



# Congressional Authority to Regulate Presidential Recordkeeping

May 15, 2026

When Richard Nixon stepped from the White House lawn onto Marine One after resigning the presidency in the wake of the Watergate scandal, he could well have assumed that some of the most familiar remnants of his administration—hundreds of audio tape recordings of conversations he had in the oval office—would remain under his control. There was, [at that point](#), a long tradition of Presidents retaining ownership of their papers and records after leaving office. Consistent with that practice, President Nixon soon reached an [agreement](#) with the Administrator of General Services ensuring that the tapes, along with more than 40 million pages of records, would be taken in former President Nixon’s custody to California, where the agreement explicitly permitted the oval office recordings to eventually be destroyed.

Once word of this arrangement reached the legislative branch, Congress acted quickly to enact the [Presidential Recordings and Materials Preservation Act](#) (PRMPA), which effectively abrogated the agreement and directed the Administrator to take “complete possession and control” of the former President’s records. That law marked the beginning to a new legislative approach to the preservation of presidential records. President Nixon challenged the PRMPA as a violation of the separation of powers, among other claims, but the Supreme Court rejected those arguments in its 1977 decision of *Nixon v. Administrator of General Services*.

Soon after, Congress solidified its new approach to the ownership and preservation of presidential records by enacting the [Presidential Records Act of 1978](#) (PRA). That law established that “[t]he United States shall reserve and retain complete ownership, possession, and control” of the records of future Presidents by ensuring their preservation in the National Archives and Records Administration (NARA). The PRA continues to govern the retention and preservation of presidential records to this day.

On April 1, 2026, the Department of Justice (DOJ) Office of Legal Counsel (OLC) expressed its [opinion](#) that the PRA is unconstitutional and that, as a result, “the President need not further comply with its dictates.” “[As a matter of custom](#),” OLC opinions are treated as binding on the executive branch, but do not bind the courts or Congress.

This Sidebar summarizes the PRA and the OLC opinion. It then briefly addresses some of the arguments made by DOJ against the PRA, including (1) the opinion’s assertion that Congress has no authority to regulate presidential records and (2) the opinion’s characterization of the PRA as a statute designed to facilitate congressional access to presidential records.

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## The Presidential Records Act

The PRA is the [statutory framework](#) governing the retention, preservation of, and future access to presidential records. Under the PRA, records that Presidents and their staff create while discharging their official duties—but [not those records](#) of a “purely private or nonpublic character”—are owned and controlled by the [United States](#). In other words, presidential records are the public property of the American people, not the personal property of any specific President. As described above, this approach represented a break from historical practice as all Presidents before Nixon had retained ownership of their records.

The PRA was not Congress’s first foray into the regulation of executive branch records. Congress enacted the [Federal Records Act](#) in 1950, which governed the retention and preservation of agency records, but that law has never applied to presidential records. It also enacted the [Presidential Libraries Act](#) of 1955, which authorized, but did not require, the Administrator of General Services to “accept and take title to” the “papers and other historical materials” of Presidents to place them into a presidential library.

Besides establishing public ownership of presidential records, the PRA also created procedures (to be supplemented by executive branch regulations) governing the creation, preservation, retention, and disposal of presidential records both during and after a presidency. During a presidency, the [law requires](#) that a President

take all such steps as may be necessary to assure that the activities, deliberations, decisions, and policies that reflect the performance of the President’s constitutional, statutory, or other official or ceremonial duties are adequately documented and that such records are preserved and maintained as Presidential records.

The incumbent President exercises [exclusive responsibility](#) over custody, control, and access to records created during the President’s administration, but these records may not be destroyed except in narrow circumstances.

