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HOUSE OF REPRESENTATIVES

REPORT
No. 94-560

DISAPPROVING REGULATIONS PROPOSED BY THE GENERAL SERVICES ADMINISTRATION IMPLEMENTING THE PRESIDENTIAL RECORDINGS AND MATERIALS PRESERVATION ACT

REPORT

OF THE

COMMITTEE ON HOUSE ADMINISTRATION
UNITED STATES
HOUSE OF REPRESENTATIVES

Together With

SEPARATE VIEWS

[To Accompany H. Res. 710]

DISAPPROVING REGULATIONS PROPOSED BY THE ADMINISTRATOR OF GENERAL SERVICES UNDER THE PRESIDENTIAL RECORDINGS AND MATERIALS PRESERVATION ACT

OCTOBER 9, 1975.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

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Mr. HAYS of Ohio, from the Committee on House Administration, submitted the following

REPORT

together with

SEPARATE VIEWS

[To accompany H. Res. 710]

The Committee on House Administraton, to whom was referred the resolution (H. Res. 710) disapproving regulations proposed by the Administrator of General Services under the Presidential Recordings and Materials Preservation Act, having considered the same, report favorably thereon, without amendment, and recommend that the resolution be agreed to.

PURPOSE

The purpose of this resolution is to disapprove portions of the regulations submitted by the Administrator of General Services pursuant to title I of Public Law 93–526 which, in the judgment of the Committee, are not consistent with the basic objectives of the Act, and do not conform to the specific criteria set forth therein.[1] (Copies of the resolution, the Act and the proposed regulations are set forth in the appendix to this report.)

[1] It should be noted, however, that none of the regulations will actually become operative until the basic issues of constitutionality have been decided by the courts. Present indications are that such court action is not likely to be concluded before some time next year.

BACKGROUND

The Presidential Recordings and Materials Preservation Act was signed into law by President Ford on December 19, 1974. The regulations here involved were submitted by the General Services Administration on March 19, 1975, pursuant to title I of the Act, relating to the disposition of the Nixon Presidential materials. Title II of the Act establishes the National Study Commission on Records and Documents of Federal Officials.

Following is a summary of the major provisions of title I of the Act:

1. The Act would nullify the Nixon-Sampson Agreement in which former President Nixon expressed an intention to donate to the Government some 42 million documents and materials to which he claims legal title and access to which he asserted an absolute right in addition to asserting the right to withdraw material from custody of the General Services Administration.

2. Under the Act the Administrator would retain custody of all tapes, papers, documents and other materials of general historical significance relating to the Presidency of Richard M. Nixon. All of the material must be retained in the Washington Metropolitan Area and cannot be detroyed except as may be provided by law.

3. Mr. Nixon would at all times have access to the material for any purpose.

4. The material would be immediately available for use in judical proceedings, subject to any "rights, defenses, or privileges which any person may raise". A request for access to the material by the Special Prosecutor would be given priority over all other requests.

5. Access to the material would be subject to regulations to assure the security of the material which would be issued by the Administrator.

6. The legislation takes no position on ownership of the material prior to enactment of the measure. However, if a court finds that the measure deprives any person of private property, the Act would authorize the payment of "just compensation" as may be determined by the court.

7. The regulations regarding public access to the material are to give special attention to providing expeditious access to Watergate-related material and are to take into account the following factors:

(1) The need to provide the public with the full truth, at the earliest reasonable date, of the abuses of governmental power popularly identified under the generic term "Watergate";

(2) The need to make such recordings and materials available for use in judicial proceedings;

(3) The need to prevent general access, except in accordance with appropriate procedures established for use in judicial proceedings, to information relating to the Nation's security;

(4) The need to protect every individual's right to a fair and impartial trial;

(5) The need to protect any party's opportunity to assert any legally or constitutionally based right or privilege which would prevent or otherwise limit access to such recordings and materials;

(6) The need to provide public access to those materials which have general historical significance, and which are not likely to be related to the need described in paragraph (1); and

(7) The need to give Richard M. Nixon, or his heirs, for his sole custody and use, tape recordings and other materials which are not likely to be related to the need described in paragraph (1) and are not otherwise of general historical significance.

8. The Act required the Administrator of General Services to submit the regulations implementing title I within 90 calendar days after enactment and gives Congress the authority to disapprove the regulations by providing in Section 105(b) that the regulations take effect 90 legislative days after submission unless they are disapproved by either House of Congress within that period.

9. The Act provides that judicial challenges and appeals therefrom be heard on an expedited basis.

HEARINGS

Hearings on the proposed regulation were held on May 22 and June 3, 1975 in order to afford the Subcommittee on Printing an opportunity to determine whether the proposed regulations were in accord with the basic objectives of the Act, and whether they conformed to the specific criteria set forth in section 104 thereof.

Appearing in support of the proposed regulations on May 22 were Mr. Arthur F. Sampson, Administrator of General Services, accompanied by Mr. Ted Trimmer, General Counsel, Dr. James B. Rhoads, the Archivist of the United States, and other members of Mr. Sampson's staff.

