Supplementary Material

Chapter 9: Liberalism Divided – Separation of Powers

Nixon v. Administrator of General Services, 433 U.S. 425 (1977)

Shortly after the resignation of President Richard Nixon, Congress passed the Presidential Recordings and Materials Preservation Act. The statute required the Administrator of General Services to take custody of the former president's papers and audio recordings, preserve them, and provide for public access. The bill was signed into law by President Ford.. Nixon immediately filed suit before a special three-judge district court panel to block enforcement of the law. The court upheld the statute, and on appeal the Supreme Court, supported by the Carter administration, affirmed that ruling in a 7–2 vote.

Historically, presidents have retained their records from their terms of office as personal property, and Nixon had entered into an agreement to donate most of his records to the government with a variety of restrictions. The statute was designed to trump the agreement and remove the restrictions while authorizing archivists to screen out privileged and private materials for the bulk of the presidential records. Nixon raised a variety of questions about the law, and the Court upheld the statute not only against concerns relating to presidential powers but also against concerns relating to personal privacy, freedom of speech and association (since some of the papers related to partisan activities), and the prohibition on bills of attainder. Congress has not applied similar regulations to other presidents, and President Ford did not turn his own papers over to the General Services Administration.

What authorizes Congress to take control of presidential papers? What are the limits of congressional control over presidential papers? Can presidential papers be distinguished from the papers of executive agencies? Does the congressional effort to preserve and grant public access to presidential materials interfere more or less substantially with the confidentiality of presidential communications than a committee subpoena for specific documents?

JUSTICE BRENNAN, delivered the opinion of the Court

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We reject at the outset appellant's argument that the Act's regulation of the disposition of Presidential materials within the Executive Branch constitutes, without more, a violation of the principle of separation of powers. Neither President Ford nor President Carter supports this claim. The Executive Branch became a party to the Act's regulation when President Ford signed the Act into law, and the administration of President Carter, acting through the Solicitor General, vigorously supports affirmance of the District Court's judgment sustaining its constitutionality. Moreover, the control over the materials remains in the Executive Branch. The Administrator of General Services, who must promulgate and administer the regulations that are the keystone of the statutory scheme, is himself an official of the Executive Branch, appointed by the President. The career archivists appointed to do the initial screening for the purpose of selecting out and returning to appellant his private and personal papers similarly are Executive Branch employees.

. . . . True, it has been said that "each of the three general departments of government [must remain] entirely free from the control or coercive influence, direct or indirect, of either of the others…," and that "[t]he sound application of a principle that makes one master in his own house precludes him

from imposing his control in the house of another who is master there." *Humphrey's Executor v. United States* (1935). . . .

But the more pragmatic, flexible approach of Madison in the Federalist Papers and later of Mr. Justice Story was expressly affirmed by this Court only three years ago in in *United State v. Nixon* (1974). . . .

Like the District Court, we therefore find that appellant's argument rests upon an "archaic view of the separation of powers as requiring three airtight departments of government." Rather, in determining whether the Act disrupts the proper balance between the coordinate branches, the proper inquiry focuses on the extent to which it prevents the Executive Branch from accomplishing its constitutionally assigned functions. Only where the potential for disruption is present must we then determine whether that impact is justified by an overriding need to promote objectives within the constitutional authority of Congress.

. . . . The Executive Branch remains in full control of the Presidential materials, and the Act facially is designed to ensure that the materials can be released only when release is not barred by some applicable privilege inherent in that branch.

Thus, whatever are the future possibilities for constitutional conflict in the promulgation of regulations respecting public access to particular documents, nothing contained in the Act renders it unduly disruptive of the Executive Branch and, therefore, unconstitutional on its face. And, of course, there is abundant statutory precedent for the regulation and mandatory disclosure of documents in the possession of the Executive Branch. See, the Freedom of Information Act . . . .

Having concluded that the separation-of-powers principle is not necessarily violated by the Administrator's taking custody of and screening appellant's papers, we next consider appellant's more narrowly defined claim that the Presidential privilege shields these records from archival scrutiny. . . .

[W]e think that the Solicitor General states the [correct] view, and we adopt it:

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

At the same time, however, the fact that neither President Ford nor President Carter supports appellant's claim detracts from the weight of his contention that the Act impermissibly intrudes into the executive function and the needs of the Executive Branch. This necessarily follows, for it must be presumed that the incumbent President is vitally concerned with and in the best position to assess the present and future needs of the Executive Branch, and to support invocation of the privilege accordingly.

. . . .

