

THE *FIRST* NIXON PAPERS CONTROVERSY: RICHARD NIXON'S 1969 PREPRESIDENTIAL PAPERS TAX DEDUCTION

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ABSTRACT: This article examines President Richard Nixon's gift of a portion of his prepresidential papers to the United States, his attempt to take an illegal tax deduction for this gift, and the role of archivists in bringing the matter to public attention. The chronology of the gift draws on interviews with participants in the affair, and on records held by the National Archives' Nixon Presidential Materials staff. The article explores causes and implications of the affair and concludes that the scandal resulted in part from the acts of certain Nixon administration officials and from the National Archives' placement under the General Services Administration (GSA). The article also examines the negation of the Presidential Records Act by several recent executive orders and the likelihood of future scandals involving presidential records at the National Archives.

Richard Nixon has the dubious distinction of being the only president of the United States to resign his office. His administration's records are similarly distinguished as having required the passage of special legislation to prevent their seizure by the president. The status of these presidential materials has embroiled the National Archives in controversy and litigation ever since. The Watergate affair was not the first scandal caused by the legal status and ownership of Richard Nixon's records. The first Nixon papers controversy centered on whether legal transfer of a selection of Nixon's prepresidential papers to the federal government had been made before a cutoff date set by Congress in tax reform legislation.

This earlier incident, the subject of this article, raised some key archival issues. These include the need for an institution to have physical possession of a deed of gift for collections of private papers; a reminder of the politicization of archival functions before the National Archives gained independence from the General Services Administration (GSA) in 1985; and the importance of the Presidential Records Act in ensuring timely public access within established archival procedures.

Finally, this incident highlights the ongoing battles over access to presidential records and the consequences for archivists and historians.

Background to the Gift

To understand why Nixon's 1969 gift of prepresidential papers ran into trouble, it is necessary to examine briefly the legal requirements for a presidential gift to the U.S. government, the IRS requirements for a tax deduction for charitable donations, and the process by which the National Archives accepted these gifts. Presidents since George Washington had done as they wished with the papers of their presidencies, which led to priceless materials being burned, sold, or otherwise scattered. Legislation passed in the 1970s took long strides toward opening these materials to the public. The 1974 Presidential Recordings and Materials Preservation Act declared official presidential papers to be public property and the papers of all presidents beginning in 1981 to be the property of the United States. The 1978 Presidential Records Act established a time line for release within an archival framework for opening or restricting unclassified presidential materials.

From 1949 to 1985, the National Archives (then known as the National Archives and Records Service, or NARS) was a subagency of the GSA. The Presidential Libraries Act of 1955 authorized the GSA to accept legal title to presidential materials; the GSA in turn delegated that authority to the National Archives. The GSA was further authorized to accept gifts with restrictions on access to assure presidents that sensitive or personal material would not be disclosed without their permission.¹ The intent of the act, which allowed the GSA to accept title to presidential papers without enabling legislation, was to encourage presidents and other public figures to donate their papers to the federal government.

The process by which deeded papers were transferred to the National Archives had generally been adhered to since the passage of the Presidential Libraries Act. Every year from 1965 to 1968, President Lyndon Johnson followed his predecessors Harry Truman and Dwight Eisenhower in annually deeding portions of his papers to the U.S. government.² It became expected, although not legally required, that a president would donate his papers to the National Archives in preparation for eventual placement in a presidential library.

Tax deductions for such gifts enticed prospective donors who otherwise would have sold their papers to collectors. Presidents Truman, Eisenhower, and Johnson had benefited financially from their annual gifts to the National Archives. Johnson described this routinized process to his successor Richard Nixon shortly after Nixon's election in November 1968.³ Typically, the president asked an appraiser to select a group of papers valued at a certain amount. After the president approved the appraiser's choices, his attorney executed a legal document transferring the selected materials to the U.S. government. Nixon assigned his personal tax attorney to look into the possibilities of a gift for the year 1968.⁴ Nixon hired appraiser Ralph Newman, who had also designated President Johnson's gifts, to perform this function. A selection of Nixon's prepresidential papers were physically transferred to the National Archives, where they were inventoried and stored until Newman designated a gift at the end of the calendar year.⁵ A deed of gift specifying certain restrictions on access to the papers was drafted, signed by Nixon, and delivered to the GSA on December 30.

The 1968 transfer met the three requirements of a gift: clear intent to give; delivery and relinquishment of dominion over the gift by the donor; and acceptance of the gift by the donee.⁶ A schedule attached to the deed described the contents of Nixon's gift and the title was clearly transferred to the National Archives.⁷ The schedule listed the contents of 21 containers consisting of 41,300 items. These included papers and artifacts from Nixon's congressional and vice presidential terms, among them speeches, correspondence files, audiotapes documenting the 1960 campaign, and the original manuscript to Nixon's *Six Crises*.⁸

As the end of the year approached, President-Elect Nixon decided to replace the team of tax attorneys who had successfully claimed a tax deduction for the gift of papers for tax year 1968. The law firm of Kalmbach, DeMarco, Knapp and Chillingworth now represented Nixon in all his personal legal matters and Frank DeMarco was assigned responsibility for preparing the president's tax return, including overseeing a similar gift of Nixon's papers for tax year 1969.⁹