On June 3, the Printing Subcommittee heard testimony from Mr. Charles Morgan, representing the American Civil Liberties Union, and a panel of witnesses representing the American Political Science Association, the American Historical Association, and the Reporters Committee for Freedom of the Press. The panel of witnesses included Professor Clement E. Vose for the American Political Science Association, Professor Norman A. Graebner for the American Historical Association, and Lyle W. Denniston for the Reporters' Committee for Freedom of the Press.

The Subcommittee also received written replies to a number of questions addressed to the witnesses during the hearings, and these submissions have all been inserted in the hearing record.

COMMITTEE ACTION

Following a complete review of the proposed regulations and the hearing record, the Printing Subcommittee concluded that many of the regulations complied with the Act and were consistent with the intent of Congress. The Subcommittee found, however, that a significant number of provisions were not consistent with the Act. The Subcommittee therefore recommended disapproval of those provisions not found to be in conformity with the intent of the legislation. The full Committee, on September 18, 1975, by a vote of 10–5 (one member voting present) ordered the resolution reported to the House.

Under the Act, the Administrator of General Services has 90 calendar days following the adoption, by either House, of a resolution of disapproval, to submit revised regulations in accordance with the directions of the Committee. Thereafter, the amended regulations will become effective following the expiration of 90 legislative days from the date of submission, unless disapproved by either House of Congress.

The major issues which developed from the hearings and subsequent discussions between members of the Subcommittee staff and representatives of the General Services Administration related to:

(1) The validity and propriety of restrictions on access involving national security and personal embarrassment;

(2) Whether final determinations for the purposes of judicial review should be vested solely in the Administrator, a political appointee, or whether they should be vested in the Presidential Materials Review Board (to be established pursuant to the regulations and composed of the Archivist of the United States, the Librarian of Congress, and a professional archivist selected by the Society of American Archivists) with respect to (a) whether materials are historically significant and are to be retained by the Government, or are of a purely personal nature, to be returned to Mr. Nixon, and (b) whether materials should be withheld from public access;

(3) The notification procedures which should be adopted to protect the legitimate rights and privileges of any individual identified in the Nixon Presidential materials; and

(4) Appropriate procedures for reproducing the tape recordings which will discourage commercialization of the tapes in a manner which would infringe upon the legitimate rights and privileges of an individual.

The Administrator of General Services has contended that he does not have authority irrevocably to delegate judgmental responsibilities imposed upon him by the Congress pursuant to the Act, since the Act does not authorize such delegation. Based upon its own studies, supported by the legislative history of the Act, a memorandum from the American Law Division of the Congressional Research Service of the Library of Congress, and a legal memorandum prepared by counsel to the American Historical Association, the American Political Science Association and the Reporters Committee for Freedom of the Press, the Committee believes that the Act grants the Administrator authority only to propose and explain regulations and not to control and regulate access to the materials. However, even if such authority had been delegated to the Administrator. a subdelegation of that authority would be permitted. (Copies of the legal memoranda are set forth in the appendix.)

Finally, the Committee believes that in order to carry out the intent of the Act, final judgment relative to public access should be lodged in persons competent in archival sciences, such as the members of the proposed Presidential Materials Review Board.

Regarding the procedures for disapproving the proposed regulations, an informal opinion of the House parliamentarian and a memorandum prepared by the American Law Section of the Library of Con-

gress conclude that Congress may disapprove the regulations in part or in whole. The memorandum of the American Law Section also concludes that the Presidential Recordings and Materials Preservation Act does not authorize a procedure whereby Congress could incorporate changes into the proposal submitted by the Administrator and thereafter approve the regulations as amended. However, a report accompanying a resolution of disapproval could suggest amendments which would be consistent with the legislative intent.

Following is a list of the sections of the proposed regulations for which the Committee recommends modifications:

Examination of material relating to national security by the Counsel to the President, Section 105–63.205(d).

Right of third parties to be notified 90 days in advance of intent to provide public access, and opportunity for such individuals to raise certain legal and constitutional rights and privileges to limit public access, Section 105–63.401–1(c).

Obligation of archivisits to refer certain material to appropriate law enforcement officials, section 105–63.401–2(d).

Final agency action by Administrator: Section 105–63.401–2(b); Section 105–63.401–4(d); and Section 105–63.402–4.

Overly broad and vague restrictions on access to:

(a) national security material, Section 105–63.402–1(a)(4);

(b) abuse of power material that may embarrass, damage or harrass, Section 105–63.402–1(b); and

(c) non-government abuse material, Section 105–63.402–2(b).

Prohibition against reproduction of the tapes, Section 105–63.404(c).

SUMMARY OF REGULATIONS PROPOSED BY GSA TO IMPLEMENT TITLE I OF PUBLIC LAW 93–526

The following is a summary of the proposed regulations to Public Law 93–526:[2]

Section 105–63.104 Definitions

This section includes definitions of: (a) Presidential historical materials; (b) private or personal materials; (c) abuses of Government power popularly identified under the generic term "Watergate"; (d) general historical significance; (e) archivists; (f) agency; (g) Administrator; (h) initial archival processing; (i) staff; and (j) national security classified information.

