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Comments

Congressional Power vis a vis the President and Presidential Papers

The concept of "separation of powers" that has emerged as a result of the framework of the Constitution denotes three separate and independent branches of government, each with its own powers that cannot be infringed upon by any other branch. However, this concept has its limits because the three branches of government must interact in order for the government to function effectively; hence, the "separation of powers" can never exist in the strictest sense. Thus, for example, the powers of the President, as head of the executive branch, will from time to time be affected by the legislative and judicial branches.

This comment will first examine the concept of separation of powers and how it has been handled by the courts, particularly

1. The term "separation of powers" is defined as follows: The governments of states and the United States are divided into three departments or branches: the legislative, which is empowered to make laws, the executive, which is required to carry out the laws, and the judicial, which is charged with interpreting the laws . . . one branch is not permitted to encroach on the domain or exercise the powers of another branch. BLACK'S LAW DICTIONARY 951-52 (6th ed. abr. 1991).

2. Article I of the Constitution defines the powers of the legislative branch; Article II defines those of the executive branch; and Article III outlines the powers of the judicial branch of government. U.S. CONST. art. I-III. The framework of the Constitution sets up a system of a limited government; that is, the distribution of authority among the branches of government gives to each branch the power to limit or expand the authority of another branch. PETER M. SHANE & HAROLD H. BRUFF, THE LAW OF PRESIDENTIAL POWER 31 (1988).

3. See Archibald Cox, Executive Privilege, 122 U. PA. L. REV. 1383, 1388 (1974) ("Interaction, not independence, has historically been characteristic of the operation of the three branches of our government").

with respect to the extent that Congress may exert power over the President. Second, it will examine the historical background with respect to the power of the President over the presidential papers. Third, this comment will analyze the effect of the Nixon administration on the issue. Fourth, it will discuss Congress' passage of the Presidential Records Act to deal with the issue. Fifth, it will examine the effect of the Reagan/Bush administrations on issues of presidential control over executive papers. Finally, this comment will conclude with an analysis of the extent to which the legislative branch may and should be able to encroach on the autonomy of the President with respect to control over the presidential papers.

I. SEPARATION OF POWERS

The concept of "separation of powers" has important implications in the area of presidential power, particularly with respect to the extent to which such power can be limited by Congress. In 1935, the Supreme Court in *Humphrey's Executor v. United States*\(^5\) asserted, "[t]he fundamental necessity of maintaining each of the three general departments . . . entirely free from the control . . . of the others . . . is hardly open to serious question. So much is implied in the very fact of the separation of the powers of these departments by the Constitution."\(^6\)

Nonetheless, *Humphrey* upheld a provision of the Federal Trade Commission Act\(^7\) that limited the President's power to remove persons appointed to the Federal Trade Commission.\(^8\) The Court determined that Congress could create an independent agency, such as the Federal Trade Commission, in which the appointees could not be removed by the President for policy reasons, but instead were removable only for cause.\(^9\) The Court supported this decision by declaring that the duties of the Federal Trade Commission were quasi-legislative and quasi-judicial, and as such wholly discon-

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   A commission is created and established, to be known as the Federal Trade Commission . . . which shall be composed of five Commissioners, who shall be appointed by the President, by and with the advice and consent of the Senate. . . . Any commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office.
9. Id. at 624.
nected from the executive branch; hence, presidential removal would threaten the powers of such department.\textsuperscript{10}

However, as a practical matter, the Court allowed Congress to create agencies which in effect could succeed in independent execution of the laws without presidential control. For instance, independent agencies are often involved in prosecuting violations of laws.\textsuperscript{11} Therefore, despite the rigid separation of powers discussion undertaken in \textit{Humphrey}, the Court has permitted Congress to limit the President's power to remove appointees involved in execution of the laws.\textsuperscript{12}

Later, the Supreme Court recognized that the President's powers could not be viewed independently of the other branches of government, and that Congress was crucial in shaping the role of the President. In \textit{Youngstown Sheet and Tube Co. v. Sawyer},\textsuperscript{13} the Supreme Court examined the scope of presidential power with respect to the legislative branch.\textsuperscript{14} In \textit{Youngstown}, the Korean conflict caused President Truman to direct the Secretary of Commerce to seize and operate the nation's steel mills when labor disputes threatened a strike.\textsuperscript{15} President Truman notified Congress of his actions after he had issued the order.\textsuperscript{16} The steel companies brought suit against the Secretary of Commerce arguing that the seizure was unconstitutional because it was not congressionally authorized.\textsuperscript{17}

In the course of its opinion, the Court discussed the power of the presidency with respect to Congress. Specifically, the Court held that the President's power to act must stem from either the Constitution or from an act of Congress.\textsuperscript{18} Finding neither to exist in this case, the Court found the seizure unconstitutional.\textsuperscript{19} In sum,

\begin{itemize}
  \item \textsuperscript{10} \textit{Id.} at 628-30. The Court distinguished these officials from presidential appointees that performed "purely executive functions" that were removable by the President at will. \textit{Id.}
  \item \textsuperscript{11} \textit{SHANE \& BRUFF}, cited at note 2, at 305. Shane \& Bruff point to the fact that the FTC has concurrent jurisdiction with the Justice Department to prosecute antitrust violations. \textit{Id.}
  \item \textsuperscript{12} \textit{Id.}
  \item \textsuperscript{13} 343 U.S. 579 (1952).
  \item \textsuperscript{14} \textit{Youngstown}, 343 U.S. at 582.
  \item \textsuperscript{15} \textit{Id.} at 583.
  \item \textsuperscript{16} \textit{Id.}
  \item \textsuperscript{17} \textit{Id.}
  \item \textsuperscript{18} \textit{Id.} at 585.
  \item \textsuperscript{19} \textit{Youngstown}, 343 U.S at 585-89. Justice Jackson, in a concurring opinion, outlined the relationship of presidential power with respect to Congress. \textit{Id.} at 635 (Jackson, J., concurring). Jackson's analysis was as follows:
  \item When the President acts pursuant to an express or implied authorization of Con-
the Court found that the President could not exercise any legislative power without Congressional approval; furthermore, the President's power to act, in the area of legislation or otherwise, was largely defined with respect to the powers that Congress could lawfully exercise and the powers that Congress had chosen to delegate to the President.20

Although the Court in Youngstown had recognized that the President's powers could not be viewed independently of Congressional powers, the Court has consistently guarded against the usurpation by Congress of powers which the Constitution has vested in the President.21 For instance, in Immigration and Naturalization Services v. Chadha,22 the Court struck down a provision of the Immigration and Nationality Act23 which gave to either House of Congress the power to veto a deportation decision of the Immigration and Naturalization Service.24 The Court asserted that Congress could not legislate and take away the President's constitutionally authorized veto power; hence, Congress' only recourse was to pass a law which would be subject to the presidential veto.25

20. Id. at 585-89.

(a) [t]he Attorney General may, in his discretion, suspend deportation and adjust the status to that of an alien lawfully admitted for permanent residence, in the case of an alien who . . .

