

Menace to Democracy:
The Forgotten Lessons of Watergate that Continue to Plague the
Presidential Records Act

Jacob Shiflett
Senior Thesis
Department of History, Columbia University

Seminar Instructor: Professor Mae Ngai
Faculty Advisor: Professor Alan Brinkley
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Introduction

Watergate symbolizes a major "turning point" in American history.¹ This event allegedly shifted public sentiments from permitting a certain level of autonomy and secrecy in the executive branch to mandating that past presidents be held accountable to the people of the United States through public "ownership of and [timely] access to" their presidential records after they leave office.² Some contend that these sentiments culminated in the Presidential Recordings and Materials Preservation Act of 1974 and the Presidential Records Act of 1978. The former "allowed the federal government to take possession of only presidential records produced by the Nixon administration... [and] stopped short of providing for state ownership of the items impounded."³ Whereas the latter "provides for [public ownership of and] eventual access to presidential documents, but only from Reagan on."⁴ Together, they supposedly guarantee a new era of open government in the United States.

Scholars recently began reexamining this matter when President George W. Bush provoked public outrage with the issuance of Executive Order 13233 on November 1, 2001. According to Bruce P. Montgomery, a professor of history at University of Colorado, Executive Order 13233:

... nullif[ied] the 1978 Presidential Records Act (PRA) by allowing former presidents, vice presidents, and their heirs to assert independently based claims of executive privilege to control access to White House materials seemingly in perpetuity.⁵

¹ Peter W. Rodino Jr. "Debate on Articles of Impeachment July 24, 1974," in *Watergate: A Brief History with Documents*, ed. Stanley I. Kutler (West Sussex: Wiley-Blackwell, 2010), 182.

² Peter Sezzi, *Personal vs. Private, Presidential Records in a Legislative Context: A Bibliographic Exploration* (Oxford: Scarecrow, 2005), 5.

³ Sezzi, 3

⁴ Sezzi, 17.

⁵ Bruce P. Montgomery, "Nixon's Ghost Haunts the Presidential Records Act: The Reagan and George W. Bush Administrations," *Presidential Studies Quarterly* 32, no. 4 (2002): 789.

In other words Montgomery, like so many other scholars, believes that the Presidential Records Act established a public entitlement to review presidential materials once presidents leave office and that subsequent executive orders do not reflect the will of the law-makers who created the legislation.⁶

However, a careful review of the events leading up to the signing of the PRA as well as the events following its adoption suggest otherwise. This thesis explores the development of ownership and public access to presidential records, from the 1970s to the present, in order to realign historical perceptions regarding the Presidential Records Act as well as realign perceptions concerning other issues such as Watergate, the PRMPA, the National Study Commission on Records and Documents of Federal Officials, and the vitality of democracy in the United States in the wake of the Watergate. In this thesis I argue that the public, through its fascination with the release of President Nixon's materials after Watergate, lost interest in the activities of the National Study Commission on Records and Documents of Federal Officials and, as a result, missed critical information for understanding the intent of the Presidential Records Act.

The reason for this stems from the fact that the Presidential Recordings and Materials Preservation Act of 1974, contrary to its portrayal as the genesis for an era of executive transparency, marked the beginning of the end for the short-lived transparency revolution prompted by Watergate. Granted law-makers offered President Nixon's

⁶ For similar contemporary interpretations of the Presidential Records Act of 1978 see: Martha J. Kumar, "Executive Order 13233 Further Implementation of the Presidential Records Act," *Presidential Studies Quarterly* 32, no. 1 (2002): 196; Robert D. Putnam and Robert J. Spitzer, "American Political Science Association Response to Executive Order 13233," *Presidential Studies Quarterly* 32, no. 1 (2002): 190; Megan L. Bezzo, "In the Name of National Security: Executive Order 13233, the Rise of the Imperial Presidency, and the Degradation of Archival Autonomy." MA Thesis, Western Washington University, 2009, 30-31; Brett L. Erickson, "Presidential Power and Public Records: Executive Order 13233 and the Presidential Records Act of 1978," MA Thesis, University of Nebraska, 2009, 50-51; Kevin Burge, "The Presidential Records Act of 1978: Its Development from the Right to Know and the Public's Demand for Federal Records Ownership," MA Thesis, Auburn University, 2008, 75-77.

Watergate materials to the public by way of the PRMPA.⁷ This act of good faith by the government reestablished public trust in Washington DC for holding Nixon accountable for his deeds. Though, the release of these materials took precedence over the National Study Commission on Records and Documents of Federal Officials.⁸ This was odd considering the PRMPA charged the commission with the significant responsibility of generating a report to make recommendations on how to reform the processes that allowed Watergate to happen.⁹ Indeed, the treasure trove of Watergate materials overshadowed all other discourse in the nation and these circumstances allowed lawmakers, who were eager to restore legitimacy to the executive branch, to slip a provision into the PRA that permits the incumbent president to unilaterally determine the extent of public access to the materials of former presidents by issuing executive orders.¹⁰

This overlooked bit of history went widely unnoticed until recently. Now lawmakers and scholars realize some of the deficiencies with the PRA. However, the recent solutions suggested by members of Congress and the scholarly community to improve the PRA fail to address the issue of allowing the incumbent president to have sweeping authority on public access to the materials of former presidents through the use of executive orders. What can we infer from this development? What does this situation tell us about transparency, accountability, and the state of democracy in the United States?

In order to fully appreciate the aforementioned information, this thesis provides a

⁷ *Presidential Recordings and Materials Preservation Act*, U.S. Code 44 Chapter 21 (1974), § 2111, Sec. 101 - Sec. 106.

<http://www.archives.gov/about/laws/nara.html#material>

⁸ Anna Kasten Nelson, "The Public Documents Commission: Politics and Presidential Records," *Government Publications Review* vol. 9, (1982): 444-445.

⁹ *Presidential Recordings and Materials Preservation Act*, U.S. Code 44 Chapter 33 (1974), §3316.

<http://www.gpo.gov/fdsys/pkg/USCODE-2008-title44/pdf/USCODE-2008-title44-chap33.pdf>

¹⁰ *Presidential Records*, U.S. Code 44 Chapter 22 (1978), §2204, (a)(1)(A) and (a)(1)(B).

<http://www.archives.gov/about/laws/presidential-records.html>

rich narrative presented in the form of a three-part odyssey in order to provide a panoramic view of ownership and access to presidential records from Watergate to the present. The first section analyzes Watergate from the break-in of the Watergate Hotel to the Supreme Court ruling on *Nixon v. Administrator of General Services* in 1977. The lessons learned from Watergate serve as a reference point for the subsequent chapters. The second section focuses on the bipartisan consensus regarding transparency in the executive branch. This inquiry begins with a discussion on the National Study Commission on the Records of Federal Officials and ends with the signing of the Presidential Records Act of 1978. The third section examines the events following the PRA with particular emphasis on its implementation and public reaction to these activities. It begins with a discussion on Executive Order 12667 signed by President Reagan in 1989 and ends with the most recent presidential records reform efforts in 2009.

The last part of the paper is reserved for the concluding remarks where I argue that the activities during Watergate, prior to the signing of the Presidential Records Act, and events following the signing of the PRA suggest that the PRA was not created to ensure transparency in government. Rather, the PRA was created to abolish the presidential library system and establish a centralized location for incumbent administrations and their staff to have ready access to the duplicate copies of federal records from former administrations via storage at the National Archives. If this was not the case, then the public would not require Freedom of Information requests to access to the sensitive or controversial records of former presidents; nor would the PRA provide the incumbent president with sweeping authority to unilaterally determine the extent of public access to the materials of former presidents through the usage of executive orders.

I. Watergate: Reigning in Nixon

"When the President does it, that means that it is not illegal."—Richard M. Nixon television interview with David Frost, May 20, 1977

On June 17, 1972 "[f]ive men... were arrested... in what authorities described as an elaborate plot to bug the offices of the Democratic National Committee" at the Watergate Hotel in Washington DC.¹¹ Two days later the press reported that one of these individuals, James W. McCord, worked for the GOP "to provide security services to the Republican National Committee."¹² Further inquiry revealed that these individuals had ties to the Richard Nixon's 1972 Committee to Re-elect the President, also known by the acronym CREEP, and that McCord held the position of security director for the organization.¹³ Evidence recovered from the investigation also implicated G. Gordon Liddy and former CIA officer E. Howard Hunt as the masterminds behind the Watergate break-in. Together these men comprised a special operations unit known as the White House Plumbers whose operations consisted of the Watergate break-in, the harassment of Pentagon Papers leaker Daniel Ellsberg, and several other clandestine operations which remained unknown to the public until the Watergate Scandal.¹⁴ "On September 15, 1972, Liddy, Hunt, and the five persons arrested in the DC Watergate offices on June 17 were indicted for burglary, unlawful entry for the purpose of intercepting oral and wire communications and conspiracy, all felonies."¹⁵

¹¹ Alfred E. Lewis, "5 Held in Plot to Bug Democrats' Office Here," *The Washington Post*, June 18, 1972. <http://www.washingtonpost.com/wp-dyn/content/article/2002/05/31/AR2005111001227.html>

¹² Bob Woodward and Carl Bernstein, "GOP Security Aide Among 5 Arrested in Bugging Affair," *The Washington Post*, June 19, 1972. <http://www.washingtonpost.com/wp-srv/local/longterm/tours/scandal/waterrat.htm>

¹³ Peter W. Rodino Jr., *Impeachment of Richard Nixon: The Final Report of the Committee on the Judiciary, House of Representatives* (New York: Viking, 1975), 60-65.

