

August 2015

Separation of Powers; Bill of Attainder; Presidential Papers; Chief Executive's Right to Privacy; Nixon v. Administrator of General Services

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Recommended Citation

Spencer, Patricia L. (1978) "Separation of Powers; Bill of Attainder; Presidential Papers; Chief Executive's Right to Privacy; Nixon v. Administrator of General Services," *Akron Law Review*: Vol. 11 : Iss. 2 , Article 8.

Available at: <https://ideaexchange.uakron.edu/akronlawreview/vol11/iss2/8>

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CONSTITUTIONAL LAW

*Separation of Powers • Bill of Attainder •
Presidential Papers • Chief Executive's
Right to Privacy*

Nixon v. Administrator of General Services, 97 S. Ct. 2777 (1977).

IN ADDRESSING ITSELF TO THE constitutionality of the "Presidential Recording and Materials Preservation Act,"¹ the United States Supreme Court in *Nixon v. Administrator of General Services (Nixon II)*² ruled for the first time on the permissible extent of congressional authority to regulate the disposition of official records and papers of a former chief executive. By its action, the Court undertook to reverse two hundred years of practice by past presidents.³

When Richard M. Nixon resigned as President of the United States,⁴ there remained behind forty-two million pages of White House documents⁵ and eight hundred eighty tape recorded conversations.⁶ Before releasing these materials to Nixon, then-president Gerald R. Ford requested and received from the Attorney General of the United States an opinion respecting ownership of the materials. The Attorney General concluded that title rested with Mr. Nixon by virtue of historical practice and the absence of any statute to the contrary.⁷ However, he further advised that Nixon's ownership claim was limited by public interest rights in the documents as records of government activity⁸ and that the materials were subject to court orders and subpoenas.⁹

¹ The statute is divided into two titles. Title I, 44 U.S.C. § 2107 (Supp. V 1975) (Pub. L. No. 93-526, 88 Stat. 1695 (1974)) is the Act herein challenged. Title II, 44 U.S.C. §§ 3315-3324 (Supp. V 1975) (Pub. L. No. 93-526, 88 Stat. 1698 (1974)) establishes the National Study Commission of Records and Documents of Federal Officials.

² 97 S. Ct. 2777 (1977).

³ J. McDonough, *Who Owns Presidential Papers?*, 27 MANUSCRIPTS 2 (1975).

⁴ The exact date was August 9, 1974. It is interesting to note that his resignation came less than two weeks after a unanimous recommendation by the House Committee on the Judiciary that he be impeached. HOUSE COMM. ON THE JUDICIARY, IMPEACHMENT OF RICHARD M. NIXON, PRESIDENT OF THE UNITED STATES, H.R. REP. NO. 93-1305, 93rd. Cong., 2d Sess. (1974).

⁵ Mr. Nixon was personally familiar with only two hundred thousand documents. 97 S. Ct. at 2798.

⁶ These conversations were recorded at Camp David and various White House offices such as the Oval Office and the Executive Office Building. 44 U.S.C. § 2107 (Supp. V 1975) (Pub. L. No. 93-526, tit. I, § 101 (a) (2)).

⁷ 43 OP. ATT'Y GEN. 1 (1974).

⁸ *Id.*

Following receipt of this opinion, the Administrator of General Services, Arthur F. Sampson, executed a depository agreement with the former President (Nixon-Sampson Agreement).¹⁰ Under the terms of this agreement, Nixon retained title to all the materials but agreed to deposit them with the General Services Administration in accordance with the Federal Records Act.¹¹ Neither party could gain access to the materials without consent of the other. The arrangement further provided that Mr. Nixon could not withdraw originals of any written documents for three years, after which time he could either retain them for himself or donate the materials to the United States Government. Similar provisions for review of the tape recordings were established with the time period extended to five years, following which time Nixon was free to destroy any or all of the tapes.¹² In any event, all of the taped conversations were to be destroyed at the expiration of ten years¹³ or upon Nixon's death,¹⁴ whichever occurred first.

Implementation of the Nixon-Sampson Agreement was delayed at the request of the Watergate Special Prosecutor who informed President Ford that he had a continuing need of the presidential materials for the successful prosecution of pending criminal cases.¹⁵ Nixon then sued to compel specific performance of the Agreement.¹⁶ His case was consolidated with various other actions¹⁷ by private plaintiffs seeking to set aside the Nixon-Sampson Agreement and gain direct access to the presidential materials under the Freedom of Information Act.¹⁸

While these combined actions were pending, Congress enacted the challenged statute which was specifically designed to abrogate the Nixon-Sampson Agreement.¹⁹ The bill directed the Administrator of General Services to take custody of the presidential papers²⁰ and devise regulations for the screening of the papers by executive branch archivists and for future distribution.²¹

¹⁰ See 10 WEEKLY COMP. OF PRES. DOC. 1104 (Sept. 16, 1974) and *Nixon v. Sampson*, 389 F. Supp. 107, 160-62 app. A (1975).