(1) is deportable under any law of the United States . . . and proves that . . . he was and is a person of good moral character; and is a person whose deportation would . . . result in extreme hardship.

II. HISTORICAL DEVELOPMENT

As the above analysis reveals, as long as Congress does not attempt to usurp power that was vested in the President by the Constitution, Congress can regulate or otherwise affect the President's overt exercise of powers. This general approach historically defined the interplay between the President and Congress with respect to control over the President's actions. However, traditionally, an exception has existed where Congress attempted to interfere with the President's autonomy and internal decisionmaking processes. This exception generally has been referred to as the executive privilege. The executive branch had frequently invoked executive privilege in cases in which Congress or the judiciary had attempted to obtain documents concerning communications within the executive branch.

The Constitution does not provide for an executive privilege to withhold information from Congress or the judiciary; the concept arose from a strict theory of separation of powers. The intent of the Framers of the Constitution with respect to executive privilege is not entirely clear. On the one hand, there were those that argued that such privilege did not exist. On the other hand, some Presidents believed that the President had the power to withhold executive papers from Congress and did in fact withhold documents. Indeed, such Presidents believed that their papers were their personal property.

The concept of private ownership rendered difficult the preservation of presidential papers. For instance, many papers were ei-
ther destroyed by Presidents, bequeathed to heirs, or destroyed by the Presidents’ heirs. A dramatic increase in the number of records preserved occurred when President Franklin D. Roosevelt established the presidential libraries, consisting of depositories for the President’s materials upon completion of the President’s term or terms in office. However, these libraries did not have the effect of altering the private ownership principle because the President had discretion over whether to deposit any papers therein.

Consequently, the private ownership principle was consistent with the presidential withholding of documents. Although requests for documents were often complied with by the Presidents, at times various Presidents chose to withhold disclosure to Congress, to the judiciary, or to the public in order to protect the confidentiality of internal communications. However, most of these decisions could be justified by reasons other than preserving the President’s need for privacy. Yet, President Jackson, in refusing to deliver to the Senate papers regarding the removal of money from the Bank of the United States, wrote as follows:

“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.”

Thus, it was apparent that claims of executive privilege had relied in some part on the President’s need for privacy with respect to internal communications. This traditional approach recognized that the President must be free to discuss and deliberate in private without fear that the communications or decisionmaking processes would later be subjected to scrutiny.

35. Id. at 412-13. For instance, Abraham Lincoln’s son Robert was once found destroying Lincoln’s Civil War correspondence. Id. at 412.
36. Id. at 414.
37. Id. at 415.
38. Cox, cited at note 3, at 1396.
40. Cox, cited at note 3, at 1404. For example, in some instances Congress had explicitly given the President the discretion to decide whether or not to deliver the documents. Id. at 1397. Other instances of non-disclosure involved presidential challenges to the particular body to deal with the subject of the requested documents. Id. at 1398.
41. Id. at 1403 (citation omitted).
42. Id.
The Nixon administration had a negative impact on presidential privilege for the necessities of the times mandated that the tension between the privilege and need for disclosure be resolved in favor of the latter.\textsuperscript{43} The Nixon administration and the Watergate inci-


The FRA requires that “[t]he head of each [f]ederal agency make and preserve records containing adequate and proper documentation of the . . . transactions of the agency.” 44 U.S.C. § 3101. Furthermore, it is the duty of each agency head to “establish and maintain an active, continuing program for the economical and efficient management of the records of the agency,” 44 U.S.C. § 3102, and to “establish safeguards against the removal or loss of records.” 44 U.S.C. § 3105.

In addition, the FRA orders the archivist to provide guidelines to federal agencies and promulgate standards and procedures which may be followed; furthermore, the archivist has a duty to inspect the record management programs of the federal agencies. 44 U.S.C. § 2904. If it is discovered that any federal agency practice was in violation of the FRA, the archivist must inform the head of the agency in writing of the violation and make recommendations for corrective measures. 44 U.S.C. § 2115. If the corrective measures are not taken, the archivist must notify the President and Congress of the violation. 44 U.S.C. § 2115.

The FRA also provides that no federal record can be alienated or destroyed except as authorized by the Act. 44 U.S.C. § 3314. A “record” is defined under the Act as follows: “[A]ll books, papers, maps, photographs, machine readable materials, or other documentary materials . . . preserved or appropriate for preservation by that agency . . . as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the Government or because of the informational value of the data in them.” 44 U.S.C. § 3301.

Pursuant to the FRA, records can be disposed of if, upon request of the agency head, the archivist believes that they lack “sufficient administrative, legal, research, or other value to warrant their continued preservation by the Government.” 44 U.S.C. § 3303(a).

Accordingly, the FRA regulated the creation, maintenance, preservation, and disposal of federal records. However, the Act did not place ownership of the records in the United States. Further, though the FRA applied to the entire Executive Branch, the FRA apparently did not govern access to Presidential materials for it regulated only agency heads. Indeed, in enacting the FRA Congress’ concern was not with the protection of executive privilege; instead, the FRA represented a concern for the maintenance of an orderly system of records management in the Executive Branch. Bretschler, cited at note 39, at 1488-89.

Furthermore, in Kissinger v. Reporters Comm. for Freedom of the Press, 445 U.S. 136 (1980), the Supreme Court determined that the FRA did not confer a private right of action on private plaintiffs, but rather that Congress’ intention was that the FRA be enforced through a system of administrative standards. Kissinger, 445 U.S. at 149. For instance, the FRA provides that the agency heads and the archivist must request the Attorney General to initiate an action to recover records removed from the agency in violation of the Act. Id. at 149; 44 U.S.C. § 3106.

Another major regulation of executive materials was had through the Freedom of Infor-
dent handed to the Supreme Court an opportunity to explore the doctrine of executive privilege and its effect on presidential withholding of documents. In *United States v. Nixon*, the Court denied President Nixon’s claim that executive privilege precluded the President from being amenable to judicial process. Here, President Nixon was named an unindicted co-conspirator in the Watergate incident by a grand jury of the United States District Court for the District of Columbia. Subsequently, the special prosecutor had a subpoena issued to Nixon requiring that he produce certain tapes, papers, and other writings relating to meetings between Nixon and his advisors. After releasing some of the requested information, Nixon filed a motion to quash the subpoena based on a claim of executive privilege.