¹⁴ For more information on the activities of the Plumbers, see: Rodino, *Impeachment of Richard Nixon*, 234-241.

¹⁵ Rodino, *Impeachment of Richard Nixon*, 87.

Suspicious of White House involvement in the break-in grew as *The Washington Post* reported that "[a] \$25,000 cashier's check, apparently earmarked for President Nixon's re-election campaign, was deposited in April in a bank account of one of the five men arrested in the break-in at Democratic National Headquarters."¹⁶ Later in the year, *The Washington Post* publicized that "John N. Mitchell, while serving as U.S. Attorney General, personally controlled a secret Republican fund that was used to gather information about the Democrats."¹⁷ In the following month, the FBI announced that:

... the Watergate bugging incident stemmed from a massive campaign of political spying and sabotage conducted on behalf of President Nixon's re-election and directed by officials of the White House and the Committee for the Re-election of the President.¹⁸

Despite these shocking revelations, Nixon won reelection in a landslide victory in the 1972 election against George McGovern. However, this chain of events piqued public interest and mandated further investigation, both criminal and congressional, into the connection between the Watergate burglars and Richard Nixon.

Before long more Republican officials, with closer ties to the Nixon, distanced themselves from the President. On April 30, 1973 "White House advisers, H.R. Haldeman and John D. Ehrlichman, along with Attorney General Richard G. Kleindienst" resigned their posts and Nixon "fired... [White House] counsel, John W. Dean III" in the

¹⁶ Carl Bernstein and Bob Woodward, "Bug Suspect Got Campaign Funds," *The Washington Post*, August 1, 1972. <http://www.washingtonpost.com/wp-dyn/content/article/2002/06/03/AR2005111001229.html>

¹⁷ Carl Bernstein and Bob Woodward, "Mitchell Controlled Secret GOP Fund," *The Washington Post*, September 29, 1972.

<http://www.washingtonpost.com/wp-dyn/content/article/2002/06/03/AR2005111001231.html>

¹⁸ Carl Bernstein and Bob Woodward, "FBI Finds Nixon Aides Sabotaged Democrats," *The Washington Post*, October 10, 1972.

<http://www.washingtonpost.com/wp-dyn/content/article/2002/06/03/AR2005111001232.html>

same day.¹⁹ These resignations, as well as the firing of Dean, raised suspicion of White House involvement in the Watergate break-in even further. Within two months the Senate started its own investigation into the matter.

North Carolina Senator "Sam Ervin gavelled the Senate Select Committee to order on May 17" in the spring of 1973.²⁰ In addition to the Senate hearings, the Department of Justice launched its own investigation. "The President... [granted] Attorney General designate Elliot Richardson absolute authority to make all of the decisions bearing upon the prosecution of the Watergate case and related matters."²¹ Richardson appointed Archibald Cox as Special Prosecutor to the case. "On May 21, 1973 Richardson appeared with... Cox before the Senate Judiciary Committee" to discuss the authority and jurisdiction of the Special Prosecutor.²² Richardson stated that Special Prosecutor Cox had jurisdiction over:

... offenses arising out of the unauthorized entry into the DNC headquarters at the Watergate, offenses arising out of the 1972 presidential election, allegations involving the President, members of the White House staff or presidential appointees and other matters which the Special Prosecutor consented to have assigned by the Attorney General. The same guidelines also provided that the Special Prosecutor would have full authority for determining whether to contest the assertion of executive privilege of any other testimonial privilege and that he would not be removed except for "extraordinary improprieties."²³

The Special Prosecutor received the Senate Judiciary Committee stamp of approval.

President Nixon expressed his support for both Richardson and Cox. Although, after the

¹⁹ Laurence Stern and Haynes Johnson, "3 Top Nixon Aides, Kleindienst Out; President Accepts Full Responsibility; Richardson Will Conduct New Probe," *The Washington Post*, May 1, 1973.
<http://www.washingtonpost.com/wp-dyn/content/article/2002/05/31/AR2005111001235.html>

²⁰ Stanley I. Kutler, *The Wars of Watergate: The Last Crisis of Richard Nixon* (New York: Alfred A. Knopf, 1990), 350.

²¹ Rodino, *Impeachment of Richard Nixon*, 176.

²² Rodino, *Impeachment of Richard Nixon*, 176.

²³ Rodino, *Impeachment of Richard Nixon*, 176; For the full testimony of Elliot Richardson, see: United States Senate, *Hearings Before the Committee on the Judiciary, Ninety-Third Congress, on Special Prosecutor* (Washington, DC: GPO, 1973), 237-260.

http://web.lexisnexis.com.ezproxy.cul.columbia.edu/congcomp/attachment/a.pdf?_m=56379c5089b14c110a25d840f7e39bfd&wchp=dGLzVtz-zSkSA&_md5=eac3914a55c4d7a6e4dea7283ce80cc0&ie=a.pdf

hearings, Nixon reiterated "to Richardson that the waiver of executive privilege extended to testimony but not to documents."²⁴ In other words, neither the Attorney General nor the Special Prosecutor had the authority to review presidential materials to discern the legitimacy of claims of executive privilege asserted by the President. As a result, the President put himself in the position to unilaterally determine the size and scope of executive privilege.

Nevertheless, the investigations continued in both the Department of Justice and the United States Senate. The assertion made by Nixon had little relevance until Sam Ervin's Senate investigation uncovered that:

[f]ormer presidential counsel John W. Dean III...discussed aspects of the Watergate cover-up with President Nixon or in Mr. Nixon's presence on at least 35 occasions between January and April of this year, according to reliable sources.²⁵

The Senate Committee also revealed through the testimony of former White House aide Alexander Butterfield that:

President Nixon has been routinely taping all his conversations and meetings in the Oval Office and cabinet room of the White House, in his Executive Office Building office and on four of his personal telephones.²⁶

This revelation immediately prompted both Ervin and Cox to request the White House tapes. Nixon of course, invoking the right of executive privilege, refused to give up the materials by stating that "the tapes, which have been under [his] sole control, will remain so."²⁷

²⁴ Rodino, *Impeachment of Richard Nixon*, 177.

²⁵ Carl Bernstein and Bob Woodward, "Dean Alleges Nixon Knew of Cover-up Plan," *The Washington Post*, June 3, 1973.

<http://www.washingtonpost.com/wp-dyn/content/article/2002/05/31/AR2005112200792.html>

²⁶ Lawrence Meyer, "President Taped Talks, Phone Calls; Lawyer Ties Ehrlichman to Payments," *The Washington Post*, July 17, 1973.

<http://www.washingtonpost.com/wpdyn/content/article/2002/06/03/AR2005112200794.html>

²⁷ Rodino, *Impeachment of Richard Nixon*, 43.

After being refused by the President, Special Prosecutor Cox subpoenaed nine of the tapes. It took a court order and a denial in a US Court of Appeals before Nixon even entertained the subpoena. Nixon then started making demands regarding under what conditions he would release the tapes.²⁸ The President demanded that in exchange for the subpoenaed tapes that Special Prosecutor Cox would refrain from subpoenaing any more executive materials. This ultimatum did not sit well with Attorney General Richardson. Then "[o]n the evening of October 19, 1973, the President issued a statement ordering Cox to agree to the proposal and desist from issuing subpoenas for tapes and documents."²⁹ Cox refused to comply with Nixon's demands. The President then ordered Attorney General Richardson to fire Cox. Richardson refused to discharge Cox from his duties. Both he and Deputy Attorney General William D. Ruckelshaus resigned, instead of carrying out Nixon's orders, and the new Attorney General, Robert Bork, relieved Cox of his duties.³⁰

Critics already advocated impeachment prior to the resignations of Richardson and Ruckelshaus as well as the firing of Special Prosecutor Cox.³¹ Pressure towards impeachment mounted further with the release of White House tapes and transcripts that Nixon's staff altered. Some transcripts of the tapes were censored. However, the most outrage stemmed from a tape that contained an "18 1/4-minute gap in the recording."³² White House Chief-of-Staff Alexander Haig could not thoroughly explain the gap. The

²⁸ For more information on the between Nixon, and Special Prosecutor Cox, and Attorney General Richardson, see: Rodino, *Impeachment of Richard Nixon*, 179-181.

²⁹ Rodino, *Impeachment of Richard Nixon*, 180.

³⁰ Carroll Kilpatrick, "Nixon Forces Firing of Cox; Richardson, Ruckelshaus Quit," *The Washington Post*, October 21, 1973.

<http://www.washingtonpost.com/wp-dyn/content/article/2002/06/03/AR2005112200799.html>

³¹ Jules Witcover, "Pressure for Impeachment Mounting," *The Washington Post*, October 21, 1973.

<http://www.washingtonpost.com/wp-dyn/content/article/2002/06/03/AR2005112200800.html>

³² George Lardner Jr., "Haig Tells of Theories on Erasure," *The Washington Post*, December 7, 1973.