¹¹ 44 U.S.C. §§ 2101-2108 (1970).

¹² Nixon-Sampson Agreement, note 10 *supra*.

¹³ That date was specified in the Agreement as September 1, 1984.

¹⁴ A prime motivating factor for sudden enactment of the challenged statute may have been congressional knowledge that during this time period Mr. Nixon suffered an ailment commonly called phlebitis, an illness which can be fatal.

¹⁵ On November 11, 1974, Watergate Special Prosecutor Henry Ruth and President Ford entered an agreement allowing the Special Prosecutor access to the materials for investigation and prosecution purposes. 97 S. Ct. at 2784.

¹⁶ *Nixon v. Sampson*, 389 F. Supp. 107 (D.D.C. 1975).

¹⁷ *Hellman v. Sampson, id.*; *Reporter's Comm. for Freedom of the Press v. Sampson, id.*

¹⁸ 5 U.S.C. § 552 (1970).

¹⁹ 44 U.S.C. § 2107 (Supp. V 1975) (quoting Pub. L. No. 93-526, tit. I, § 101). See also *Nixon v. Sampson*, 389 F. Supp. 107 app. (D.D.C. 1975).

²⁰ 44 U.S.C. § 2107, (Supp. V 1975) (quoting Pub. L. No. 93-526, tit. I, § 101).

²¹ 44 U.S.C. § 2107, (a) (Supp. V 1975) (quoting Pub. L. No. 93-526, tit. I, § 104).

The following day, Nixon commenced action²² for declaratory and injunctive relief against enforcement of the Act on the grounds that it was a violation of his constitutional rights and, unfairly, applied only to him.²³

A three-judge United States District Court for the District of Columbia²⁴ rejected each of Mr. Nixon's challenges to the constitutionality of the Act.²⁵ On direct appeal,²⁶ the Supreme Court affirmed, holding only that granting custody of the presidential materials to the Administrator of General Services and permitting their archival screening did not render the statute unconstitutional on its face. Writing for a majority of seven, Justice Brennan defined Nixon as a "legitimate class of one"²⁷ and a proper target for special treatment by Congress. The concurring opinion of Justice Stevens reasoned that such a distinction was justified because of the unique circumstances regarding Nixon's premature departure from office and his immunity from criminal prosecution due to his pardon.²⁸ These circumstances and the danger that he might destroy evidence necessary to the Watergate investigation made Nixon a proper target for special treatment by Congress.

Though no specific law governed the ownership of documents and materials accumulated while in office,²⁹ departing presidents for two centuries

²² At the time of filing his complaint, Nixon also made an application for a three-judge district court under 28 U.S.C. §§ 2282-2284 (1970). Judge Richey of the United States District Court for the District of Columbia declined to rule on the application. Nixon filed a petition for writ of mandamus to compel the District Court to act on the motion. That petition was denied, *Nixon v. Richey*, 513 F.2d 427 (D.C. Cir. 1975) on the assumption that Judge Richey would proceed in accordance with 28 U.S.C. §§ 2282-2284 (1970). However, Judge Richey failed to rule on the application and filed an opinion. *Nixon v. Sampson*, 389 F. Supp. 107 (D.D.C. 1975). The Court of Appeals for the District of Columbia stayed the entry of judgment to enable a three-judge district court to hear the issues. *Nixon v. Richey*, 513 F.2d 430 (D.C. Cir. 1975).

²³ Nixon attacked the constitutionality of Title I as a violation of (1) separation of powers, (2) presidential privilege doctrine, (3) Nixon's privacy interests, (4) Nixon's first amendment associational rights, and (5) the Bill of Attainder Clause. 97 S. Ct. at 2783. Nixon included the charge of violation of his equal protection rights under the fourth and fifth amendments in *Nixon v. Administrator of Gen. Services*, 408 F. Supp. 321 (D.D.C. 1976), but he did not raise that issue on appeal here.

²⁴ 44 U.S.C. § 2107 (Supp. V 1975) (quoting Pub. L. No. 93-526, tit. I, § 105 (a)) (exclusive jurisdiction vested in the United States District Court for the District of Columbia).

²⁵ *Nixon v. Administrator of Gen. Services*, 408 F. Supp. 321 (D.D.C. 1976).

²⁶ Pursuant to 28 U.S.C. § 1253 (1966) direct appeals to the U.S. Supreme Court are available after the three-judge district court hands down rulings which grant or deny interlocutory or permanent injunctions in civil proceedings.

²⁷ 97 S. Ct. at 2805.

²⁸ *Id.* at 2814 (Stevens, J., concurring).