The district court denied the motion to quash, holding that the judiciary had the final word with respect to claims of executive privilege. The court issued an order for *in camera* inspection of the subpoenaed material. Nixon appealed to the United States Court of Appeals for the District of Columbia Circuit. The special prosecutor and Nixon then each filed a petition to the Supreme Court for a writ of certiorari before judgment, both of which were granted.

On appeal, Nixon argued that the subpoena should be quashed because the separation of powers doctrine prohibited judicial review of the President’s claim of executive privilege, and that, for purposes of constitutional law, executive privilege should prevail over the subpoena. After finding that the controversy was indeed susceptible to judicial review, the Court examined Nixon’s claim of

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46. *Id.* at 687.
47. *Id.* at 688.
48. *Id.* Nixon publicly released edited transcripts of 43 conversations in which portions of 20 of the subpoenaed documents were included. *Id.*
49. *Id.*
51. *Id.* at 714.
52. *Id.* at 689-90.
53. *Id.* at 690.
54. *Id.* at 703.
55. *Nixon*, 418 U.S. at 703.
an absolute privilege and the need to protect the communications between Presidents and their advisors. The Court stated that the privilege of presidential confidentiality arose from the supremacy of the branches of government within their own area of constitutional duties; hence, the protection of the President’s confidentiality had constitutional underpinnings. Consequently, the Court asserted that there was a presumptive privilege in favor of presidential communications. The Court based this assertion on the expectation of a President to the confidentiality of conversations and correspondence and on the deference accorded to the privacy of all citizens.

However, the Court did not rule in favor of the President’s “presumptive privilege.” Instead, the Court held that “neither the doctrine of separation of powers, nor the need for confidentiality of high-level communications, without more, can sustain an absolute, unqualified Presidential privilege . . . .” The Court further stated that absent a claim of a need to protect military, diplomatic, or national security, the interest in confidentiality alone was not hindered by an in camera inspection of the documents. The Court weighed the President’s need for confidentiality against the need for fair administration of criminal laws, and found that a generalized interest in confidentiality alone could not outweigh the need for fair adjudication of a criminal case. Hence, the Court ordered that the President comply with the subpoena, but cautioned that, with respect to an in camera inspection of presidential

56. Id. at 704-05.
57. Id. at 705-06.
58. Id. at 708.
59. Id. Furthermore, the Court reasoned that a President must be free to have open and free discussions with advisors in private so that policies may be shaped without hindrance. Id.
60. Nixon, 418 U.S. at 706.
61. Id. The Court further asserted that construing Article II powers as providing to the President an absolute, unqualified privilege against enforcement of the criminal laws would do violence to the notion of a constitutionally “workable government” and upset the role of the Judiciary as provided by Article III of the Constitution. Id. at 707.
62. The Court noted that although the President’s interest in confidential communications was not explicitly set forth in the Constitution, it is related to the effective function of the President in carrying out the duties of the office, and as such had its roots in the Constitution. Id. at 705-06.
63. Id. at 712-13. The Court examined the interests in the administration of justice in light of the Fifth and Sixth Amendments and found that the constitutional need for production of evidence in a criminal trial was essential. Id. at 711-13. Furthermore, the Court reasoned that, while the President’s interest in confidentiality was only general, the need for production of evidence at a particular trial was more specific and crucial. Id. at 713.
material, the district court had a heavy burden of ensuring that any evidence not relevant to the prosecution was not released.\textsuperscript{64}

The Court in \textit{United States v. Nixon} struck a fair balance between the need for presidential privacy and the need for disclosure. The Court recognized that a President necessarily demands a high level of confidentiality in order for decisionmaking to be effective.\textsuperscript{65} The Court appeared to place this demand within the realm of constitutional protection.\textsuperscript{66} However, it also recognized that some fundamental interests, especially those rooted in the Constitution, must prevail over a generalized interest in privacy absent more compelling circumstances.\textsuperscript{67} The fact that this was a \textit{criminal case} involving the President may have influenced the Court to ensure that the subpoena did issue, for the public's interest in learning of any possible criminal activities of its elected leader was indeed compelling. Even so, the Court's decision represented a fair and reasonable method of examining a President's claim of executive privilege.\textsuperscript{68}

Consequently, the principles underlying the decision in \textit{United States v. Nixon} were further discussed in a later case involving Congressional regulation of presidential papers. In \textit{Nixon v. Administrator of General Services},\textsuperscript{69} the Supreme Court examined the constitutionality of the Presidential Recordings and Materials Preservation Act ("PRMPA").\textsuperscript{70}

\begin{itemize}
\item \textsuperscript{64} \textit{Id.} at 714-15.
\item \textsuperscript{65} \textit{Nixon}, 418 U.S. at 708.
\item \textsuperscript{66} See \textit{id.} at 705-06.
\item \textsuperscript{67} \textit{Id.} at 706.
\item \textsuperscript{68} Interestingly, in 1948 Congressman Richard M. Nixon, addressing the issue of executive privilege, asserted as follows:
That would mean that the President could have arbitrarily issued an Executive order . . . denying the Congress of the United States information it needed to conduct an investigation of the executive department and the Congress would have no right to question his decision.
Any such order of the President can be questioned by the Congress as to whether or not that order is justified . . . .
Cox, cited at note 3, at 1396 (citation omitted).
\item \textsuperscript{69} 433 U.S. 425 (1977).
§ 101. (a) Notwithstanding any other law or any agreement or understanding . . . any Federal employee in possession shall deliver, and the Archivist of the United States . . . shall receive, obtain, or retain, complete possession and control of all original tape recordings of conversations which were recorded . . . and which—
(1) involve former President Richard M. Nixon or other individuals who, at the time of the conversation, were employed by the Federal Government;
\end{itemize}
The PRMPA was passed in an effort to abrogate the Nixon-Sampson agreement. The general purpose of the PRMPA was to keep all materials pertaining to the Nixon administration in the custody of the archivist of the United States. Specifically, the PRMPA provided that complete control and possession of papers, documents and other objects and materials that constituted historical materials would be in the United States. Additionally, the PRMPA directed that the administrator take into account the need to give to Nixon tape recordings and other materials not pertaining to the interest in providing the public with the truth about Watergate, along with those materials not of historic significance.

(b)(1) Notwithstanding any other law or any other agreement . . . the Archivist shall receive, retain, or make reasonable efforts to obtain . . . the Presidential historical materials of Richard M. Nixon . . .