Section 105–63.401 Processing

The regulations provide that the Administrator shall delay processing materials for 30 days after the lifting of the court order preventing implementation of the regulations. This delay will be used to permit persons to initiate legal action to protect their legal rights. The initial archival processing will commence at the end of the 30 day period and public access will be granted shortly thereafter, unless otherwise restricted.

[2] A copy of the proposed regulations are included in the Appendix.

Section 105–63.401–1 Rights and privileges; right to a fair trial

Within 90 days after the effective date of the regulations a person may petition the Administrator to limit access to the material on the grounds that public access would violate a legal or constitutional right or privilege or that it may jeopardize an individual's right to a fair trial.

The Administrator has discretion under the regulations to consider these claims after the expiration of the 90 days.

Section 105–63.401–2 Segregation and review; Senior Archival Review Board; Presidential Materials Review Board

This section establishes the basic procedure for processing the material:

(1) Initial determination regarding public access will be made by professional archivists;

(2) Difficult questions will be referred to a "Senior Archival Review Panel" selected by the Archivist of the United States;

(3) Classifications which raise significant issues "involving interpretation of these regulations or having far reaching precedential value will be submitted to the Presidential Materials Review Board, composed of the Archivist of the United States, the Librarian of Congress and a distinguished professional nominated by the Council of the Society of American Archivists and appointed by the Administrator; and

(4) Decisions of the Board will be reviewed by the Administrator who shall make the final agency decision.

Section 105–63.401–3 Notice of Determination

Notice of initial archival determinations are to be printed in the Federal Register.[3]

Section 105–63.401–4 Appeals

Any person may petition the Administrator to appeal an initial archival determination within 30 days after notification in the Federal Register. Mr. Nixon, his agents and heirs may petition at any time. Appeals shall be heard by the Presidential Materials Review Board. The Administrator shall make the final agency decision.

Section 105–63.401–5 Transfer of materials

Private and personal material of Mr. Nixon which is neither related to the abuses of power or otherwise of general historical significance shall be transferred to him or his agents or heirs no sooner than 30 days after notice of the determination has been published in the Federal Register.

Section 105–63.402–1 Materials related to abuses of power

(1) It is necessary to protect a legal or constitutional right or privilege;

(2) It is necessary to protect an individual's right to a fair and impartial trial;

(3) Release would violate a Federal statute;

(4) Release would disclose or compromise national security classified information (with certain exceptions); or

[3] See the Appendix for a letter from Arthur F. Sampson, Administrator, GSA, regarding publication in Federal Register.

(5) Disclosure would tend to embarrass, damage or harass living persons and deletion would not distort the understanding of the material.

Section 105–63.402–2 Materials of general historical significance unrelated to abuses of government power

Access may be restricted in circumstances identical to points 1 through 4 listed above, except that access to material not related to abuses of power may be restricted when:

(1) Disclosure would compromise trade secrets, etc;

(2) Constitute an invasion of privacy;

(3) Disclose or compromise materials compiled for law enforcement purposes; and

(4) Tend to embarrass, damage or harass living persons.

Section 105–63.402–3 Periodic review of regulations

Materials placed under restrictions will be reviewed periodically and reclassified, if appropriate.

Section 105–63.402–4 Appeal of restrictions

A classification may be appealed to the Presidential Materials Board. The Administrator shall make the final agency decision with respect to each appeal.

Section 105–63.402–5 Deletion of restrictive portions.

Reasonably segregable portions of materials shall be provided after deletions have been made.

Section 105–63.403 Reference room locations, hours and rules

The Administrator shall designate precise locations where the material shall be available to the public.

Section 105–63.404 Reproduction of tape recordings of Presidential recordings

Duplicates of the tapes will be made for public and official reference. Tapes cannot be reproduced for researchers.

Section 105–63.405 Reproduction and authentication of other materials

Reproduction of non-tape material is authorized and will be done by GSA personnel.

RECOMMENDED MODIFICATIONS OF REGULATIONS PROPOSED BY GSA

1. *Section 105–63.206(d)*: Examination of national security material. This proposed regulation provides in part:

(d) Prior to each access which may result in the examination of Presidential historical materials that relate to matters of national security, the Administrator of General Services or his designated agent shall notify the Counsel to the President who shall be given the opportunity to examine these materials and raise any objections, defenses, or privileges to prevent or limit the proposed access.

GSA did not include the above provision in the public access regulations which were submitted for Congressional review. Rather, it was included in regulations pertaining to preservation, protection of, and

access procedures to Nixon Presidential materials. However, since this provision, as well as all other provisions of Section 105–63.206 (dealing with access procedures), directly affect all public access to the Nixon Presidential materials, it must obviously be subject to Congressional approval.