²⁹ The issue of ownership of presidential papers has still not been settled. Though the court in *Nixon v. Sampson*, 389 F. Supp. 107 (D.D.C. 1975) declared that title lies with the government, that opinion was stayed in *Nixon v. Richey*, 513 F.2d 427 (D.C. Cir. 1975). The Supreme Court has determined that the issue of legal title to the materials is irrelevant to the constitutionality of the statute since 44 U.S.C. § 2107 (1977) provides for just compensation if anyone's economic interests are involved. 97 S. Ct. at 2806, 2810.

have consistently considered their papers personal property, whether private or official in nature, and have taken such papers with them.³⁰ Prior to the abrupt termination of the Nixon Administration, the right of a former president to determine the disposition of his official communications and govern their public access had never been challenged. Considering this historical precedent, Appellant Nixon asserted that the executive branch was immune from all congressional regulation of its papers.³¹

Traditionally, every president, congressperson, and justice of the Supreme Court, *i.e.*, each constitutional office holder, has had the right to determine the disposition of his or her own papers.³² The practical importance of this tradition has its basis in separation of powers principles.³³ Congress has seemingly sanctioned this practice of former presidents by repeatedly appropriating funds for the purchase of various presidents' papers.³⁴ Such appropriations would appear to indicate congressional recognition of the legitimacy of a president's title in the papers compiled during his term in office. As late as 1955, with the passage of the Presidential Libraries Act,³⁵ Congress seemed to assume that the president retained ownership of his papers since that Act was designed to encourage the voluntary donation of such papers to the government.³⁶

The only two cases directly relating to the issue of ownership or control of presidential papers also assumed that the president owned his papers. The courts in *Folsum v. March*³⁷ and *In re Roosevelt's Will*³⁸ sanctioned the tradition by apparently assuming that title lies in the former president. But as early as *Folsum*, Justice Story recognized a superseding public interest in presidential documents when he specifically stated that "from the nature of the public service, or the character of the documents, embracing *historical*, military or diplomatic information, it may be the right, and even the duty,

³⁰ See J. McDonough, *Who Owns Presidential Papers?*, 27 MANUSCRIPTS 2 (1975).

³¹ 97 S. Ct. at 2789.

³² See *Inland Waterways Corp. v. Young*, 309 U.S. 517 (1940). "Constitutional power, when the text is doubtful, may be established by usage." Thus, even with no statutory sanction, consistent historical practice may define ownership of property or determine the existence of a power. *Id.* at 525.

³³ U. S. CONST. art. II.

³⁴ The most notable cases include George Washington, Thomas Jefferson, James Madison, James Monroe, and Andrew Jackson. J. McDonough, *Who Owns Presidential Paper?*, 27 MANUSCRIPTS 2, 4 (1975).

³⁵ 44 U.S.C. §§ 2101, 2107, 2108 (1970).

³⁶ Legislative history shows that Congress fully considered the question of ownership when debating the Presidential Libraries Act and determined that title rests with the President. 2 U. S. CODE CONG. & AD. NEWS 3041 (1955).

³⁷ 9 F. Cas. 342 (C.C.D. Mass. 1841) (No. 4901) (Story, J., sitting as Circuit Justice).

³⁸ 73 N.Y.S.2d 821, 190 N.Y. Misc. 341 (Sur. Ct. 1947).

of the government to give them publicity, even against the will of the writers."³⁹

But a new trend has emerged as a direct response to the political realities of the 1970's.⁴⁰ The strict lines that separated the powers of the three branches have gradually eroded since new concepts stress the public interest in such presidential papers. The tradition of private ownership of federal papers has been broken by congressional enactment of such statutes as the Freedom of Information Act,⁴¹ the Privacy Act of 1974,⁴² and the Federal Records Act.⁴³ Such measures (which were found not to be unconstitutional usurpations of the powers of the executive branch⁴⁴) and the repeal of a particular gift tax law⁴⁵ evidence a retreat from the "nonmandatory, noncoercive manner in which it had previously legislated with respect to presidential papers."⁴⁶ The final break with the noncompulsory treatment of presidential papers came with the passage of Title I of the Presidential Recordings and Materials Preservation Act.⁴⁷ These statutes all represent the trend away from the tradition of presidential control of presidential papers.⁴⁸ It is precisely this

³⁹ *Folsum v. Marsh*, 9 F. Cas. 342, 347 (C.C.D. Mass. 1841) (No. 4901) (emphasis added).

⁴⁰ This nation began with a relatively simple system of government for a comparatively small community of citizens when George Washington set the precedent of taking his papers with him when he left office. J. McDonough, *Who Owns Presidential Papers?*, 27 *MANUSCRIPTS* 2 (1975). But today, the possibility of executive abuse of power is much greater due to the complexities of the bureaucratic composition of government and the enormous amount of power vested in one individual.

⁴¹ 5 U.S.C. § 552 (1970).

⁴² 5 U.S.C. § 552(a) (Supp. V 1975).

⁴³ 44 U.S.C. §§ 2101-2108 (1970).

⁴⁴ See *Federal Aviation Administration v. Robertson*, 422 U.S. 255 (1975); *Environmental Protection Agency v. Mink*, 410 U.S. 73 (1973).