In view of [the specific directions contained in the law], there is no reason to believe that the restriction on public access ultimately established by regulation will not be adequate to preserve executive confidentiality. An absolute barrier to all outside disclosure is not practically or constitutionally necessary. As the careful research by the District Court clearly demonstrates, there has never been an expectation that the confidences of the Executive Office are absolute and unyielding. All former Presidents from President Hoover to President Johnson have deposited their papers in Presidential libraries (an example appellant has said he intended to follow) for governmental preservation and eventual disclosure. The screening processes for sorting materials for lodgment in these libraries also

involved comprehensive review by archivists, often involving materials upon which access restrictions ultimately have been imposed. The expectation of the confidentiality of executive communications thus has always been limited and subject to erosion over time after an administration leaves office.

We are thus left with the bare claim that the mere screening of the materials by the archivists will impermissibly interfere with candid communication of views by Presidential advisers. We agree with the District Court that, thus framed, the question is readily resolved. The screening constitutes a very limited intrusion by personnel in the Executive Branch sensitive to executive concerns. These very personnel have performed the identical task in each of the Presidential libraries without any suggestion that such activity has in any way interfered with executive confidentiality. . . .

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

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In short, we conclude that the screening process contemplated by the Act will not constitute a more severe intrusion into Presidential confidentiality than the in camera inspection by the District Court approved in *Nixon*. . . .

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The judgment of the District Court is *affirmed*.

JUSTICE STEVENS, concurring

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JUSTICE WHITE, concurring

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JUSTICE BLACKMUN, concurring

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One must remind oneself that our Nation's history reveals a number of instances where Presidential transition has not been particularly friendly or easy. On occasion it has been openly hostile. It is my hope and anticipation - as it obviously is of the others who have written in this case - that this Act, concerned as it is with what the Court describes, as "a legitimate class of one," will not become a model for the disposition of the papers of each President who leaves office at a time when his successor or the Congress is not of his political persuasion.

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JUSTICE POWELL, concurring

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I agree that the Act cannot be held unconstitutional on its face as a violation of the principle of separation of powers or of the Presidential privilege that derives from that principle. 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. In concluding that the Act is not facially invalid on this ground, I consider it dispositive in the circumstances of this case that the incumbent President has represented to this Court, through the Solicitor General, that the Act serves rather than hinders the Art. II functions of the Chief Executive.

. . . . I believe that Congress unquestionably has acted within the ambit of its broad authority to investigate, to inform the public, and, ultimately, to legislate against suspected corruption and abuse of power in the Executive Branch.

. . . .

Congress still might be said to have exceeded its enumerated powers, however, if the Act could be viewed as an assumption by the Legislative Branch of functions reserved exclusively to the Executive by Art. II. . . . But the Act before us presumptively avoids these difficulties by entrusting the task of ensuring that its provisions are faithfully executed to an officer of the Executive Branch.

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. . . . I would hold that [the] representations [of the incumbent president] must be given precedence over appellant's claim of Presidential privilege. Since the incumbent President views this Act as furthering rather than hindering effective execution of the laws, I do not believe it is within the province of this Court to hold otherwise.

. . . . It is uncontroverted, I believe, that the privilege in confidential Presidential communications survives a change in administrations. I would only hold that in the circumstances here presented the incumbent, having made clear in the appropriate forum his opposition to the former President's claim, alone can speak for the Executive Branch.

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CHIEF JUSTICE BURGER, dissenting

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I find it very disturbing that fundamental principles of constitutional law are subordinated to what seem the needs of a particular situation. That moments of great national distress give rise to passions reminds us why the three branches of Government were created as separate and coequal, each intended as a check, in turn, on possible excesses by one or both of the others. The Court, however, has now joined a Congress, in haste to "do something," and has invaded historic, fundamental principles of the separate powers of coequal branches of Government. To "punish" one person, Congress - and now the Court - tears into the fabric of our constitutional framework.

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Long ago, this Court found the ordinary presumption of constitutionality inappropriate in measuring legislation directly impinging on the basic tripartite structure of our Government.

Our role in reviewing legislation which touches on the fundamental structure of our Government is therefore akin to that which obtains when reviewing legislation touching on other fundamental constitutional guarantees. Because separation of powers is the base framework of our governmental system and the means by which all our liberties depend, Title I can be upheld only if it is necessary to secure some overriding governmental objective, and if there is no reasonable alternative which will trench less heavily on separation-of-powers principles.

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In pursuit of that principle [of separation of powers], executive power was vested in the President; no other offices in the Executive Branch, other than the Presidency and Vice Presidency, were mandated by the Constitution. Only two Executive Branch offices, therefore, are creatures of the Constitution; all other departments and agencies, from the State Department to the General Services Administration, are creatures of the Congress and owe their very existence to the Legislative Branch.

The Presidency, in contrast, stands on a very different footing. Unlike the vast array of departments which the President oversees, the Presidency is in no sense a creature of the Legislature. The President's powers originate not from statute, but from . . . constitutional command . . . [A]lthough the branches of Government are obviously not divided into "watertight compartments," the office of the Presidency, as a constitutional equal of Congress, must as a general proposition be free from Congress' coercive powers. . . .