<http://www.washingtonpost.com/wp-dyn/content/article/2002/06/03/AR2005112200802.html>

media increased their pressure on the White House. On November 17, 1973 during a press conference Nixon reiterated that he no personal knowledge relevant to Watergate and stated that "[he was] not a crook."³³

During his 1974 State of the Union, President Nixon pleaded with lawmakers and the public by stating "the time [had] come to bring [the] investigation and the other investigations ... to an end. One year of Watergate [was] enough."³⁴ Needless to say, this did not distract nor dissuade the Special Prosecutor and Congress from their investigations. The Special Prosecutor indicted former Attorney General John Mitchell and former White House aides H.R. Haldeman and John Ehrlichman on March 1, 1974. Nixon's inner circle started to collapse. In response to this Nixon attempted to undermine the mandate for the investigation by releasing "1,254 pages of the secretly recorded conversations of crucial Watergate-related meetings from September, 1972, through April, 1973."³⁵

This did not have the desired effect. Special Prosecutor Jaworksi continued to press the White House for more documents and materials. "On April, 18, 1974 Judge Sirica issued a trial subpoena requested by... [Jaworski] for 64 presidential conversations."³⁶ Nixon vehemently objected to the subpoena and asserted claims of executive privilege over the requested materials. The ultimate showdown between the Special Prosecutor and the President commenced. Eventually, this issue made its way up to the US Supreme Court under *US v. Nixon*. Then on July 24, 1974 the Supreme Court

³³ Carroll Kilpatrick, "Nixon Tells Editors, 'I'm Not a Crook'," *The Washington Post*, November 18, 1973. <http://www.washingtonpost.com/wpdyn/content/article/2002/06/03/AR2005112200801.html>

³⁴ President Richard Nixon, "State of the Union Address," January 30, 1974. <http://www.infoplease.com/t/hist/state-of-the-union/187.html>

³⁵ Haynes Johnson, "Nixon Hands Over Transcripts," *The Washington Post*, May 1, 1974. <http://www.washingtonpost.com/wp-dyn/content/article/2002/05/31/AR2005112200803.html>

³⁶ Rodino, *Impeachment of Richard Nixon*, 576.

ruled "unanimously, and definitively, that President Nixon must turn over tape recordings of White House conversations needed by the Watergate special prosecutor for the trial of the President's highest aides."³⁷ Nixon coordinated the handing over of the subpoenaed materials within a week.

Three days after the Supreme Court ruling, "[t]he House Judiciary Committee took the momentous step... of recommending that the president of the United States be impeached and removed from office."³⁸ The walls started closing in on Nixon. On August 5, 1974 the infamous "smoking gun" tape was released that directly implicated Nixon and his closest advisors with the obstruction of the Watergate investigation.³⁹ In the conversation on the tape, Haldeman and Nixon hatched a plan to solicit Director of the CIA Richard Helms and Deputy Director of the CIA Vernon A. Walters to approach Director of the FBI L. Patrick Gray and request that he halt the Watergate investigation on grounds of national security. Nixon knew investigators would eventually review the contents of the tape. He also knew that Congress fully intended on going through with the impeachment. The President realized there was absolutely no way out. The judicial branch stripped him of the his last line of defense, executive privilege.

Nixon announced his resignation on August 8, 1974 and left the Office of the

³⁷ John P. MacKenzie, "Court Orders Nixon to Yield Tapes; President Promises to Comply Fully," *The Washington Post*, July 25, 1974
<http://www.washingtonpost.com/wp-dyn/content/article/2002/06/03/AR2005112200805.html>
Supreme Court of the United States, *United States v. Nixon, President of the United States, et al*, 418 U.S. 683 (1974).

<http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=418&invol=683>

³⁸ Richard Lyons and William Chapman, "Judiciary Committee Approves Article to Impeach President Nixon, 27 to 11," *The Washington Post*, July 28, 1974.

³⁹ White House, "Transcript of a Recording of a Meeting Between the President and H.R. Haldeman in the Oval Office on June 23, 1972 From 10:04 TO 11:39 AM," June 23, 1972.

http://nixon.archives.gov/forresearchers/find/tapes/watergate/trial/exhibit_01.pdf

President the following day.⁴⁰ President Ford issued a full pardon for Nixon a month later.⁴¹ In his pardon, Ford offered a rationalization behind not holding Nixon accountable for his crimes:

It is believed that a trial of Richard Nixon, if it became necessary, could not fairly begin until a year or more has elapsed. In the meantime, the tranquility to which this nation has been restored by the events of recent weeks could be irreparably lost by the prospects of bringing to trial a former President of the United States. The prospects of such trial will cause prolonged and divisive debate over the propriety of exposing to further punishment and degradation a man who has already paid the unprecedented penalty of relinquishing the highest elective office of the United States.⁴²

In other words, Ford issued a pardon in order to rescue both Nixon and the legitimacy of the Office of the President from public scrutiny. Nixon, in his response to the pardon, offered critical insight into the mentality of the executive branch concerning matters of criminality:

My perspective on Watergate is quite different than it was while I was embattled in the midst of the controversy, and while I was still subject to the unrelenting daily demands of the presidency itself. Looking back on what is still in my mind a complex and confusing maze of events, decisions, pressures and personalities, one thing I can see clearly now is that I was wrong in not acting more decisively and more forthrightly in dealing with Watergate, particularly when it reached the stage of judicial proceedings and grew from a political scandal into a national tragedy.⁴³

In this statement Nixon suggested that, while president, he viewed Watergate as a distraction from his daily activities as President of the United State and that actions of grave criminality equate to nothing more than trivial political scandals.

⁴⁰ Carroll Kilpatrick, "Nixon Resigns," *The Washington Post*, August 9, 1972.

<http://www.washingtonpost.com/wpdyn/content/article/2002/06/03/AR2005033108821.html>

⁴¹ President Carter later commuted the sentence of Watergate participant and Nixon staffer, G. Gordon Liddy as well. This further demonstrated that the executive branch did not hold itself accountable; President Jimmy Carter, "Commutation of G. Gordon Liddy's Prison Sentence Announcement of the Commutation, With the Text of the Order, With the Text of the Order," April 12, 1977.

<http://www.presidency.ucsb.edu/ws/index.php?pid=7345>

⁴² President Gerald R. Ford, "Proclamation 4311, Granting a Pardon to Richard Nixon," September 8, 1974.

<http://watergate.info/ford/pardon-proclamation.shtml>

⁴³ Richard M. Nixon, "Response to Proclamation 4311,"

<http://watergate.info/ford/pardon.shtml>

Despite Nixon's presidential pardon from Ford, there still remained the issue of the documents and materials related to Watergate which the Supreme Court did not order Nixon to turn over to the Special Prosecutor. Law-makers and scholars feared that Nixon would destroy all other Watergate related materials in his possession since, up to this point, presidential documents and materials were considered personal property of the former president. They had cause to be concerned for the reason that, prior to leaving office on September 8, Nixon cut a deal with the head of the General Services Administration Arthur F. Sampson two days before whereby the former president retained personal control of the White House tapes. As a result, Congress hastily passed the Presidential Recordings and Materials Preservation Act of 1974 that mandated the Archivist to seize control of Nixon's presidential materials, identify the materials relevant to Watergate, and immediately begin processing them for public acquisition.⁴⁴

Nixon challenged the constitutionality of this act in *Nixon v. Administrator of General Services* on five significant grounds. He claimed that the act violated the separation of powers clause; that it violated a president's privilege of confidentiality; that the act invaded his personal privacy; that it interfered with his First Amendment rights; and that the act violated the bill of attainder clause.⁴⁵ The Supreme Court disagreed on all five challenges and, subsequently, upheld the Presidential Recordings and Materials Preservation Act. Thus, the PRMPA became the first law in US history to declare government control of presidential property.

Looking back, the Watergate scandal offered critical insight into a number of

⁴⁴ *Presidential Recordings and Materials Preservation Act*, U.S. Code 44 Chapter 21 (1974).
<http://www.archives.gov/about/laws/nara.html#2111-note>

⁴⁵ United States Supreme Court, *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977).
<http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?court=us&vol=433&invol=425>

issues relevant to democracy and an open society. First, it suggests that presidents have the means and motive to conduct questionable operations to get the upper-hand on their political adversaries. Second this development provides that the executive branch will censor material with embarrassing, unethical, or illegal information when releasing these materials to the public by asserting claims of executive privilege. Third, this narrative holds that a special prosecutor, without the support of the judicial branch, stands no chance at policing the executive for the reason that they still work for the executive and must comply with the orders of the president. Fourth, the unfolding of Watergate posits that it takes the efforts of all three branches of government to reign in a rogue president as well as to ensure accountability and transparency in the executive branch. Lastly, the aftermath of Watergate reveals that presidents consider scandals, even from former presidents, to be a distraction toward their daily duties and that acts of presidential criminality equate to nothing more than trivial political scandals. Moreover, the pardoning of Nixon illustrates that presidents are held to a different, more lenient, standard than the rest of us and that incumbent presidents will place the preservation of the image of the Office of the President ahead of justice.

II. Presidential Records Act: New Era of Open Government?

"Watergate may be over, but public records are still in jeopardy."—Anna Kasten Nelson, "The Public Documents Commission Politics and Presidential Records," *Government Publications Review*, vol. 9, (1982): 450.

The Presidential Recordings and Materials Preservation Act of 1974 contained a provision that mandated the creation of the National Study Commission on Records and Documents of Federal Officials.⁴⁶ This provision stated that:

[i]t shall be the duty of the Commission to study problems and questions with respect to the control, disposition, and preservation of records and documents produced by or on behalf of Federal officials, with a view toward the development of appropriate legislative recommendations and other recommendations regarding appropriate rules and procedures with respect to such control, disposition, and preservation.⁴⁷

In other words, the legislation charged the Commission with the responsibility of determining the extent of personal ownership of federal officials' materials as well as the degree to which the public should have access to those records. The findings of the Commission would presumably serve as the template for federal legislation to ensure a new era of accountability and transparency in government in the wake of Watergate. However, the PRMPA did not require Congress to abide by the findings of the Commission in the drafting of legislation regarding the materials of federal officials nor did the PRMPA obligate Congress to take any action at all once the Commission submitted its report. The PRMPA granted Congress a lot of leeway in their enforcement of the Commission's suggestions. Although, Congress ultimately based its bills on the findings and suggestions of the Commission for the Presidential Records Act of 1978.

