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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JUDICIAL WATCH, INC.,) Civil Action No.
) 10-cv-1834
)
) v.
NATIONAL ARCHIVES AND) October 14, 2011
RECORDS ADMINISTRATION,) 10:03 a.m.
)
) Defendant.) Washington, D.C.

TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE AMY BERMAN JACKSON
UNITED STATES DISTRICT JUDGE

COURT REPORTER: PATRICIA A. KANESHIRO-MILLER, RMR
 Certified Realtime Reporter
 Official Court Reporter
 Room 4704B, U.S. Courthouse
 Washington, D.C. 20001
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APPEARANCES

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PROCEEDINGS

1
2 THE CLERK: Your Honor, calling Civil Action 10-1834,
3 Judicial Watch, Incorporated v. National Archives and Records
4 Administration.

5 Will all counsel please approach the podium and
6 identify yourselves for the record and the parties you
7 represent.

8 MR. BEKESHA: Good morning, Your Honor. Michael
9 Bekesha on behalf of the plaintiff, Judicial Watch.

10 THE COURT: Good morning.

11 MR. SCHWEI: Good morning, Your Honor. Daniel Schwei
12 on behalf of the defendant, the National Archives and Records
13 Administration.

14 THE COURT: Good morning.

15 MS. SHAPIRO: Good morning, Your Honor. Elizabeth
16 Shapiro on behalf of the Archives.

17 THE COURT: Good morning.

18 This is the defendant's motion, so I think we ought to
19 start with the defendant.

20 MR. SCHWEI: Good morning, Your Honor, and may it
21 please the Court, plaintiff's requested relief is both
22 extraordinary and unprecedented. Plaintiff is attempting to
23 compel the National Archives to physically seize and then
24 publicly scrutinize the personal audio diary of a former
25 president of the United States. This Court lacks the

1 authority to provide such relief. Neither the Presidential
2 Records Act nor the Administrative Procedure Act authorizes
3 such an order. Under those statutes, a private litigant
4 cannot compel the seizure and scrutiny of a potential
5 presidential record. This fundamental defect underlies each
6 of the threshold reasons why plaintiff's complaint must be
7 dismissed.

8 First, plaintiff's alleged injury is not redressable.
9 Plaintiff's only alleged injury here is a lack of access to
10 the audiotapes, but the Court cannot require NARA to go seize
11 those audiotapes, and NARA does not currently possess the
12 audiotapes; therefore, the injury cannot be redressed under
13 the PRA. Moreover, NARA's decision about how to enforce the
14 PRA cannot be overruled by this Court.

15 THE COURT: Can I determine from the face of the
16 pleadings from the point where we are at the moment that you
17 don't actually have them?

18 MR. SCHWEI: According to the allegations in
19 plaintiff's complaint, NARA does not currently possess the
20 tapes.

21 THE COURT: I think he says, upon information and
22 belief, the president took them with him. And I think it's in
23 one of your -- the second letter, the appeal letter,
24 Exhibit 4, that the archivist says, we don't have them. You
25 would have thought that would have been the response to the

1 first -- in the first letter, but at that point they say, we
2 don't have them. Is that a given for purposes of this
3 hearing? I'm going to ask the plaintiff the same thing. Does
4 everybody agree that they're not there?

5 MR. SCHWEI: Yes, Your Honor --

6 THE COURT: All right.

7 MR. SCHWEI: -- I think everybody does agree that
8 they're not there. That's based both on the complaint and the
9 letter that you referenced --

10 THE COURT: Okay.

11 MR. SCHWEI: -- which is incorporated into the
12 complaint.

13 THE COURT: Okay.

14 MR. SCHWEI: With those allegations, because NARA does
15 not possess the tapes and because the Court can't order NARA
16 to go out and seize the tapes, there is simply no way to
17 redress the only injury alleged in plaintiff's complaint,
18 which is a lack of access to the audiotapes.

19 The second threshold reason which is tied to that same
20 fundamental defect is that the PRA is the statute that
21 precludes judicial review under the PRA. That's true both
22 because of the D.C. Circuit's *Armstrong* line of decisions and
23 because the particular action here, namely the classification
24 of particular records as personal, is precluded by the PRA.

25 The third threshold reason is the lack of final agency

1 action. The letters that Your Honor referenced earlier were a
2 response to a FOIA appeal, not to anything related to the PRA.

3 And the final reason, which is not a threshold reason
4 why this Court must dismiss the complaint, is that it fails to
5 state a claim upon which relief can be granted. Even assuming
6 all of the factual allegations, the particular records here
7 were not -- NARA's action in responding to those letters was
8 not an arbitrary and capricious action.

9 THE COURT: Let me start with kind of the fundamentals
10 here. Basically, you are beyond the redressability issue,
11 which goes to the scope of the archivist's authority. I guess
12 your third position is that -- the second issue that you
13 raised is that the classification decision is not reviewable
14 by the Court.

15 Who made the classification decision here?

16 MR. SCHWEI: I think there are two classification
17 decisions, only one of which the plaintiff is challenging.
18 President Clinton initially classified the audiotapes as --
19 presumably classified the tapes as personal records by not
20 transferring them to the archives at the conclusion of his
21 administration.

22 There's then the second classification determination,
23 setting aside the final agency action problem, of course, but
24 assuming that there is a final determination on that issue,
25 NARA then would be presented with the issue: Do we agree with

1 the president's classification? If NARA does not agree, then
2 they can invoke their enforcement mechanism, which we discuss;
3 or if they do agree, then they are not required to do anything
4 further. And so there's really -- there are two
5 classification decisions, but the issue in front of this Court
6 is did NARA act arbitrarily or capriciously in making their
7 own decision or responding to the plaintiff's own letter.

8 THE COURT: Well, I don't understand -- the judicial
9 review issue seems to be based on the president's
10 classification decision. Once archives takes it upon itself
11 to make its own classification decision, why isn't that
12 reviewable? What was it even doing at that point?

13 MR. SCHWEI: Because the issues are exactly the same,
14 are these presidential records or are these personal records,
15 and so for this Court to review the archivist decision, it
16 would necessarily have to decide did the president correctly
17 classify these materials. And plaintiff's own complaint bears
18 that out when they allege that President Clinton unlawfully
19 retained these materials. So the rationale for why judicial
20 review is precluded, namely a sensitivity for the president's
21 personal papers, applies both to the president's own
22 classification decision as well as the archivist decision
23 because that issue, the examination of are these presidential
24 or personal, that is the rationale for precluding judicial
25 review, and the Court would have to answer that question

1 regardless of whether it is the archivist or the president.

2 THE COURT: Well, all the arguments for why I can't
3 review a decision of the president don't apply to the
4 archivist, so my first question: What was -- under what
5 authority was the archivist even purporting to reclassify or
6 to classify at all the tapes? I mean the -- the letter says I
7 have to consider the nature of the audiotapes, the purpose for
8 which they were created, how they were utilized. Based on the
9 record before me, I am of the opinion that the tapes are
10 personal.

11 Now, under the statute, differentiation between
12 presidential records and personal records is made by the
13 president. At the close of the presidency, the presidential
14 records become -- fall within the custody of the archivist.
15 What was the archivist doing when it purported to make a
16 classification decision? What portion of the statute even
17 permitted that exercise to go on?

18 MR. SCHWEI: Right, I think the statute would be
19 Section 2112(c), which is the enforcement mechanism, which
20 allows the archivist to go after records that it believes are
21 improperly classified or that are outside of its control and
22 that it believes should be within its custody and control, and
23 so that is exactly what happened in the *McIlveney* decision,
24 the *United States v. McIlveney* lawsuit in which the archivist
25 and the Department of Justice jointly brought a lawsuit to

1 recover a map of Cuba that was annotated by President Kennedy
2 because they believed it belonged in the Kennedy Presidential
3 Library.

4 THE COURT: So the decision before this Court to
5 review, in your view, is the archivist's refusal to invoke the
6 enforcement mechanism under 2112? Is that even alleged in the
7 complaint?

8 MR. SCHWEI: No, the action as alleged in the
9 complaint is an arbitrary and capricious challenge to the
10 merits decision, are these presidential or personal; but
11 there's a separate question of redressability. And a
12 necessary action to redress plaintiff's injury would be to
13 order the archivist to initiate this enforcement action. So
14 even before we deal with the complaint, the actual claim in
15 the complaint, the Court needs to examine the threshold
16 inquiry of redressability. Under that inquiry, the relevant
17 decision is did the archivist fail to invoke the enforcement
18 mechanism or is that something the Court can review. And the
19 answer is no. And so it's not necessarily what is alleged in
20 the complaint, but it is a separate inquiry under the
21 redressability. And so because this Court cannot review the
22 archivist's failure to enforce the discretionary -- or the
23 failure to bring the discretionary enforcement action, that's
24 why redressability fails here.

25 THE COURT: What's your basis -- I understand the

1 basis for saying I can't review what the president did. What
2 is your basis for your claim that I can't review the
3 archivist's decision of whether or not to invoke the
4 enforcement mechanism?