⁴⁵ Tax Reform Act of 1969, Pub. L. No. 91-172, 83 Stat. 487 (1969) reduced the permitted charitable contribution deductions for an individual creator of papers, manuscripts and similar items from their fair market value to the donor's actual cost of producing them. Although the work papers of a public officeholder could have an extremely high market value, there would be no allowable tax deduction for their donation since the papers were created at government expense and the donor incurred no costs in producing them. Therefore, the statute, in effect, no longer permitted deductions for papers of presidents donated to the United States or other nonprofit organizations.

⁴⁶ 97 S. Ct. at 2791. An example of such legislation is the Presidential Libraries Act, 44 U.S.C. §§ 2101, 2107, 2108 (1970).

⁴⁷ 44 U.S.C. § 2107 (Supp. V 1975).

⁴⁸ This trend will likely continue if federal legislators continue the momentum begun under Title II of the Act. 44 U.S.C. §§ 3315-3316 (Supp. V 1975) directs the establishment of a commission to study the problems concerning "the control, disposition, and preservation of records and documents" produced by or for federal officials and to make legislative recommendations regarding whether Presidents of the United States and any or all federal officeholders should be subject to provisions similar to Title I. Thus, Congress has opened the door to allow even more legislative restrictions in the future on controls of papers of all branches of government.

movement away from voluntary donations and toward unlimited intrusions into executive work papers that Nixon argues will have the far-reaching effect of hampering the ability of a president to gather necessary information to carry out his constitutionally assigned tasks.⁴⁹

The primary issue in this case concerns whether the separation of powers doctrine⁵⁰ is violated by a legislative enactment⁵¹ that deprives a former president of any control over disposition of official papers accumulated during his tenure in office⁵² and that provides for eventual public access to such materials.⁵³ Appellant Nixon strenuously argued that such an act is an unconstitutional encroachment upon the powers reserved to the executive branch. He contended that it inhibits a chief executive's ability to function effectively in carrying out his constitutional duties by impeding his ability to communicate in confidence with his advisors, thereby compromising the complete candor and objectivity needed for high level decision making.⁵⁴

The former President relied very heavily on *United States v. Nixon*⁵⁵ (*Nixon I*) which emphatically recognized that presidential communications are presumptively privileged and that privilege is constitutionally based on the separation of powers principle.⁵⁶

This principle is a firmly established doctrine that defines the jurisdictional limits of the three branches of government and prohibits each from interfering in the constitutional powers vested in another branch.⁵⁷ The Supreme Court has consistently interpreted the Constitution so as to allow no interference with the policies and practices of the executive branch. Earlier

⁴⁹ 97 S. Ct. at 2793-94.

⁵⁰ U. S. CONST. art. II, § 1, cl. 1, provides in part: "The executive power shall be vested in a President of the United States of America."

⁵¹ 44 U.S.C. § 2107 (Supp. V 1975).

⁵² 44 U.S.C. § 2107 (Supp. V 1975) (quoting Pub. L. No. 93-526, tit. I, § 101) (places complete control of all Nixon's papers and tapes in the Administrator of General Services).

⁵³ 44 U.S.C. § 2107 (Supp. V 1975) (quoting Pub. L. No. 93-526, tit. I, § 104 (a)).

⁵⁴ See Brief of Appellant at 20-22. See also *United States v. Nixon*, 418 U.S. 683, 705-06 (1974) (same argument used regarding subpoena duces tecum in criminal investigations).

⁵⁵ 418 U.S. 683 (1974).

⁵⁶ *Id.* at 708, citing *Nixon v. Sirica*, 487 F.2d 700, 717 (D.C. Cir. 1973) (presidential communications held to be presumptively privileged). See also *Nixon v. Administrator of General Services*, 408 F. Supp. 321, 343-45 (D.D.C. 1976) (although the court felt strongly that only an incumbent could assert the privilege, it noted that if a former president asserted the privilege, the privilege carried less weight than if asserted by an incumbent); *Nixon v. Sampson*, 389 F. Supp. 107, 147 (D.D.C. 1975) *stayed at* 513 F.2d 430 (D.C. Cir. 1975) (held that a former president could not assert a presidential privilege against disclosure of his confidential communications accumulated while in office); *Sun Oil Co. v. United States*, 514 F.2d 1020, 1025 (Ct. Cl. 1975) (assuming, without deciding, that a former president has a presumptive privilege).