The 1969 Gift

In February 1969, Nixon approved John Ehrlichman's plan to claim the maximum tax deduction for that year.¹⁰ The shipment, constituting one-third of the total of Nixon's prepresidential materials, was moved to the National Archives.¹¹ The 1969 gift papers, described as being "in various states of disarray," were considered to be in courtesy storage.¹² Materials "in courtesy storage" or "on deposit" still belong to the donor until a formal legal transfer is signed, usually through a deed of gift. Materials are considered to be "deeded to the U.S." only after they have been transferred to the physical and legal control of the government. There were two reasons for courtesy storage: to encourage the president to donate his papers to the government at a later date and to allow the National Archives to unpack, inventory, and arrange them into a workable order in case the president needed access to any of his materials. Although in most cases the archivists' code of ethics calls for discouraging the imposition of restrictions to access, courtesy storage was a privilege routinely extended to presidents considering gifts of their papers to the U.S. government, and was crucial in preparing for the appraiser's designation of a gift.¹³ At this point, no one thought that the materials' transfer to the National Archives building constituted a gift.

With the placement of this portion of Nixon's undeeded prepresidential papers in a number of preliminary archival series in April and May 1969, the next step in the gift process was appraisal. To comply with accepted practice, the president's tax lawyers would have then designated a dollar amount allowable for deductions and the appraiser would have designated a selection of papers valued at this amount. Book appraiser Ralph Newman, who had selected Nixon's first gift of papers, was asked to designate the second gift.¹⁴ Newman did not appraise any of the papers in the five months after archival arrangement was completed.

Up to this point, the 1969 gift had followed the pattern set by previous presidential donations. However, the legal foundation for tax deductions of gifts was threatened by the proposed Tax Reform Act of 1969, a major overhaul of the U.S. tax code. Its provisions relating to charitable contributions of papers attempted to close a loophole that

benefited public officials such as Presidents Johnson and Nixon. Critics denounced the old law for rewarding public figures for donating papers that should not have been considered theirs to begin with. Before passage of the act, the author or original owner of papers or letters was entitled to deduct the fair market value of the materials' worth, up to 30 percent of the taxpayer's adjusted gross income.¹⁵ The provisions of the Tax Reform Act eliminated the tax break claimed for gifts of papers, "so that the tax deduction value for income tax purposes of any such document, speech or item of correspondence would be worth only the inconsequential value of the piece of paper it was written on, not the appreciated value that a collector might pay for the manuscript." This led to a dramatic decrease in the donation of personal papers to the U.S. government and certain charitable organizations.¹⁶

Nixon and his aides were actively involved in the Tax Reform Act debate and mindful of the act's impact on Nixon's planned gifts of papers. On April 21, 1969, Nixon sent his tax reform proposals to Congress, which upheld the existing provisions for tax deductions for charitable contributions of gifts of personal papers. Republican senators in particular had targeted Johnson's tax savings.¹⁷ Edward Morgan, an attorney serving as an aide to John Ehrlichman, later described a "mad scramble" of White House lobbying in June 1969, to preserve the tax code's charitable donation provisions that benefited President Nixon.¹⁸ On July 25, 1969, the House Ways and Means Committee recommended eliminating the tax deduction, but the administration still believed it had a chance to retain it in the final version of the legislation. In October 1969, Morgan and Ehrlichman exchanged memos expressing concern about the versions of the bill that, according to Morgan, could "wipe out" the president's planned tax savings. They lobbied an official at the Treasury Department to retain the tax code provisions on charitable donations.¹⁹ The House and Senate passed different versions of the Tax Reform Act. The compromise version that passed both chambers set July 25, 1969, as the deadline for donations.²⁰ On December 30, 1969, President Nixon signed it into law.²¹

In order for Nixon's 1969 gift to meet the requirements of the Tax Reform Act, legal transfer would have to be made in writing on or before July 25, 1969. After working with the 1968 deeded papers in April 1969, Newman did not return to the archives until November 3, 1969.²² On that date, Newman met Richard Jacobs, Deputy to the Assistant Archivist for Presidential Libraries, and Jacobs's assistant Mary Walton Livingston, who showed him the Nixon materials in National Archives courtesy storage. Newman expressed interest in selecting the "General Correspondence" series, which contained letters to Nixon from national figures and foreign leaders, but he considered the letters from ex-presidents and foreign heads of state too valuable to donate to the U.S. all at once. He suggested extracting the letters written by Lyndon B. Johnson, John F. Kennedy, J. Edgar Hoover, Herbert Hoover, Earl Warren, Hubert Humphrey, and Sam Rayburn, and deeding the remaining correspondence as the 1969 gift.²³ Livingston feared that removing these items would detract from the collection's value to scholars and, instead, suggested selecting the entire boxes containing VIP letters rather than just the individual letters. The 17 boxes containing these letters were separated and the remaining 828 boxes were selected for the 1969 gift.