5 MR. SCHWEI: I think it starts with heck *Heckler v.*
6 *Chaney*, the Supreme Court's decision stating that
7 presumptively, a failure to bring an enforcement action is not
8 reviewable by this Court. And then the second thing is when
9 one looks at the actual statutory text of the enforcement
10 mechanism, it says that when the archivist considers it to be
11 in the public interest, he may initiate an enforcement action.
12 And that type of language, when an agency, individual, or
13 representative considers it to be in the public interest, has
14 already been construed by the D.C. Circuit to constitute
15 unreviewable discretion by the agencies because there is no
16 law to apply for this Court in determining whether the agency
17 had properly determined whether something is or is not in the
18 public interest.

19 THE COURT: Can I review it under the APA as arbitrary
20 and capricious exercise of the discretion? The discretion is
21 so unfettered that I can't even review it under that standard?

22 MR. SCHWEI: Correct, Your Honor, which is what both
23 *Heckler v. Chaney* and the line of D.C. Circuit decisions hold,
24 which is that APA review has a carve-out stating that this
25 statute of the APA does not apply to agency action committed

1 to agency discretion by law, and that is exactly what the
2 Supreme Court held in *Heckler v. Chaney*; that an agency's
3 failure to initiate an enforcement action is unreviewable
4 because that decision is committed to agency discretion by
5 law. And the particular statutory text we have here, the D.C.
6 Circuit already construed nearly identical statutory text and
7 also agreed that that language constitutes unreviewable
8 discretion, so no APA review is available.

9 THE COURT: What you're saying makes it -- when you
10 read the letter, it doesn't give you any indication that what
11 the archivist is talking about is whether or not it's going to
12 invoke the enforcement mechanism. It sounds like the
13 archivist is making a classification decision, which is not
14 committed to the archivist in the first place.

15 MR. SCHWEI: According to the D.C. Circuit's case
16 laws, I think it is, and the reason why is because part of the
17 decision whether to enforce is the antecedent judgment whether
18 a violation has even occurred, and those are the cases that we
19 cite in our reply brief, such as *Block v. SEC*, that even if
20 the Court -- even if the agency declines not to enforce on the
21 basis of there being no violation, that antecedent
22 determination whether there is or is not a violation is part
23 of the decision to enforce and thus cannot be reviewed. And
24 that's true both under the D.C. Circuit's law and it was the
25 case in *Heckler v. Chaney*.

1 THE COURT: Well, doesn't *Armstrong II* specifically
2 contemplate that the one thing that is reviewable is the
3 classification decision of what's presidential and what's not.

4 MR. SCHWEI: Only in very narrow circumstances, which
5 are not present here. The *Armstrong II* decision creates -- it
6 allows for review of guidelines defining what constitutes a
7 presidential record but only if there is a Federal Records Act
8 or a Freedom of Information Act claim at issue. And here
9 plaintiff, in their brief, concedes both of those points.
10 Number one, plaintiff concedes that it is not challenging any
11 guidelines; and number two, plaintiff concedes that it is not
12 bringing an FAR or a FOIA-based claim. And so for those
13 reasons, it fails under both preconditions for an *Armstrong II*
14 type of claim. The *Armstrong II* type of claim would allow
15 someone under the APA to argue that bringing an FAR claim
16 only, not a PRA claim, which is the only statute at issue
17 here, it would allow someone bringing an FAR claim to argue
18 that the guidelines defining what is a federal record are at
19 issue, and in order to determine whether those guidelines are
20 accurate, the Court would also be able to determine whether
21 guidelines defining presidential record are accurate and
22 conform to the statute.

23 THE COURT: Right. I mean, *Armstrong II*, the holding
24 is much narrower than some of the language in it.
25 *Armstrong II* was dealing with a situation where presidential

1 agencies were trying to sweep what are agency records
2 otherwise covered by FOIA and the FAR into the Presidential
3 Records Act and, therefore, narrow access to them; and
4 *Armstrong II* said, no, you can't do that. But there are
5 snippets in there that this Court has read subsequently as
6 saying, well, the Court was concerned about over classifying
7 in general, and there's a concern that a president could
8 shield all sorts of things that should be open to the public
9 by simply designating them as private.

10 What is the -- what is to prevent a president from
11 frustrating the balance that the statute was trying to strike
12 between his privacy and public access and given the fact that
13 the Court recognizes that just about nothing that a president
14 does is private? Let's say a president kind of maliciously
15 over classifies, what is the remedy?

16 MR. SCHWEI: I think there are three answers to that,
17 Your Honor. The first one and the primary remedy is that it
18 always lies with the archivist and the attorney general, who
19 have the authority if they believe that the president has
20 misclassified something that they can invoke the discretionary
21 enforcement mechanism and pursue recovery of those records.
22 So there's always the possibility for the archivist to act as
23 the check, and that's what Congress chose, and that's the
24 remedy that this Court is bound by. The Congress did not
25 choose to allow private litigants to try to compel the

1 archivist to pursue those records. Congress left the decision
2 in the archivist's and the attorney general's hands.

3 The second answer --

4 THE COURT: Is that a remedy that the archivist even
5 has available once the president is no longer the president?
6 And what it says in the Presidential Records Act is you have
7 the remedies available to you under the records act. So you
8 go to the records act, and it says you can ask the attorney
9 general to go after an agency. But we're now talking about a
10 former president. Can he go after a former president?

11 MR. SCHWEI: Yes, and that would be a very serious
12 consideration for the archivist to make, but that is exactly
13 what Congress intended, is leaving it to the archivist and the
14 attorney general to decide when it is appropriate under
15 serious considerations in situations like that to seek
16 recovery of those records. It is a very different situation
17 what plaintiff is attempting here, which is a private litigant
18 trying to compel the archivist to sue a former president, and
19 there are good reasons why Congress would leave the decision
20 to experts like the archivist and the attorney general.

21 And the second answer, I think, going back to Your
22 Honor's earlier question about the checks on the president, is
23 that *Armstrong I* already addressed this issue and said, quote,
24 "Congress presumably relied on the fact that subsequent
25 presidents would honor their statutory obligations to keep a

1 complete record of their administration." And that's on page
2 20 of our initial brief, that the D.C. Circuit in *Armstrong* --

3 THE COURT: Given some of the litigation that's
4 occurred subsequently, that may or may not have been a good
5 thing to do.

6 MR. SCHWEI: Well, that was Congress's judgment, which
7 the D.C. Circuit upheld in *Armstrong I*.

8 And the third check on a president is always Congress,
9 because if Congress believes that a president is wildly
10 misclassifying information, it can pass a law to change the
11 statutory structure or to seize some of those records, which
12 it has done in the past. That's exactly what happened with
13 President Nixon and the Presidential Recordings and Materials
14 Preservation Act, or the PRMPA, which was the predecessor to
15 the Presidential Records Act. Congress felt that there was a
16 real danger of losing some of these documents, and so they
17 passed a new statute seizing those documents.

18 THE COURT: Well, and the statute we're dealing with
19 came after that, so the whole point is to have to avoid that,
20 that's why we have this statute.

21 MR. SCHWEI: Correct. Hopefully, this statute will
22 avoid that through enforcement mechanisms like the archivist,
23 but in the event that it does not, then it is always up to
24 Congress.

25 And a second historical instance of Congress acting is

1 with records relating to President Kennedy's assassination,
2 which Congress passed a law in 1992 to preserve all of those
3 records and make them publicly available.

4 So even aside from the archivist's own enforcement
5 discretion and the presumed good faith of the president to
6 honor the PRA, there is always the possibility that Congress
7 could act to correct an instance where a president is not
8 following the PRA.

9 THE COURT: Well, what's -- how do you distinguish the
10 American Historical Association case?

11 MR. SCHWEI: Right. That case was really about
12 whether after a president's term ends the president still
13 retains legal authority to make certain classification
14 decisions, and there the archivist had essentially delegated
15 the authority to the former president. And so before the
16 Court in that case was the legality of that agreement. So
17 it's not really a case like this one, where a private litigant
18 is trying to compel the archivist to seize and reclassify
19 certain records. Peterson was simply a case about who the
20 relevant decision maker was, and that issue is not present
21 here because the archivist clearly is the relevant decision
22 maker here and plaintiff is not alleging otherwise.

23 THE COURT: Well, but the Court said it had the
24 authority to look at what the archivist was doing, whether the
25 archivist was doing what it was doing because it was bound by

1 a contract with the former president or because it was just
2 simply acceding to the judgment of a former president. The
3 Court determined after reading *Armstrong I* and *Armstrong II*
4 that there was a little window open for it to look at the
5 classification process and to review what the archivist was up
6 to.