Subsection (d) is troublesome in at least two respects: (1) it appears to recognize a right in the Counsel to the President to originally classify national security materials, even though no such authority has been delegated to him, either by existing law or Executive Order (see E.O. 11652, Mar. 8, 1972, as amended by E.O. 11714, April 24, 1973); and (2) the resolution appears to allow Counsel to limit access to materials even though they have not been, and canot be, classified under existing law.

It would appear more appropriate to refer such requests to the National Security Council, which does have such authority.

The Committee recommends the following amendment:

"(d) Prior to each access which may result in the examination of Presidential historical materials that relate to matters of national security, the Administrator of General Services or his designated agent shall notify the [Counsel to the President] *National Security Council*, [who] *which* shall be given the opportunity to examine these materials and raise any objections, defenses, or privileges to prevent or limit the proposed access. *In asserting any such objections, defense or privilege, the National Security Council shall state in writing why the material involved has been or should be properly clasified under existing law or executive order: Provided, That this provision shall not be construed to allow the restriction of public access to material which is not and cannot be properly classified under existing law or executive order.*

2. Section 105–63.401–1: Rights and privileges; right to a fair trial. This regulation provides in part:

> (c) In his discretion, the Administrator may consider claims and petitions described in paragraphs (a) and (b) of this subsection after the expiration of 90 calendar days from the effective date.

Paragraph (a) of this section allows an individual (i.e. Mr. Nixon or a former White House aide) to petition GSA, within 90 calendar days after the effective date of the regulations, to restrict access to certain Presidential materials because of a legal or constitutional right or privilege possessed by the petitioner (i.e. right to privacy). Paragraph (b) allows a Federal, state or local government attorney to petition the GSA, within 90 calendar days after the effective date of the regulations, to restrict access to Presidential materials whose public disclosure would prejudice a particular individual's right to a fair and impartial trial.

Since a concerned individual is not likely, unless notified by GSA, to have any knowledge or reason to know that the materials include information about him which can lawfully be restricted, he may not learn of the existence of such information until the 90-day period has expired. Likewise, a government attorney may not learn of the inclusion of relevant materials until the expiration of such period.

To provide adequate protection of all individual rights, GSA should be required to consider a petition filed after 90 days even if the material has already been made available to the public.

Furthermore, in any case in which an individual named in the materials can be located, he should be so notified in writing at least 90 days before public access is to be provided. The notification should also describe the individual's rights of appeal under this section. Otherwise, a person would be powerless to exercise his legal rights meaningfully in situations in which he may suffer a violation of a constitutional or legal right.

The Committee recommends the following amendment:

(c) *The Administrator shall consider claims and petitions described in paragraphs (a) and (b) of this subsection, filed after the expiration of 90 calendar days from the effective date, where there is good cause for the failure to file the claim or petition with 90-day period, and the claim or petition is filed within 90 calendar days after the claimant or petitioner becomes aware of the release of such materials, or has reasonable cause to file such petition or claim, to prevent release of such materials.* In his discretion, the Administrator may consider *other* claims, and petitions described in paragraphs (a) and (b) of this subsection after the expiration of 90 calendar days from the effective date.

(d) No less than 90 calendar days before providing public access to any specific set of materials, the Administrator shall make a reasonable effort to locate and shall notify by certified mail, return receipt requested, any individual identified in the materials that the materials are to be made public. Such notification shall set forth the relevant context in which the individual was identified and shall advise the individual of his rights of appeal under this section.

3. Section 105–63.401–2: Segregation and review; Senior Archival Review Panel; Presidential Materials Review Board.

This regulation provides in part:

> (d) If, during the processing period described in Sec. 105–63.401(b), the archivists should discover any materials which they determine reflect an aparent violation of law which has not been the subject of prior investigations, the archivists shall bring the material to the attention of the Administrator for referral to the Department of Justice or other appropriate action.

This regulation places an unnecessary obligation on both the archivists and the Administrator. Archivists may not be familiar with all "prior investigations" and even if they were, the prior investigation may be ongoing or capable of being re-opened. Therefore; the archivists should refer all information bearing on potential criminal activity to the Administrator. The Administrator, in turn. should be required to forward all such material—however innocuous in appearance—to the Justice Department. The Administrator is in no position to evaluate the relevance of any material to any ongoing investigation which may or may not be known to him. Further. the determination of what information may be relevant to an ongoing investigation is not an appropriate function of the Administrator.

The Committee recommends the following amendment:

"(d) If, during the processing period described in § 105–63.401 (b), the archivists should discover materials which reflect an apparent violation of [criminal] law [which has not been the subject of prior investigation], the archivists shall bring the material to the attention of the Administrator for referral to the Department of Justice [or other appropriate action]."

4. *Section 105–63.401–2:* Final agency action by Administrator.

