA violates separation-of-powers principles, too. "Perhaps the most telling indication of [a] severe constitutional problem … is the lack of historical precedent" for novel regulation of executive power. *Free Enter. Fund v. PCAOB*, 561 U.S. 477, 505 (2010) (quoting *Free Enter. Fund v. PCAOB*, 537 F.3d 667, 699 (D.C. Cir. 2008) (Kavanaugh, J., dissenting)). The PRA upsets two centuries of settled historical practice by claiming "ownership" of records that have traditionally belonged to former presidents. 44 U.S.C. § 2202. And the 2014 amendment to the

PRA provides that "the Archivist may maintain and preserve Presidential records on behalf of the President" during the President's term in office, and that "[t]he President shall remain exclusively responsible for custody, control, and access to such Presidential records." 44 U.S.C. § 2203(f). "The Archivist may not disclose any such records … *until the conclusion of a President's term of office*," *id.* (emphasis added), at which point "the Archivist of the United States shall assume responsibility for the custody, control, and preservation of, and access to, the Presidential records of that President," *id.* § 2203(g)(1). These provisions contradict a former President's traditional authority to control and access his records.

Even under *Nixon II*'s "undue disruption" test, the PRA goes further than the PRMPA. For example, while the PRMPA did not claim ownership of presidential records, the PRA does. *See Nixon II*, 433 U.S. at 445 n.8; 44 U.S.C. § 2202. The PRMPA was limited to the Watergate records, but the PRA applies to all presidential records of every President in perpetuity. The PRMPA gave executive officials custody and control over the Watergate records, while the PRA *mandates* public disclosure of presidential records. *See* 44 U.S.C. §§ 2202, 2203(f). These and other sweeping intrusions of executive authority in the PRA are inconsistent with the history of presidential records and unduly disruptive of the Executive Branch.

In short, the Court's approval of the PRMPA did not negate the longstanding principle that former presidents retain control over their presidential records. That principle—often the case with Article II—is rooted in constitutional and private norms. "The President is the only person who alone composes a branch of government. As a result, there is not always a clear line between his personal and official affairs." *Trump*, 140 S. Ct. at 2034. Acknowledging the President's private interest in his papers does not negate his constitutional interest. To the contrary, "[t]he interest of the man' is often 'connected with the constitutional rights of the place.'" *Id.* (quoting The Federalist No. 51, at 349). By claiming unilateral custody and ownership of former presidents' records, the PRA violates the Constitution.

III. Even if Congress had the authority to pass the PRA, the act did not override the proprietary character of presidential papers.

A narrower reading of the statute can avoid the PRA's constitutional infirmities. The PRA can—and should—be interpreted to govern only records that the President voluntarily relinquishes to the custody of the United States. That more limited reading avoids the constitutional problems associated with Congress claiming unilateral control over all papers while preserving the standards and procedures the PRA establishes for the Archivist.

Under the PRA, "[p]residential records" include "documentary materials … created or received by the President, the President's immediate staff, or a unit or individual of the Executive Office of the President … which relate to or have an effect upon the carrying out of the constitutional, statutory, or other official or ceremonial

duties of the President." 44 U.S.C. § 2201(2). The PRA's definition does not distinguish classified records from other records—classified or not, the test is whether the record was prepared or received by the President or his staff in furtherance of the President's duties.

The PRA *does* distinguish presidential records from personal records and agency records. Personal records "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" are not presidential records. *Id.* § 2201(3). And agency records that fall under other disclosure statutes are exempt from the PRA's definition of presidential records. *Id.* § 2201(2). Notably, this definition excludes "extra copies of documents produced only for convenience of reference, when such copies are clearly so identified." *Id.* § 2201(2)(B)(iv). "During a President's term of office, the Archivist may maintain and preserve Presidential records on behalf of the President," but the President remains "exclusively responsible for custody, control, and access to such Presidential records." *Id.* § 2203(f).