The Commission undoubtedly served as a critical role in framing the future

⁴⁶ *Presidential Recordings and Materials Preservation Act*, U.S. Code 44 Chapter 33 (1974), §3316. <http://www.gpo.gov/fdsys/pkg/USCODE-2008-title44/pdf/USCODE-2008-title44-chap33.pdf>

⁴⁷ *Presidential Recordings and Materials Preservation Act*, U.S. Code 44 Chapter 33 (1974), §3317.

debate over ownership and access of federal officials' materials. The PRMPA guided the activities of the Commission to center around seven key concerns of lawmakers.⁴⁸ First, the legislation directed the Commission to determine whether or not the traditional approach to dealing with presidential records was acceptable and whether or not this practice should also apply to the materials of federal officials in the other two branches of government. Second, it instructed the Commission to consider its findings in relation to §2107 through §2112 of U.S. Code 44 Chapter 21.⁴⁹ Third, the PRMPA informed the Commission to determine whether their findings "should affect the control, disposition, and preservation of records and documents of agencies within the Executive Office of the President created for short-term purposes by the President."⁵⁰ Fourth, the legislation ordered the Commission to consider "the recordkeeping procedures of the White House Office" in order to identify which materials the White House Office produces for the use of the President.⁵¹ Fifth, it mandated that the Commission evaluate "the nature of rules and procedures which should apply to the control, disposition, and preservation of records and documents produced by Presidential task forces, commissions, and boards."⁵² Sixth, the provision ordered the Commission to identify "criteria which may be used generally in determining the scope of materials which should be considered to be the records and documents of Members of the Congress."⁵³ Lastly, the PRMPA required the

⁴⁸ U.S. Code 44 Chapter 33 (1974), §3317.

⁴⁹ These provisions included: §2107 that covered the acceptance of records for historical preservation; §2108 that dealt with the responsibility for custody, use, and withdraw of records; §2109 that addressed the preservation, arrangement, duplication, and exhibition of records; §2110 that focused on the servicing of records; §2111 that affected the material accepted for deposit; and §2112 that had to do with presidential archival depositories.

⁵⁰ U.S. Code 44 Chapter 33 (1974), §3317.

⁵¹ U.S. Code 44 Chapter 33 (1974), §3317.

⁵² U.S. Code 44 Chapter 33 (1974), §3317.

⁵³ U.S. Code 44 Chapter 33 (1974), §3317.

Commission to evaluate "the privacy interests of individuals whose communications with Federal officials, and with task forces, commissions, and boards, are a part of the records and documents produced by such officials. task forces, commissions, and boards."⁵⁴ In addition to these measures, the PRMPA granted the Commission the authority to investigate any other issues that they deemed necessary.

Such was the magnanimous task of the National Study Commission on Records and Documents of Federal Officials. Although, the main provisions in the PRMPA also unintentionally worked to undermine the activities of the Commission by charging the Ford administration with the momentous obligation of preparing the Nixon presidential recordings and materials for distribution to the Archivist of the United States for processing. President Ford was faced with a choice: either comply with the main provisions of the PRMPA that called for the processing and distribution of Nixon's presidential records for public use or fulfill his obligation under the PRMPA to appoint three delegates to the Commission and their chairman from among the three in order to facilitate their inquiry. Saddled with this choice, Ford ultimately decided on "emptying files [rather] than appointing a commission."⁵⁵ This decision ensured a significant delay in the assembly of the Commission and the fervor over the release of Nixon's presidential materials, as well as other political matters, drew the public's interest from the Commission altogether.⁵⁶

Nevertheless, the first meeting did not convene until a full year from the signing

⁵⁴ U.S. Code 44 Chapter 33 (1974), §3317.

⁵⁵ Anna Kasten Nelson, "The Public Documents Commission: Politics and Presidential Records," *Government Publications Review* vol. 9, (1982): 445.

⁵⁶ Nelson, 444.

of the PRMPA.⁵⁷ After appointing Herbert Brownell as Chairman of the Commission, President Ford pursued a hands-off approach to its activities. "No attempt was made to influence the course of the Commission's work and no agreements were reached as to the procedure."⁵⁸ The agenda of the Commission was left entirely to the discretion of Herbert Brownell. Nevertheless, the Commission conducted multiple panel discussions and public hearings. In addition to this it also received several independent surveys and case studies relevant to presidential, congressional, and judicial records.

During the course of its inquiry, the Commission collected some significant testimonies and controversial information that would ultimately not make it into the recommendations of the final report. The panel discussion that took place on January 14, 1977 cut to the heart to the issue of presidential records by exploring every perspective with respect to the ownership and access to the materials in exhaustive detail. At the beginning of the discussion Andrew Goodpaster, former Staff Secretary to the President under Dwight Eisenhower, made a bold claim that "Watergate is perhaps not the best basis on which to form the set of arrangements that should guide... [the] government in its general conduct of affairs."⁵⁹ In other words, Goodpaster believed that Watergate was an isolated incident. Moreover, he argued that any evaluation of ownership and access to presidential records with Watergate in mind was an unwarranted overreaction.

⁵⁷ President Ford signed the Presidential Recordings and Materials Preservation Act into law on December 19, 1974 and stated that he would appoint the three presidential representatives as well as the chairman to the Commission in a timely manner. Congress appointed their representatives to the Commission on March 20, 1975 and April 25, 1975. President Ford did not get around to appointing the presidential representatives to the Commission until September 8, 1975 and the first meeting of the Commission did not convene until December 1975.

⁵⁸ Nelson, "The Public Documents Commission: Politics and Presidential Records," 445.

⁵⁹ Anna Kasten Nelson, ed., "Transcript: Documents and Records of the Executive Office of the President, A Panel Discussion Arranged Under the Auspices of the National Academy of Public Administration, Washington, D.C.," in *The Records of Federal Officials: A Selection of Materials from the National Study Commission on Records and Documents of Federal Officials* (New York: Garland, 1978), 34.

In the same discussion Bryce Harlow, former Administrative Assistant to President Eisenhower, stated the main problem of establishing a new process for public access to presidential records stems from the fact that the tendency would be to either establish "a process that would create no records at all that are wanted by most, or the continuation of very highly sensitive, very confidential records that are revealed much later."⁶⁰ The former model ended up as one of the two initial proposals in Congress following the submission of the Commission's report and, ironically, the latter resembled the final product that Congress arbitrated over during the legislative process for the Presidential Records Act of 1978. Thus, in a way, the points made by Harlow foreshadowed the future debate over the PRA.

Building on the points raised by Harlow, Stephen Hess discussed several issues including his views on presidential materials as well as the materials of presidential advisors. He argued that:

[p]residential papers should belong to the United States, and that the people who accept political appointments can no longer be essentially private people. They should understand this before accepting their office, and obviously they don't have to accept the office.⁶¹

This touched on one of the most hot-buttoned issues concerning executive transparency. It was the discussions with presidential advisors that implicated Nixon in obstructing the Watergate investigation. Yet the materials relating to presidential advisors ended up being the most closely guarded records during the Commission's investigation and subsequent legislative proposals in Congress.

In part, this was due to the so-called "chilling effect." This theory presumed that

⁶⁰ Nelson, ed., *The Records of Federal Officials: A Selection of Materials from the National Study Commission on Records and Documents of Federal Officials*, 36.

⁶¹ Nelson, ed., *The Records of Federal Officials: A Selection of Materials from the National Study Commission on Records and Documents of Federal Officials*, 40.

advisors would withhold controversial advice from the officials they serve if the advice would eventually end up in the public domain. Hence, why some officials started recommending the materials of their advisors be exempt from eventual public access.

Hess countered this assertion by stating that it is the responsibility of public servants to:

do one's best in government, that is giving the best advice possible if one is in the advice-giving business to the President, understanding full well that sooner or later one's actions or views will become publicly known if there's any interest in them....⁶²

According to Hess, this was for the reason that candid advice "takes [precedence] over all other considerations, such as right to privacy, potential embarrassment, and so forth."⁶³

Hess pressed on by claiming:

that potential embarrassment to one's self or to others should not be the criterion for suppressing records, official records--of course, excluding national security ones--should be available to the public at the conclusion of Presidential administrations.⁶⁴

In doing so Hess, one of the most vocal advocates for open government, assisted in the whitewashing of Watergate history since Nixon attempted to use national security as a vehicle to conceal his involvement in obstructing the Watergate investigation. Moreover, this statement reaffirmed the practice of protecting administration underlings and controversial issues under the premise of national security. Regardless, the views held by Hess reflect some of the Commission's recommendations and seemingly influenced both initial pieces of legislation after the Commission submitted its reports. These views even embody the consensus reached in the language of the Presidential Records Act. Although, this was not the only intriguing facet of this discussion.

⁶² Nelson, ed., *The Records of Federal Officials: A Selection of Materials from the National Study Commission on Records and Documents of Federal Officials*, 40.

⁶³ Nelson, ed., *The Records of Federal Officials: A Selection of Materials from the National Study Commission on Records and Documents of Federal Officials*, 41.

⁶⁴ Nelson, ed., *The Records of Federal Officials: A Selection of Materials from the National Study Commission on Records and Documents of Federal Officials*, 41.