§ 102. (a) None of the tape recordings or other materials . . . shall be destroyed . . . except as hereafter may be provided by law.

(b) Notwithstanding any other provision of this title . . . the tape recordings and other materials . . . shall, immediately . . . be made available, subject to any rights, defenses, or privileges which the Federal Government or any other person may invoke, for use in any judicial proceeding . . .


The PRMPA represented a Congressional response to President Nixon's intention to have the millions of documents and hundreds of tape recordings that had been accumulated while in office shipped to him in California. Nixon v. GSA, 433 U.S. at 430.

71. Id. at 432. Nixon's intention to retain his papers was illustrated by the Nixon-Sampson agreement, in which Nixon and the Administrator of General Services, Arthur B. Sampson, agreed that Nixon was to be vested of all legal and equitable title to the materials. Id. at 431. Further, the agreement recited that the materials were to be deposited near Nixon's home in California at a government facility. Id. The documents were to be held in the facility for three years, subject to Nixon's right to reproduce any materials. Id. at 432. At the end of the term, Nixon was to donate the documents to the United States but could exercise the right to withdraw any document without formality for any purpose as he saw fit. Id. The tape recordings, on the other hand, were to be donated to the United States after five years; however, Nixon retained the right to direct that the administrator destroy any tapes. Id. Moreover, the tapes were to be destroyed at the time of Nixon's death or on September 1, 1984, whichever came first. Id.


73. 44 U.S.C.A. § 2111 note. Further, the PRMPA prohibited destruction of such materials, made them available for court subpoena, afforded Nixon access to any materials for any purpose consistent with the PRMPA, and directed the administrator to promulgate regulations governing access to the materials. 44 U.S.C.A. § 2111 note.

74. 44 U.S.C.A. § 2111 note. Specifically, § 104 of the PRMPA lists the factors which the Administrator must take into account in promulgating the regulations as follows:

(1) the need to provide the public with the full truth, at the earliest reasonable date, of the abuses of governmental power popularly identified under the generic term 'Watergate';
In addition, judicial review by the United States District Court for the District of Columbia was provided for under the PRMPA.  

Consequently, Nixon filed an action in the District Court for the District of Columbia challenging the constitutionality of the PRMPA and seeking an injunction against its enforcement. The district court determined that the PRMPA did not violate the Constitution and, therefore, dismissed the action. On writ of certiorari to the Supreme Court, Nixon argued that the PRMPA violated principles of separation of powers and that it offended the presumption of confidentiality of presidential communications set forth in United States v. Nixon.  

The Court, in analyzing the PRMPA, determined that it did not violate principles of separation of powers. First, the Court rejected Nixon's claim that the congressional delegation of decision-making power to an executive officer related to disclosure of presidential materials constituted an interference with executive branch business. Instead, the Court opined that because control of the materials was given to the Administrator of General Services and the career archivists, who were all executive officials appointed by

(2) the need to make such recordings and materials available for use in judicial proceedings;
(3) the need to prevent general access, except in accordance with appropriate procedures established for use in judicial proceedings to information relating to the Nation's security;
(4) the need to protect every individual's right to a fair and impartial trial;
(5) the need to protect any party's opportunity to assert any legally or constitutionally based right or privilege which would prevent or otherwise limit access to such recordings and materials;
(6) the need to provide public access to those materials which have general historical significance, and which are not likely to be related to the need described in paragraph (1); and
(7) 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 the need described in paragraph (1) and are not otherwise of general historical significance.

75. 44 U.S.C.A. § 2111 note.
76. Nixon v. GSA, 433 U.S. at 429-30. The PRMPA was signed by President Ford in December of 1974, four months after Nixon had resigned as President. Id. at 429. Nixon commenced this action the day after Ford signed the PRMPA. Id. Nixon challenged the constitutionality of the PRMPA based on principles of separation of powers. Id. at 440.
77. Id. at 430.
78. Id. at 440. In addition to the separation of powers and privilege claims, Nixon also argued that the PRMPA offended his privacy interest, his First Amendment association rights, and the Bill of Attainder Clause. Id. at 429. However, the Court determined that these additional arguments were without merit. Id. at 455-84.
79. Id. at 440.
80. Id. at 441.
the President, legislative non-interference was demonstrated.\(^{81}\)

Furthermore, the Court asserted that Nixon's argument represented an "'archaic view of the separation of powers as requiring three airtight departments of government'."\(^{82}\) Instead, the proper inquiry in analyzing separation of powers issues was whether the PRMPA deterred the executive branch from accomplishing its proper functions as set forth in the Constitution.\(^{83}\) The Court concluded that the PRMPA contained appropriate safeguards to protect executive branch functions.\(^{84}\) Indeed, the fact that the materials remained in the control of the executive branch and could be released only absent an applicable executive privilege was of particular significance.\(^{85}\)

The Court also rejected Nixon's assertion of presidential privilege with respect to the materials.\(^{86}\) The Court, relying on the analysis set forth in *United States v. Nixon*,\(^ {87}\) recognized that a President, and even a former President, may assert a privilege with respect to communications made in performance of official responsibilities and in the process of shaping policies and making decisions.\(^{88}\)

Notwithstanding, the Court contended that the screening of materials by archivists presented a very limited interference with the need for confidentiality in presidential decisionmaking; indeed, the archivists had historically reviewed presidential materials on a confidential basis for purposes of maintaining presidential libraries.\(^{89}\) Furthermore, consistent with the requirements of *United States v. Nixon*, the Court concluded that intrusions into executive

\(^{81}\) Nixon v. GSA, 433 U.S. at 441.

\(^{82}\) Id. at 443 (citing Nixon v. GSA, 408 F. Supp. 321, 342 (D.C. Cir. 1976)).

\(^{83}\) Id. at 443.

\(^{84}\) Id. at 444.

\(^{85}\) Id. The Court also focused on the fact that the materials were available for use in judicial proceedings subject to a valid claim of executive privilege, that the materials which were purely private were to be returned to Nixon, and that the PRMPA did not make any materials available to Congress for inspection. Id.

\(^{86}\) Nixon v. GSA, 433 U.S. at 449-50.


\(^{88}\) Nixon v. GSA, 433 U.S. at 449. However, the Court determined that its review of executive privilege was limited to the process by which the President's materials would be screened by the archivists, for pursuant to the PRMPA, any subsequent disclosure to the public would be subject to any asserted privilege of the President. Id. at 450. The Court also noted that purely private materials would be protected and returned to the President. Id.