The Tax Reform Act's passage set off panicked communications between the aides working on the president's tax return. Newman called Nixon's tax attorney Frank

DeMarco for further instructions on how to proceed in light of the act's change in tax law regarding charitable donations. Newman said that DeMarco told him there was nothing left for him to do on Nixon's gift for 1969. Newman later told investigators, "I thought he'd blown it," a reference to DeMarco's having missed the deadline for deeding the papers to the United States.²⁴ In a letter to DeMarco, Newman lamented the act's effect on charitable gifts of papers and expressed hope that archives and libraries would succeed in forcing changes to the law. Newman also suggested that DeMarco consider deeding those non-textual Nixon materials such as books, trophies, and other artifacts, which still qualified for charitable donation tax deductions for tax year 1970.²⁵

The National Archives Gets Involved

National Archives staff also followed the debate over the Tax Reform Act with interest. Within days of the act's passage, the archives noticed a dramatic decline in year-end gifts of papers to the government.²⁶ Livingston and Daniel Reed, Assistant Archivist for Presidential Libraries, drafted a memo for the signature of Archivist of the United States James B. Rhoads, stating that "the flow of gifts to presidential libraries" had slowed considerably since the act's passage. The National Archives expected the "donation by Nixon of another increment of his prepresidential papers as a second installment to those deeded to the Government of the U.S. in December 1968. No such donation was made in December 1969, although we understood all plans had been made for it."²⁷ A number of public figures decided not to make gifts of papers to the National Archives, among them Lyndon Johnson, who had made a gift in each of the past four years. Nixon's own chief of staff, H. R. Haldeman, who had reportedly agreed to deposit his papers at the National Archives, also declined.²⁸ Nixon's prepresidential papers were in a state of limbo: they were under the archives' physical control but ownership had not yet been deeded to the government.

On March 27, 1970, less than three weeks before the IRS filing deadline, DeMarco finally took action. DeMarco called Newman to tell him to prepare a list of items suitable for deeding, with a total value of around \$500,000.²⁹ DeMarco told Newman to get confirmation from the National Archives that it considered the 1969 deed process completed, even though Newman had been saying for months that this was not the case. To Newman's surprise, DeMarco said he was documenting President Nixon's gift of papers to the U.S. government, which had been accomplished when the papers were delivered to the National Archives on March 27, 1969.³⁰ Newman believed that the act's passage had ruled out a 1969 tax deduction for the president, but he followed DeMarco's orders. His appraisal in December 1969 had valued the contents of 828 boxes of Nixon's correspondence files. After estimating the market value for a box of Nixon's papers, he decided that approximately three hundred more boxes would be required for their total value to equal \$500,000. Newman called Livingston, asking her to call him back with a complete list of around 1,200 boxes to be donated. He said that this information was needed by the White House within the hour. Livingston was uncomfortable with Newman's request.³¹ Newman had called her from Chicago, so he could not accurately appraise the value of any papers she selected. Livingston and an assistant quickly chose four new categories of papers. These boxes of papers, added to the 828 boxes of corre-

spondence selected by Newman in December 1969, amounted to 1,176 boxes. Livingston prepared a schedule listing the 828 boxes that Newman had appraised earlier. She then read over the telephone to Newman a list of the additional boxes she had selected. Newman thanked her and asked her to “keep this matter between him and myself because it would be better that way for the White House and for him if I didn’t discuss this with my superiors.”³² Livingston wrote to her files that, “The letter inside from R. Newman is the only ‘deed of gift’ NL [the National Archives’ Office of Presidential Libraries] will receive according to word received today from Mr. Newman.”³³ Newman also sent Livingston a letter thanking her for her assistance with the papers “designated as a gift by RMN [Richard Nixon] in 1969.”³⁴ Newman’s letter did not mention his phone conversation with Livingston earlier in the day.

One result of the activity on March 27, 1970, was a list of items DeMarco claimed had been deeded to the government exactly one year earlier, which had actually been selected by Livingston. Another result was the misleading letter to Livingston, which appropriated DeMarco’s wording that a gift had been made to the U.S. government in 1969. The letter implied that the list of papers had been selected and deeded well in advance when, in fact, it had just been read over the phone to Newman.

Newman prepared a letter appraising the value of the 1,176 boxes and forwarded it to DeMarco. These boxes consisted of five categories of papers. Of these, Newman had personally appraised only one, the General Correspondence series. A gift of these papers, actually selected in March 1970, was claimed on Nixon’s 1969 tax return.

Two facts prove that there had been no transfer of legal title in March 1969. As of this date, the papers were stacked on palettes and not accessible for appraisal.³⁵ Also, the only person granted the right of access to the papers was Newman, who was assigned to appraise them for tax purposes before April 1970.³⁶

Newman sent the letter to Livingston in order to support DeMarco’s claim that a legal transfer of these papers to the government had been effected in March 1969. On April 10, 1970, to beat the tax filing deadline, the signatures and notarization were falsified.³⁷ Desperate to have some documentation that the papers had been deeded in 1969, DeMarco had asked Newman to prepare an appraisal form backdated to March 27, 1969, in order to meet the July 25 cutoff date set by Congress. DeMarco and White House lawyer Edward Morgan broke the law by backdating the deed of gift to March 27, 1969. The deed stated that Morgan had acted as Nixon’s representative in depositing at the National Archives the papers selected by Newman. DeMarco then notarized it as of April 21, 1969, for inclusion with President Nixon’s 1969 tax return and kept it in his safe. Morgan also signed a duplicate original deed, which was filed with the GSA to provide supporting documentation in case anyone questioned the deed’s legitimacy.³⁸