Before a President leaves office, the President can designate a period of restricted access to certain information, up to twelve years. *See id.* at 2204. The categories eligible for restricted access include records relating to national defense or foreign policy secrets, appointments for federal office, trade secrets, and confidential communications. *See id.* § 2204(a). Although the President specifies the duration of the restricted-access period, the Archivist of the United States ultimately determines "whether access to a Presidential record … shall be restricted" after consultation with the President. *Id.* § 2204(a)(3). The Archivist's determination is not subject to judicial review except to the extent it "violates the former President's rights or privileges." *Id.* § 2204(e). These provisions reflect "an assumption made by Congress … that subsequent Presidents and Vice Presidents would comply with the Act in good faith, and therefore, Congress limited the scope of judicial review and provided little oversight authority for the President and Vice President's document preservation decisions." *Citizens for Resp. & Ethics in Wash. v. Cheney*, 593 F. Supp. 2d 194, 198 (D.D.C. 2009).

The PRA preserves former presidents' unqualified access to their records. "[T]he Presidential records of a former President shall be available to such former President or the former President's designated representative." *Id.* § 2205(3). Other entities have qualified access to presidential records: Courts, incumbent presidents, and Congress have access to presidential records "subject to any rights, defenses, or privileges which the United States or any agency or person may invoke." *Id.* § 2205(2). And the Archivist and employees of the National Archives and Records Administration "who are engaged in the performance of normal archival work" have access to presidential records that are "in the custody of the Archivist." *Id.* § 2205(1). In contrast, a former President's access to his own records is limited neither by who has custody of the records nor by the "rights, defenses, or privileges" of anyone else—including the sitting President. Only the President "during whose term or terms of

office such Presidential records were created" has the absolute right to access those records. *Id.* § 2201(5).

The PRA does vest the United States with "complete ownership, possession, and control of Presidential records." 44 U.S.C. § 2202. A broad reading of that provision would conflict with the historical tradition of presidential ownership. But these competing claims of ownership are reconcilable: the PRA defines "Presidential records" only for itself. In other words, there are two kinds of presidential records. One is the historical kind—the presidential records that belong to the President, and no one else, by virtue of their relationship to his office. Presidents have always maintained exclusive ownership of these historical presidential records. The second kind are records designated as "Presidential records" under the PRA. These PRA records are also presidential records of the first kind, but they have obtained a unique designation as PRA records by the President. Consistent with the constitutional tradition, these PRA records have been donated to the United States, which then assumes "complete ownership, possession, and control" of those records. *Id.* § 2202. But the President retains "unfettered control over his own documents," *Jud. Watch, Inc. v. NARA*, 845 F. Supp. 2d 288, 297 (D.D.C. 2012), including personal and presidential records not "in the custody of the Archivist," 44 U.S.C. § 2205.

Any conflict between the PRA and historical tradition dissolves with the PRA's saving construction, which disclaims that nothing in the PRA "shall be construed to confirm, limit, or expand any constitutionally-based privilege which may be available to an incumbent or former President." *Id.* § 2204(c)(2).

A. Precedent confirms that the PRA cannot override the proprietary character of presidential papers.

Courts have recognized that the PRA did not abrogate the background principle that presidential papers belong to the President. In *Armstrong I*, the D.C. Circuit reviewed a claim under the PRA to prevent President George H.W. Bush from erasing material stored on the White House computer systems during the last two weeks of the Reagan Administration. *Armstrong v. Bush* (*Armstrong I*), 924 F.2d 282, 284 (D.C. Cir. 1991). The plaintiffs—a group of researchers and historians—sought a declaration that the electronic materials were presidential records under the PRA, an injunction prohibiting the destruction of those materials, and an order directing the government to classify and preserve the materials. The court held that even though the PRA purported to require the President to preserve, document, and maintain presidential records, "the PRA precludes judicial review of the President's recordkeeping practices and decisions." *Id.* at 291.

The court reasoned that "permitting judicial review of the President's compliance with the PRA would upset the intricate statutory scheme Congress carefully drafted to keep in equipoise important competing political and constitutional concerns." *Id.* at 290. Although the PRA set preservation standards for

the President, it left "the implementation" of those standards "in the President's hands." *Id.* And "the PRA accords the President virtually complete control over his records during his term of office." *Id.* The President has, for example, unilateral authority to dispose of records during his term, and "neither the Archivist nor the Congress has the authority to veto the President's disposal decision." *Id.* Given these features, the court held that "the PRA is one of the rare statutes that does impliedly preclude judicial review." *Id.*

After remand to the district court, *Armstrong* returned to the D.C. Circuit. This time, the court confronted whether the President had properly classified certain materials as presidential records. The National Security Council and the Office of Science & Technology Policy had issued guidelines differentiating *federal records* subject to the Freedom of Information Act (FOIA) from *presidential records* subject to the PRA. *See Armstrong v. Exec. Off. of the President* (*Armstrong II*), 1 F.3d 1274, 1277 (D.C. Cir. 1993). The plaintiffs claimed that the agencies' guidelines erroneously classified materials as presidential records subject to the PRA that should have been classified as federal records subject to FOIA. *Id.* at 1278. This time, the court ruled that it had jurisdiction.