Another issue raised by the discussion panel addressed the problems of policy communication between outgoing and incoming administrations. William J. Hopkins, who served as the records keeper in the White House from 1931 to 1971, stated that "[e]ach administration... as it came in, questioned the system. They couldn't understand it. They questioned 'How can we have any continuity when we don't have the files of the previous administration?'"⁶⁵ However, according to Hopkins, the outgoing administrations "were all in favor" of the current system of records management.⁶⁶ This discussion established that, in addition to a conflict between private ownership and public access to presidential materials, there existed a tension between outgoing presidents, who took their materials with them to disjointed presidential libraries, and the incoming administrations that wished to have ready access to these organized materials for practical reasons.⁶⁷

Hopkins claimed that incoming administrations could reestablish continuity by tracking down the copies of the outgoing materials that presidents took with them. These duplicates were presumably left behind in the various government agencies and departments. Though this proved to be a hassle for incoming administrations and, as noted by Arthur Schlesinger Jr. in the same panel, in some instances the duplicated materials did not get housed in their respective agencies or departments. Consequently, Schlesinger argued, "we can't always be certain that documents necessary for the

⁶⁵ Nelson, ed., *The Records of Federal Officials: A Selection of Materials from the National Study Commission on Records and Documents of Federal Officials*, 44.

⁶⁶ Nelson, ed., *The Records of Federal Officials: A Selection of Materials from the National Study Commission on Records and Documents of Federal Officials*, 44.

⁶⁷ Prior to the Presidential Records Act, the Presidential Libraries Act of 1955 allowed former presidents to take all of their materials with them once they left office and store these materials in a privately constructed, publicly maintained facility;

Presidential Libraries Act, U.S. Code 2112 Chapter 44 (1955).

<http://www.archives.gov/presidential-libraries/laws/1955-act.html>

continuity of the public business are going to be found in other places."⁶⁸ Thus, the Commission uncovered that there existed a need for a consolidation of former presidential materials so that incoming administrations could have ready access to the important materials of outgoing administrations. In other words, the housing of former presidential materials in presidential libraries hampered the daily operations of the executive branch.

The materials of primary concern for incoming administrations were diplomatic cables and intelligence reports. Walt W. Rostow, former Special Assistant for National Security Affairs to President Johnson, also noted that these materials needed to be guarded from premature release to the public. Rostow argued that this was necessary in order to protect intelligence sources as well as prevent a "chilling effect" within the executive branch.⁶⁹ Adding to this, Schlesinger claimed that "for most purposes... [a disclosure] interval of ten years would be about right for both domestic and foreign policy, leaving out certain deeply sensitive ones of national security."⁷⁰ Although, Schlesinger really believed "that the personal and political papers are the real treasure for the historian."⁷¹ Moreover, Schlesinger stated that:

these [materials] should be treated in the same way as those papers necessary for the continuity of the public business, and that this requires on the one hand a certain discretion in the way they're used, requires protection for them, but on the other hand, since they are being protected and held and so on for eventual use, that use should be part of--is the objective, and that should be kept in mind too.⁷²

⁶⁸ Nelson, ed., *The Records of Federal Officials: A Selection of Materials from the National Study Commission on Records and Documents of Federal Officials*, 53.

⁶⁹ Nelson, ed., *The Records of Federal Officials: A Selection of Materials from the National Study Commission on Records and Documents of Federal Officials*, 50-51.

⁷⁰ Nelson, ed., *The Records of Federal Officials: A Selection of Materials from the National Study Commission on Records and Documents of Federal Officials*, 54.

⁷¹ Nelson, ed., *The Records of Federal Officials: A Selection of Materials from the National Study Commission on Records and Documents of Federal Officials*, 56.

⁷² Nelson, ed., *The Records of Federal Officials: A Selection of Materials from the National Study Commission on Records and Documents of Federal Officials*, 56.

In other words, Schlesinger argued that the personal and political papers of former presidents should be housed in the same manner as the materials of former presidents relating to national security. However, Schlesinger claimed that materials concerning national security should be kept under lock and key at the discretion of the executive branch. This was a notion that all of the panel agreed upon—even Stephen Hess.

The ideas generated during this discussion eventually found their way into the recommendations made by the Commission in its report as well as in the language of the bill the Presidential Records Act. Though the drafting of the report did not turn out to be a smooth process. In January of 1977, the Commission prepared to write the report. A legal report was due the following February and the recommendations report was due on March 31.⁷³ However, due to the organization of the Commission office, none of the Commission members knew whether Brownell's staff would write the recommendations report or whether the Brownell's legal staff was solely focused on writing the February report.

Despite the confusion, a subcommittee of the Commission took the initiative in drafting the report because most were "[r]eluctant to leave matters in the hands of the chairman."⁷⁴ Tensions grew even greater between the members of the Commission and Chairman Brownell during the March 7 meeting whereby "the Commission learned that... Brownell did not intend to support the majority report. Instead, he was submitting an 'alternate report' written by the legal staff under the direction of Dressander and Rankin."⁷⁵ The reason for the alternate report was a disagreement between Brownell and

⁷³ U.S. Code 44 Chapter 33 (1974), §3322; Nelson, 446.

⁷⁴ Nelson, "The Public Documents Commission: Politics and Presidential Records," 446.

⁷⁵ Nelson, "The Public Documents Commission: Politics and Presidential Records," 446.

the Commission members on whether or not to have a universal method of dealing with materials generated by the three branches of government. Brownell believed the materials generated by all three branches should be treated in the same manner and the Commission members disagreed. Yet, the subcommittee desperately tried to compromise with Brownell in order to prevent the submission of two reports. Hence the inclusion of Brownell's views in the subcommittee's report.

In spite of the attempted compromise, the Commission submitted two separate reports—a minority report drafted by the legal staff and the majority report written by the subcommittee. The majority report made some notable recommendations. First, the report suggested that "documentary materials produced or received by the President, his staff, and units or individuals in the Executive Office of the President should be divided into three categories: (A) Federal records, (B) Presidential Public Papers, and (C) Personal papers of the President."⁷⁶ Federal records were "documentary materials made of received by the units of the Executive Office of the President other than those whose sole function is to advise and assist."⁷⁷ The Commission defined presidential public papers as:

documentary materials that the President and his immediate staff made or received in connection with the President's constitutional or statutory duties or that were made or received by units of the Executive Office of the President whose sole function is to advise and assist the President.⁷⁸

In other words, federal records included documents such as diplomatic cables and intelligence reports that incoming administrations expressed interest in according to the January 14, 1977 discussion panel and presidential public papers included documents that the president's office produced apart from these sensitive communications and reports

⁷⁶ National Study Commission on Records and Documents of Federal Officials, "Final Report," March 31, 1977, 29.

⁷⁷ National Study Commission on Records and Documents of Federal Officials, 29.

⁷⁸ National Study Commission on Records and Documents of Federal Officials, 29.

generated by the various government agencies and departments. The personal papers of the president, on the other hand, were simply "materials of a purely private or non-official character."⁷⁹

The Commission proposed that federal records and presidential public papers should be considered public property whereas the personal papers of the president should be considered the private property of the former president to manage on his own terms.⁸⁰ The Commission also discussed public access to federal records and presidential public papers. The report maintained that public access to federal records should be subject to Freedom of Information Act regulations.⁸¹ The Commission also argued that restrictions to public access of presidential public papers should not exceed a "fifteen-year restriction period" with the exception of documents relating to "state's secrets... and inter-agency or intra-agency memoranda... plus claims of executive privilege."⁸² This meant the Commission fully endorsed the practice of providing the executive with the unilateral authority to conceal matters of "national security" from the public despite the lessons learned from Watergate.

The minority report produced by Brownell's legal staff made a similar argument for access to presidential records. Except the minority report suggested that both the kinds materials categorized under federal records and presidential public papers in the majority report should be subject to Freedom of Information Act regulations.⁸³ The report also recommended that there should not be a full-disclosure period such as the 15 years recommended as mentioned in the majority report. Instead, researchers would have to

⁷⁹ National Study Commission on Records and Documents of Federal Officials, 31.

⁸⁰ National Study Commission on Records and Documents of Federal Officials, 31 .

⁸¹ National Study Commission on Records and Documents of Federal Officials, 1.

⁸² National Study Commission on Records and Documents of Federal Officials, 31.

⁸³ Nelson, "The Public Documents Commission: Politics and Presidential Records," 447.

individually request access to the specific materials of former presidents on their own accord. Needless to say, these reports ensured a presidential records bill that would ultimately fail to meet public expectations. Though scholars did not realize this until over twenty years later.

Drawing on the recommendations made by the two Commission reports, Congress started drafting presidential records legislation in the fall of 1977. "[O]n September, 17, 1977 Congressman Richardson Preyer (Dem-NC) introduced a bill to amend the Freedom of Information Act to insure public access to the official papers of the President."⁸⁴ This bill embodied the suggestions made in the minority report produced by Chairman Brownell's legal staff. The Preyer bill raised public suspicion of its intentions and drew fierce criticism from historians and archivists. As a result, "Rep. Brademus (D-Ind.) and Rep. Alan Ertel (D-Penn.) introduced a separate bill on presidential records on February 20, 1978."⁸⁵ Soon "[a] companion to this bill was introduced in the Senate by Senator Gaylord Nelson (D-Wisc.) on February 27."⁸⁶ Both the Brademus-Ertel bill and Nelson bill "gave to the President complete control over his records for fifteen years, as recommended by the majority report."⁸⁷

On February 23, 1977 the House of Representatives started hearings to mull over the two proposals. The "[f]our days of hearings reflected little support for [the] immediate access [as contained in the Preyer bill], but [raised] considerable concern over the unnecessary lengthy fifteen year moratorium" as suggested by the Brademus-Ertel

⁸⁴ Nelson, "The Public Documents Commission: Politics and Presidential Records," 449.