The travels of the duplicate original deed eventually brought the crimes to light. It remained in the GSA’s files until mid-September 1971, when the GSA discovered a problem. President Nixon had not signed the deed, which bore the signature of Edward Morgan, and the GSA returned the deed to the White House for resolution.³⁹ Jacobs was present at the meeting when the deed was returned, but he was not aware of this until later. The GSA lawyers “never said a word” to Jacobs about the reason that the deed was returned.⁴⁰ The deeds of gift for the papers of former Presidents Truman, Eisenhower,

and Johnson were all on file with the National Archives, but this was not true of Nixon's 1969 gift of papers. After being returned by the GSA for a signature in September 1971, the duplicate original Nixon deed sat in the White House files until January 1973.⁴¹

A crucial break in the case occurred when an administration official sent the Nixon deed of gift to John Nesbitt, who served as both the GSA's representative at the White House and as the director of the archives' Nixon project at the White House.⁴² Nesbitt forwarded the deed of gift, along with questions, to Daniel Reed, who answered Nesbitt's questions and ordered the correspondence to be filed. The duplicate original attached to Nesbitt's memo was filed in the National Archives Office of Presidential Libraries' copy file, which held reference copies. Livingston and Jacobs were not alerted that the duplicate deed of gift had arrived, because it had been mistakenly filed as a copy of a presidential deed of gift rather than as an original deed. This happened because the duplicate original was a photocopy in every way but one: on the last page was Edward Morgan's original signature. The deed of gift had finally reached the National Archives, but perhaps since it seemed inconceivable to deliver a presidential deed of gift to the National Archives in such an offhand fashion, it was not discovered in the files until six months later.

The Media Break the Story

In June 1973, *Washington Post* national correspondent Nick Kotz's news stories raised the possibility of misconduct by the president's staff with respect to the deed. His newspaper articles were the catalyst that led to the discovery of the deed at the National Archives. After White House aide Gordon Strachan testified in Watergate hearings that he had been involved in the donation of Nixon's prepresidential papers, a curious editor at the *Post* asked Kotz to look into the matter. Kotz found the GSA uncooperative. Kotz wondered why the National Archives, which still had no knowledge of any deed of gift for 1969, told him that he could see any presidential deed of gift except the one for Richard Nixon's 1969 gift of papers. Kotz called Livingston at home. Although she wouldn't talk to him, according to Kotz, "the terror in her voice" at being asked about the case told him all he needed to hear.⁴³

Kotz sensed a cover-up. His luck dealing with the GSA changed when Counsel to the President Leonard Garment, one of Nixon's most trusted advisors, ordered Administrator of General Services Arthur Sampson to allow Kotz access to the gift documents. Viewing the documents, Kotz realized that "the dates simply didn't add up." His first story for the *Post* concluded that the 1969 gift had been handled "in a way that precluded anyone but [Nixon's] closest associates from knowing during 1969 that the President actually had made such a gift . . . [and in a way that] officials at Archives" had no "official knowledge that a gift was being made."⁴⁴ After interviewing Morgan, DeMarco, and Newman, Kotz published two more stories on the subject in June 1973.⁴⁵

Livingston was a major force in bringing the story to public attention. She had pressed for action since Newman asked her to select the gift papers in 1970, but without a deed of gift to serve as evidence of fraud, the National Archives had not acted on her recommendation. After her conversations with Newman in March and April of 1970, she went directly to Archivist Rhoads with evidence that Newman could not have appraised and

selected papers for deeding in 1969. First, Newman had wanted papers selected in a hurry and asked Livingston to do it. He had never examined these papers himself. Second, of the five categories of papers listed in the 1969 deed of gift, Livingston had selected four on March 27, 1970, over eight months after the cutoff date for claiming a charitable tax deduction for donations of personal papers. Livingston was convinced that Nixon had claimed a tax deduction that he was not entitled to.

Nick Kotz's stories reporting the White House's contradictory statements and new information on the 1969 deed provided pieces of the puzzle that were necessary to prove Livingston's allegations. While searching for evidence, she and Jacobs discovered the falsified duplicate original deed of gift in the National Archives Office of Presidential Libraries copy file.⁴⁶ The discovery of a signed and dated document meant that the National Archives now had evidence of wrongdoing. Livingston and Jacobs immediately wrote a memo to get GSA legal counsel involved.⁴⁷ On October 26, 1973, dissatisfied with progress in the case after the discovery of the incriminating deed of gift, Livingston wrote another memo stating her suspicions for the record. Livingston wrote that there was clear evidence of wrongdoing and that the GSA should make all relevant documents available to the IRS and other investigating bodies.⁴⁸ Jacobs and Rhoads, armed with Livingston's memo, met with the GSA general counsel who took the evidence to Administrator Sampson.⁴⁹ An investigation of the circumstances surrounding the gift was now certain.

The five-member Joint Committee on Internal Revenue Taxation investigated the case. Nixon asked Wilbur Mills, Chairman of the Joint Committee, to assess the legality of two of his transactions with the IRS: the 1969 gift of prepresidential papers and the sale of his property in San Clemente, California.⁵⁰ The Joint Committee decided that Nixon owed a total of \$432,787 in back taxes and interest for the tax years 1969–1972.⁵¹ Because of questions arising out of the papers case, Richard Nixon took the unprecedented step of publicly disclosing his financial records in 1973.