7 MR. SCHWEI: Right.

8 THE COURT: So do you think that that part of the
9 decision was wrong?

10 MR. SCHWEI: The part that read *Armstrong I and II* and
11 concluded that the Court could enforce a freestanding PRA
12 claim under the APA, yes, we believe that part of the decision
13 was wrong; but I will also note that the Peterson decision
14 involved guidelines. And so still whatever *Armstrong I and II*
15 might mean or whatever other courts have construed them to
16 mean, it is always in the context of reviewing guidelines
17 defining presidential records, and here that is not what
18 plaintiff is attempting to do, as they concede in their brief.
19 They are attempting to reclassify particular records as
20 presidential records; and even under the Federal Records Act,
21 which by all accounts permits more judicial review, litigants
22 are precluded from challenging a particular classification
23 decision, and the reason why is because that is the
24 administrative enforcement mechanism that Congress chose.
25 They chose to give it to the archivist to choose whether to

1 reclassify or pursue the recovery of missing records. They
2 did not want private litigants in control of that, which is
3 consistent with the rationale of *Heckler v. Chaney*, which is
4 that agencies are in the best position to determine how to
5 spend their resources and to chose how to enforce their
6 statutes.

7 THE COURT: Well, if, in fact, the president was not
8 just chatting up Taylor Branch and musing about why he did
9 what he did but they literally kept the tapes running while he
10 went about conducting his business and he is talking on the
11 phone to foreign leaders and he's making appointments, doesn't
12 that sort of take it out of the realm of what you started
13 with, which is this is a personal audio diary? Aren't we
14 really talking about records, or at least in part, that track
15 his official presidency?

16 MR. SCHWEI: Right, so just to be clear, our position
17 is that Your Honor could only reach that issue if Your Honor
18 disagrees with all of our threshold arguments but --

19 THE COURT: I understand that, but it's an interesting
20 issue.

21 MR. SCHWEI: Right. But here those tapes that
22 President Clinton allegedly recorded are the functional -- or
23 NARA rationally responded to the plaintiff and said those
24 tapes are the functional equivalent of a diary or other
25 personal notes because those tapes were not prepared for use

1 in official business, they were not communicated throughout
2 the government. They were simply President Clinton's personal
3 record --

4 THE COURT: How does the archivist know what they were
5 without asking President Clinton?

6 MR. SCHWEI: Because based on the facts provided by
7 the plaintiff in the letter, and which are again alleged here
8 in the complaint, NARA responded rationally to the letter by
9 saying, based on the facts that you have provided in your
10 letter, those sound more like personal records rather than
11 presidential records.

12 THE COURT: Even the ones where it is literally a tape
13 recording of him on the phone talking to someone else as
14 opposed to a recording of his expounding on his presidency to
15 a historian?

16 MR. SCHWEI: But that would be no different than if
17 the president sat down and simply wrote in their diary, this
18 is what I said on a telephone conversation earlier --

19 THE COURT: Well, no, one is filtered through
20 someone's memory and perception and the other is a raw tape.

21 MR. SCHWEI: It would be the equivalent of either the
22 post hoc recollection or personal notes, which are also
23 included in the statute, which is the mere fact of
24 contemporaneousness would not take it outside the realm of
25 personal records because, again, the statute recognizes that

1 its diaries and papers and personal notes, or the functional
2 equivalent thereof, and so personal notes would likely be
3 created contemporaneously but --

4 THE COURT: I'm not focusing on the timing; I'm
5 focusing on the exact duplication, the capturing of the
6 conduct of official business, it is different. The transcript
7 that is being created at this moment is different than the
8 notes he is sitting there taking.

9 MR. SCHWEI: Because the transcript is a public record
10 that will be communicated, you know -- it might be posted on
11 the docket and it is available to everyone, but here the
12 audiotapes were allegedly created solely by President Clinton
13 solely for his use after the presidency, solely to act as
14 memory joggers about what happened during his presidency.

15 THE COURT: How can you say that? How do you know it
16 was prepared solely to be a memory jogger? Aren't you making
17 factual findings about what was in President Clinton's mind?

18 MR. SCHWEI: No. It's based on the facts provided by
19 the plaintiff in their letter. NARA rationally concluded that
20 President Clinton created these solely as memory joggers for
21 his post-presidency.

22 THE COURT: The definition of personal records
23 includes diaries, journals, or other personal notes serving as
24 the functional equivalent of a diary or a journal -- yes --
25 which are not prepared or utilized for transacting government

1 business -- correct -- but it also says not communicated in
2 the course of transacting government business.

3 Now, isn't pressing the "on" button on a tape recorder
4 while you pick up the phone and talk to a foreign leader
5 communicated in the course of transacting government business?

6 MR. SCHWEI: That was not plaintiff's argument in
7 their letter, and NARA could rationally conclude that it was
8 not communicated in the course of transacting government
9 business, because the focus is not on the -- perhaps the audio
10 of President Clinton's voice, it would be on the records
11 themselves, so the records were not communicated in the course
12 of transacting government business.

13 THE COURT: I think his letter clearly cites those
14 instances where Taylor Branch pointed out that the president
15 kept the tape running while he conducted business, and they
16 specifically asked the archivist to segregate those portions.
17 So I don't see how you can't say that's not in the letter.

18 MR. SCHWEI: But there is no allegation in the letter
19 or the complaint that the records were communicated in the
20 course of transacting government business, because the
21 relevant record is the audiotapes, not the sound of President
22 Clinton's voice as he's speaking.

23 THE COURT: Okay. So the way you parse the statute is
24 he had to take the tape out of the tape recorder after Branch
25 made it and hand it to someone in the course of official

1 business to make it a presidential record. The fact that it
2 captured the conduct of official business doesn't bring it
3 under the statute.

4 MR. SCHWEI: Right, and there are a couple of further
5 points to add to that, which is that is certainly a reasonable
6 reading of the statute, and NARA would be entitled to
7 deference on that reading, which is something that the
8 plaintiff does not contest here. And the second point is that
9 presidential diaries have historically, and almost certainly
10 will in the future, contain information relating to official
11 business. The president is so busy that it's almost certain
12 that every presidential diary will contain information about
13 what the president did, and that's borne out by President
14 Reagan's diary, which is almost exclusively about official
15 business, and also by the Supreme Court's decision in the
16 Nixon case and in the D.C. Circuit's subsequent decision where
17 they say, simply because a record has official business or
18 historical interest does not take it outside the realm of a
19 personal record.

20 And Congress was very cautious in drafting this
21 protection for personal records. I think that goes to one of
22 our other preclusion arguments about how Congress would not
23 have intended to allow a private litigant to challenge the
24 classification of a particular record as presidential or
25 personal, and one of the reasons why is the history of the

1 president -- that led up to the passage of the Presidential
2 Records Act. At the time when Congress passed this act, the
3 scope of a president's personal privacy right was still
4 undefined and was still being litigated by President Nixon,
5 and so Congress, when drafting this statute, was very cautious
6 to avoid a potential challenge on personal privacy grounds,
7 which was one of the main arguments that President Nixon made
8 to the Supreme Court and then later to the D.C. Circuit.
9 That's borne out both by this expressed exemption for personal
10 records, as well as the legislative history which talks about
11 why it's important to avoid some of the challenges presented
12 by the Nixon litigation.

13 THE COURT: Well, but all of that goes back to where
14 we started, which is Congress and the Courts recognizing a
15 strong presumption that it should -- it is committed to the
16 discretion of the president to say, this is mine and this is
17 public, and that's why I don't quite understand the way the
18 archivist went about answering the letter. Instead of saying
19 the president designated these as personal, it said, I think
20 they're personal. And once the archivist purports to be
21 acting, making this classification decision, then it seems to
22 be it's making a decision that might be a reviewable agency
23 action.

24 MR. SCHWEI: But it is not reviewable because it is
25 inherently part of the enforcement decision, which is

1 delegated to the archivist's complete discretion. And so
2 that's why the archivist responded making -- responding with
3 its own independent evaluation and characterization, because
4 the archivist could -- could, theoretically, go after records
5 that it believes are presidential records but not within its
6 custody and control. And so there is a role for the archivist
7 in this statutory scheme, which is what Congress intended, but
8 there is not a role for the Court to evaluate the archivist's
9 decisions within that statutory scheme.

10 THE COURT: It certainly didn't make it clear at any
11 point in its letter that that's what it was doing. There
12 might have been a more helpful way to get this teed up the way
13 you now read it.

14 MR. SCHWEI: But it is not the way I'm reading it, and
15 I think a lot of the confusion is because this entire case was
16 initially teed up as a FOIA case, which is that the letters
17 all were FOIA requests pursuant to the PRA, and so the genesis
18 of those letters led the archivist to respond in the way it
19 did, and then only when this complaint was filed does the
20 plaintiff add these additional dimensions of, oh, the
21 archivist is required to go seize these tapes and provide me
22 access to them. And so the reason why the issues that we're
23 discussing now are perhaps not completely borne out in this
24 letter is because they were never raised in the appeal by
25 plaintiff and, therefore, the archivist had no occasion to

1 respond to them, and I think that goes to the core of our
2 final agency action argument, which is that the letter that
3 plaintiff is focusing on here was certainly a final agency
4 action with respect to the FOIA appeal but it did not present
5 the PRA type issues that we are now discussing and, therefore,
6 it did not create binding legal consequences under the PRA,
7 and it did not represent the consummation of the agency's
8 decision-making process under the PRA.