⁸⁵ Nelson, "The Public Documents Commission: Politics and Presidential Records," 449.

⁸⁶ Nelson, "The Public Documents Commission: Politics and Presidential Records," 449.

⁸⁷ Nelson, "The Public Documents Commission: Politics and Presidential Records," 449.

and Nelson bills.⁸⁸ Consequently, negotiations after the hearings produced a compromise bill whereby "the President had limited control of his papers for ten years. The restrictions which could be imposed were similar to the FOI Act restrictions contained in the Preyer bill."⁸⁹ Thus, Congress codified the government secrecy initiatives as discussed on the January 14, 1977 panel in their legislation.

Despite the compromise between Preyer, Brademus, and Ertel the measures in the bill were not strong enough for the executive branch to accept. In the spring of 1978, the Carter "[a]dministration... [started] resisting, not promoting, public access to documents."⁹⁰ Carter had two primary reservations regarding the presidential records legislation. First, he expressed grave concern over the so-called "chilling effect" even though the proposed legislation offered ample time for the presidential public papers to chill before public release. Second, Carter did not want his presidential records to be subject to the new legislation. This harkened back to the point made by William J. Hopkins that outgoing administrations enjoyed the traditional way of handling the materials of former presidents.

Carter stood firm during the negotiations between Congress and the White House. This served to water the already weak legislation down even more. Congress and the Carter administration finally agreed upon a solution that "allows the President to restrict access to six categories of information for twelve years. The six categories include classified records, material exempted by statute or relating to Federal appointments, trade

⁸⁸ Nelson, "The Public Documents Commission: Politics and Presidential Records," 449; Subcommittee of the Committee on Government Operations, House of Representatives, Ninety-Fifth Congress, Second Session, *Presidential Records Act of 1978 Hearings: H.R. 10998 and Related Bills to Amend the Freedom of Information Act to Insure Public Access to the Official Papers of the President, and for Other Purposes, February 23, 28; March 2 and 7, 1978* (Washington DC: GPO, 1978), 846-847.

⁸⁹ Nelson, "The Public Documents Commission: Politics and Presidential Records," 450.

⁹⁰ Allen Weinstein, "Presidential Papers--Carter Feels a Chill," *Los Angeles Times*, April 9, 1978, pg, F5.

secrets, personnel, investigations, etc."⁹¹ However, this did not apply to federal records. This measure applied to presidential public papers. Moreover, the final version of the bill that Carter signed into law included a provision that allows the incumbent president to unilaterally determine the extent of public access to both federal records and presidential public papers through the use of executive orders.⁹²

This narrative demonstrates that after four years of exhaustive deliberation since the release of the smoking gun tape, the policy makers of the United States arrived back at the pre-Watergate conclusion that the president knows best. The provisions in the presidential records bill allowed the executive branch to keep its communications from the public for up to 12 years and, if need be, extend the restrictions even longer through the signing of executive orders in spite of the fact that unfettered access to confidential communications allowed the public to reign in Nixon for his involvement in Watergate.⁹³ The bill also granted sweeping authority to the president to classify and conceal controversial issues under the premise of national security through executive orders.⁹⁴ In doing so, the law whitewashed the history of Watergate due to the fact that Nixon attempted to use national security as a vehicle to hide his involvement in Watergate from the public.

President Carter signed the Presidential Records Act into law on November 6, 1978 and, as a result, codified the very practices that enabled Watergate to take place into American law. Which begs the question: why did the Presidential Records Act come into being? The Commission panel discussion on January 14, 1977 suggests that the law was

⁹¹ Nelson, "The Public Documents Commission: Politics and Presidential Records," 450; U.S. Code 44 Chapter 22 (1978), §2204 .

⁹² *Presidential Records*, U.S. Code 44 Chapter 22 (1978), §2204, (a)(1)(A) and (a)(1)(B).
<http://www.archives.gov/about/laws/presidential-records.html>

⁹³ U.S. Code 44 Chapter 22 (1978), §2204, (a)(5) and (a)(1)(B).

⁹⁴ U.S. Code 44 Chapter 22 (1978), §2204, (a)(1)(A) and (a)(1)(B).

not meant to ensure general public access to presidential records and transparency in government. Rather, the law was created to abolish the presidential library system and in its place establish a centralized location at the National Archives for the housing of duplicate copies of federal records from former administrations. This arrangement guaranteed that incumbent presidents and their staff would have ready access to the information generated by former administrations and, subsequently, bridge the continuity gap between outgoing and incoming administrations.

III. Specters of Watergate: In the Executive We Trust

"It has become clear to Congress that the PRA is not sufficiently clear with respect to its disclosure mandates. Without further Congressional action each successive President likely will issue his own executive order interpreting the original PRA, thus making the public's access to Presidential records contingent upon the will of the executive..."—Report of the Committee on Homeland Security and Governmental Affairs, United States Senate, May 19, 2009

President Ronald Reagan signed the first executive order affecting the Presidential Records Act on January 16, 1989. In Executive Order 12667, President Reagan unilaterally established procedures for the implementation of the Presidential Records Act. As mentioned in the proceeding chapter, the Presidential Records Act allowed this practice. The directives in the Reagan order covered three distinct areas: processes for notifying officials of the National Archives and Records Administration's intent on disclosing presidential records, policies regarding the handling of executive privilege claims from former and incumbent presidents, and guidelines for judicial review.⁹⁵

The order altered the Presidential Records Act in many ways. Executive Order 12267 reduced the number of categories for claims of executive privilege from six to three but, in doing so, expanded the scope of executive privilege.⁹⁶ These new ambiguous categories established by the executive order were "national security (including the conduct of foreign relations), law enforcement, or the deliberative processes of the Executive branch."⁹⁷ The undefined terminology used to establish these new categories allowed the president to claim privilege over virtually any material at their own

⁹⁵ President Ronald Reagan, *Executive Order 12667—Presidential Records*, January 18, 1989. <http://www.archives.gov/federal-register/codification/executive-order/12667.html>

⁹⁶ The language of the Presidential Records Act, in § 2204, established six categories of executive privilege. These categories were: matters relating to national security and foreign policy, records relevant to appointments to federal office, materials specifically prohibited for release by statute, sensitive information regarding trade, confidential communications between a president and his or her advisors, and personnel and medical files "which would constitute a clearly unwarranted invasion of personal privacy."

⁹⁷ Reagan, *Executive Order 12667--Presidential Records*, Sec. 1.

discretion. In addition to expanding the definition of executive privilege from the original language of the Presidential Records Act, Executive Order 12667 also expanded the notification procedures by including incumbent presidents and their legal staff in the review process.

The language in the Presidential Records Act, mandated that the Archivist had to notify former presidents or their designated representatives of the release of their presidential materials. However, the Archivist was only required to alert former presidents of materials that explicitly raised concerns relevant to executive privilege.⁹⁸ Moreover, the Presidential Records Act required former presidents to establish the perimeters for their own individual privilege claims prior to leaving office. In other words, the Presidential Records Act ordered presidents to personally identify and flag specific materials that they wished to assert claims of executive privilege over before their presidential term ended. This served as the basis for determining the validity of executive privilege claims and guided the Archivist in his or her role of chief arbiter over presidential records.

The Reagan order changed this dynamic in a few ways. First, it allowed former presidents to assert claims of privilege even after leaving office. Second, the order mandated that the Archivist also inform the incumbent president, as well as many other government entities including the Attorney General and the White House Counsel, of the release of records of former presidents. In doing so Executive Order 12667 created an extensive network of executive oversight by mandating a full, secondary review of all presidential materials before their release. Lastly, the executive order removed the

⁹⁸ *Presidential Records Act*, U.S. Code 44 Chapter 22 (1978), §2206.
<http://www.archives.gov/about/laws/presidential-records.html>

Archivist as custodian of presidential records and chief arbiter of executive privilege claims by providing the incumbent president, absent a court order, with the final say over disclosing materials from past presidencies.

Despite these sweeping unilateral reforms to the Presidential Records Act, "[Executive Order] 12667 received little critical examination until" over a decade later when the first presidential records came up for public release.⁹⁹ The presidential records of Ronald Reagan were supposed to be released in January of 2001. However, President George W. Bush postponed the release of these records on three separate occasions.¹⁰⁰ Then on November 1, 2001 President Bush issued Executive Order 13233. This was the second executive order to affect the implementation of the Presidential Records Act but, unlike the Reagan executive order, this one ignited a heated debate over the role of the executive branch in enforcing the Presidential Records Act.

The outrage stemmed from the numerous changes to the implementation of the PRA that President Bush made in the executive order. The ten-section order made three new and bold proclamations just in the second section. First, Executive Order 13233 rescinded the three categories of executive privilege as annotated in the Reagan order. In their place, the Bush order established four new categories. These categories were "the states secrets privilege... the presidential communications privilege... the attorney-client

⁹⁹ Brett L. Erickson, "Presidential Power and Public Records: Executive Order 13233 and the Presidential Records Act of 1978," (MA Thesis, University of Nebraska, 2009), 80.