"(h) When the matter certified to the Board by the Senior Archival Panel involves a determination required in paragraphs (a) or (b) of this subsection, the Administrator will publish notice in the Federal Register of the materials to be considered by the Board. In order to protect the privacy of persons who may have such an interest in the materials, the notice shall consist only of a generic description and listing of the materials to be considered by the Board. Any person may intervene in the Board's consideration by petitioning the Administrator in writing within 30 calendar days of publication of notice. The Board shall submit to the Administrator its written recommendation, together with dissenting and concurring opinions, of the proper categorization and disposition of the pertinent materials. The Administrator will make the final administrative determination. If the determination of the Administrator is different from that recommended by the Board, he will state his reasons in writing. The Administrator will notify the petitioner by certified mail, return receipt requested, of the final administrative determination. The Administrator will refrain from transferring any materials in accordance with § 105–63.401–5(a) as a result of the final administrative determination for at least 30 calendar days from the petitioner's receipt of such notice."

The problem with this regulation is that it affords the Administrator unfettered discretion to make the final administrative determination as to which materials should be retained for public access. It is ill-advised, for at least two reasons, to provide the Administrator with such power.

First, as the GSA report itself states, decisions regarding the retention of the Nixon Presidential materials should be made on a non-partisan basis and should reflect the judgement of those trained in archival science. The GSA Administrator—a political appointee who serves at the pleasure of the President and who normally is not trained in archival science—can add little to the substance of non-partisan archival decisions.

Second, affording the Administrator unfettered discretion to make final administrative determinations would increase the risk—both in reality and in appearance—that partisan political concerns will govern decisions concerning the retention of the Nixon Presidential materials. Congress and the American people should not have to worry that at some future time, under some future circumstances, the Administrator will give in to political temptations.

Although the Administrator contends that he cannot "delegate" the authority to make the final agency determination, memoranda submitted by counsel to the American Historical Society, the American Political Science Association and The Reporter's Committee for Freedom of the Press and by the American Law Section of the Library of Congress agree that the Administrator's conclusion is invalid and that the authority to make the final agency determination may be vested in the Presidential Materials Review Board.[3]

The Committee recommends the following amendment:

(h) When the matter certified to the Board by the Senior Archival Panel involves a determination required in paragraphs (a) or (b) of this subsection, the Administrator will publish notice in the *Federal Register* of the materials to be considered by the Board. In order to protect the privacy of persons who may have such an interest in the materials, the notice shall consist only of a generic description and listing of the materials to be considered by the Board. Any person may intervene in the Board's consideration by petitioning the Administrator in writing within 30 calendar days of publication of notice. The Board shall submit to the Administrator its written [recommendation] *decision*, together with dissenting and concurring opinions, of the proper categorization and disposition of the pertinent materials. The [Administrator] *Board's decision* will [make] be the final administrative determination. [If the determination of the Administrator is different from that recommend by the Board, he will state his reasons in writing.] The Administrator will notify the petitioner by certified mail, return receipt requested, of the final administrative determination, within 30 calendar days following receipt of such determination. The Administrator will refrain from transferring any materials in accordance with § 105–63.401–5(a) as a result of the final administrative determination for at least 30 calendar days from the petitioner's receipt of such notice.

5. Section 105-63.401–4: Final agency action by Administrator. This regulation provides in part:

(d) Upon consideration of appeals as described in paragraphs (a) or (b) of this subsection, the Board shall submit to the Administrator its written recommendation, together with dissenting and concurring opinions, of the proper categorization and disposition of the pertinent materials. The Administrator will make the final administrative determination If the determination of the Administrator is different from that recommended by the Board. he will state his reasons in writing. The Administrator will notify the petitioner by certified mail, return receipt requested, of the final administrative determination. The Administrator will refrain from transferring any materials in accordance with § 105–63.401–5 (a) as a result of the final administrative determination for at least 30 calendar days from the petitioner's receipt of such notice.

[3] See Appendix for legal memoranda.

This regulation, like section 105–63.401–1(h), affords the Administrator unfettered discretion to dispose of petitions concerning the retention of certain materials. Therefore, the Committee recommends the following amendment:

(d) Upon consideration of appeals as described in paragraphs (a) or (b) of this subsection, the Board shall submit to the Administrator its written [recommendation] *decision*, together with dissenting and concurring opinions, of the proper categorization and disposition of the pertinent materials. *For the purpose of judicial review the* [Administrator] *Board's decision* will [make] *be* the final administrative determination. [If the determination of the Administrator is different from that recommended by the Board, he will state his reasons in writing.] The Administrator will notify the petitioner by certified mail, return receipt requested of the final administrative determination within 30 calendar-days following receipt of such petition. The Administrator will refrain from transferring any materials in accordance with § 105–63.401–5(a) as a result of the final administrative determination for at least 30 calendar days from the petitioner's receipt of such notice.

6. Section 105–63.402–1: Materials related to abuses of governmental power.

This regulation provides, in pertinent part, as follows:

(a) The Administrator will restrict access to materials determined during the processing period to relate to abuses of governmental power, as defined in § 105–63.104(c), when:

* * * * *

(4) The release of the materials would disclose or compromise national security classified information. However, the Administrator may waive this restriction when:

* * * * *

(iv) The requester has signed a statement, satisfactory to the Administrator and to the heads of agencies having subject matter interest in the material, which declares that the requester will not publish, disclose, or otherwise compromise the classified material to be examined and that the requester has been made aware of Federal criminal statutes which prohibit the compromise or disclosure of this information.