⁵⁷ See *Flast v. Cohen*, 392 U.S. 83 (1968); *Springer v. Government of the Philippine Islands*, 237 U.S. 189 (1928).

opinions of the Court reflect the strict constructionist view that each of the three branches ought to remain free from any control or coercive influence of another.⁵⁸ But more recent decisions of the Court⁵⁹ have unequivocally rejected that view and the district court in *Nixon II* has deemed it to be an "archaic view of the separation of powers as requiring three airtight departments of government."⁶⁰

Nixon I replaced the strict constructionist interpretation of the separation of powers principle with a balancing test.⁶¹ The Court weighed the importance of the constitutional privilege of confidentiality in presidential communications against the constitutional requirements of the judicial branch in promoting the fair administration of criminal justice.⁶² A unanimous Court recognized a presumptive privilege of confidentiality for presidential communications due to the well recognized need for candor in official decision making.⁶³ But the Court acknowledged that the presumption could be overcome by a showing of a legitimate need of a coequal branch of government whose competing interests outweigh a president's interest in confidentiality.⁶⁴

Had that same test been applied in this case (*i.e.*, balancing the chief executive's protected constitutional privilege of confidentiality against the mere desire of Congress to preserve one former president's papers for the public), the case may have been decided differently. But because the Court was apparently convinced of the exigent need to preserve these materials, it was forced to stretch the *Nixon I* test⁶⁵ into a two part functional test. First, this test analyzed the *extent* to which the legislative act interferes with the constitutionally assigned functions of the executive branch. Secondly, the test balances the extent of the interference against a consideration of whether

⁵⁸ *Humphrey's Ex'r v. United States*, 295 U.S. 602, 629 (1935); *O'Donoghue v. United States*, 289 U.S. 516, 530 (1933), citing *Springer v. Government of Phillipine Islands*, 277 U.S. 189, 201 (1928).

⁵⁹ See *Buckley v. Valeo*, 424 U.S. 1 (1976); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) (held separation of powers was not intended to operate with absolute independence).

See also THE FEDERALIST No. 47, 325-26 (J. Cooke ed. 1961); I. J. STORY, COMMENTARIES ON THE CONSTITUTION § 525 (M. Bigelow ed. 1905).

⁶⁰ 97 S. Ct. at 2790, citing *Nixon v. Administrator of General Services*, 408 F. Supp. 321, 342 (D.D.C. 1976).

⁶¹ 418 U.S. at 711-12.

⁶² Various constitutional guarantees have been held to be sacred especially in the criminal area. For example, the fifth amendment guarantees a defendant due process of law, and the sixth amendment defines a duty of the courts to insure that all relevant evidence be produced to protect the defendant. For reasons such as these, the Court in *Nixon I* found that judicial needs clearly outweigh a general claim of presidential privilege. *Id.* at 711-12.

⁶³ *Id.* at 706.

⁶⁴ *Id.* at 707.

⁶⁵ *Id.* at 711-12.

the encroachment is justified by an overriding need to promote legitimate congressional objectives.⁶⁶ By using this two part standard, Justice Brennan found that the Act did not violate the separation of powers doctrine by requiring the General Services Administration to take custody of and screen the presidential papers.⁶⁷ He reasoned that the slight encroachment on confidentiality caused by the screening was justified when weighed against the legitimate objectives of Congress. Such objectives included furthering the important public interest in preserving a complete and accurate historical record, insuring continuity in executive policymaking, receiving information regarding the excessive abuses of Watergate, and insuring the availability of materials for judicial proceedings.⁶⁸

The concurring opinion of Justice Powell helps to clarify Justice Brennan's opinion by declaring:

This is not a case in which the Legislative Branch has exceeded its enumerated powers by assuming a function reserved to the Executive under Art. II. The question of governmental power in this case is whether the Act, by mandating seizure and eventual public access to the papers of the Nixon Presidency, impermissibly interferes with the President's power to carry out his Art. II obligations.⁶⁹

The Court interpreted Article II as merely prohibiting Congress from passing a law which would frustrate the president's ability to function. It would therefore seem that if this Act made it difficult for a president to obtain the candid advice needed in his work, as recognized in *Nixon I*, then Congress would be inhibiting that ability to function and the Act would be a violation of separation of powers. However, the Court found that the statute was consistent with the privilege of confidentiality recognized in *Nixon I* because section 104(a) (5) of the Act⁷⁰ explicitly preserves the privilege and guarantees that such matters will not be disclosed.

⁶⁶ 97 S. Ct. at 2790.

⁶⁷ Both the district court and the Supreme Court limited their inquiry to the facial validity of the Act requiring the Administrator to take custody of the materials and provide for screening by government archivists and disregarded the issue of eventual public access because no regulations had yet taken effect under Section 104. A number of regulations have been submitted to Congress by the Administrator, but none have yet been passed. S. Res. 428, 94th Cong., 2d Sess., 122 CONG. REC. 5290-91 (1976); H.R. Res. 1505, 94th Cong., 2d Sess., 122 CONG. REC. 10043-44 (1976); S. Res. 244, 94th Cong., 1st Sess., 121 CONG. REC. 15803-08 (1975).

⁶⁸ 97 S. Ct. at 2794-95.

⁶⁹ 97 S. Ct. at 2818.