¹⁰⁰ White House Counsel Alberto Gonzales, under the direction of President George W. Bush, issued three memos to Archivist John W. Carlin to delay the release of Reagan's presidential papers. The first memo sent on March 23, 2001 extended the review period of Reagan's records to June 21, 2001. The second memo forwarded on June 6, 2001 suspended the release of Reagan's presidential materials until August 31, 2001. The third memo put out on August 31, 2001 did not provide an end date for the review period of Reagan's records. Furthermore, all three of these memos also delayed the release of Vice President George H.W. Bush in a similar manner.

or attorney work product privileges... and... the deliberative processes privilege."¹⁰¹ This language enabled the president to keep the public in the dark on a number of issues from "military, diplomatic, and national security secrets" to "communications of the President or his advisors" to "legal advice or legal work" and even to "the deliberative processes of the President or his advisors" past the twelve-year restriction period established by the PRA.¹⁰² Moreover, the executive order took its definition of executive privilege further by relying on two Supreme Court cases to frame the issue.

Executive Order 13233 stated that, according to the ruling in *Nixon v. Administrator of General Services*, "constitutionally based privileges available to a President 'survive... the individual President's tenure" and that:

a former President, although no longer a Government official, may assert constitutionally based privileges with respect to his Administration's Presidential records, and expressly rejected the argument that 'only an incumbent President can assert the privilege of the Presidency.'¹⁰³

This provision served as the basis for the new measures that empowered former presidents to evoke claims of privilege even after leaving office. In addition to this, the executive order cited the Supreme Court ruling on *United States v. Nixon* in its interpretation of executive privilege. Executive Order 13233 decreed that "a party seeking to overcome the constitutionally based privileges that apply to Presidential

¹⁰¹ President George W. Bush, *Executive Order 13233—Further Implementation of the Presidential Records Act*, Sec. 2, November 1, 2001.

<http://edocket.access.gpo.gov/2009/pdf/E9-1712.pdf>

¹⁰² President George W. Bush, *Executive Order 13233—Further Implementation of the Presidential Records Act*, Sec. 2, November 1, 2001.

¹⁰³ President George W. Bush, *Executive Order 13233—Further Implementation of the Presidential Records Act*, Sec. 2, November 1, 2001; United States Supreme Court, *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977).

<http://caselaw.lp.findlaw.com/cgibin/getcase.pl?court=us&vol=433&invol=425>

records must establish at least a 'demonstrated, specific need' for particular records."¹⁰⁴

The language in this provision mandated that individuals or institutions seeking access to records sealed under executive privilege must first establish a credible reason for requesting the records. This ambiguous phrase provided a veto to the incumbent and former presidents to deny access to any Freedom of Information request for records that they did not wish to release. However, these were not the only changes to the PRA.

Executive Order 13233 also established a 90 day review period for former presidents to assess their materials prior to their public release.¹⁰⁵ The intent behind this provision was to codify the language in the *Nixon v. Administrator of General Services* ruling to extend executive privilege past the end of the former president's term. In other words, it amended the PRA from mandating presidents to identify and exert privilege over materials prior to leaving office to allowing former presidents to continuously evaluate their materials prior to their release.¹⁰⁶ In the same section, this provision was accompanied by a tedious review process whereby both incumbent and former presidents had to agree not to evoke executive privilege over materials designated for release before the Archivist could release the materials to the public.¹⁰⁷ This consensus measure ensured that the most controversial and sensitive records of former administrations faced a rigorous review process prior to their authorized release by the incumbent president. The arrangement ensured that virtually no contentious presidential records would ever hit the

¹⁰⁴ President George W. Bush, *Executive Order 13233—Further Implementation of the Presidential Records Act*, Sec. 2, November 1, 2001; United States Supreme Court, *United States v. Nixon*, 418 U.S. 683, 1974.

<http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=418&invol=683>

¹⁰⁵ President George W. Bush, *Executive Order 13233—Further Implementation of the Presidential Records Act*, Sec. 3(b), November 1, 2001.

¹⁰⁶ U.S. Code 44 Chapter 22 (1978), §2204.

¹⁰⁷ President George W. Bush, *Executive Order 13233—Further Implementation of the Presidential Records Act*, Sec. 3(b), November 1, 2001.

public domain. Yet the extended executive privilege in two other ways.

First, the Bush order authorized former presidents to identify a representative to serve in their place if the former president was unable to execute his or her duties of reviewing the materials that the National Archives intended to release. The order boldly stated that "[u]pon the death or disability of a former President, the former President's designated representative shall act on his behalf for purposes of this Act and this order, including with respect to the assertion of constitutionally based privileges."¹⁰⁸ In doing so the Bush administration asserted that, in pursuant to the *United States v. Nixon* ruling, executive privilege claims for former presidents could be evoked from beyond the grave through an intermediary. In addition to this provision, Executive Order 13233 also declared that:

this order shall also apply with respect to any such records that are subject to any constitutionally based privilege that the former Vice President may be entitled to invoke, but in the administration of this order with respect to such records, references in this order to a former President shall be deemed also to be references to the relevant former Vice President.¹⁰⁹

In other words, the Bush order also extended the right of evoking executive privilege to former vice presidents and the review process for these records, prior to their release by the Archivist, was the same review process for the records of former presidents. Despite the peculiarity of some of these provisions, the Bush administration insisted that they were vital to thoroughly implement the PRA.¹¹⁰

Needless to say, these new interpretations of executive privilege and the PRA drew immediate and fierce criticism from lawmakers and scholars. On November 7, 2001

¹⁰⁸ President George W. Bush, *Executive Order 13233—Further Implementation of the Presidential Records Act*, Sec. 10, November 1, 2001.

¹⁰⁹ President George W. Bush, *Executive Order 13233—Further Implementation of the Presidential Records Act*, Sec. 11, November 1, 2001.

¹¹⁰ The White House Office of the Secretary, "Press Briefing with Ari Fleischer," November 1, 2001. <http://www.fas.org/sgp/news/2001/11/wh110101.html>

the Minority Staff for the Committee on Government Reform in the House of Representatives issued a summary of the Bush executive order. This report questioned the scope of executive privilege established by the executive order and viewed it as "in direct conflict with the Presidential Records Act."¹¹¹ The *New York Times* proclaimed that "Executive Order 13233 ended more than 30 years of increasing openness in government."¹¹² A few days later, the American Historical Association offered its critique of the Bush order. In an open letter to Chairman of the Committee on Government Reform, Stephen Horn, AHA Executive Director Arnita A. Jones declared that:

Executive Order 13233... makes a mockery of the... [PRA] and the intent of the Congress in enacting it. Far from establishing orderly procedures for the release of presidential records as the Bush administration claims, the order devises a series of nearly impenetrable barricades to information about presidential decision-making that the public has a right to have."¹¹³

Journalist Eric Alterman expressed similar concerns. In a December, 2001 piece for *The Nation* Alterman argued that "Executive Order 13233... eviscerates the nation's access to its own history, effectively overturning the Presidential Records Act (PRA) of 1978 by fiat."¹¹⁴ Similarly, the following year, the American Political Science Association provided its own response to the Bush order in the form of open letter to Chairman Horn. In it, Robert D. Putnam and Robert J. Spitzer assert that "Executive Order 13233 conflicts with the premise of the Presidential Records Act of 1978, which calls for presidential records to become public and places the burden on the government to insure such records

¹¹¹ Minority Staff Committee on Government Reform, House of Representatives, "Summary of the Bush Executive Order on the Presidential Records Act," November 7, 2001.

¹¹² Richard Reeves, "Writing History to Executive Order," *New York Times*, November 16, 2001.

¹¹³ Arnita A. Jones, "American Historical Association Response to Executive Order 13233," *Presidential Studies Quarterly*, 32, no.1 (March 2002): 193.

¹¹⁴ Eric Alterman, "Freedom Is History (and Vice Versa)," *The Nation*, December 10, 2001, 12.

are opened for review and done so on a timely basis."¹¹⁵ However, as noted in the previous chapter, the Presidential Records Act assured nothing of the sort.

Nevertheless, while these individuals aired their grievances, a complaint was filed with the United States District Court for the District of Columbia on behalf of the American Historical Association, Hugh Davis Graham, Stanley I. Kutler, the National Security Archive, the Organization of American Historians, Public Citizen, and the Reporters Committee for Freedom of the Press on November 28, 2001 by the Public Citizen Litigation Group.¹¹⁶ In their complaint, the group declared seven ways in which Executive Order 13233 "violates the PRA."¹¹⁷

First, the plaintiffs claimed "that the Bush Order... [made] it possible for materials to be withheld for an unlimited time because it... [let] incumbent and former presidents to review the materials before their release."¹¹⁸ Second, they argued "that the Bush Order violate[d] the PRA by requiring the incumbent president to concur with a former president's assertion of privilege, absent compelling circumstances, even if there is no legal basis for the exercise of privilege."¹¹⁹ Third, the group asserted "that the Bush Order impermissibly requires the Archivist to wait until the former president permits the release of records, even if the incumbent president authorized their release."¹²⁰ Fourth, the

¹¹⁵ Robert D. Putnam and Robert J. Spitzer, "American Political Science Association Response to Executive Order 13233," *Presidential Studies Quarterly* 32, no. 1 (2002): 190.

¹¹⁶ "Complaint in American Historical Association v. National Archives and Records Administration," November 28, 2001.

<http://www.rcfp.org/news/documents/20011128ahavnara.html>

¹¹⁷ United States District Court for the District of Columbia, *American Historical Association v. National Archives and Records Administration* Civil Action No. 01-2447, (2004), 12-13.

<http://www.fas.org/sgp/jud/aha.pdf>

¹¹⁸ *American Historical Association v. National Archives and Records Administration* Civil Action No. 01-2447, (2004), 12-13.