\(^{89}\) Id. at 451-52. The Court noted that in light of this historical practice, executive officials should recognize that their communications may be subject to examination by the archivists. Id. at 452. Further, the Court noted that the archivists "'record for discretion in handling confidential material is unblemished.'" Id. (citation omitted).
confidentiality were justified by substantial government and public interests. Thus, the Court concluded that the PRMPA did not violate any principle of executive privilege and was therefore constitutional.

Interestingly, the Court in *Nixon v. Administrator of General Services* did not appear to attach the same weight to the President's need for confidentiality in communications that it did in *United States v. Nixon*. The Court instead opined that "[a]n absolute barrier to all outside disclosure is not practically or constitutionally necessary . . . . [T]here has never been an expectation that the confidences of the Executive Office are absolute and unyielding." The Court based this assertion on the fact that former Presidents had deposited papers in presidential libraries for preservation and disclosure. Further, the Court stated the expectation of the confidentiality of presidential communications had consistently been limited in the past and is subject to erosion after a President leaves office. Accordingly, the Court concluded that claims of executive privilege by themselves must yield to congressional purposes of preservation of materials for important government and historical reasons.

Although the Court in *Nixon v. Administrator of General Services* did recognize that Congress may regulate the President so long as it does not usurp any of the President's constitutional power, it did not place as much importance on principles of executive privilege as it had in *United States v. Nixon*. Indeed, the Court rendered it difficult to ascertain exactly when presidential confidentiality would prevail over congressional demands for disclosure. Of course, Congress will almost always have an interest in preservation of presidential materials. The Court indicated that this interest will overcome the President's need for confidential-

90. *Id.* Among these interests were the need for procedures to preserve materials for historical and governmental purposes, the need to restore public confidence in the political process, and the need for the materials in civil and criminal litigation. *Id.* at 452-53.
91. *Id.* at 455. Nixon continued to mount challenges to the taking of his materials pursuant to the PRMPA. See, e.g., *Nixon v. United States*, 782 F. Supp. 634 (D.C. Cir. 1991), in which it was determined that Nixon did not have legal title to his papers, but instead, as President, held them as trustee for the people of the United States. *Id.* at 643.
93. *Id.*
94. *Id.* at 451.
95. *Id.* at 454.
96. *Id.* at 443.
97. Compare note 92 and accompanying text with note 60 and accompanying text.
ity. Indeed, the Court suggested that unless the President can invoke a specific privilege, such as the need to protect military secrets, the bare interest in confidentiality will never be sufficient to override Congress’ power to regulate presidential materials.

This analysis, if taken to its extreme, would render constitutional any regulation enacted by Congress to control access to virtually all of the President’s materials, excepting those materials to which the President may invoke a specific need for a privilege. Thus, presidential decisionmaking could be hindered through the President’s knowledge that any communications of historical significance may be subject to regulation and disclosure.

IV. THE PRESIDENTIAL RECORDS ACT

Although the Supreme Court provided answers to questions regarding control over Nixon’s records, the Nixon administration left Congress with the recognition that the United States lacked a clear policy with respect to the papers of the President. The PRMPA applied only to Nixon, and the question of ownership of presidential documents remained open.

In 1978, Congress attempted to resolve the issues surrounding executive privilege and the ownership of presidential materials through enactment of the Presidential Records Act (“PRA”). The House Report accompanying the PRA stated the purposes of the Act as follows: “(1) to establish the public ownership of records created by future Presidents . . . in the course of discharging their official duties; and (2) to establish procedures governing the preservation and public availability of these records at the end of a Presidential administration.” The PRA provides that the United States retains complete ownership, possession, and control of presidential records.

Consequently, during the term in office, the President has the duty to create and manage adequate records ensuring that “the activities, deliberations, decisions, and policies that reflect the per-

98. Nixon v. GSA, 433 U.S. at 450.
99. Id.
100. McGowan, cited at note 33, at 431.
101. Id. at 426.
104. 44 U.S.C. § 2202. Vice-presidential records are treated in the same manner as presidential records for purposes of the PRA. 44 U.S.C § 2207.
formance of his constitutional, statutory, or other official or ceremonial duties are adequately documented . . . .”

Furthermore, the PRA requires that all documentary materials produced or received by the President, the President’s staff, or the President’s assistants be characterized and maintained as either presidential or personal records. 106

Additionally, the PRA provides that the President can dispose of any records no longer of historical, evidentiary, administrative or informational value. 107 The only restriction placed on the President is the duty to obtain, in writing, the archivist’s108 views concerning the intended disposal. 109 If the archivist notifies the President that Congress will not be consulted regarding disposal of the records, the President can then dispose of the records immediately. 110 If, however, the archivist believes the records to be of significant interest, Congress will be notified and the President must submit disposal schedules to Congress and wait sixty days before disposal. 111 However, neither the archivist nor Congress has a veto power over the decision of the President to dispose of the records. 112 Congress does, however, have the power to pass legisla-

105. 44 U.S.C. § 2203(a).
106. 44 U.S.C. § 2203(b). “Documentary material” is defined under the PRA to be “all books, correspondence, memorandums, documents, papers, pamphlets, works of art, models, pictures, photographs, plats, maps, films, motion pictures . . . .” 44 U.S.C. § 2201(1).

Presidential records include “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.” 44 U.S.C. § 2201(2)(A).

Personal records include “all documentary materials . . . of a purely private or nonpublic character” such as:

(a) diaries, journals, or other personal notes . . . not prepared or utilized for . . . transacting Government business;

(b) materials relating to private political associations . . . having no relation to . . . the carrying out of . . . duties . . . ; and

(c) materials relating exclusively to the President’s own election to the office of the Presidency . . . which have no relation to . . . the carrying out of . . . duties of the President.

44 U.S.C. § 2201(3).

107. 44 U.S.C. § 2203(c).

108. The Archivist of the United States is an executive official who is appointed by the President with the advice and consent of the Senate and may be removed by the President. 44 U.S.C. § 2103(a). The President must communicate the reasons for such removal to Congress. 44 U.S.C. § 2103(a).


110. 44 U.S.C. § 2203(c).