There are two principal difficulties with this regulation.

First, the regulation would restrict access to materials whose disclosure would "compromise" national security classified information. This standard is far too vague. Conceivably, it could be argued that disclosure of virtually any presidential material would "compromise" national security information. Congress should therefore rely on existing standards. Under present law, the government can classify any item when its disclosure would reveal or compromise sensitive information. (See Exec. Order 11652, Secs. 1, 6, 12). If the government has not classified the item, there should be no further national security restriction on access to it.

Second, if a researcher is otherwise authorized to review classified material and has signed a sworn statement that he will not disclose

the sensitive material, that should be sufficient to allow him access. The sworn statement should not, in addition, have to be "satisfactory" to the Administrator or any federal agency. No standards are offered to determine when a statement would be deemed "satisfactory." Use of the term, consequently, would allow government officials arbitrarily to deny access to otherwise authorized persons.

The Committee recommends the following amendment:

> (a) The Administrator will restrict access to materials determined during the processing period to relate to abuses of governmental power, as defined in § 105–63.104(c), when:
>
> (4) The release of the materials would disclose [or compromise] national security classified information. However, the Administrator may waive this restriction when:
>
> (iv) The requester has signed a statement, [satisfactory to the Administrator and to the heads of agencies having subject matter interest in the material], which declares that the requester will not publish, disclose, or otherwise compromise the classified material to be examined and that the requester has been made aware of Federal criminal statutes which prohibit the compromise or disclosure of this information."

7. Section 105–63.420–1: Material that may embarrass, damage or harass.

> (b) The Administrator may restrict access to portions of materials determined to relate to abuses of governmental power when the release of those portions would tend to embarrass, damage, or harass living persons, and the deletion of those portions will not distort, and their retention is not essential to an understanding of, the substantive content of the materials.

The intent of this restriction is understandable and acceptable: to protect the reputations of living persons from unnecessary embarrassment. To the extent that such concern is legitimate, this regulation seems superfluous. Any pursely personal items would automatically be exempt from disclosure and perhaps even retention by GSA. (See Sections 105–63.104(b); 105–63.401–5.)

Even if it were not superfluous, the regulation still raises problems. Almost by definition, the Watergate affairs are embarrassing to those who were associated with them. Therefore, virtually all of the Watergate materials could, conceivably, be subject to this restriction.

The additional qualification does not help. It states only that embarrassing materials will not be withheld if their deletion will not "distort" the Watergate history and if their retention is not "essential" to an understanding of that history. But Congress did not direct that only the "essentials" of the Watergate affairs be made public; Congress directed that "the full truth" be made public. This regulation would undermine that congressional purpose.

Another problem with the regulation is that the Administrator has total, unfettered discretion to determine whether personal matter included within the Watergate materials should be withheld. If the material is personal and not necessary to understand an abuse, the Administrator should be required to restrict access.

The Committee recommends the following amendment:

(b) The Administrator [may] *shall* restrict access to any portions of materials determined to relate to [abuses of governmental power when the release of those portions would tend to embarrass, damage or harass living persons, and the deletion of those portions will not distort, and their retention is not essential to an understanding of the substantive content of the materials] an individual's personal affairs, such as personnel and medical files if after being given a reasonable opportunity to review the materials, the individual involved expresses, in writing, a desire to withhold such portions from public access: *Provided*, That if material relating to an abuse of governmental power refers to, involves or incorporates such personal information, the Administrator will make available such personal information, or portions thereof, if such personal information, or portion thereof, is essential to an understanding of the abuse of governmental power."

8. Section 105-63.402-2: Materials of general historical significance unrelated to abuses of governmental power.

This regulation provides in part:

(b) The Administrator may restrict access to materials of general historical significance, but not related to abuses of governmental power, when the release of the materials would:

(1) Disclose or compromise trade secrets or commercial or financial information obtained from a person and privileged or confidential; or

(2) Constitute a clearly unwarranted invasion of personal privacy; or

(3) Disclose or compromise investigatory materials compiled for law enforcement purposes; or

(4) Tend to embarrass, damage, or harass living persons.

GSA states in its report that, with the exception of paragraph (4), these restrictions were derived from the Freedom of Information Act. The problem is that GSA's restrictions are written in terms much more vague than the FOI provisions. This is a mistake. If archivists and administrators are to apply these regulations in a manner consistent with the P.L. 93–526, the restrictions should be clear and specific.

As for paragraph (4), this also is too vague. It is not at all clear how this exemption is to be applied. (GSA's report contains virtually no information to communicate an understanding of how similar terms were in fact applied by custodians of other presidential papers.) In any event, this regulation seems superfluous. Any investigative or purely personal information—presumably the kind of materials GSA has in mind—is already withheld from disclosure under other exemptions.