9 THE COURT: Well, it certainly seems final when you
10 look at it. The archivist says, I'm done, go to District
11 Court now. And since now you've just explained that the whole
12 point of making the classification decision in the letter was
13 as a predicate to whether it was going to invoke the
14 enforcement mechanism or not, why isn't the letter a final
15 decision that is not going to invoke the enforcement
16 mechanism? I understand you're saying that even if it is that
17 is not a reviewable decision --

18 MR. SCHWEI: Right.

19 THE COURT: -- but why doesn't the letter clearly say,
20 we're done with this from the archive's perspective?

21 MR. SCHWEI: Because it only says we are done with
22 this with respect to the FOIA claim that was actually
23 presented in the letter. It says, first and most
24 fundamentally, we don't have these audiotapes, so your FOIA
25 claim is over; but oh by the way, here's an additional

1 explanation about why we do not think -- or we do not think
2 that these -- we probably view these records as personal
3 records rather than presidential.

4 THE COURT: Well, "probably" is a little softer than
5 what they said. It said, "I decide."

6 MR. SCHWEI: They say, based on the facts made
7 available to me, I believe that these are personal records,
8 which is -- which has nothing to do with the actual FOIA claim
9 that was presented.

10 THE COURT: So to tee up the claim that you would
11 ultimately be standing here and telling me is unreviewable,
12 they would have had to write a letter to the archivist and
13 say, please exercise your authority under 2112 to ask the
14 attorney general to go after the records, and the archivist
15 write back and say no, and then they were supposed to sue
16 under the APA and say that was arbitrary and capricious so
17 that you could come back and say it's within its unfettered
18 discretion so you have to dismiss this.

19 MR. SCHWEI: Which is the point of requirements like
20 final agency action, to give the agency the opportunity to
21 actually consider the issues that are going to then be
22 litigated. So it makes sense to give the agency the first
23 opportunity to consider those issues and resolve them before a
24 lawsuit is filed against that agency.

25 THE COURT: So you're telling him that if he thinks he

1 can make a better case than he's made already for the fact
2 that these might be presidential records and not personal
3 records, he can write another letter asking the archivist to
4 consider invoking the enforcement mechanism and the archivist
5 hasn't already decided whether it would or it wouldn't?

6 MR. SCHWEI: I think that lawsuit would present all of
7 the same --

8 THE COURT: I'm not talking about the lawsuit. Is
9 that letter dead on arrival, or is that a letter he could
10 write?

11 MR. SCHWEI: I can't speak to whether that would be
12 dead on arrival. It's the agency's decision.

13 THE COURT: But your position on final agency action
14 is that that decision has not yet been made?

15 MR. SCHWEI: That the letter at issue here does not
16 represent a final agency action with respect to that decision.

17 THE COURT: Okay. All right. Well, that's
18 interesting.

19 MR. SCHWEI: But that lawsuit, the eventual lawsuit
20 would present all of the same other threshold --

21 THE COURT: That would be dead on arrival, in your
22 view?

23 MR. SCHWEI: Yes, Your Honor.

24 THE COURT: All right. I think you've covered all of
25 your points, but if I interrupted you too early and there is

1 something else you want to cover, you can do so.

2 MR. SCHWEI: No, Your Honor, I think we've covered all
3 of the issues.

4 THE COURT: Okay. Thank you very much.

5 MR. BEKESHA: Good morning, Your Honor.

6 Since you guys just -- since you just concluded with
7 talking about the agency action, the first letter in response
8 to our FOIA request did not say anything about we don't have
9 the records. It just said these are not presidential records.
10 So we wrote another letter, and in response we received the
11 same response. So we believe it is a final agency action
12 because you had a first letter. We asked for -- you know, we
13 provided more evidence, more guidance on why we believed the
14 tapes were presidential records, and archives came back and
15 still said, once again, in a final agency action, these are
16 not presidential records.

17 THE COURT: But your suit is certainly premised on the
18 assumption that they do not have them; is that correct?

19 MR. BEKESHA: We don't know whether or not they have
20 them. We assume that they don't have them on information and
21 belief because archives has told us they don't have them.

22 THE COURT: And if I'm assuming the complaint to be
23 true for purposes --

24 MR. BEKESHA: Then --

25 THE COURT: -- it's not your allegation that they do

1 have them and they're hiding them from you --

2 MR. BEKESHA: Correct.

3 THE COURT: -- because you've asked me to order them
4 to go get them?

5 MR. BEKESHA: We've asked you to determine that the
6 records are presidential records; and once --

7 THE COURT: Well, you've asked me to order them to go
8 get them.

9 MR. BEKESHA: To an extent. We asked the Court to
10 require them to assume custody and control of them. We're not
11 asking for seizure. I mean it sounds awful that they think
12 we're asking for this Court to bang down President Clinton's
13 door and seize these audiotapes. I mean archives could make a
14 phone call, they could write a letter. There is nothing in
15 the record stating that President Clinton wouldn't just give
16 them the records. So we're asking that they assume custody
17 and control of them. We're not specifically saying they have
18 to go seize.

19 THE COURT: They can call and ask, but ultimately
20 you're asking them to assume control to get something they
21 don't have.

22 MR. BEKESHA: That's correct, Your Honor.

23 THE COURT: All right. What authority under the
24 statute do they have to do that?

25 MR. BEKESHA: Under the Presidential Records Act, they

1 are required to assume custody and control of the records and
2 then make them immediately available.

3 THE COURT: They're required to assume custody and
4 control of the presidential records after the president
5 designates which are which?

6 MR. BEKESHA: Possibly.

7 THE COURT: Where do they have the authority to go
8 behind that and demand something else?

9 MR. BAKESHA: Well, first, it is not in the record and
10 no one knows how President Clinton classified these records,
11 nor is that an issue here today. But the second --

12 THE COURT: Why not?

13 MR. BEKESHA: Why isn't it an issue?

14 THE COURT: Right. Aren't we missing an indispensable
15 party here?

16 MR. BEKESHA: We're not because the definition of
17 presidential records doesn't talk about how the president
18 classifies the records; it talks about the substance of the
19 records. So regardless of how the president classifies the
20 records, if it is a presidential record based on substance,
21 they're still presidential records.

22 THE COURT: No, the president is given the specific
23 authority to categorize the records as presidential or
24 personal, and the ones that are personal are filed separately.
25 Then when the presidency ends under the statute, the

1 presidential records go within the custody and the control of
2 the archivist. So where under that statutory scheme does the
3 archivist have any control over something that has already
4 been separated as personal?

5 MR. BEKESHA: Well, the plaintiff -- we would argue
6 that there is that classification that goes on initially, but
7 that's not -- that's just to help the White House and the
8 president sort out which records is going to be turned over to
9 archives. It's not the final decision. It's not absolute.
10 The definition of a presidential record doesn't include a
11 presidential record is what the president says it is. A
12 presidential record --

13 THE COURT: Well, actually, I think that's exactly
14 what the statute says. Where does the statute give the
15 archivist the authority to decide what a presidential record
16 is?

17 MR. BEKESHA: The archivist -- all the statute says is
18 that the archivist of the United States shall assume
19 responsibility for the custody, control, and preservation of
20 and access to presidential records of that president.

21 Our argument is that these records, as we've alleged,
22 are presidential records and, therefore, archives is to assume
23 custody and control of the records --

24 THE COURT: That's upon conclusion of the president's
25 term of office.

1 MR. BEKESHA: Correct, and he has been out of office.

2 THE COURT: Right. And that's Section (f).

3 MR. BEKESHA: Correct.

4 THE COURT: But if you go up to Section (b),
5 documentary materials produced or received by the president
6 and his staff or units or individuals in the executive office
7 of the president shall -- shall -- to the extent possible, be
8 categorized as presidential records or personal records upon
9 their creation or receipt and be filed separately. That's
10 (b). That's during the presidency. It's only after the
11 presidency is over and there is a category -- you know, let's
12 say he had two boxes, he's leaving the White House; personal,
13 presidential, personal, presidential. They get this box, they
14 don't get the other box. This is what they assume custody and
15 control over. So where do they get to classify anything?

16 MR. BEKESHA: Your Honor, if you go to section or
17 subsection (b), it says, shall to the extent practical be
18 categorized. It does not say that if it is not categorized by
19 the president as a presidential record that it is not a
20 presidential record.

21 For example, if you go to the archive's website about
22 the Clinton Library --

23 THE COURT: It says it shall be classified as
24 presidential or personal and filed separately.

25 MR. BEKESHA: Correct. The president is supposed to

1 categorize his records but that doesn't make it a presidential
2 record; that is just how the president categorizes the record.