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Consistent with the principle of noncoercion, the unbroken practice since George Washington with respect to congressional demands for White House papers has been, in Mr. Chief Justice Taft's words, that "while either house [of Congress] may request information, it cannot compel it. . . ." . . .

Part of our constitutional fabric, then, from the beginning has been the President's freedom from control or coercion by Congress, including attempts to procure documents that, though clearly pertaining to matters of important governmental interests, belong and pertain to the President. This freedom from Congress' coercive influence, in the words of *Humphrey's Executor*, "is implied in the very fact of the separation of the powers. . . ." . . .

This independence of the three branches of Government, including control over the papers of each, lies at the heart of this Court's broad holdings concerning the immunity of congressional papers from outside scrutiny. . . .

Title I [of the statute, directing the seizure of the papers] is an unprecedented departure from the constitutional tradition of noncompulsion. The statute commands the head of a legislatively created department to take and maintain custody of appellant's Presidential papers, including many purely personal papers wholly unrelated to any operations of the Government. Title I does not concern itself in any way with materials belonging to departments of the Executive Branch created and controlled by Congress.

. . . . Recasting, for the immediate purposes of this case, our narrow holding in *Nixon*, the Court distills separation-of-powers principles into a simplistic rule which requires a "potential for disruption" or an "unduly disruptive" intrusion, before a measure will be held to trench on Presidential powers.

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[The majority's] analysis is superficial in the extreme. Separation-of-powers principles are no less eroded simply because Congress goes through a "minuet" of directing Executive Department employees, rather than the Secretary of the Senate or the Doorkeeper of the House, to possess and control Presidential papers. Whether there has been a violation of separation-of-powers principles depends, not on the identity of the custodians, but upon which branch has commanded the custodians to act. Here, Congress has given the command.

If separation-of-powers principles can be so easily evaded, then the constitutional separation is a sham.

. . . . The legislation is also invalid on another ground pertaining to separation of powers; it is an attempt by Congress to exercise powers vested exclusively in the President - the power to control files, records, and papers of the office, which are comparable to the internal workpapers of Members of the House and Senate.

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The Constitution does not speak of Presidential papers, just as it does not speak of workpapers of Members of Congress or of judges. But there can be no room for doubt that, up to now, it has been the implied prerogative of the President - as of Members of Congress and of judges - to memorialize matters, establish filing systems, and provide unilaterally for disposition of his workpapers. Control of Presidential papers is, obviously, a natural and necessary incident of the broad discretion vested in the President in order for him to discharge his duties.

To be sure, we recognized a narrowly limited exception to Presidential control of Presidential papers in *Nixon*. But that case permits compulsory judicial intrusions only when a vital constitutional

function, i.e., the conduct of criminal proceedings, would be impaired and when the President makes no more "than a generalized claim of . . . public interest . . .," in maintaining complete control of papers and in preserving confidentiality. That case, in short, was essentially a conflict between the Judicial Branch and the President, where the effective functioning of both branches demanded an accommodation and where the prosecutorial and judicial demands upon the President were very narrowly restricted with great specificity "to a limited number of conversations . . . ." Moreover, the request for production there was limited to materials that might themselves contain evidence of criminal activity of persons then under investigation or indictment. Finally, the intrusion was carefully limited to an in camera examination, under strict limits, by a single United States District Judge. That case does not stand for the proposition that the Judiciary is at liberty to order all papers of a President into custody of United States Marshals.

United States v. Nixon, therefore, provides no authority for Congress' mandatory regulation of Presidential papers simply "to promote the general Welfare" which, of course, is a generalized purpose. No showing has been made, nor could it, that Congress' functions will be impaired by the former President's being allowed to control his own Presidential papers. Without any threat whatever to its own functions, Congress has by this statute . . . exercised authority entrusted to the Executive Branch.

Finally, in my view, the Act violates principles of separation of powers by intruding into the confidentiality of Presidential communications protected by the constitutionally based doctrine of Presidential privilege. A unanimous Court in *United States v. Nixon* could not have been clearer in holding that the privilege guaranteeing confidentiality of such communications derives from the Constitution, subject to compelled disclosure only in narrowly limited circumstances . . . .

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As a constitutionally based prerogative, Presidential privilege inures to the President himself; it is personal in the same sense as the privilege against compelled self-incrimination. Presidential privilege would therefore be largely illusory unless it could be interposed by the President against the countless thousands of persons in the executive Branch, and most certainly if the Executive officials are acting, as this statute contemplates, at the command of a different branch of Government.