The Joint Committee concluded that none of the three legal requirements for a gift—intent, delivery, and acceptance—had been met as of July 25, 1969. First, the intent of the donor to give personal property had not been established in a written instrument such as a signed deed of gift. Second, it was unclear that Nixon had relinquished, delivered, and granted rights to the papers to the U.S. government. The National Archives, not Nixon or his representatives, had ordered delivery to its storage facility.⁵² After delivery of the papers in 1969, the GSA did not receive a deed of gift until 1970. This meant that acceptance by the donee, the third requirement for a legal gift, was not met in 1969. The Joint Committee also found that the access restrictions placed by Nixon on his prepresidential papers made a written deed of gift essential. The donee couldn't carry out the donor's intent without knowledge of these restrictions, which were unknown to the National Archives for all of 1969.⁵³

In May 1973, the Watergate Special Prosecution Force (WSPF) was created under Watergate Special Prosecutor Archibald Cox. Its mission was to investigate and prosecute all criminal cases delegated by the Attorney General under the rubric of "Watergate." Evidence uncovered in WSPF investigations targeting Nixon administration officials was ruled material to the impeachment proceedings.⁵⁴ In late July 1974, the House Judiciary Committee considered 12 proposed articles of impeachment against

President Nixon. An article related to the gift of papers alleging that Nixon had received payments “in excess of the compensation provided by law” under the constitution was voted down by 12 to 26, failing to gain inclusion in the articles of impeachment against Nixon.⁵⁵ The committee likely took into consideration that Nixon had made restitution for some of the back taxes and interest that he owed. Compared to the Nixon administration’s other violations of the constitution, the illegal tax deduction may have seemed more like petty crime than the “Treason, Bribery, or other high crimes and misdemeanors” required for impeachment. Three Watergate-related articles of impeachment were eventually approved by the Committee.

WSPF lawyers prosecuted the trials of DeMarco, Newman, and Morgan. In 1974, Edward Morgan pleaded guilty to conspiring to commit fraud for signing the deed of gift with the falsified date and repeatedly lying about it to investigators.⁵⁶ Morgan then testified against Newman and DeMarco, who in early 1975 were indicted for conspiring to defraud the IRS and the U.S. government.⁵⁷ DeMarco was charged with obstructing the investigations of the Joint Committee and the IRS.⁵⁸ The charges against DeMarco were dismissed on a technicality, but the trial judge strongly implied DeMarco’s guilt, agreeing with the government that no deed of gift had been signed in 1969.⁵⁹ As with Morgan, the charges against Newman arose out of instances where he had been asked to sign fraudulent documents prepared by DeMarco, Nixon’s personal tax lawyer. Newman was convicted on one count of tax fraud, for preparing a false affidavit that he had personally examined the president’s 1969 gift papers and appraised them at \$576,000. He was also convicted on one count of perjury during the IRS investigation that resulted.⁶⁰

Summary and Analysis

How did a routine donation of papers turn into a potentially impeachable offense? To summarize, Nixon’s gift of papers for the tax year 1968 followed standard National Archives procedures, but his 1969 donation failed to do the same. For the 1969 gift, Nixon’s prepresidential papers were delivered to National Archives custody by March 1969, but were not legally deeded until after the Tax Reform Act had gone into effect. Under the act, charitable donations of personal papers made after July 25, 1969, were not eligible for income tax deductions. Nixon’s lawyers backdated the deed of gift to the United States, claimed that a gift had been made before the deadline, and took a tax write-off for the president in the amount of \$576,000. The incriminating deed of gift changed hands a number of times and evidence of wrongdoing was finally uncovered in 1973 by two National Archives employees who located the deed by accident and then forced the issue. The legal case against Nixon’s aides hinged on the question of whether a gift of papers had been legally transferred to the U.S. government before tax law changes took effect on July 25, 1969. In fact, the deed of gift was not even created until 1970. This discovery led to investigations by Congress, public interest groups, and the media, culminating in two criminal convictions and the issue being considered for inclusion in the articles of impeachment against Richard Nixon in 1974.

Much of the responsibility for the scandal can be assigned to DeMarco who, unlike his subordinates, was able to avoid a prison sentence. DeMarco’s defense was that a gift had been made upon delivery of the papers in 1969 and that his rush in 1970 to get a gift

to the GSA was unimportant, since it only served to "memorialize" a gift previously made to the U.S.⁶¹ One objection to this is that a tax attorney should have been aware of the legal requirements for a gift. Another objection is that DeMarco would not have initiated the flurry of activity in March 1970 if he thought it was a mere formality. DeMarco was clearly worried about the consequences if he did not immediately provide evidence to support his claim that a gift was made before July 1969.