3 THE COURT: Well, who exercises the authority to
4 classify?

5 MR. BEKESHA: Archives, in response to two of our
6 letters, states that it has the authority to make that
7 determination.

8 THE COURT: Well, and I'm not sure that it does, and
9 I'm asking you where is that authority found in the statute.
10 There is no reference to presidential versus personal anywhere
11 in the statute except in subsection (b).

12 MR. BEKESHA: No, Your Honor, but the other parts of
13 the statute talk about presidential records --

14 THE COURT: Right.

15 MR. BEKESHA: -- and once -- a presidential record is
16 not because somebody classified it as so but because it fits
17 the criteria. We have alleged that these records are
18 presidential records based on the information and belief
19 listing, as you were speaking about before, you know,
20 conversations with foreign dignitaries, conversations with
21 congressmen, and the recording kept going.

22 So our position is these records are clearly
23 presidential records and they should be made available to the
24 public as quickly as possible.

25 THE COURT: Well, let's say you're right. What

1 authority do I have to tell the archivist to do anything about
2 it? And what authority do you have to sue, to ask them to do
3 anything about it?

4 MR. BEKESHA: Well, first off, if you look at the
5 enforcement mechanisms that the archives keeps talking about,
6 section 2112(c), as well as the separate provision about the
7 attorney general.

8 THE COURT: Right. And 2112(c) states the archivist
9 may.

10 MR. BEKESHA: Correct, but it also talks about records
11 being deposited with them. It doesn't talk about necessarily
12 enforcement actions to go get records they don't have. I
13 think what 2112(c) talks about is, once archives is provided
14 with personal records, other records, they may treat them as
15 though they were received as presidential records, which is
16 important when they're prior presidents, not as much the case
17 anymore, but I mean prior to the Presidential Records Act, if
18 they received these materials from a former president, what do
19 they do with them. And all 2112(c) talks about is, once they
20 receive them, they can treat them as presidential records.

21 And then with regard to the attorney general
22 provision, that only applies to the Federal Records Act. I
23 mean there is no statutory authority or any case authority
24 talking about --

25 THE COURT: Well, the Presidential Records Act says,

1 if they think it is in the public interest, they can invoke
2 the remedies available in the Federal Records Act, and then
3 you have to go and read the Federal Records Act to see what
4 they're talking about. But if you're saying neither one of
5 those applies here, where is the statutory authority -- let's
6 put aside the question of whether I can even order them to do
7 it -- where is the statutory authority that they get to call
8 up -- we're not going to go knock on the door now -- and say,
9 President Clinton you've got something that you shouldn't
10 have?

11 MR. BEKESHA: The authority would be under the
12 Presidential Records Act and the idea that the records -- that
13 archives is required to assume custody and control of the
14 records and make them available. If they don't have the
15 records, they cannot make them available to the public under
16 FOIA or under any other provision or in any other way. So the
17 authority rests with what the statute says; that they are
18 required to assume custody and control and then required to
19 make those available to the public.

20 In this instance, if they don't have the records, they
21 will then have an obligation to try to obtain and try to get
22 the records, and that's what we're asking. We're asking for a
23 determination that the records are presidential records and
24 that archives assumes custody and control of the records.

25 THE COURT: But you can only read that section the way

1 you're reading that section if you read that section without
2 reading the rest of the statute, that something happens before
3 the end of the presidency, and what happens before the end of
4 the presidency is the president classifies his records.

5 MR. BEKESHA: Well, we don't know -- that's the other
6 problem. We don't know what the president did. We do not
7 know if President Clinton classified these records as personal
8 records or as presidential records. Archives doesn't know.
9 Archives, in the letter, assumed that these records were
10 classified one way, but they don't know. I mean there's --

11 THE COURT: So why aren't -- are we missing a party
12 here? American Historical Association sued George Bush.

13 MR. BEKESHA: We're challenging -- we don't think
14 President Clinton is a necessary party because we're
15 challenging the determination by archives; and archives, at
16 that time, didn't reference President Clinton. They said, as
17 this Court has already stated, they said based on information,
18 I determine.

19 Now, there may be information that President Clinton
20 has that he may be able to provide to the Court to clarify how
21 he classified the records, what happened to the records, maybe
22 even where the records are; but in the motion to dismiss, that
23 is not an issue. Maybe we need to take the next step and
24 see -- have very limited discovery on that issue if the idea
25 of the classification is important, let the case go forward at

1 this point, and then figure out what the next step is.
2 Limited discovery of some sort may resolve those issues.

3 THE COURT: Well, what do you do with the holding in
4 *CREW vs. Chaney* that there is no cause of action against the
5 archivist under this statute?

6 MR. BEKESHA: We would turn the Court's attention to
7 the *Judicial Watch v. Commerce Department* case about -- which
8 was FACA, so slightly different -- but how -- you know, the
9 prevention of making this determination prevents any possible
10 remedy, any action. I mean this relies solely on the
11 determination that these were not presidential records.
12 Because they're not presidential records, archives argues, you
13 know, it's outside the scope of FOIA. There would be
14 no -- because it is outside the scope of FOIA, we couldn't
15 bring a FOIA lawsuit against the Court -- I'm sorry -- against
16 archives. So we're stuck. We have no way to challenge their
17 determination. And so we believe in this instance, which is
18 different circumstances, that APA allows, and this Court has
19 authority, to make a determination under the APA about the
20 decision that archives made in this instance.

21 THE COURT: What is the decision that you're asking me
22 to review? The failure to invoke the enforcement mechanisms
23 or the classification?

24 MR. BEKESHA: Well, the determination that these
25 records are not presidential records.

1 THE COURT: And again, why -- why is there a cause of
2 action against them? How do you distinguish *CREW v. Chaney*?
3 What the Court found in that situation is she could mandamus
4 the vice president, but there wasn't really anything she could
5 do about the archivist. Why isn't that the answer here?

6 MR. BEKESHA: If I recall correctly, *CREW* was -- *CREW*,
7 very similar to *Armstrong*, was during the presidency.

8 THE COURT: Right.

9 MR. BEKESHA: President Clinton is no longer in
10 office. These are different circumstances. There is -- a lot
11 of those issues talk about separation of powers and courts and
12 even Congress interfering with the president's day-to-day
13 activities while the president or vice president is in office.
14 We don't have that issue here.

15 THE COURT: Right. What she said in *CREW* is, at this
16 point before the presidency is over, they don't have any
17 authority. They don't get to classify, the vice president is
18 doing all the classifying. So there is nothing in the
19 statute, there is no statutory hook for me to hold them
20 responsible. So she lets them out of the lawsuit.

21 Here you're saying the presidency is over, but I see
22 even less of a statutory hook at this point because they get
23 what's given to them at the end of the presidency. They don't
24 get anything else under the statute, and you're saying there's
25 something they didn't get that was misclassified and I want

1 it.

2 MR. BEKESHA: Well, we don't know if they're
3 misclassified. All we know is that archives does not have
4 these audiotapes at this moment. And based on their letters,
5 they made a determination that they don't have the audiotapes
6 because they're not presidential records. That's all that's
7 before the Court right now. You know, we don't know if they
8 may have received the audiotapes at one point. We don't know
9 that. They haven't alleged that they never received them;
10 just that they don't have them right now. They may have been
11 reviewed by archives. We don't know. We've alleged that
12 these are presidential records, that they have a requirement
13 to assume custody and control of these records, that they have
14 a responsibility and obligation to make these records
15 available to the public. Their response, archives' response
16 was they're not presidential records, you don't get them, and
17 that's what we're stuck with, that's what we're faced with.

18 THE COURT: Well, the Presidential Records Act,
19 according to *Armstrong I*, accords the president virtually
20 complete control over his records during the term of his
21 office. And the archivist and Congress can't even veto him if
22 he actually starts disposing of records, much less saying, you
23 know, this is private.

24 How do you square that language with your claim that
25 the decision to classify these records is subject to judicial

1 review?

2 MR. BEKESHA: Well, both the *Armstrong* cases were
3 extremely focused and they were during the presidency and now
4 we're after the presidency; but how we view *Armstrong* was the
5 creation, the management, and disposal decisions; and we're
6 not addressing any of the creation, management, or disposal
7 decisions made by President Clinton.

8 THE COURT: But the only classification --

9 MR. BEKESHA: He created --

10 THE COURT: -- decision in *Armstrong II* said the Court
11 had to be able to review was the decision essentially to bring
12 things under the Presidential Records Act that don't belong
13 there as opposed to excluding something from the Presidential
14 Records Act that you think belongs there. What right do you
15 have as a private party to say, I am not particularly happy
16 with the balance that has been struck under the Presidential
17 Records Act here?