The court held that it could review whether documents were "agency records" under FOIA instead of "presidential records under the PRA." *Id.* at 1292. The court observed that the PRA's definition of presidential records "does not include any documentary materials that are … official records of an agency (as defined in [FOIA])." 44 U.S.C. § 2201(2). And because "[j]udicial review plays an indispensable role" in determining what documents are agency records under FOIA, courts also determine the scope of the FOIA exception in the PRA's definition of presidential records. *Armstrong II*, 1 F.3d at 1292. "Put another way, the PRA provides that the definition of 'agency' records in the FOIA trumps the definition of 'presidential records' in the PRA." *Id.* This limitation "prevent[s] the PRA from becoming a potential presidential *carte blanche* to shield materials from the reach of the FOIA." *Id.* And courts maintain the power to decide whether materials are agency records or presidential records. That power is underscored by the fact that "*disposal* decisions under the PRA *are* unreviewable." *Id.* at 1293 (citing *Armstrong I*, 924 F.2d at 290). If courts lacked the power to review both the disposal and designation of presidential records, any records "could be forever removed from [FOIA's] provisions if it were improperly classified as a presidential record and destroyed." *Id.*

Neither *Armstrong* case disturbed a former President's background authority to access and dispose of presidential records as he pleases. Likewise, neither case addressed the distinction between a President's personal records and his presidential records. That issue came up later when an organization sued to obtain access to audiotapes made by former President Bill Clinton during his presidency. The court concluded that the *Armstrong* cases affirmed the principle that the President maintained "unfettered control over his own documents." *Jud. Watch*, 845 F. Supp. 2d at 297. The court thus "ha[d] serious doubts about whether the former President's

retention of the audiotapes as personal is a matter that is subject to judicial review." *Id.* at 298. The court ultimately dismissed for lack of standing because it was "unable to provide the remedy plaintiff seeks by ordering that defendant 'assume custody and control' over the audiotapes." *Id.* at 305.

At least one case reached the opposite conclusion. On his final day in office, President George H.W. Bush signed an agreement with the Archivist giving the President exclusive control over electronic records of the Executive Office of the President created during his term. *Am. Hist. Ass'n v. Peterson*, 876 F. Supp. 1300, 1303 (D.D.C. 1995). A group of historians, researchers, librarians, and journalists sued to force the Archivist to take custody of the records from the President. *Id.* at 1303-04. The court declared that the agreement violated the PRA, ruling that "nowhere in the PRA is there any provision allowing a former President to exercise control over Presidential records after his term in office ends." *Id.* at 1315. But the court overlooked the unqualified mandate that "the Presidential records of a former President shall be available to such former President." 44 U.S.C. § 2205(3). The court also did not credit the history of presidential records or discuss the "competing political and constitutional concerns," *Armstrong I*, 924 F.2d at 290, which the PRA resolves in the President's favor, 44 U.S.C. § 2204(c)(2). Later decisions thus declined to follow *American Historical Association*. *E.g.*, *Jud. Watch*, 845 F. Supp. 2d at 298; *Doyle v. DHS*, 331 F. Supp. 3d 27, 65 (S.D.N.Y. 2018) ("[J]udicial review for compliance with the PRA extends only to guidelines that categorize materials as presidential records, such that by doing so, an agency may run afoul of the PRA's definition of 'presidential records' and, thus, treat records as presidential when they would otherwise fall within the FRA."), *aff'd*, 959 F.3d 72 (2d Cir. 2020).