⁷⁰ The statute requires that regulations providing for public access must take into account "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." 44 U.S.C. § 2107 (Supp. V 1975) (quoting Pub. L. No. 93-526, tit. I, § 104 (a) (5)).

Chief Justice Burger wrote a strenuous dissent and protested that the majority ignored precedent, and, in reaching its decision, "invaded historic, fundamental principles of the separation of powers of coequal Branches of government."⁷¹ Rehnquist also dissented and predicted that because of the unclear scope of the majority's opinion, there would be a "severe dampening on free communications to and from the President"⁷² in the future.

The second major issue in this case concerns whether Title I of the Presidential Recordings and Materials Act⁷³ constitutes a bill of attainder in violation of Art. I, § 9 of the Constitution.⁷⁴ Mr. Nixon asserted that the enactment was aimed singly and specifically at him and punitively deprived him of his property by taking away control of his papers, thereby constituting a bill of attainder.

Bills of attainder originated in England and were typified by four basic characteristics. They specified the individual's name, specified the offense of which he was deemed guilty, declared his guilt, and prescribed his punishment.⁷⁵ But the Supreme Court gives a broader definition of a bill of attainder which includes a legislative act that inflicts punishment for past acts on a specified individual or an easily ascertainable group without benefit of a judicial trial.⁷⁶

The first major case in this area, *Fletcher v. Peck*,⁷⁷ held that Congress had a duty to enact statutes of general applicability that would leave to judicial determination whether an individual should be subject to the sanctions of a statute.⁷⁸ Subsequent cases continued to interpret the Bill of Attainder Clause primarily as a check on legislative power.⁷⁹ Even as late

⁷¹ 97 S. Ct. at 2821.

⁷² *Id.* at 2848.

⁷³ 44 U.S.C. § 2107 (Supp. V 1975).

⁷⁴ U. S. CONST. art. I, § 9 provides: "No Bill of Attainder or ex post facto law shall be passed." It should be noted that the Federal Constitution contains another bill of attainder prohibition directed to the states: "No state . . . shall pass any Bill of Attainder . . ." U.S. CONST. art I, § 10.

⁷⁵ Comment, *The Supreme Court's Bill of Attainder Doctrine: A Need for Clarification*, 54 CALIF. L. REV. 212, 214 (1966).

⁷⁶ See *United States v. Brown*, 381 U.S. 437, 448-49 (1965); *United States v. Lovett*, 328 U.S. 303, 315-16 (1946); *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 323 (1866); *Ex parte Garland*, 71 U.S. (4 Wall.) 333, 377 (1866).

⁷⁷ 10 U.S. (16 Cranch) 87 (1810).

⁷⁸ "It is the peculiar province of the legislature to prescribe general rules for the government of society; the application of those rules to individuals in society would seem to be the duty of other departments." *Id.* at 136.

⁷⁹ See *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277 (1866); *Ex parte Garland*, 71 U.S. (4 Wall.) 333 (1866).

as 1945, the Court in *United States v. Lovett*⁸⁰ continued its uninterrupted development of a broad application of bill of attainder prohibitions.⁸¹

But Justice Frankfurter in his concurring opinion in *Lovett* returned to the classic historical test. His was a very narrow, technical approach which looked to the form of the legislative enactment⁸² and presented rigorous requirements for the finding of a punishment.⁸³ Frankfurter's view became the majority position throughout the 1940's and 1950's as a reactionary Court chose to uphold antisubversive legislation from Congress by refusing to proclaim statutes of that period violative of the constitutional prohibition against bills of attainder.⁸⁴

In *United States v. Brown*,⁸⁵ the most recent case which discusses bills of attainder, the Supreme Court reexamined these past approaches and shifted the emphasis away from the Frankfurter view to that developed in the earlier cases of *Lovett*, *Cummings v. Missouri*,⁸⁶ and *Ex parte Garland*.⁸⁷ However, because *Brown* merely followed the trend of the earlier cases and failed to establish a judicial standard for bills of attainder, the Court may continue to vacillate between the two approaches. In addition, the Court in *Brown* applied an equal protection type of analysis, as noted in the dissenting opinion,⁸⁸ and thereby "invited the Court to apply the equal protection doctrine to bill of attainder challenges in the future."⁸⁹ However, this type of analysis involves a distinct constitutional protection and ought not be applied to bills of attainder.⁹⁰

The Supreme Court in *Nixon II*, in using the equal protection analysis

⁸⁰ 328 U.S. 303 (1946).

⁸¹ *Id.* at 315-16.

⁸² *Id.* at 322.

⁸³ For Frankfurter, the only punishment which led to a finding of a bill of attainder was retribution for past acts and any such statutorily imposed deprivations had to be accompanied by a legislative intent to punish. *Id.* at 324, 326.

⁸⁴ *Garner v. Board of Pub. Works*, 341 U.S. 716 (1951); *American Communications Ass'n v. Douds*, 339 U.S. 382 (1950).

⁸⁵ 381 U.S. 437 (1965).