111. 44 U.S.C. §§ 2203(d)-(e).

tion to prohibit the disposal of certain records.\footnote{113}{See H.R. Rep. No. 1487 at 13.}

At the conclusion of the President's term or terms in office, the duty to maintain, preserve, and provide access to presidential records shifts to the Archivist of the United States,\footnote{114}{See note 108 and accompanying text. Congress, in enacting the PRA, did not want to place any limitations on the authority of the President to remove the Archivist so that actual control of presidential papers would remain within the executive branch. H.R. Rep. No. 1487 at 2.} whose responsibility it is to ensure that all such records are deposited in an archival facility operated by the United States.\footnote{115}{44 U.S.C. §§ 2203(f)(1)-(2).} The archivist is, however, authorized to dispose of any records that had been examined and determined to lack any administrative, historical, or informational value.\footnote{116}{44 U.S.C. § 2203(f)(3).}

The PRA also gives to the archivist the duty to make presidential records available to the public as quickly and as completely as possible.\footnote{117}{44 U.S.C. § 2204.} Notwithstanding this duty, the PRA places restrictions on public access to presidential records. For example, the President can specify durations, not to exceed twelve years, in which access to certain documents may be withheld.\footnote{118}{44 U.S.C. § 2203(f)(3).} Full discretion is given to the archivist to restrict any records, and such decisions are not subject to judicial review.\footnote{119}{44 U.S.C. § 2203(f)(1).} Furthermore, the PRA neither expressly provides for judicial review of the President or archivist nor confers any private right of action; hence, the question remains as to whether judicial review may have been impliedly precluded by the PRA.\footnote{120}{Bretscher, cited at note 39, at 1486-87.}

Congress enacted the PRA with the decision in \textit{Nixon v. Administrator of General Services} in mind.\footnote{121}{H.R. Rep. No. 14876 at 6-7.} Specifically, Congress wanted to ensure that it did not encroach on the President's ability...
to perform the duties assigned by the Constitution.\textsuperscript{122} Thus, total control of the recordkeeping system was left in the hands of the executive branch through the President and the archivist, a purely executive official removable by the President.\textsuperscript{123} Congress also left the President with discretion in the preservation or disposal of records and allowed the President to restrict access for twelve years.\textsuperscript{124} Furthermore, Congress did not provide for judicial review of the PRA and left open the question of whether it was impliedly precluded.\textsuperscript{125}

By including all of these safeguards, Congress seemed to recognize the need to protect the confidentiality of the President's communications. However, Congress, in relying solely on the decision in \textit{Nixon v. Administrator of General Services}, in reality did not attach significance to the traditional deference that was accorded to a President's claim of confidentiality; instead, it concentrated only on non-interference with the President in carrying out the duties which were constitutionally delegated to the President. Through the PRA, Congress may have effectively placed a barrier on a President's ability to communicate freely without the realization that someday, whether at the conclusion of the presidential term or twelve years in the future, the President's actions will be subject to public disclosure. This very possibly could have a chilling effect on a President concerned with maintaining a favorable image in history.

Nonetheless, because questions of judicial review were left open,\textsuperscript{126} and the PRA may not be enforceable against the President, the President may be able to dispose of any information the President wishes not to disclose. If this is true, then the PRA may have left the President with substantial discretion so as not to impinge on presidential decisionmaking processes. As the discussion that follows will reveal, this was a crucial determination that the courts were forced to examine after passage of the PRA.

\begin{footnotes}
\item[122] \textit{Id.} at 13.
\item[123] \textit{Id.}
\item[124] 44 U.S.C. § 2204(a).
\item[125] See note 120 and accompanying text.
\item[126] See note 120.
\end{footnotes}
V. THE EFFECT OF THE REAGAN AND BUSH ADMINISTRATIONS

The PRA was effective on January 20, 1981;\(^1\) thus Ronald Reagan was the first President to be affected by its terms. In *Armstrong v. Bush*,\(^2\) Reagan's alleged involvement in the selling of arms to Iran in order to subsidize the Contras in Nicaragua ("Iran-Contra") provided the courts with the opportunity to answer questions of judicial review and determine the effect that the PRA had upon the President and executive privilege.

President Reagan, at the conclusion of his administration, began preparing to destroy information contained on the PROFS system, the inter-office computer communications system used by employees within the Executive Office of the President ("EOP").\(^3\) The PROFS system became significant during the congressional investigation of Iran-Contra, for it appeared that messages which discussed the scheme were sent via PROFS by certain participants.\(^4\) When journalist Scott Armstrong, the National Security Archive, and other private citizens and entities ("plaintiffs") heard of the proposed disposal, they filed suit in the District Court for the District of Columbia against then President Bush as head of the EOP, the National Security Council ("NSC") and against the Archivist of the United States ("defendants") seeking declaratory and injunctive relief under the Freedom of Information Act ("FOIA"),\(^5\) the PRA, and the FRA.\(^6\)

The plaintiffs alleged that information contained on the PROFS system constituted either agency records, thus falling under the FOIA or the FRA, or presidential records, thus governed by the PRA.\(^7\) The plaintiffs also contended that the NSC's recordkeeping procedures were "arbitrary and capricious"; thus, the archivist had shirked his responsibilities under the PRA and FRA to ensure that the PROFS system information was properly managed.\(^8\)

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129. *Armstrong*, 721 F. Supp. at 344-45. PROFS, a computer system marketed by IBM, allowed for users of the system to send three types of messages to other users: "(1) short 'notes' or mail; (2) larger documents, which the recipient could revise; and (3) individual calendars." *Id.* at 345.

130. *Id.* at 345 n.1.


132. *Armstrong*, 721 F. Supp. at 347; *See also Armstrong*, 810 F. Supp. at 337.


134. *Id.*. The procedures for preservation of the PROFS information by the EOP were limited. *Id.* at 345. For example, the NSC made backup tapes of information that had not
Therefore, plaintiffs sought to enjoin the destruction of the PROFS information and to compel the President and the NSC to classify the information under either the FRA or PRA.\(^{135}\)

The defendants moved to dismiss the action or, in the alternative, for summary judgment.\(^{136}\) However, they did not raise a challenge to the constitutionality of the PRA itself;\(^{137}\) instead, the defendants argued that implying a private cause of action into the PRA or the FRA violated the principles of separation of powers.\(^{138}\) Further, the defendants emphasized that the legislative history of the PRA demonstrated Congress' concern with not interfering with presidential performance of constitutional duties, as set forth in \textit{Nixon v. Administrator of General Services}.\(^{139}\)

Accordingly, the defendants contended that, to further this aim, Congress ensured that control of the records be vested in the executive branch through the archivist.\(^{140}\) Therefore, judicial review of the PRA would result in an improper transfer of control to the judiciary and would violate separation of powers.\(^{141}\) Moreover, the defendants asserted that even if a private cause of action could be implied, the President's actions demonstrated complete compliance; further, his actions were unreviewable because the actions were committed to the President's discretion under the Administrative Procedures Act ("APA").\(^{142}\) Hence, the defendants claimed that, because they were discretionary, these actions constituted the unreviewable exercise of political authority and represented purely political questions.\(^{143}\)

The lower court denied the defendants' motions to dismiss and already been deleted by the senders or receivers of the information. \textit{Id.} The backup tapes were kept for only two weeks before disposal. \textit{Id.} Other entities in the EOP kept backup tapes for four to six weeks before disposal. \textit{Id.}

135. \textit{Id.}
136. \textit{Id.} at 348.
137. \textit{Id.} at 353 n.16.
139. \textit{Id.} at 350.
140. \textit{Id.}
141. \textit{Id.} In addition, the defendants urged that the information on the PROFS system did not constitute a "record" for purposes of the PRA or FRA. \textit{Id.} at 348.