18 MR. BEKESHA: Well, the *Armstrong* cases were during
19 the presidency; and although I won't concede that point, I
20 would say that under *Armstrong*, if President Clinton was still
21 in office and making these audiotapes, at this point, under
22 *Armstrong*, we may not be able to go in and ask the Court to
23 deal with the creation, the management, and the disposal of
24 the records. But these are different times. We know these
25 records exist. We know they've been created. We don't know

1 how they were necessarily managed during the presidency. We
2 don't know what happened to them when President Clinton's term
3 ended. All we know is that archives does not have the records
4 and they don't believe they are presidential records, and
5 we're trying to figure that out. We're asking the Court to
6 make a determination based on the evidence provided that these
7 records are presidential records, and once they're
8 presidential records, other obligations take effect.

9 THE COURT: How can I make that decision without the
10 information that would really only be in the president's head,
11 what they were created and utilized for?

12 MR. BEKESHA: Well, that's the problem. Archives
13 thinks they can still make that determination. They, in fact,
14 make that determination, so we're challenging their
15 determination. We're challenging that their decision was
16 arbitrary and capricious because they never reviewed the
17 records, they never asked President Clinton about the records.
18 They looked at our letter and said, no, we don't think these
19 are presidential records, they're not subject to FOIA, so
20 we're challenging that decision.

21 THE COURT: Well, if a Court could review the decision
22 of presidential versus personal, how would it go about doing
23 that? What is the standard of review?

24 MR. BEKESHA: Well, first, the standard of
25 review -- the Court would be reviewing the determination. It

1 wouldn't -- and once you get to that point --

2 THE COURT: Right. But am I supposed to defer? Do I
3 get to do it de novo? It depends on what it was prepared or
4 utilized for. How would I make that determination without
5 input from the president? And doesn't the lack of any mention
6 of any of this in the statute sort of point to the notion that
7 once it's done, it's done?

8 MR. BEKESHA: I don't think so. If once it's done,
9 it's done, the president could classify or not classify, do
10 nothing, and then take all his papers and records with him on
11 the last day. And archives would say, oh, well, we can't do
12 anything about that. We don't believe that was the intent
13 that Congress had in mind.

14 THE COURT: All right. Well, let's say President
15 Clinton took everything with him, and not just these tapes --

16 MR. BEKESHA: Uh-huh.

17 THE COURT: -- and there was essentially an abuse of
18 the Presidential Records Act, and it was a matter of history,
19 he held a press conference and he said, I am taking every
20 single piece of paper in the White House with me, so there,
21 and he leaves. What can the archivist do under the statute?

22 MR. BEKESHA: Under the statute, the archives is
23 required to assume custody and control. Exactly how the
24 archives goes about doing that is part of the discretion that
25 archives has. But we're not challenging the enforcement

1 mechanism of how they get somewhere. If they're trying to get
2 C -- if we're at point A and they're trying to get to point D
3 and B and C is in the middle, we're not challenging whether
4 they choose point B or whether they choose point C, whether or
5 not they file a court action, have the attorney general file a
6 court action, whether they try to physically seize the
7 records, make a phone call. All we're saying is they have a
8 requirement to do so. How they go about doing it is for the
9 archives to choose, but they're required to do so.

10 THE COURT: And you get all of that out of the
11 sentence in Section (f)?

12 I mean doesn't the fact that the Presidential Records
13 Act itself specifies the administrative enforcement remedy
14 available under the Federal Records Act indicate that that is
15 the enforcement mechanism and the only enforcement mechanism?

16 MR. BEKESHA: We don't believe so, Your Honor. I mean
17 also --

18 THE COURT: What does "assume custody and control"
19 mean in your view? What do you want them to do?

20 MR. BEKESHA: Because they are also required to make
21 them available to the public, "assume custody and control"
22 would be to take control of the records or have somebody else
23 take control of the records, review the records, because if
24 there is personal information --

25 THE COURT: How do they take control? He's got them.

1 I have them. He issues a press release, I've got them. I'm
2 taking them to New York with Buddy. Then what? What are they
3 supposed to do?

4 MR. BEKESHA: As I said, there are many options.
5 They --

6 THE COURT: Tell me one.

7 MR. BEKESHA: One option is they can call President
8 Clinton and ask. There is nothing in the records --

9 THE COURT: Okay. He says no. Now what?

10 MR. BEKESHA: They write a nice letter. They maybe
11 use one of these enforcement mechanisms. Maybe they try
12 something else. I mean the idea is, also, you know, Section
13 2202 says, the United States shall reserve and retain complete
14 ownership, possession, and control of presidential records.
15 Under the Presidential Record Act, these records are United
16 States property. They are supposed to stay within the United
17 States government. So if you take everything combined and you
18 take the Public Records Act and you look at all those sections
19 as a whole, archives is required to have custody and control
20 of presidential records because they're United States
21 government property and they're supposed to make them
22 available to the public, you know, 5 years, 10 years,
23 12 years, 20 years, if its designated as such, and they're
24 supposed to process them through FOIA, and if they process
25 them through FOIA, they can segregate. We don't dispute that

1 some of these records could be more of an audio diary; but as
2 a whole, they're presidential records and archives is required
3 to process them as such.

4 THE COURT: Well, what is your response to the Court's
5 holding in the CREW opinion that there is no private right of
6 action under the PRA?

7 MR. BEKESHA: We have brought this claim under the
8 APA.

9 THE COURT: Well, you've brought it under both. Are
10 we only talking about APA?

11 MR. BEKESHA: The decision whether or not these are
12 presidential records is our focus.

13 THE COURT: Okay.

14 MR. BEKESHA: So our focus is the APA and the
15 determination that archives made. Where Presidential Records
16 Act and where FOIA comes into play is that the decision was
17 based on the Presidential Records Act; but the focus -- our
18 claim, our argument is solely on the APA, that it was -- that
19 the determination was arbitrary and capricious and that these
20 records are presidential records.

21 THE COURT: Well, why is it arbitrary and capricious?
22 If you say the final agency action is the letter saying, in my
23 opinion, based on the record before me, these are private, and
24 you say that that is a final decision, and you say that that
25 is a reviewable decision, and that's a decision that the

1 archivist was entitled to make under the statute -- which I'm
2 not sure about, but let's assume you're right about all those
3 things and they made it, and I agree with you that it is
4 final -- what am I measuring it against to find it to be
5 arbitrary and capricious? If I'm using the APA, doesn't that
6 mean that I have to give them deference?

7 MR. BEKESHA: There is deference involved but -- and I
8 don't want to go ahead and read our five-page letter -- but if
9 the Court looks through the five-page letter that we wrote on
10 appeal --

11 THE COURT: No, I read it.

12 MR. BEKESHA: -- we pretty clearly establish that
13 these were presidential records. We talk about all the
14 instances that these are presidential records, about
15 conversations President Clinton had with foreign dignitaries,
16 with congressmen, with senators, talking about policies,
17 trying to determine who is going to be his next secretary of
18 state, I believe. These are all conversations about policy,
19 even in some instances where Taylor Branch went off to a
20 foreign country and came back and reported to the president
21 about what he saw there. These are all discussions that
22 aren't like a diary. A diary is something you usually write
23 at the end of the day, at the end of the week in your point of
24 view of what is -- of what occurred. This is actually what
25 occurred as it was occurring. It's no different than, you

1 know -- this is very similar -- counsel was talking about this
2 idea --

3 THE COURT: Let's say you're right because I think
4 there is something to at least the portions of the tapes where
5 he's doing something else other than just chatting with Taylor
6 Branch. Taylor Branch is watching him do his job. It's a
7 record of his doing his job. That still doesn't necessarily
8 fall within the definition because personal talks about what
9 you do with the record and whether you use the record in the
10 course of your government business. And I don't believe there
11 is anything in your letter that suggests he used the
12 recordings for anything other than personal purposes. But
13 let's say you are right and he -- after he got off the
14 phone -- took his tape with Taylor Branch and sent it to his
15 chief of staff and said, listen to this great conversation I
16 just had with the foreign leader, wasn't I brilliant, and do
17 you think I made the right decision or should I call them
18 back? So let's say some portion of them fall within
19 presidential records. Why is your injury redressable? Why
20 doesn't that just sort of end the lawsuit?

21 MR. BEKESHA: Well, under -- going back to the
22 *Judicial Watch vs. Commerce* case, the FACA case where it
23 talked about standing in the FACA context, in there -- I mean
24 I think we fall within there. Because the records were
25 determined not to be presidential records, we fail

1 to -- archives doesn't have an obligation to process the
2 records; and because of that, we don't have access to the
3 records. I think -- if the system worked and you went through
4 the checklist, once they're determined presidential records,
5 archives assumed custody and control of the records, and then
6 they make them available. Because the determination was these
7 were not presidential records, therefore they fall outside the
8 context of FOIA, we don't get the records, and that's our
9 injury. Our injury is that Judicial Watch as well as --

10 THE COURT: But Judicial Watch said that the defendant
11 in that case was subject to statutory obligations under the
12 particular statute that were within the agency's power to
13 discharge.