[After a President leaves office](#), the Archivist of the United States (the head of NARA) “assume[s] responsibility for the custody, control, and preservation of, and access to, the Presidential records of that President.” Although the PRA provides for the eventual public access to presidential records held by NARA, [the law](#) does not permit such access until 5 years after the end of the presidency, and the President may further restrict access to [certain categories](#) of documents—for example, records relating to appointments to federal office—for up to 12 years after the President’s term of office ends. Even after the expiration of the 5- or 12-year period, both former and incumbent Presidents may intervene at any time to assert claims of any “[constitutionally based privilege](#)” to prevent public access to those records.

Finally, the PRA contains a special access provision. Under that [provision](#), NARA can, regardless of the previously described temporal limitations, make presidential records available to (1) an incumbent President, if needed for the conduct of official business; (2) the courts, pursuant to subpoena in a criminal or civil proceeding; or (3) [Congress](#), pursuant to subpoena from a committee of jurisdiction, “if such records contain information that is needed for the conduct of its business and that is not otherwise available.” Access under this provision, however, [remains subject to](#) “any rights, defenses, or privileges which the United States or any agency or person [including the President or former President] may invoke.”

## The OLC Opinion

When he signed the PRA, [President Jimmy Carter](#) raised no constitutional objections to the new statute and instead noted how the law included an appropriate “safeguard” by providing a legal process for the “resolution of constitutional questions raised by disputes over the release of presidential records.” [Subsequent Presidents](#), though sometimes raising concerns over the role played by executive privilege in

disputes over access, have all acknowledged the law's applicability. On April 1, 2026, however, DOJ [posited](#) that the PRA is unconstitutional because it “exceeds Congress’s enumerated and implied powers” and “aggrandizes the Legislative Branch at the expense of the Constitutional independence and autonomy of the Executive.”

With respect to Congress’s authority, OLC began by noting that every law enacted by Congress must be supported by either an enumerated or implied constitutional power. OLC recounted the long history of Presidents retaining ownership over their documents prior to the 1970s and Congress’s non-intervention in that tradition, which it [viewed](#) as a “telling indication” that Congress possesses no such power to regulate presidential records.

OLC determined that, in its view, the PRA could not be sustained under any of a number of possible sources of authority. The law [could not be supported](#) by the Congress’s implied oversight power, it reasoned, because the PRA is “unsupported by any valid legislative need”; or the legislature’s power over agencies, since that power does not extend to the office of the President; or the spending power, since that power cannot be used to “regulate coordinate branches of government”; or the Necessary and Proper Clause, since the law “restricts rather than empowers the President.”

With respect to *Nixon*, OLC [asserted](#) that the Court’s 1977 opinion is both “distinguishable” and “wrong.” The opinion is distinguishable, according to OLC, because the PRMPA “sought a discrete set of identified materials under extraordinary circumstances” and was therefore a much narrower statute than the PRA, which “establishes a permanent regime governing all presidential records.” In any event, [according to OLC](#), *Nixon* was also wrongly decided and does not reflect the Court’s current, “more thoughtful approach” to evaluating the separation of powers. The memorandum instead characterized the *Nixon* opinion as representative of the “*ancien regime*” of the Court’s ‘mid-twentieth century’ approach to separation of powers.” The opinion stops short of explicitly calling for *Nixon* to be overturned, but it does seem to suggest DOJ’s view that *Nixon* is the type of “[fundamentally misguided](#)” decision that the Court may revisit.

Finally, OLC [determined](#) that, because constitutional “infirm[ities] pervade[] the entire statute,” the “PRA is invalid in its entirety.” As a result, the memorandum concludes, “the President need not further comply with its dictates.”

## Counterarguments to the OLC Position

The OLC legal position has [supporters](#) but has also been the [subject](#) of some [criticism](#). This section notes counterarguments to two specific aspects of the memorandum’s legal reasoning: (1) the determination that the PRA exceeds Congress’s legislative power and (2) the characterization of the PRA as a statute designed to facilitate congressional access to presidential records.