Although the plaintiffs brought claims pursuant to the FOIA, the court did not address these claims because it found that the FOIA constituted a "disclosure statute, and a disclosure statute only" and as such it imposed no obligations for record maintenance. \textit{Id.} at 345 (citing \textit{Kissinger}, 445 U.S. at 152).

143. \textit{Armstrong}, 721 F. Supp. at 351.
for summary judgment.\textsuperscript{144} The court disagreed that judicial review of the PRA constituted the judicial usurpation of executive power.\textsuperscript{145} Instead, the court reasoned that judicial review only ensured that the President complied with the PRA and did not alter the control vested in the archivist or the executive branch.\textsuperscript{146}

Moreover, the court determined that the PRA, by its terms, was not discretionary; indeed, the language of the PRA was mandatory.\textsuperscript{147} Accordingly, the court contended that although the President was given some discretion over how to manage the presidential records, the PRA nevertheless imposed an affirmative duty on the President to ensure that records were maintained.\textsuperscript{148} The court also concluded that the presidential compliance with the PRA did not constitute a political question.\textsuperscript{149} Thus, the court found that the PRA and the FRA were enforceable through the APA.\textsuperscript{150}

The defendants appealed to the United States Court of Appeals for the District of Columbia Circuit, and asserted that the plaintiffs, as private parties, lacked standing to assert claims under the PRA or FRA.\textsuperscript{151} Furthermore, the defendants claimed that the President’s actions were not reviewable under the PRA or FRA because the PRA precluded judicial review of presidential actions and the FRA precluded judicial review of agency actions.\textsuperscript{152}

The court, affirming the lower court’s decision not to grant summary judgment, first determined that the plaintiffs had standing

\begin{itemize}
\item[144.] Id. at 354-55.
\item[145.] Id. at 350.
\item[146.] Id.
\item[147.] Id. at 352 (citing 44 U.S.C. § 2203(a)). Specifically, the court said that § 2203(a) requires that “through the implementation of records management controls . . . the President shall document the performance of his duties” and assure that such documents “[a]re maintained as Presidential records.” Id.
\item[148.] Armstrong, 721 F. Supp. at 353.
\item[149.] Id. Specifically, the court found significant the fact that ownership of the records was transferred to the United States in determining that the President’s actions under the PRA would not constitute a political question. Id. Additionally, the court denied that judicial review under the PRA would display a lack of respect for the President or that it was impossible for want of judicially manageable standards. Id. (citing Baker v. Carr, 369 U.S. 208 (1962)).
\item[150.] Id. at 354. The court concluded that the FRA was also enforceable through the APA, although it concentrated its discussion solely on the PRA. Id. at 351-54. In addition, the Court found that there were genuine issues of fact as to whether the PROFS information constituted a “record” for purposes of the PRA and FRA and whether the NSC’s recordkeeping procedures were “arbitrary and capricious.” Id. at 353-54.
\item[152.] Armstrong, 924 F.2d at 287.
\end{itemize}
because they were in the "zone of interests" to be protected by the statutes.\textsuperscript{153} Specifically, the court decided that the intention of Congress in enacting both the PRA and the FRA was to secure to private researchers access to the records and history of the United States government.\textsuperscript{154}

However, the court reversed the lower court's determination that the PRA did not preclude judicial review.\textsuperscript{155} The court opined that the intention of Congress in enacting the PRA was to balance two competing goals: (1) to ensure the preservation and public ownership of presidential materials, and (2) to effectuate a policy of minimal interference with the President's day-to-day operations and retain executive control of the materials.\textsuperscript{156} Thus, the court reasoned that Congress impliedly precluded judicial review so that the President would be required to maintain the records, but that implementation of the requirement would be left to the President's own discretion.\textsuperscript{157} Furthermore, the court reversed the lower court's determination that the APA authorized judicial review of the President's actions under the PRA, because the President was not an "agency" for purposes of the APA; accordingly, the court remanded the case to the district court.\textsuperscript{158}

\begin{itemize}
\item \textsuperscript{153} Id.
\item \textsuperscript{154} Id.
\item \textsuperscript{155} Id. at 290.
\item \textsuperscript{156} Id.
\item \textsuperscript{157} Armstrong, 924 F.2d at 290. Thus, the court asserted: "[i]t is difficult to conclude that Congress intended to allow courts, at the behest of private citizens, to rule on the adequacy of the President's records management practices or overrule his record creation, management, and disposal decisions." Id. (citation omitted).

Consequently, the court deemed significant the fact that under the PRA neither Congress nor the archivist had the authority to veto a decision of the President to dispose of records. Id. Also, the court noted that the PRA did not give the archivist authority to examine or question the President's record management practices. Id.

\item \textsuperscript{158} Id. at 297. Nevertheless, the court did agree with the lower court's decision that the FRA did not impliedly preclude judicial review. Id. at 291-92. Although the court did find that the FRA precluded a private citizen from directly enforcing the FRA against an agency official, the FRA did not preclude a challenge against the agency head or archivist through the APA based on their failure to take enforcement action. Id. at 294-95.

The court based this determination on the holding in Kissinger, 445 U.S. at 148, which maintained that the FRA precluded private enforcement in favor of a system of administrative enforcement. Armstrong, 924 F.2d at 294. Further, the court noted that the legislative history of the FRA did not indicate a congressional mandate against judicial review under the APA's "arbitrary and capricious" standard. Id. at 295.

Crucial to this determination was the court's finding that the separation of powers concerns inherent in the PRA did not exist with respect to the FRA because the President's day-to-day operations were not at stake. Id. at 292. Hence, the court affirmed the lower court's decision that the APA authorized judicial review of the NSC's recordkeeping procedures and of the archivist's alleged breach of duty under the FRA. Id. at 297.
On remand, the district court examined the recordkeeping practices of the NSC with respect to the PROFS system, as well as the practices of the archivist in providing adequate guidelines for its preservation.\(^\text{159}\) First, the court determined that some of the information on the PROFS system did indeed rise to the level of a "record" under the FRA.\(^\text{160}\) Second, the court found that the recordkeeping procedures of the NSC were "arbitrary and capricious" and in violation of the FRA.\(^\text{161}\) Finally, the court found that the archivist violated his duties of providing adequate guidelines and failed to prevent the destruction of valuable information contained on the PROFS system.\(^\text{162}\) Thus, the court ordered the archivist to take all necessary measures to ensure that all federal records on the PROFS system, with the exception of purely presidential records under the PRA, were preserved.\(^\text{163}\)

VI. Analysis and Conclusion

The impact of the decision in Armstrong v. Bush is unclear. On the one hand, the result of the decision was to prevent the destruction of the information on the PROFS system by the President.\(^\text{164}\) However, the court’s analysis itself leads to the conclusion that the PRA is a judicially unenforceable statute that really only ensures that the President does not remove or destroy presidential papers at the conclusion of the term in office.