14 MR. BEKESHA: Yes.

15 THE COURT: And what they're saying is it is just
16 simply not within our power to do what it is you want us to
17 do, to assume custody and control of the records, and you keep
18 repeating that phrase, and I keep asking you what does that
19 mean, what do they have the statutory authority to do other
20 than exercise their unfettered discretion to ask the attorney
21 general to try to go get them, and you haven't pointed to
22 anything in the statute that they have the authority to do,
23 and I think that's kind of where this sits at the moment.

24 What enforcement mechanism, what thing, what power can
25 they exercise under the statute that I can order them to do

1 that makes your injury redressable?

2 MR. BEKESHA: Once the records are determined to be
3 presidential records, there is an obligation to assume custody
4 and control of them. How -- and I will just say, once again,
5 how they go about doing that -- Judicial Watch is not
6 challenging how. We're not challenging whether they use one
7 enforcement mechanism or another. The statute --

8 THE COURT: I just want you to tell me what they have
9 other than the one that they have that they don't have to do.

10 Under the APA, for instance, I can only order an
11 agency to do what it has to do.

12 MR. BEKESHA: Yes.

13 THE COURT: And under the statute, they don't have to
14 go after misclassified records. They can choose to go after
15 misclassified records. And so that's why I want to know what
16 is it that you see that they have the statutory power to do
17 that they also have the statutory obligation to do.

18 MR. BEKESHA: We believe they have -- I keep repeating
19 myself.

20 THE COURT: To assume custody and control of their
21 records?

22 MR. BEKESHA: Yes, I sound like a broken record, but
23 this obligation will exist. You know, once a determination is
24 that they are presidential records, this obligation is
25 created; and once that obligation is created, it sets

1 up -- there may be other options -- Judicial Watch is harmed
2 by that determination because it ends everything. It's final,
3 it's determinative, and there is no redressability -- I mean
4 there is no other way to challenge this determination. And
5 once the determination is made that's presidential records, it
6 opens the door. It leaves for the possibility that archives
7 will go out and get the records. It leaves the possibility
8 that they'll use one of their enforcement mechanisms or they
9 may use other avenues to get them.

10 We're challenging the determination. We're not
11 challenging archives' failure to bring an enforcement action.
12 We didn't get there. That's not before the Court. What's
13 before the Court is --

14 THE COURT: Why isn't that what should happen next?

15 MR. BEKESHA: If this Court agreed and found that the
16 records were presidential records and ordered archives to, to
17 the best of its abilities, seek to assume custody and control
18 of the records, it would bring us to a next step. If archives
19 didn't use their -- you know, all their powers to the best of
20 their ability, there would be --

21 THE COURT: We're talking about very mushy
22 unenforceable orders at this point. I mean I just don't think
23 I could issue an order that says try your best. Then how
24 would anybody be able to ascertain whether they've complied.

25 MR. BEKESHA: If archives did nothing, they wouldn't

1 be complying. If they asked President Clinton to turn over
2 the records and he did, they would be complying. It opens up
3 the door for Judicial Watch to be redressed, to have the
4 records determined to be presidential records and then
5 properly processed as presidential records are supposed to be.
6 Once again, you know, archives can pick and choose how they
7 can go about assuming custody and control, but they have to do
8 so under the statute.

9 THE COURT: But to me the statute only has them assume
10 custody and control of what has been designated by the
11 president as presidential records. Earlier in the statute
12 it's the president who exercises the authority to classify
13 them one way or the other and then they get what is
14 presidential, they don't get what's personal. And so you're
15 basically asking me to enforce the definition section as
16 opposed to asking me to enforce the section that tells under
17 which the archivist has authority one way or the other.

18 MR. BEKESHA: But once the definition section is
19 enforced, then the other sections fall into place. If a
20 record is determined to be a presidential record, archives
21 can't sit back and do nothing. I mean these are United States
22 government property. They are supposed to be made available
23 to the public. So the definition is important. The
24 determination of what is a presidential record is important
25 because it leads to everything else.

1 THE COURT: But the statute doesn't include a private
2 right of action. The statute doesn't include a judicial
3 review provision. Doesn't all of that suggest that
4 misclassified records are only subject to the
5 enforcement -- the one mechanism that is set forth in the
6 statute, which is that they can exercise their discretion to
7 go ask the attorney general and Congress to do something about
8 this?

9 MR. BEKESHA: No, but it also leaves open the
10 opportunity to bring an APA claim for that because there is no
11 remedy, there is no avenue or vehicle to bring such a
12 challenge specifically under the PRA, and that's why we're
13 focusing on the determination made by archives in its two
14 letters.

15 THE COURT: Well, they say that the determination they
16 make is essentially do we invoke the enforcement mechanism or
17 not and that that discretion is so broad that it is
18 unreviewable. What is your response to that?

19 MR. BEKESHA: That they didn't make a determination
20 about the failure to bring an enforcement action; they made
21 solely a determination about whether or not these records are
22 presidential records, and their determination was that it was
23 not. There is nothing in their determination saying -- under
24 their theory, they could have said, these are presidential
25 records but we don't invoke the enforcement mechanism. That

1 would have been a different determination and something else
2 we may have a possibility -- I don't know -- to challenge, but
3 that wasn't their determination. Their determination was only
4 is this -- are these records presidential records.

5 THE COURT: And what was the source of their authority
6 to make that determination at all?

7 MR. BEKESHA: Their source would be the PRA and
8 their -- the overall objective to make presidential records
9 available to the public.

10 THE COURT: What part of the PRA accords the archivist
11 as opposed to the president any authority whatsoever to
12 classify things as presidential versus personal? Isn't that a
13 decision committed to the president under the act?

14 And I agree with you, the letter purports to make a
15 decision --

16 MR. BEKESHA: Uh-huh.

17 THE COURT: -- and I find that troubling, and I see
18 why you took the approach you took in light of receiving the
19 letter you received. But where do they have the authority to
20 do any classifying or reclassifying?

21 I mean initially I thought this lawsuit was about your
22 asking them to sort of reclassify. Now you're saying they
23 went ahead and classified and I think they're wrong and that
24 is a reviewable agency action --

25 MR. BEKESHA: Uh-huh.

1 THE COURT: -- and that has some force to it. But I
2 don't know that they had the power to do that at all anywhere
3 under this statute. I don't see anywhere where Congress gave
4 the archivist the opportunity to decide what of the
5 president's is personal or not.

6 MR. BEKESHA: During his term there is no -- I mean
7 they have no -- archivist has no authority during the
8 president's term to make a classification. That is solely up
9 to the president.

10 THE COURT: Well, after his term, how does that
11 change? What's personal is personal. What he used it for,
12 what he thought it was for, what he created it for, and that's
13 why it says, under Section (b), they should be categorized as
14 presidential or personal upon their creation or receipt.

15 MR. BEKESHA: Yes. The president is required to
16 classify the records, if possible. But it does not -- it does
17 not say that only those records classified by the president
18 are presidential records. They're just saying he's supposed
19 to classify. He holds one sheet of paper up, he puts one in
20 one box, one in the other. That's what his requirement is.
21 If he takes, for example, his daily calendars or maybe his
22 notes on his speeches, a speech that he just -- one of his
23 speeches and puts that in the personal records box, that
24 doesn't make it a personal record, that just means that
25 President Clinton classified it as a personal record.

1 THE COURT: Right. And *Armstrong I* says, while he's
2 doing that, there is no judicial review whatsoever. What he
3 does he has unfettered discretion to. We're going to trust
4 him to do it right. Congress trusted him to do it right. He
5 has unfettered discretion to do it, though the archivist is
6 allowed to raise his hand and say, Mr. President, how about
7 this, how about that, but very, very limited authority to veto
8 what he is doing. Even literally shredding presidential
9 records, he may dispose of presidential records, and there is
10 nothing we can do about it.

11 MR. BEKESHA: Correct.

12 THE COURT: And that, it seems to me, is even more
13 troubling than what you're talking about. If he can do that,
14 why can't he do this?

15 MR. BEKESHA: He could classify them as such and maybe
16 he did and maybe he didn't. We don't know. But it is still
17 under the obligation -- but archives is still under the
18 obligation to take possession of presidential records.

19 Now, they could -- Congress could have easily in the
20 definition of presidential records said a presidential record
21 is this and list what makes it a presidential record and then
22 said, and as classified by the president. But they didn't.
23 They didn't focus on the president's classification in the
24 definition of a presidential record. They focused on the
25 substance.

1 THE COURT: Well, but they do in Section 2203
2 specifically talk about the classification process taking
3 place.

4 MR. BEKESHA: Well, that talks about the management
5 and custody of the records. I mean that's the section it is
6 in, section on how to manage these. Congress was
7 concerned that --

8 THE COURT: Well, as I said, Section (b) is the only
9 section I could find that talks about personal at all other
10 than the definition section, and so they have the
11 categorization of presidential versus personal taking place
12 during the presidency, which makes perfect sense.