¹¹⁹ *American Historical Association v. National Archives and Records Administration* Civil Action No. 01-2447, (2004), 13.

¹²⁰ *American Historical Association v. National Archives and Records Administration* Civil Action No. 01-2447, (2004), 13.

plaintiffs claimed "that the Bush Order violates the PRA by allowing a former president who is deceased or disabled to designate a representative to make determinations about whether to assert executive privilege over records or to allow public access to them."¹²¹ Fifth, they questioned whether "a former president is entitled to assert a claim of executive privilege independent from a former or incumbent president, or that such a claim by a former vice president is entitled to the same treatment as a privilege claim by a president."¹²² Sixth, the group claimed "that the Bush Order is contrary to NARA's regulations, which allow the Archivist to open records even when a former president has asserted privilege, if he determines that such privilege claim is improper."¹²³ Lastly, they argued "that the Bush Order impermissibly expands the constitutional scope of executive privilege... and that the Archivist's implementation of the Bush Order constitutes arbitrary and capricious agency action."¹²⁴

On almost all grounds, the District Court ruled that "the suit [was] nonjusticiable, and consequently the Court... [had] no jurisdiction over the case."¹²⁵ Though the District Court did acknowledge the legitimacy of the plaintiffs' first grievance. However, the Court stated that "[p]laintiffs' past injury [inflicted by section 3(b) of Executive Order 13233 was] simply not redressable by the relief they seek, and their only possible redressable injury... [was] hypothetical."¹²⁶ The group walked away from the dispute

¹²¹ *American Historical Association v. National Archives and Records Administration* Civil Action No. 01-2447, (2004), 13.

¹²² *American Historical Association v. National Archives and Records Administration* Civil Action No. 01-2447, (2004), 13.

¹²³ *American Historical Association v. National Archives and Records Administration* Civil Action No. 01-2447, (2004), 13.

¹²⁴ *American Historical Association v. National Archives and Records Administration* Civil Action No. 01-2447, (2004), 13.

¹²⁵ *American Historical Association v. National Archives and Records Administration* Civil Action No. 01-2447, (2004), 23.

¹²⁶ *American Historical Association v. National Archives and Records Administration* Civil Action No. 01-2447, (2004), 23.

empty handed but, while they waged this 4 year court battle, Congress started their own efforts to strike down Executive Order 13233 through legislation.

In 2002 a bipartisan coalition led by, Representative Stephen Horn, drafted and submitted a bill that aimed to rescind the controversial Bush order.¹²⁷ However, this bill never made it to the floor for a vote. Later, in 2007 Congress attempted to pass similar legislation again.¹²⁸ This bill overwhelmingly passed in the House of Representatives, but died in committee at the hands of Senator Jim Bunning in the Senate.¹²⁹ Congress attempted to pass the legislation once again in 2009.¹³⁰ Though this bill did not make it to the floor of the Senate either.

Ironically, none of these bills addressed the primary concerns that were raised by the plaintiffs in the *American Historical Association v. National Archives and Records Administration* case. Sure the bills moved to rescind Executive Order 13233 but, on the other hand, all three codified the extended review period for former presidents that was instituted by the Bush Order.¹³¹ Although, the review period was reduced from 90 days, with the capability of indefinite extensions, in the Bush Order to 20 days with only the opportunity for another 20 days extension in the amendment bills. Regardless of this slight alternation, this demonstrated that Congress sympathized with the Bush

¹²⁷ United States House of Representatives, *House Resolution 4187*, April 11, 2002.
<http://www.gpo.gov/fdsys/pkg/BILLS-107hr4187ih/pdf/BILLS-107hr4187ih.pdf>

¹²⁸ United States House of Representatives, *House Resolution 1255*, March 1, 2007.
<http://www.gpo.gov/fdsys/pkg/BILLS-110hr1255ih/pdf/BILLS-110hr1255ih.pdf>

¹²⁹ United States Senate, *Senate Bill 886*, March 14, 2007.
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Meredith Fuchs, "Court Rules Delay in Release of Presidential Papers is Illegal: Fails to Address Authority of Former Vice Presidents to Hold Up Disclosure of Papers," October 1, 2007.
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¹³⁰ United States House of Representatives, *House Resolution 35*, January 6, 2009.
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¹³¹ *House Resolution 4187* Sec. 2(a)(3)(A) and Sec. 2(a)(3)(B), April 11, 2002; *House Resolution 1255* Sec. 2(a)(3)(A) and Sec. 2(a)(3)(B), March 1, 2007; and *House Resolution 35* Sec. 2(a)(3)(A) and Sec. 2(a)(3)(B), January 6, 2009.

administration on its demonstrated need for an extended review period. Thus the PRA amendment bills were not offered in order to ensure inevitable public access to the materials of former presidents. Rather, these bills were presented in order to provide the executive branch with more flexibility in its time constraints on executive privilege.¹³² Nevertheless, Executive Order 13233 was eventually repealed and this provision disappeared along with it.

On January 21, 2009 President Barack Obama signed Executive Order 13489 that rescinded the Bush order.¹³³ This executive order reestablished the PRA implementation guidelines constructed by the Reagan order. It even contained the same interpretation of categories concerning executive privilege.¹³⁴ In addition, the Obama order reinstated the incumbent president as the chief arbiter on the disclosure of the materials of former presidents.¹³⁵ Despite this disturbing development, advocates for government transparency hailed Executive Order 13489 as a victory for open government.¹³⁶ This trend, from the Reagan presidency to the Obama presidency, suggests that the public does not understand the intent behind the PRA. If they did then they would have not been outraged by Executive Order 13233. However, this trend also suggest that the public is naively content with allowing one person to determine how much we know about the

¹³² Committee on Government Reform, United States House of Representatives, *Presidential Records Act Amendments of 2002 Report, November 22, 2002* (Washington DC: GPO, 2002), 3; Committee on Oversight and Government Reform, United States House of Representatives, *Presidential Records Act Amendments of 2007 Report, March 9, 2007* (Washington DC: GPO, 2007), 2; Committee on Homeland Security and Governmental Affairs, United States Senate, *Presidential Records Act Amendments of 2009 Report, May 19, 2009* (Washington DC: GPO, 2009), 1.

¹³³ President Barack Obama, *Executive Order 13489—Presidential Records*, January 21, 2009. <http://edocket.access.gpo.gov/2009/pdf/E9-1712.pdf>

¹³⁴ President Barack Obama, *Executive Order 13489—Presidential Records*, Sec. 1(g), January 21, 2009.

¹³⁵ President Barack Obama, *Executive Order 13489—Presidential Records*, Sec. 3(d) and Sec. 4(b), January 21, 2009.

¹³⁶ Peter Shane, "Obama's First Executive Order Strikes a Blow for Transparency and the Rule of Law," *Huffington Post*, January 22, 2009.

http://www.huffingtonpost.com/peter-m-shane/obamas-first-executive-or_b_160002.html

history of the executive branch.

Conclusion

In closing, this thesis demonstrated that our understanding of Watergate and the Presidential Records Act is misguided. Contrary to popular belief, Watergate did not usher in a new era of transparency and accountability in the executive branch. This was exhibited by the pardoning of Nixon by President Ford and the commuting of G. Gordon Liddy's sentence by President Carter. The only accountability and transparency immediately produced during Watergate was the sequestering of Nixon's materials. However, the Presidential Recordings and Materials Preservation Act of 1974 permitted the Archivist to release only the materials relevant to Watergate. Did this provision of the PRMPA conceal other misdeeds of the Nixon administration from the public? Possibly.

The PRMPA worked in another way to undermine open government advocacy. The mandate for President Ford to process Nixon's presidential records for release to the Archivist delayed Ford's appointments to the National Study Commission on Records and Documents of Federal Officials. Moreover, the fervor over the release of the Watergate materials redirected public interest and eclipsed the activities of the Commission once they conducted their investigations. This disinterest allowed the Commission to make bold recommendations for the presidential records legislation without the hassle of public criticism. These measures included the need to protect confidential communications within the executive branch as well as prevent the hasty public release of sensitive materials relating to national security. In doing so, the Commission affirmed that the United States did not learn anything from Watergate for the reason that Nixon attempted to use national security as a means to shield confidential communications that implicated

him and his advisors in obstruction of justice. The majority of recommendations offered by the Commission ended up in the Presidential Records Act of 1978.

However, the PRA did not ensure public ownership and access to the records of presidential records as some suggest. The true intent behind the PRA can be traced back to the January 14, 1977 Commission panel discussion. During the discussion, several participants expressed a need for a centralized location for the duplicate copies of the federal records from former presidential administrations so that the incumbent president and his or her staff could have ready access to these materials for continuity and practical use. Thus the purpose of the PRA was to abolish the presidential libraries system, which scattered the duplicate copies of federal records from former administrations around the country, and consolidate them under the control of the Archivist at the National Archives. Public access to the presidential public papers of former presidents was just a perk to this arrangement. Although, the PRA allowed the president to further restrict access to these materials through the use of executive orders and claims of executive privilege.

In spite of the subtle intent of the PRA, lawmakers and scholars still argue that the law was meant to provide public ownership and access to the materials of former presidents. Even though the Reagan and Obama executive orders that these individuals support prove otherwise. Nevertheless, this naïveté and stubbornness empowers Congress and the executive branch to continue to distort the history of Watergate and mislead the public as to the intent of the Presidential Records Act. Suffice it to say, the accountability and transparency measures that the public wants will not come without a comprehensive PRA amendment that reforms the use of executive order and claims of executive privilege that safeguards confidential communications and issues of "national security."

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