In sum, the caselaw confirms at least four basic principles: (1) presidents retain a property interest in their papers after leaving office, *Nixon*, 978 F.2d at 1284; (2) the President has absolute control over "creation, management, and disposal decisions" of his presidential papers, *Armstrong I*, 924 F.2d at 290; (3) the President retains unreviewable "discretion to segregate materials as personal," *Jud. Watch*, 845 F. Supp. 2d at 297; and (4) former presidents retain a constitutional claim of executive privilege over presidential records. The PRA did not disturb these principles.

B. Executive practice confirms that the PRA did not override the proprietary character of presidential papers.

Even after Congress passed the PRA, Presidents continued to assume absolute control over their records. President Ronald Reagan signed EO 12,667 at the end of his administration, which imposed archiving and release procedures for records under the PRA. *See* Exec. Order No. 12,667, 54 Fed. Reg. 3,403 (Jan. 18, 1989). EO 12,667 preserved a former President's claim of executive privilege, providing more detailed procedures for the Archivist to resolve privilege claims. The order, for example, required the Archivist to "identify any specific materials, the disclosure of which he believes may raise a substantial question of Executive privilege," and notify

the incumbent President and former President to whom the privilege applies. *Id.* at 3,403.

President George H.W. Bush was more direct in asserting rights over his records. President Bush entered an agreement with the Archivist transferring a large portion of electronic records to the Archivist while retaining "exclusive legal control over all Presidential information, and all derivative information in whatever form, contained on the materials." *Am. Hist. Ass'n*, 876 F. Supp. at 1322-23. A district court later set aside that agreement on dubious reasoning that "the D.C. Circuit has not yet blessed." *Jud. Watch*, 845 F. Supp. 2d at 298; *see Am. Hist. Ass'n*, 876 F. Supp. at 1322. Regardless of the merits of that decision, it is beyond doubt that the Bush agreement was consistent with the longstanding principle "that presidential papers have been treated as the President's private property." *Nixon*, 978 F.2d at 1284.

In 2001, President George W. Bush enacted EO 13,233, which clarified the scope of executive privilege. Exec. Order No. 13,233, 66 Fed. Reg. 56,025 (Nov. 1, 2001). Among other things, the order required the Archivist to abide by a former President's claim of executive privilege "until the incumbent President advises the Archivist that the former President and the incumbent President agree to authorize access to the records or until so ordered by a final and nonappealable court order." *Id.* at 56,027. Because "the former President independently retains the right to assert constitutionally based privileges," former presidents had an effective veto on the disclosure of their presidential records. *Id.* at 56,026-27. President Bush framed EO 13,233 as "implementing" the PRA, but in reality, the order reclaims executive power that the PRA unconstitutionally abrogated. *Cf.* Turley, *supra*, at 671 ("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.").

In 2009, President Obama revoked EO 13,233 with his own executive order that largely reflected Reagan's order. *See* Exec. Order No. 13,489, 74 Fed. Reg. 4,669 (Jan. 21, 2009). With respect to former presidents' claims of executive privilege, EO 13,489 shifted the ultimate decision from the former President to the incumbent President. *See id.* at 4,670 ("[T]he Archivist shall abide by any instructions given him by the incumbent President or his designee unless otherwise directed by a final court order."). But the order did not vest the ultimate decision in the Archivist, nor did it discuss any of the history supporting a former President's control over his records. These practices indicate that presidents understood a continuing tradition of control over their presidential records even after Congress enacted the PRA. That presidents did not expressly disavow the PRA reflects a desire to avoid interbranch conflict and a belief that their actions were consistent with a proper interpretation of the statute.

* * *

Text, precedent, and executive practice reinforce the historical tradition. The records a President creates or receives while performing the duties of his office are

his presidential records. That test does not depend on the content of the records or whether the records are classified. The test does not change when a President leaves office. If, for example, a former President acquires *new* records after leaving office, those new records would not enjoy the same constitutional status as his presidential records acquired while in office. But the presidential records a President takes with him upon vacating the presidency are his, to do with as he pleases. The President can keep them, sell them, destroy them, or donate them, as all Presidents have done.

IV. Conclusion

The documents that a President prepares or receives during his term in office belong to him. Practice and precedent support that intuitive principle, which presidents since Washington unanimously invoked. A reading of the Presidential Records Act that fails to account for a former President's right to possess and control his records is inconsistent with the text, history, and precedent of presidential records.