13 MR. BEKESHA: Right, but they didn't need to say
14 personal records there. They could have just said, if it
15 falls in the presidential. I mean if it is not a presidential
16 record --

17 THE COURT: Right.

18 MR. BEKESHA: -- then it is a personal record.

19 THE COURT: Right. And so that seems to vest
20 exclusive authority for saying this is personal on the person
21 who would know.

22 MR. BEKESHA: It gives him that ability to classify at
23 that time, but it doesn't mean that something he classifies at
24 that time is, in fact, a personal or a presidential. It just
25 means he needs to classify it to make it easier for management

1 during his term and then after his term for archives. If the
2 president didn't classify and didn't manage his records, if he
3 didn't think about it, if there was no system set up, then
4 you'd have a problem. At the end of the term, you'd have a
5 big stack of papers, one page personal, one page presidential,
6 and archives would have to sort it out and figure it out. So
7 Congress here was trying to make it easy for archives. They
8 were trying to say the president needs to classify records.
9 Just because he classifies it doesn't mean it's a presidential
10 record. We're also not asking for archives to go on a fishing
11 expedition and try to find records that may or may not exist.
12 We informed archives that these records exist. Based on the
13 letters, it almost seems to suggest that archives -- I'm
14 sorry -- not letters, audiotapes -- that these audiotapes
15 exist. So we're not asking for a fishing expedition.

16 THE COURT: Well, I feel like your entire theory works
17 if I ignore *Armstrong I* completely, and you say I can ignore
18 *Armstrong I* completely because that was during the presidency,
19 and *Armstrong II* is during the presidency, and CREW is during
20 the presidency, and American Historical Association is
21 different. Are you hanging your hat on anything other than
22 *Judicial Watch v. Commerce*, or am I writing on a blank slate
23 here?

24 MR. BEKESHA: None of these issues were before the
25 Court. And that happens. In *Armstrong* it was the first time

1 that it was before the Courts.

2 THE COURT: I just want to know if I'm right that
3 you're saying I'm writing on a blank slate?

4 MR. BEKESHA: Yes.

5 THE COURT: Okay.

6 MR. BEKESHA: Yes. We don't think the current case
7 law discusses this issue at all, and that happens. And so
8 yes, it's a blank slate with in mind what the PRA says and the
9 obligations that archives has.

10 THE COURT: Okay. So let's go back to my original
11 question: What is the standard of review to be applied to a
12 classification decision? Are you saying arbitrary and
13 capricious because I'm getting at it through the APA?

14 MR. BEKESHA: Yes. I mean that's our argument; that
15 the determination was arbitrary and capricious. How to review
16 the audiotapes -- I mean it would be a -- I mean it's
17 difficult to answer.

18 THE COURT: It's an important question --

19 MR. BEKESHA: It is, and I appreciate that. I just --
20 thinking, you know --

21 THE COURT: You're telling me, Judge, you absolutely
22 get to review it. And I'm saying, okay, what's the --

23 MR. BEKESHA: Right. I mean, it would be arbitrary
24 and capricious because it is under the APA. Our claim is that
25 they acted arbitrarily and capriciously, and then you would

1 take into account the facts alleged and whether or not their
2 decision was merited based on the facts presented to them in
3 the letters and also in the complaint.

4 THE COURT: Well, and am I giving them Chevron
5 deference because they're the agency given the authority to
6 implement this statute under the Presidential Records Act?

7 MR. BEKESHA: I think because the decision was so
8 arbitrary it doesn't matter what standard you review it under.
9 The letters clearly establish that these records are
10 presidential records; that even with some deference, which the
11 agency doesn't even -- I mean they don't even discuss the
12 facts. They just say these sound like personal diaries. They
13 don't even -- it seems based on the letters that they didn't
14 even think about, well, if this is one end of the
15 conversation, you know, is that recordings made in the Oval
16 Office? Those would be presidential records but why not
17 these. Oval Office operations helped set up the meetings.
18 They were intimately involved in the recordings. They set up
19 the appointments with Taylor Branch. They escorted him
20 sometimes into the Oval Office, sometimes into other rooms in
21 the White House.

22 THE COURT: Well, let's say you're right about every
23 single step of this: They were wrong. I have the authority
24 to tell them that they were wrong. I have the authority to
25 say assume custody and control. And they make a phone call,

1 write a nice letter. They even head up to Observatory Circle
2 and knock on the door. And he says, they're my records, and
3 he closes the door. How is your injury something we can
4 redress?

5 MR. BEKESHA: The injury there would be redressable
6 because by making a determination that the records are
7 presidential records, it falls under FOIA, and there would
8 be -- the FOIA statute would kick in.

9 THE COURT: FOIA only has to give you what they have.

10 MR. BEKESHA: Yes, unless it's in the possession of
11 another agency or --

12 THE COURT: He's not an agency.

13 MR. BEKESHA: It could be -- and I haven't --

14 THE COURT: He is a private citizen.

15 MR. BEKESHA: He is a private citizen, but he also
16 holds -- the former president has some type of office.

17 THE COURT: Are you saying that my order to them, go
18 get them, binds him to give them to them when they knock on
19 the door --

20 MR. BEKESHA: No, your order would not bind them.
21 However, they are --

22 THE COURT: So even if you win, what do you get?

23 MR. BEKESHA: We get the possibility to discuss that
24 when the time comes. I mean we've been redressed -- I mean
25 the injury of the determination stops the proceedings. I mean

1 it stops. We win by now -- we now have --

2 THE COURT: The opportunity to sue President Clinton,
3 which you haven't elected to do so far?

4 MR. BEKESHA: We haven't elected to do so, so far, but
5 that could be a possibility, or the possibility could be that
6 he turns over the records. It just opens the door to having
7 many -- redressability could be by simply having them declared
8 presidential records and then the ability to have the further
9 process under FOIA. You know, there are many different
10 instances where an agency could go out and get records under
11 FOIA.

12 THE COURT: This is not one of those. This just does
13 not fall within -- if they don't have them, FOIA doesn't help
14 you.

15 MR. BEKESHA: Most likely, yes.

16 THE COURT: Okay. All right. Is there anything else
17 that you wanted to say that I took you off your outline and
18 you didn't get to say?

19 You can take a minute.

20 MR. BEKESHA: Thank you.

21 I think we covered everything.

22 THE COURT: All right. Thank you very much.

23 MR. BEKESHA: Thank you very much.

24 THE COURT: All right. Briefly, I think I understand
25 all the arguments you made initially, and I don't think we

1 need to repeat them. The one thing that we haven't really
2 talked about is the only thing he talked about, which is the
3 mandatory nature of Section (f), where it says the archivist
4 shall assume responsibility for access to presidential
5 records, and he says presidential records is defined in the
6 definition section, these meet the definition, therefore you
7 do have a duty that is enforceable by this Court, reviewable
8 by this Court. What do you say to that?

9 MR. SCHWEI: We have two responses to that: The first
10 is that, as Your Honor alluded to, we argue that whatever that
11 duty within Section 2203(f) is, it only applies to the
12 specific collection of presidential records designated by the
13 president as Section 2203(b) contemplates, which there are two
14 pre-existing collections that get -- one gets transferred at
15 the end of the term; personal records do not.

16 The second argument is that even the language of
17 2203(f) does not actually impose a duty to, quote, assume
18 custody and control. What 2203(f) actually says is, quote,
19 to assume responsibility for assume custody and control, which
20 is very different, because as the D.C. Circuit stated in the
21 *American Friends Service Committee v. Webster case*, when a
22 statute says -- a statute there said NARA shall have
23 responsibility to conduct inspections of records; and the
24 D.C. Circuit, in that case, stated NARA does not have a
25 mandatory duty to conduct inspections. NARA has the

1 responsibility and the prerogative, but it is not the type of
2 mandatory duty and certainly not the type of specific
3 unequivocal command that is required under the APA for this
4 Court to order NARA to actually comply with that section.

5 THE COURT: Is that cited in your reply, the case you
6 just cited to me?

7 MR. SCHWEI: Yes, Your Honor.

8 THE COURT: Okay. All right. I think you said you
9 had two answers. That was the second answer. The first
10 answer was Section (b) --

11 MR. SCHWEI: Correct.

12 THE COURT: -- that he puts them in the two boxes.

13 All right. Is there anything else you want to say in
14 response to what he said?

15 MR. SCHWEI: I think we're content to rest on our
16 briefs, Your Honor.

17 THE COURT: Okay. Thank you very much.

18 I very much appreciate the quality of the arguments
19 this morning. It is a very interesting case. I think, based
20 upon everything I've read, that we are writing on a relatively
21 blank slate, which makes it interesting, but it also means I
22 need to think about it, and I'm going to take it under
23 advisement. And thank you very much.

24 (Proceedings adjourned at 11:31 a.m.)
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CERTIFICATE OF OFFICIAL COURT REPORTER

I, Patricia A. Kaneshiro-Miller, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Patricia A K Miller *10/31/11*

PATRICIA A. KANESHIRO-MILLER

DATE



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