To remedy these problems, the Committee believes the provision should be amended as follows:

(b) The Administrator [may] *shall* restrict access to materials of general historical significance, but not related to abuses of governmental power, when the release of these materials would:

(1) Disclose [or compromise] trade secrets and commercial or financial information obtained from a person and privileged or confidential; or

(2) *Disclose personnel and medical files and similar files or information when their disclosure would /c/*onstitute a clearly unwarranted invasion of personal privacy; or

(3) Disclose [or compromise] investigatory materials compiled for law enforcement purposes, *but only when the disclosure of such records would*

(i) *interfere with enforcement proceedings,*

(ii) *constitute an unwarranted invasion of personal privacy,*

(iii) *disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source,*

(iv) *disclose investigative techniques and procedures, or*

(v) *endanger the life or physical safety of law enforcement personnel.*

9. Section 105–63.402–4: Final agency action by Administrator.

> Upon the petition of any researcher who claims in writing to the Administrator that the restriction of specified materials is inappropriate and should be removed, the archivists shall submit the pertinent materials, or representative examples of them, to the Presidential Materials Review Board described in § 105–63.401–2(g). The Board shall review the restricted materials, consult with interested Federal agencies as necessary, and make a written recommendation to the Administrator, including dissenting and concurring opinions, as to the continued restriction of all or part of the pertinent materials. When the determination of the Administrator is different from that recommended by the Board, he will state his reasons in writing. The Administrator will notify the petitioner of the final administrative decision.

This provision is unclear since it does not state explicitly that the Administrator has the authority to make the final administrative determination. However, it is known that it is the Administrator's intention that authority be vested in him, and is likely to be so interpreted. Since this would vest in the Administrator broad discretion to make such final determination (see items 4 and 5 for discusion of this issue), the Committee recommends the following amendment:

> Upon the petition of any researcher who claims in writing to the Administrator that the restriction of specified materials is inappropriate and should be removed, the archivists shall submit the pertinent materials, or representative examples of them, to the Presidential Materials Review described in § 105–63.401–2(g). The Board shall review the restricted materials, consult with interested Federal agencies as necessary, [and make a written recommendation] *submit* to the Administrator *its written decision*, including dissenting and concurring opinions, as to the continued restriction of all or part of the pertinent materials. [When the determination of the Administrator is different from that recommended by the Board, he will state his reasons in writing.]

For purposes of judicial review, the *Board's decision will be the final administrative decision.* The Administrator will notify the petitioner of the final administrative decision within 30 calendar days following receipt of the petition.

10. Section 105–63.404: Reproduction of tape recordings of Presidential conversations.

This regulation provides in part:

> (c) No researcher may reproduce or have reproduced sound recordings of the reference copies of the tape recordings described in paragraph (a) of this section.

GSA states that this regulation to prohibit reproduction of the tape recordings "is to prevent unwarranted commercial exploitation of the tape recordings."

This provision is, at best, unnecessary, and at worst, inconsistent with the spirit if not the letter of the Act.

To begin with, the regulations and existing judicial procedures already protect every person's constitutional and legal rights. If Mr. Nixon, or any other person, believes he has a constitutional or legal right to prevent reproduction of the recordings, he can petition the GSA under Section 105–63.401–1(a), or assert the right in court.[4]

In evaluating this regulation, it is also necessary to consider the basic intent of the Act. That legislation was designed, within certain limitations, to provide as much public access to the materials as physically possible as quickly as possible. To that end, GSA recognizes that legitimate research requires the reproduction of printed materials; reproduction is no less necessary when the material is a tape recording. Indeed, the legitimate research need for the reproduction of tape recordings is particularly acute for two reasons: (1) the recordings provide especially invaluable and new raw data concerning the history of the Nixon Presidency; and (2) it may take many, many hours of listening to identify and understand the nuances of voices.

There is of course a risk that some people will reproduce the recordings and exploit them for commercial purposes. That is the risk of a free society. Moreover, it is a risk the Founding Fathers accepted in adopting the free speech protections of the first amendment, any researcher can announce to the world the findings of his research.

The Committee believes that this regulation should be deleted.

It should be noted that with the elimination of the prohibition of reproduction of the tapes, the General Services Administration will have to develop procedures to cover tapes reproduction. It is the Committee's view that, in order to discourage commercialization of tapes in a manner which could infringe upon the legitimate rights and privileges of an individual, GSA should develop reproduction procedures for the tape recordings similar to those which have been developed for the reproduction of written matter.

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[4] It should be noted here that the U.S. District Court in Washington, D.C. rejected a petition by the television networks to release to the public the recordings used in evidence. The court was primarily concerned that release of the recordings would result in commercial exploitation and that this, in turn, might prejudice and individual's right to a fair trial (especially since some of the Watergate defendants might have to be retried). The court implicitly recognized that, at some point in the future after all the trials are completed, the recordings might be available for reproduction. *United States* v. *Mitchell,* Misc. No. 74–128 (D.D.C. April 4, 1975).