DeMarco waited too long to give a gift and broke the law in a desperate attempt to cover up his error. Presidential aide Charles Colson substantiated this theory in an interview with WSPF attorneys. Counsel to the President J. Fred Buzhardt had told Colson about DeMarco's ploy to claim the maximum tax advantage for President Nixon. Buzhardt said that the papers were delivered to the archives during the debate over the Tax Reform Act. A number of different cutoff dates for gifts of personal papers were proposed by congressional committees; DeMarco delayed the signing of the deed of gift until he knew which date had been adopted. According to the memorandum, "DeMarco did not want the Congress to set a date which would be prior to the execution of the deed thereby making the gift nondeductible." If the cutoff date enacted by Congress were any time after March 27, 1969, DeMarco planned to produce the deed and claim to have met the deadline. If the deadline were earlier than this date, then DeMarco was free to destroy the deed and reclaim Nixon's papers from courtesy storage at the National Archives. Buzhardt said that DeMarco "outsmarted himself" by trying to keep his options open.⁶²

The result was a self-inflicted wound for Nixon. He had signed legislation eliminating a tax deduction that he later claimed on his own tax returns. Despite reporting over \$200,000 a year in income, Nixon himself had paid the same tax as a family with an annual income of \$15,000.⁶³

Richard Nixon's Role

A central question of the Nixon papers scandal is, "What did the president know and when did he know it?" in Howard Baker's memorable phrase. There is a wealth of documentary evidence that aides knew that Nixon's signing of the Tax Reform Act invalidated his planned tax deduction. Still, the question of Nixon's culpability in this matter will continue to be a difficult one. DeMarco never said that Nixon had ordered him to commit illegal actions. None of the principals in the case implicated Nixon directly and no mention of the incident has been discovered in the White House taping system, which was begun in early 1971 and ended two and a half years later.⁶⁴ Besieged by the Watergate scandal, the White House did not tape any conversations while the gift of papers was being investigated. At a press conference in November 1973, Nixon said that he had followed President Johnson's suggestion to claim a tax deduction for a donation of his papers and had "turned them over to the tax people . . . [who] prepared the returns, and took that as a deduction." Nixon explained that the tax deduction reflected the high value set on the papers and considerably lowered his income tax payments. Nixon said, "Whether those amounts are correct or not, I do not know, because I have not looked at my returns."⁶⁵ Based on the facts in evidence, some speculative comments can be made about Nixon's involvement in the affair.

Nixon's public statement that he did not closely follow his tax returns was disingenuous. Nixon kept himself apprised of his general fiscal condition and in certain areas betrayed a detailed understanding of matters affecting his bottom line. In February 1969, he approved Ehrlichman's plan to claim the maximum allowable deduction from gifts of papers and donation of book royalties.⁶⁶ In June 1969, Ehrlichman wrote two memos to Morgan asking questions about Nixon's taxes. One memo stated that Nixon wanted "to be sure that his business deductions include all allowable items" and that he planned to take the maximum allowable charitable deduction, presumably for another gift of his papers.⁶⁷ DeMarco told investigators that he went over the tax return page by page with the president, who said, "That's fine" after seeing each page.⁶⁸

Nixon definitely knew that he was getting a tax refund and that the gift of papers was largely responsible.⁶⁹ During his interview with the WSPF, Colson revealed that in February 1974, Nixon told him that "it would have been more beneficial for him to have sold the papers than to have given them to the U.S. government." Despite being embroiled in Watergate, Nixon was still concerned with realizing a profit from his prepresidential papers.⁷⁰ Considering that he signed legislation that he and his representatives knew would deny him a tax deduction, Nixon must share some of the responsibility for the incident.

Conclusion

The gift of papers controversy has been ignored by scholars more concerned with the constitutional crisis of Watergate than with a fraudulent legal document and the complexities of federal tax law. However, there is a larger significance to the Nixon prepresidential papers incident. The papers scandal did not provoke a constitutional crisis, but it did contribute to a new openness into presidents' personal financial affairs. The Nixon prepresidential papers affair contributed to the passage of the Presidential Records Act, a sea change in the public's legal relationship to the records of its leaders. The papers case foretold the difficulties facing the National Archives in regard to presidential papers. It also holds lessons for all those concerned generally with government accountability, in particular with the public ownership of government records.

If the administration's wrongdoing in the papers case had been discovered earlier, might the nation have been spared the crimes of Watergate? To speculate, it is possible that this would have had no impact on future events, but it is also possible that exposure of Nixon administration wrongdoing in 1970 could have discouraged Nixon from initiating the activities of the "plumbers," thus short-circuiting the crimes collectively known as the Watergate scandal.

To focus more narrowly, the case has three important lessons for archivists. First, the story points to the need at the outset for consensus between the donor and the repository as to the conditions of a donation. The Nixon donation was made in such an ambiguous way that the National Archives could not be certain of its status. Before acceptance, an archival institution should require transfer of legal title to collections of private papers in order to settle definitively questions that may arise later. Aside from the legal issue, few institutions can afford to spend time and money to arrange, describe, and preserve collections that they do not own.

Second, the Nixon incident offers an organizational case study of an institution subsumed in a parent agency. NARS never shared the mission of its parent agency. From 1949 to 1985, the GSA imposed an extra layer of bureaucratic controls and "business-oriented agency" management concepts on its five subordinate units.⁷¹ NARS' priority was the long-term preservation of historical materials, while the GSA's priorities were governmental efficiency and management of government resources. The GSA rather than NARS held the deed of gift for the Nixon papers, which delayed for several years the archivists' discovery of wrongdoing. On several occasions, NARS staff had suspicions of fraud, but lacked access to the documents that would have confirmed them. If the deed of gift had originally been trusted to NARS' files instead of the GSA legal office, archivists would have known immediately that Nixon's lawyer falsely claimed that a gift of papers had been made in 1969.