Indeed, the President may dispose of records that the President does not wish to preserve without any veto power on the part of the archivist or Congress.\(^\text{165}\) The only possible exception to this is if Congress decides to pass legislation to prohibit a proposed disposal. However, this could only occur when the archivist brings the proposed disposal to Congress’ attention.\(^\text{166}\) Given that the archivist is a purely executive official removable by the President, it is not difficult to imagine a situation in which certain important historical materials may escape Congress’ attention altogether.

\(^{160}\) Armstrong, 810 F. Supp. at 340-41.
\(^{161}\) Id. at 342-48. This finding was based on the fact that the NSC gave discretion of determining what was a federal record to its staff, the material on the computer system was different from the copy that is printed out and preserved, and there was no adequate supervision of the staff’s determination of what constituted a record. Id.
\(^{162}\) Id. at 348.
\(^{163}\) Id. at 350.
\(^{164}\) Id.
\(^{165}\) 44 U.S.C. § 2203(d)-(e).
\(^{166}\) 44 U.S.C. § 2203(d)-(e).
Furthermore, although the PRA does require the President to create, maintain, and preserve a system of records, it does not provide any remedy if the President does not do so. In effect, the PRA relies heavily upon voluntary compliance by the President.

As such, the PRA may recognize the traditional deference granted to presidential communications to a greater degree than suggested in *Nixon v. Administrator of General Services*. Therefore, the PRA may be more in accordance with the principles of *United States v. Nixon*, wherein the Supreme Court recognized that there was more to protecting the President's communications than non-interference with constitutional functions. The PRA may reflect a congressional realization that the President's communications should be accorded more protection than suggested in *Nixon v. Administrator of General Services*. However, if this were true, Congress probably would have expressly precluded judicial review rather than leaving to the courts the decision of whether it was impliedly precluded. Furthermore, the language of the PRA suggests that the President's duties are mandatory rather than discretionary, as the lower court recognized in *Armstrong v. Bush*. Thus, it is this author's opinion that the PRA probably does not impliedly preclude judicial review. Nevertheless, there are many safeguards written into the PRA which protect the President's discretion and control of the materials; hence, based on *Nixon v. Administrator of General Service*, it is unlikely that the courts will ever find the PRA to be an infringement on the President's powers and thus, unconstitutional.

However, the fact that the President has to take the PRA into account at all in the course of making decisions on policy may be a hinderance in itself. Indeed, Presidents in the future will invariably be more careful with regard to their records if they choose to comply with the PRA. This will be true because not only will they have to be more cautious about what is communicated, but they will also have to submit to Congress proposals for disposal of certain information the archivist deems valuable.

Although Congress has no veto power over disposal decisions, the President may not wish for Congress to view executive branch materials that the President plans to dispose. This in itself could cause a President to exercise caution when communicating. Addi-

168. See notes 61 and 62 and accompanying texts.
169. See note 148 and accompanying text.
170. 44 U.S.C. § 2203(d)-(e).
tionally, the President's disposal decisions are subject to congressional legislation. Of course, the President would have an opportunity to veto the bill that prohibits the disposal. Undeniably, if Congress overrides a presidential veto by a two-thirds vote, there is a strong possibility that the President's interest in confidentiality will not be great enough to counter a compelling interest in preserving the information. This would comport with the analysis in *United States v. Nixon*, whereby the Court determined that the President's need for confidentiality is of constitutional proportion and can only be overridden by a compelling interest.

Thus, the PRA may serve an important function by allowing Congress to at least inspect materials before they are destroyed, so as to preclude destruction of information that it has a compelling interest in retaining. However favorable this may be, the possibility exists that Presidents, through good faith compliance with the PRA, may screen their own communications and less readily speak openly and freely for fear that Congress may at some point examine and scrutinize what they have preserved as a record.

If the President does not wish to comply with the PRA, it may be possible for the President to pressure the archivist not to submit the proposed disposal to Congress, because the archivist works directly for the President. However, a President may not wish to pressure the archivist in this way and the archivist, who is a professional, may not wish to follow the President's command. Hence, the President would still be affected by the PRA, for without it this option would not be considered at all.

Concededly, it is beneficial to the public to place ownership of presidential papers in the hands of the United States; thus, valuable information of social or historical importance will be maintained and preserved when the President does not object. The PRA would have accomplished much if that was its only goal. The constitutionality of such law cannot be doubted for it recognizes that the President is elected to serve the public, but it offers the President the latitude to make decisions without fear that open and full discussion may lead to disclosure of secret information. However, the provisions of the PRA may go a step beyond the presumption of confidentiality recognized in *United States v. Nixon*, for they mandate that the President create and maintain a record system and subject presidential records to Congressional disclosure.

The decision in *Armstrong v. Bush* adds another dimension to the dilemma: executive materials may be subject to disclosure under the FRA by way of review of the agency head's and archivist's actions under the "arbitrary and capricious" standard of the APA. Although this does not impede the President in the decision-making process, this does effectively subject executive materials to congressional regulation and possible public disclosure. The extent to which these materials are subject to claims of executive privilege is unclear. On the one hand, the same principles should apply to executive branch materials as apply to the President's own materials because it is the autonomy of the entire branch that is protected, and not just that of the President. On the other hand, however, the court in *Armstrong v. Bush* asserted that agency materials did not deserve the same protection as did the President's day-to-day communications.\(^{172}\)

The decision in *Armstrong v. Bush*, however, was not that of the Supreme Court. Consequently, the issues that are raised by that decision and by the area of presidential autonomy will not be resolved until the Supreme Court has the opportunity to decide them. In the meantime, President Clinton and future Presidents face the uneasy task of ascertaining whether or not compliance with the PRA is necessary. As for the archivist, the court in *Armstrong v. Bush* has made the role more clear for the time being: the archivist will be busy ensuring that federal agencies have complied with the FRA but not so busy when it comes to the President.

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