OLC’s conclusion that Congress lacks authority to enact the PRA is open to at least two counterarguments. First, although OLC is correct that the Court in *Nixon* did not identify the source of Congress’s power to dictate the custody and preservation of Nixon’s records, the Court explicitly stated in that case that Congress had authority to do so. In arriving at that conclusion, the Court [explained](#) that there was “abundant” precedent for congressional regulation of executive branch documents and that these previous statutes had “never been considered invalid as an invasion of [executive] autonomy.” While the earlier statutes applied only to agency records, the Court nevertheless explicitly concluded in *Nixon* that Congress had a “[similar](#)” power over presidential records that was based on its “important interests” to “preserve the materials for legitimate historical and governmental purposes.” “Congress,” the Court [held](#), “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.” OLC, as noted above, [asserts](#) that this reasoning applies only to the PRMPA

and not the PRA, and that it was flawed in that the opinion failed “to appreciate the Article II consequences of permitting Congress to regulate presidential records.”

Second, the OLC opinion did not address what may be Congress’s strongest source of constitutional authority for regulating government records: [Article IV, Section 3 of the Constitution](#) states that “Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.” Although this provision, in light of its reference to “territory or other property,” has often constituted the source of Congress’s power over federal lands and other real property, the Supreme Court has [stated](#) that Congress’s “power of regulation and disposition was not confined to territory, but extended to ‘other property belonging to the United States,’ so that the power may be applied . . . ‘to the due regulation of *all other personal and real property rightfully belonging to the United States.*’” This interpretation of Article IV has roots as far back as Justice Joseph Story’s influential *Commentaries on the Constitution of the United States*, published in 1833. Prior to enactment of the PRMPA and PRA, presidential records were viewed—including at least [implicitly](#) by Congress—as the private property of the President that created them. Long after Nixon had left office, for instance, the D.C. Circuit [determined](#) that “at the time when PRMPA was passed, President Nixon’s presidential papers were exclusively the property of the President.” As a result, the court held that the PRMPA—though constitutional under *Nixon*—was a taking of the former President’s property requiring just compensation under the Fifth Amendment. (The DOJ [settled](#) with the Nixon estate in 2000, agreeing to pay \$18 million for his presidential records.) If, however, presidential records are now government property, as Congress determined they are in the PRA, Article IV may be a source of authority for the congressional regulation of government records, whether held by agencies or the President.

The National Study Commission on Records and Documents of Federal Officials, an advisory body [established](#) as part of the PRMPA 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,” agreed with this interpretation. The [Commission’s final report](#) announced its conclusion that, under Article IV, Section 3, “Congress has the authority to declare documentary materials generated by Federal officials in connection with their official duties to be public property . . . and to provide for their disposition.” Whether a “President, Congressman, or any other elected or appointed public official,” the Commission [endorsed the principle](#) that any “individual who seeks or accepts public office should recognize that materials created in the discharge of the business of the public belong to the public.”

OLC’s characterization of the PRA as a law that empowers Congress at the expense of the President also appears subject to various critiques. The OLC analysis [frames](#) the PRA as a congressional attempt to aggrandize its own access to presidential records, rather than regulate the handling of presidential records within the executive branch. This approach allows OLC to marshal separation-of-powers arguments that the Court has applied in the context of congressional investigations, including language from [Trump v. Mazars](#), a case involving congressional access to the personal financial records of a sitting President. This framing also creates a context in which OLC can draw upon principles associated with interbranch comity and the accommodations process—a long-standing arrangement in which congressional access to sensitive executive records is sometimes resolved through good faith negotiation, and compromise. For example, the OLC analysis [asserts](#) the PRMPA and the PRA “interrupted” a historical arrangement where “Presidents owned and controlled presidential papers, and Congress obtained such papers through political negotiation and interbranch accommodation.”