The GSA Office of General Counsel withheld information from NARS administrators directly relating to National Archives functions. When it discovered problems with the gift in 1971, GSA did not consult with the National Archives. Livingston knew that there had been no gift of papers in 1969 and seeing the backdated deed of gift would have provided incontrovertible evidence of deception. The careless way in which the GSA circulated a priceless deed illustrated the inherent problems of NARS answering to the GSA. The archives' discovery of illegally backdated documents was one catalyst for NARS' independence from the GSA.

It is clear that the GSA's authority over the National Archives delayed the discovery of fraud. An independent National Archives, dealing directly with those White House aides responsible for the 1969 gift, would have likely detected these problems with the gift and may have averted the papers scandal of 1973. By keeping the deed of gift locked in the vaults of the GSA, the backdating secret was safe until journalist Nick Kotz persuaded senior Nixon aide Leonard Garment to allow him access to the gift documents.

Unlike the National Archives staff members dedicated to the preservation of the record, the General Services Administrator was dedicated to Richard Nixon. Consistent with his misuse of agencies such as the FBI and CIA, Nixon "repeatedly . . . insisted to his aides that he wanted a Commissioner [of Internal Revenue] to faithfully do his bidding" by auditing and harassing Nixon's enemies.⁷² Nixon had similar motives in appointing a General Services Administrator and Sampson did not disappoint him. Sampson, rather than the archivist of the United States, controlled access to Nixon's presidential records and granted Nixon sole ownership when he resigned the presidency. On several occasions during the controversy over the prepresidential papers, the administrator ruled in Nixon's favor on matters of great import to NARS without consulting its leaders. The Nixon administration's politicization of the GSA made it unthinkable for a General Services Administrator to defy the president regarding the disposition of his papers and political considerations inevitably trumped archival considerations.

The GSA continued to interfere with NARS operations. In 1979, without the consent of the archivist of the United States, General Services Administrator Rowland Freeman pressed for the dispersion of permanent historical records of national importance to regional archives. Congress successfully reversed the GSA decision. In 1981, the GSA reduced NARS' operating budget by one-third. In 1983, while the archivist was attend-

ing an international archives conference, General Services Administrator Gerald Carmen replaced several NARS senior managers with staff loyal to the GSA. The response to such meddling was the development of a coalition to "free" the archives from the GSA. Archivist Robert Warner succeeded in bringing together archivists, historians, genealogists, and other concerned groups and, in 1984, Congress passed legislation granting NARS status as an independent agency. The archivist of the United States took over responsibility for the care of federal records from the General Services Administrator. Another reason for independence was to reverse the trend towards politicization of the archives. To this end, the archivist of the United States is appointed by the president and confirmed by the Senate solely on the basis of professional qualifications, without regard to political affiliation. This standard was followed until 1995, when President Bill Clinton appointed John Carlin, a politician with no archival experience. Clinton's decision marked the first time a nonprofessional had led the National Archives and set a precedent for other chief executives to follow in appointing future archivists of the United States. Carlin has been an ally of the archival and research communities, but there is no guarantee that successor archivists will follow his example.⁷³

The IBM PROFS E-mail system used by the Reagan and Bush White Houses generated another controversy for the National Archives in 1989, proving that the same questions about presidential records will continue to be raised in the digital age. The Bush administration planned to destroy the E-mail system backup tapes and concerned citizens filed suit to ensure that these tapes were subject to archival review and the Freedom of Information Act (FOIA). In the words of the Presidential Records Act, "the Archivist of the United States shall assume responsibility for the custody, control, and preservation of, and access to, the Presidential records of that President."⁷⁴ David Bearman writes of "the passive role played by the U.S. National Archives" and of the archivist's participation "in a direct assault on the integrity of the electronic records of the Bush administration." To be fair, this may have been due more to a lack of experience in managing electronic records than to indifference to the potential destruction of permanent records.⁷⁵ However, the court held the archivist of the United States in contempt of court for not taking control of the PROFS electronic records and for not informing Congress of the imminent destruction of the records.⁷⁶

Government records are often a touchstone in governmental disputes and controversies. Access to these records will continue to play a central role in the operation of government and similar scandals are bound to arise in the future. In such a situation, an archivist of the United States, who is appointed by the president, is often called on to preserve and make accessible records that may incriminate that president. It is an open question whether an archivist of the United States from outside the profession can be counted on to blow the whistle in the event of a scandal involving government records. The Nixon papers disputes and the PROFS case are not encouraging signs. The current system seems to have few safeguards against future archives scandals.