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To the extent Congress is empowered to coerce a former President, every future President is at risk of denial of a large measure of the autonomy and independence contemplated by the Constitution and of the confidentiality attending it. Indeed, the President, if he is to have autonomy while in office, needs the assurance that Congress will not immediately be free to coerce him to open all his files and records and give an account of Presidential actions at the instant his successor is sworn in. Absent the validity of the expectation of privacy of such papers (save for a subpoena under *United States v. Nixon*), future Presidents and those they consult will be well advised to take into account the possibility that their most confidential correspondence, workpapers, and diaries may well be open to congressionally mandated review, with no time limit, should some political issue give rise to an interbranch conflict.

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I leave to another day the question whether, under exigent circumstances, a narrowly defined congressional demand for Presidential materials might be justified. But Title I fails to satisfy either the required narrowness demanded by *United States v. Nixon* or the requirement that the coequal powers of the Presidency not be injured by congressional legislation.

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JUSTICE REHNQUIST, dissenting

Appellant resigned the Office of the Presidency nearly three years ago, and if the issue here were limited to the right of Congress to dispose of his particular Presidential papers, this case would not be of major constitutional significance. Unfortunately, however, today's decision countenances the power of

any future Congress to seize the official papers of an outgoing President as he leaves the inaugural stand. In so doing, it poses a real threat to the ability of future Presidents to receive candid advice and to give candid instructions. This result, so at odds with our previous case law on the separation of powers, will daily stand as a veritable sword of Damocles over every succeeding President and his advisers. . . .

My conclusion that the Act violates the principle of separation of powers is based upon three fundamental propositions. First, candid and open discourse among the President, his advisers, foreign heads of state and ambassadors, Members of Congress, and the others who deal with the White House on a sensitive basis is an absolute prerequisite to the effective discharge of the duties of that high office. Second, the effect of the Act, and of this Court's decision upholding its constitutionality, will undoubtedly restrain the necessary free flow of information to and from the present President and future Presidents. Third, any substantial intrusion upon the effective discharge of the duties of the President is sufficient to violate the principle of separation of powers, and our prior cases do not permit the sustaining of an Act such as this by "balancing" an intrusion of substantial magnitude against the interests assertedly fostered by the Act.

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We are dealing with a privilege, albeit a qualified one, that both the Court and the Solicitor General concede may be asserted by an ex-President. It is a privilege which has been relied upon by Chief Executives since the time of George Washington. Unfortunately, the Court's opinion upholding the constitutionality of this Act is obscure, to say the least, as to the circumstances that will justify Congress in seizing the papers of an ex-President. . . .

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Were the Court to advance a principled justification for affirming the judgment solely on the facts surrounding appellant's fall from office, the effect of its decision upon future Presidential communications would be far less serious. But the Court does not advance any such justification.

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Justice Powell's view that the incumbent President must join the challenge of the ex-President places Presidential communications in limbo, since advisers, at the time of the communication, cannot know who the successor will be or what his stance will be regarding seizure by Congress of his predecessor's papers. Since the advisers cannot be sure that the President to whom they are communicating can protect their confidences, communication will be inhibited. Justice Powell's view, requiring an ex-President to depend upon his successor, blinks at political and historical reality. The tripartite system of Government established by the Constitution has on more than one occasion bred political hostility not merely between Congress and a lame duck President, but between the latter and his successor. To substantiate this view one need only recall the relationship at the time of the transfer to the reins of power from John Adams to Thomas Jefferson, from James Buchanan to Abraham Lincoln, from Herbert Hoover to Franklin Roosevelt, and from Harry Truman to Dwight Eisenhower. Thus while the Court's decision is an invitation for a hostile Congress to legislate against an unpopular lame duck President, Justice Powell's position places the ultimate disposition of a challenge to such legislation in the hands of what history has shown may be a hostile incoming President. I cannot believe that the Constitution countenances this result. One may ascribe no such motives to Congress and the successor Presidents in this case, without nevertheless harboring a fear that they may play a part in some succeeding case.

The shadow that today's decision casts upon the daily operation of the Office of the President during his entire four-year term sharply differentiates it from our previous separation-of-powers decisions, which have dealt with much more specific and limited intrusions. These cases have focused upon unique aspects of the operation of a particular branch of Government, rather than upon an intrusion, such as the present one, that permeates the entire decisionmaking process of the Office of the President. . . .

. . . . I agree with the Court that the three branches of Government need not be airtight, and that the separate branches are not intended to operate with absolute independence. But I find no support in the Constitution or in our cases for the Court's pronouncement that the operations of the Office of the President may be severely impeded by Congress simply because Congress had a good reason for doing so.

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I think that not only the Executive Branch of the Federal Government, but the Legislative and Judicial Branches as well, will come to regret this day when the Court has upheld an Act of Congress that trenches so significantly on the functioning of the Office of the President. I dissent.