⁸⁶ 71 U.S. (4 Wall.) 277 (1866).

⁸⁷ 71 U.S. (4 Wall.) 333 (1866).

⁸⁸ 381 U.S. 437, 462 (1965).

⁸⁹ Comment, note 75 *supra*, at 232.

⁹⁰ Though the majority opinion stated that the Bill of Attainder Clause "was not intended to serve as a variant of the Equal Protection Clause" (97 S. Ct. at 2804), it nevertheless analyzed the validity of the statute using equal protection terms when defining legislative classifications by designating Nixon as a "legitimate class of one" (*id.* at 2805). The majority also discussed the Frankfurter motivational test of congressional intent to punish (*see* note 83, *supra*) and decided no such intent existed here (97 S. Ct. at 2808). Conversely, Burger's dissent considers the motives of Congress when enacting legislation to be irrelevant (*id.* at 2839) and would instead look to see whether a particular individual had suffered any denial of procedural safeguards (*id.* at 2840).

suggested in *Brown*, only examined whether the statute bore a rational relationship to a permissive congressional goal in determining whether the Act constituted a bill of attainder.⁹¹ The Court appears to be saying that even if the statute meets the usual criteria for bills of attainder, that enactment will still not be deemed unconstitutional as long as it is justified by legitimate congressional objectives (*i.e.*, preserving the availability of judicial evidence and of historically relevant materials).

The basic problem with the Court's analysis is that "equal protection is irrelevant and actually undermines the effectiveness of a bill of attainder doctrine."⁹² Where a statute is challenged as a bill of attainder, the inquiry should focus on whether the victim of the legislation has been deprived of procedural due process rights rather than whether or not the public interest justifies congressional actions in passage of a statute.⁹³

The Bill of Attainder Clause is but one of the many safeguards of personal liberty embodied in the Constitution. It protects an individual's procedural rights by prohibiting legislative usurpation of judicial power, commonly referred to as "trial by legislature."⁹⁴

The basic evil of bills of attainder is their denial of procedural due process to the accused.⁹⁵ The *Brown* court considered the Bill of Attainder Clause to be interrelated with the separation of powers doctrine⁹⁶ and surmised that the clause "was intended to provide a general dividing line between legislative and judicial functions and thereby to operate as the chief means of implementing the separation of powers."⁹⁷ But this view appears too narrow. Justice Black provided a broader perspective in *Lovett* when he reasoned that the legislature should not usurp a judicial function, not because of separation of powers principles or equal protection doctrines, but because such usurpations deprive the individual of procedural safeguards that are afforded in a court of law.⁹⁸

The true import of the prohibition against bills of attainder is that Congress may not choose such a means of legislating against a particular evil, regardless of whether the statute meets equal protection standards (*i.e.*, no matter how rational the connection between the means and the end).⁹⁹ Had the *Nixon II* Court adopted a procedural due process basis for

⁹¹ 97 S. Ct. at 2807. The Court again labels this analysis as a functional test.

⁹² See Comment, note 75 *supra*, at 232.

⁹³ *Id.* at 249.

⁹⁴ *United States v. Brown*, 381 U.S. 437, 442 (1965).

⁹⁵ See Comment, note 75 *supra*, at 245.

⁹⁶ 381 U.S. 437, 442 (1965).

⁹⁷ *Id.* at 472.

⁹⁸ 328 U.S. 303, 316-18 (1946).

⁹⁹ See Comment, note 75 *supra*, at 249.

its bill of attainder doctrine, as Chief Justice Burger suggested in his dissent,¹⁰⁰ the decision would have better protected personal liberties from the demands of political expediency.

Though the district court found the final arguments of this case the "most troublesome,"¹⁰¹ the Supreme Court easily dismissed Nixon's claim that the Act¹⁰² violated his constitutional rights of privacy and freedom of political expression and association by providing for the seizure of *all* his papers and effects. Mr. Nixon alleged that his first amendment¹⁰³ rights would be infringed by the mere archival screening of his materials because these papers contained certain intra-family communications and political conversations that were unrelated to those business documents which are the subject of the statute.

A chief executive's right to privacy is a specialized constitutional area which is difficult to define and is an issue that has remained unresolved by this decision. The Court conceded that Appellant Nixon had some legitimate first amendment associational and privacy rights in his personal papers, but then applied its ubiquitous balancing test. Since only a relatively small proportion of the materials are genuinely private and the Act provides for their return,¹⁰⁴ any burden to Nixon arising solely from review of his papers by discreet government archivists for the narrow purpose of separating the public documents from the private is insufficient to outweigh countervailing government interests in preservation and disposition of the materials.

However, Burger's dissent provides that the Act should only be upheld if it meets the strict scrutiny test¹⁰⁵ and under this test, he would have declared the statute unconstitutional. Burger relies on the decision in *Buckley v. Valeo*¹⁰⁶ which supports the proposition that compelled disclosure cannot be justified by a mere showing of some legitimate governmental interest.¹⁰⁷

¹⁰⁰ 97 S. Ct. at 2838-41.