For this reason, the archivist should not be a politically appointed position on which overt pressure can be exerted. The appointment of the Secretary of the Smithsonian Institution, who is selected by an advisory committee of professionals, provides an alternative model that might discourage the politicization of the office. The archivist of the United States should be selected in a similar way. As a historical, cultural, and

research institution, NARA is more similar to the Smithsonian than to an agency such as the GSA. Appointment of the archivist on the basis of professional qualifications, similar to the Smithsonian model, would produce more watchful archivists, more loyal to the custody of records than to the individual who created the records.⁷⁷

The Nixon papers case holds a third lesson for archivists. The Nixon presidential papers scandal of 1974 was a second instance of Nixon struggling with the National Archives over control of his administration's materials. The incident forced Congress to pass the 1974 Presidential Recordings and Materials Preservation Act (PRMPA), seizing the records in order to prevent President Nixon from destroying records relevant to the Watergate investigations. The 1978 Presidential Records Act was also enacted in response to the Nixon presidential papers scandal. Unfortunately, the passage of the Presidential Records Act has by no means resolved questions of ownership and public access to historical records of presidents. The combined effect of two executive orders, one by Ronald Reagan and one by George W. Bush, have practically nullified Congress's intent in passing the Presidential Records Act. Executive Order 12667, signed by Reagan days before leaving office in 1989, granted him and future presidents an unlimited number of 30-day extensions to respond to requests. In effect, the executive order grants a sitting president the right to block any release of his presidential records indefinitely. The only way to overturn a president's invocation of executive privilege is a final, non-appealable court order mandating release of the materials.

On three occasions in 2001, the Bush administration blocked the scheduled release under the Presidential Records Act of 68,000 pages of Reagan administration domestic policy records, which officials at the National Archives and the Reagan library had approved. The Presidential Records Act requires the public release of most presidential records 12 years after that president leaves office. In November 2001, President George W. Bush signed Executive Order 13233, which confirmed Executive Order 12667 and added a new set of regulations asserting even broader authority for presidents to control the release of unclassified documents.⁷⁸ The Bush administration offered as justification the Supreme Court ruling in a Watergate case, *Nixon v. Administrator of General Services*, which actually ruled against Nixon. Under that ruling, a president may assert executive privilege, but the archivist may overrule those assertions and release the materials. Before the release of records, Bush's executive order would require the consent of both the sitting president and the president whose administration created the records. The Bush administration justified the executive order primarily for reasons of national security, but also out of deference to former presidents whose records are scheduled for release.⁷⁹ Critics saw the executive order's assertion of veto power over any release of any president's records as disasters for historical scholarship and the public right to request the unclassified records of the U.S. government. The Presidential Records Act and Freedom of Information Act already contained exemptions for sensitive records such as those containing national security and trade secrets. The Bush executive order reversed the Presidential Records Act's burden of proof, shifting it from the administration to the requestor, who must seek release through the courts, an expensive and time-consuming process.

Executive Order 13233 would roll back many of the gains made by NARA and the public since the scandal over the Nixon deed of gift. It would make the archivist once

again subservient to general claims of “executive privilege” made by a president or former president. A president is granted the right to delay release of papers as long as he wants merely by claiming that he needed more time to respond. According to one critic, the “order tries to rewrite the Presidential Records Act by requiring individuals to show a ‘demonstrated, specific need’ through an FOIA request rather than rely on the process provided in the PRA [Presidential Records Act] that mandates systematic release of records through an established archival procedure.”⁸⁰

In November 2001, Congress heard testimony that the executive order could lead to a return to the pre-Presidential Records Act days when the public had no legal right to access the records of presidents.⁸¹ The executive order would grant a president or former president the power to prevent release of his materials. This power is not equivalent to the outright ownership enjoyed by all presidents before President Nixon. Yet the purpose of the Presidential Records Act, to open these materials to public scrutiny, would be thwarted by Executive Order 13233. As of this writing (December 2001), the executive order has met with strong criticism from the historical and archival communities and a lawsuit has been filed to prevent its implementation.

While presidential records are legally considered to be in the public domain, President Bush’s executive order shows how easily the clock can be turned back on the public’s right to know. The Presidential Records Act requires release to the public in a timely fashion, but the executive order effectively overrules this requirement. Similarly, the precedent of appointing a nonprofessional to lead the National Archives does not encourage confidence in the agency’s future insulation from political pressures. As in 1969, these issues will continue to pose serious challenges to the record keeping of presidential administrations. The Nixon prepresidential papers controversy was caused in part by an overreaching and dishonest president and his staff, but the legal and political conditions that contributed to that scandal are still present in the current system.

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6. *Examination*, 13.
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8. *Examination*, Exhibit I-1.
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12. *Watergate Special Prosecution Force Report* (Washington, D.C.: Government Printing Office, 1975): 6.
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25. *Statement*, 288.
26. *Statement*, 288.
27. *Statement*, 10.
28. Transcript, *U.S. v. Newman*, 344.
29. *Statement*, 11.
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33. Draft letter, Mary Livingston to Ralph Newman, April 7, 1970, folder Prepresidential Papers, 1969 Deed of Gift, White House Special Files, Staff Member and Office Files, President's Personal Files, box 181, Richard M. Nixon Presidential Materials Staff, National Archives at College Park, Maryland.
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43. Author's interview with Nick Kotz, May 10, 1997.
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45. Kotz interview. "Tax Break Sought for Nixon Papers," *Washington Post*, June 12, 1973, A2. "Nixon Gift Tax Break Legal, Lawyer Says," *Washington Post*, June 16, 1973, A1.
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