Although OLC views the PRA as a tool for Congress to access presidential records, the PRA provides Congress with no right of access to the records of incumbent Presidents and contains only one provision pertaining to congressional access to records of a former President held by the NARA—a [provision](#) that similarly governs access by incumbent Presidents and access in litigation through judicial subpoenas. The rest of the law regulates the creation, preservation, and disposition of presidential records by and within

the *executive* branch. As noted above, the law provides the President with exclusive control over his records while in office and then transfers custody of those records to NARA—an executive branch agency—once the President leaves office. This framing of the PRA as a law primarily concerned with record retention and eventual public access, rather than congressional access, is arguably confirmed by the law’s legislative history. The House Report associated with the law identifies the PRA’s dual purposes:

- (1) to establish the public ownership of records created by future presidents and their staffs in the course of discharging their official duties; and (2) to establish procedures governing the preservation and public availability of these records at the end of a Presidential administration.

The importance of this distinction between congressional *regulation* of presidential records within the executive branch and congressional *access* to presidential records was underscored in *Nixon*. There, the Court indicated that President Nixon’s asserted separation-of-powers concerns were *weakened* by the “*highly relevant*” details that “control over the materials remains in the Executive Branch”; that the official charged with administering the law was a “himself an official of the Executive Branch”; and that the “career archivists” charged with doing an initial screening of presidential records “similarly are Executive Branch employees.” This all remains true under the PRA.

As described in *Nixon*, however, the PRMPA, unlike the PRA, did “not make the presidential materials available to the Congress—except insofar as Congressmen are members of the public and entitled to access when the public has it.” In comparison, as noted above, the PRA special access provision gives congressional committees of jurisdiction, along with the incumbent President and the courts, limited access to presidential records once transferred to NARA. Still, the terms of the PRA do not appear to aggrandize Congress’s existing authority to access these records. Instead, the PRA makes clear that access to presidential records by Congress *remains* “subject to any rights, defenses, or privileges which the United States or any agency or person may invoke,” including executive privilege. Committee access is further *restricted* by the fact that the committee must articulate how the requested records are “needed for the conduct of its business” and that the records are “not otherwise available.”

As a result, the PRA does not appear to expand Congress’s ability to access presidential records beyond what the body already possesses as part of its constitutional power of inquiry. If, for example, a committee were to request presidential records under the special access provision, both former and incumbent Presidents would be free to invoke any *applicable legal privileges* to NARA and subsequently ask a court to block Congress from accessing protected records. President Trump, for example, filed such a *lawsuit* in 2021 when a House investigative committee sought records from his first term.

Even assuming that, as OLC asserts, congressional access to former Presidents’ records under the PRA’s special access provision was unconstitutional, that determination likely would not free the President from complying with the PRA’s other provisions, especially those on record retention and preservation. The OLC opinion *concludes* that the entire PRA must fall, since constitutional problems “pervade[] the entire statute.” The Supreme Court has made clear that courts should take a *restrained approach* when considering the effect one problematic provision has on the rest of the relevant statute. The *default rule* is to “sever” an unconstitutional provision and permit the rest of the statute to continue in force if the rest of the statute can stand on its own, unless it is evident that Congress would not have enacted the remainder of the statute independently of the invalid part. In light of the purposes articulated by Congress in enacting the PRA—public ownership of presidential records and the preservation of and eventual public access to presidential records—it would appear that the congressional access provision is ancillary to the central purpose of the statute and that the other preservation and ownership provisions can operate independently. Supporting this interpretation, Congress clarified its intent by including a severability clause in the PRA, which *explicitly provides* that “[i]f any provision of this Act is held invalid for any reason by any court, the validity and legal effect of the remaining provisions shall not be affected thereby.”

## Conclusion

When enacted, the PRMPA and PRA marked a clear shift from private ownership of presidential records to public ownership. Since that time, the PRA has governed the creation and preservation of presidential records, and no court has questioned the law's facial constitutionality, nor, until the recent OLC opinion, has an incumbent President. Congress has various tools at its disposal if it wishes to respond to the executive branch's determination that the President is not bound by the PRA, including amending or repealing the PRA or focusing its legislative and oversight powers on the White House's ongoing compliance with existing law.

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