¹⁰¹ 408 F. Supp. 321, 357 (D.D.C. 1976).

¹⁰² The Presidential Recordings and Materials Act, 44 U.S.C. § 2107 (Supp. V 1975).

¹⁰³ "Congress shall make no law . . . abridging the freedom of speech." U. S. CONST. amend. I.

¹⁰⁴ 44 U.S.C. § 2107 (Supp. V 1975) (quoting Pub. L. No. 93-526, tit. I, § 104 (a) (7)) provides for "the need to give Richard M. Nixon, or his heirs, for his sole custody and use, tape recordings and other materials not likely to be related to the need [to provide the public with the full truth of the abuses of governmental power associated with Watergate] and are not otherwise of general historical significance."

¹⁰⁵ 97 S. Ct. at 2832.

¹⁰⁶ 424 U.S. 1 (1976).

¹⁰⁷ *Cf. Roe v. Wade*, 410 U.S. 113 (1973). The right of privacy guaranteed by the fourth amendment is not absolute; an intrusion may be justified by a compelling state interest.

An individual's right to privacy is not expressly mentioned in the Constitution, but the Supreme Court has repeatedly recognized it as a fundamental right of every citizen.¹⁰⁸ This implicit right has been qualified for public figures by *New York Times v. Sullivan*,¹⁰⁹ wherein it was held that by voluntary entry into public life, an elected official surrenders certain privacies that are secured for the majority of the public. Therefore, since Mr. Nixon's conversations and documents are those of a public servant, his privacy rights are limited. The extent to which these rights are limited, however, has not been measured with any certainty. But the Court has suggested recently that an individual does not have a reasonable expectation of privacy in the business records he produces for which he can assert neither ownership nor possession.¹¹⁰

The Court has failed to make a firm decision resolving the issue of executive rights, and leaves open the possibility of extending first amendment protections to records generated during a public official's tenure in office. It should be noted that complete protection would effectively shelter an officeholder from public accountability for misuse of their publicly conferred powers.

Mr. Nixon's papers and tapes contain the only complete record of one of the most severe constitutional crises in our nation's history. Fear that this precious evidence might be destroyed combined with the tremendous public necessity to learn all the facts surrounding that incident are valid justification for the promulgation of the Act.

But instead of setting a firm precedent for all future presidents and officeholders, the Court very carefully tried to limit the holding of this opinion. Justice Brennan stressed the singularity of this case by attributing the result to a unique factual context. The concurring opinions reiterated strenuously that the decision set no precedent for dealings with future presidents.

The Court has compromised on some very important constitutional issues. By balancing the competing needs of coequal branches of government, the Court has made further invasions into the boundaries distinguishing the three separate powers. In applying an equal protection analysis, rather than due process standards, in order to determine whether a statute is a bill of attainder, the Court has severely decreased the effectiveness of the bill of attainder protections. Finally, by acknowledging an individual's legitimate right of privacy in his personal papers and then denying him such right

¹⁰⁸ See *Griswold v. Connecticut*, 381 U.S. 479 (1965). "The First Amendment has a penumbra where privacy is protected from government intrusion." *Id.* at 483.

¹⁰⁹ 376 U.S. 254 (1964).

¹¹⁰ *United States v. Miller*, 425 U.S. 435, 440 (1976).

because of a particular need of one branch of government, the Court has placed governmental functional needs above individual rights. This is a dangerous approach that opens the way to future encroachments on an individual's fundamental rights.

Hopefully this decision will be interpreted so as to have a positive impact on further legislation governing the distribution of papers of other constitutional officeholders. Opening the business records of all government offices (as opposed to the personal papers of such officeholders) to administrative review in order to protect the public against abuses of power at all levels would constitute one such positive impact. This legislation could be promulgated under Title II of the Act, although Congress has not yet contemplated passage of any such measures.

PATRICIA L. SPENCER

EVIDENCE

Affirmative Defenses • Defendant's Burden of Proof • Defense of Extreme Emotional Disturbance • Due Process

Patterson v. New York, 97 S. Ct. 2319 (1977).

THE UNITED STATES SUPREME COURT in *Patterson v. New York*¹ upheld the constitutionality of a New York murder statute² which places on the defendant the burden of proving extreme emotional disturbance. The Court thereby determined that New York courts in applying the statute against defendant Gordon Patterson had not violated his right to due process of law.

¹ 97 S. Ct. 2319, 2321 (1977).

² The statute provides in relevant part:

A person is guilty of murder in the second degree when:

1. With intent to cause the death of another person, he causes the death of such person or of a third person; except that in any prosecution under this subdivision, it is an affirmative defense that:

(a) The defendant acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be. Nothing contained in this paragraph shall constitute a defense to a prosecution for, or preclude a conviction of, manslaughter in the first degree or any other crime.