The Committee recommends the following conforming amendment to section 105–63.405:

(a) The copying for researchers of materials, *including reference copies of the* tape recordings described in § 105–63.404, normally will be done by personnel of the General Services Administration using government equipment. With the permission of the Administrator or his designated agent, a researcher may use his own copying equipment. Permission shall be based on the determination that such use will not harm the materials or disrupt reference activities. Equipment shall be used under the supervision of GSA personnel.

CONCLUSION

Following a careful analysis of the proposed regulations and the hearing record, the Committee has concluded that, with the exception of the provisions discussed above, the Administrator of General Services has performed creditably in drafting regulations to implement the Presidential Recordings and Materials Preservation Act.

However, the Committee believes that the provisions discussed above must be modified in order fully to carry out the basic objective of the Act which is to provide the public with the "full truth," at the earliest reasonable date, of the abuses of governmental power popularly identified under the generic term "Watergater", and to provide public access to those materials which have general historical significance and are not otherwise related to Watergate matters.

Accordingly, the Committee has identified those provisions of the proposed regulations which, in its judgment, unduly delay or restrict public access, or are otherwise likely to thwart the expressed intention of the Congress. In this connection, the Committee expects the proposed Presidential Materials Review Board to have the professional judgment needed to make the important decisions related to public access. The Committee also believes that the required advance notice to third parties included in the Committee's proposed modifications will provide the neecssary protection to such parties identified in the Presidential materials.

SEPARATE VIEWS OF HON. JAMES C. CLEVELAND

On May 22, I urged my colleagues to approach these draft regulations with more care than the basic Act received, giving greater deference to the doctrine of executive privilege and the issue of personal privacy.

These urgings have gone largely unheeded, with the result that this Committee is now on record with a position even more inimical to these values than the draft regulations which now stand disapproved.

If the General Services Administration now complies with the instructions of H. Res. 710, S. Res. 244 and Senate Report 94–368 and new regulations are accordingly to take effect, I foresee at least three possible consequences:

1. These new regulations will be subject to challenge as failing to conform to the provisions of the Presidential Recordings and Materials Preservation Act.
2. The Act itself will be subject to further constitutional challenge.
3. In the event that the Act and the regulations are sustained, great damage may be inflicted on personal privacy and on the ability of the executive branch of government to function unimpaired.

These concerns can best be grasped by a chronological account of the evolution of my position. I have long taken an active interest in the constitutional protections which permit the various branches of government to function. In this connection, in the course of my work as ranking minority member of the Joint Committee on Congressional Operations, I have had occasion to take issue with the position of the Supreme Court with respect to the scope of constitutional immunity of the Members of Congress.

For a general discussion of this issue, see Cleveland, "Legislative Immunity and the Role of the Representative," Journal of the New Hampshire Bar Association, Vol. 14, No. 4, 1973. For specific legislative proposals, see the additional views of Mr. Brooks and Mr. Cleveland, Senate Report 93–896, "The Constitutional Immunity of Members of Congress: Report of the Joint Committee on Congressional Operations on the Legislative Role of Congress in Gathering and Disclosing Information," June 3, 1974.

PROTECT OFFICE, NOT THE PERSON

The focus of concern throughout is not upon privileges and immunities as the personal prerogatives of the office-holder, but the protections afforded by the Constitution to the office held in keeping with the functions performed.

Similarly, the issue of executive privilege has concerned me for a long time, as I have recognized its validity when invoked by former

President Nixon's predecessors. I continued to recognize its validity when it was invoked by Mr. Nixon, though in that case it turned out to be an abuse of the principle. Yet, as Mr. Justice Frankfurter observed in an analogous situation, "The claim of an unworthy purpose does not destroy the privilege." And I continue to hold this view with respect to the incumbent and future presidents.

Accordingly, I welcomed the July 24, 1974 decision of the Supreme Court in *United States* v. *Nixon, President of the United States, et al.*, which went to great lengths to recognize executive privilege while at the same time ruling it subject to challenge. I strongly supported this decision with respect to both the release of the Nixon tapes and its identification of the constitutional basis for executive privilege. As I noted in my May 22 statement to the Subcommittee on Printing, I had been wrestling in my own mind the feasibility of devising a legislative means of resolving the conflict in constitutional values ultimately shaped by Judge Sirica and basically reaffirmed by the high court.

That opinion stated, in part, as follows:

> The expectation of a President to the confidentiality of his conversations and correspondence, like the claim of confidentiality of judicial deliberations, for example, has all the values to which we accord deference for the privacy of all citizens and added to those values the necessity for protection of the public interest in candid, objective, and even blunt or harsh opinions in presidential decisionmaking. A President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately. These are the considerations justifying a presumptive privilege for presidential communications. The privilege is fundamental to the operation of government and inextricably rooted in the separation of powers under the Constitution.

As P.L. 93–526 was under development in our Committee, I supported its basic thrust and sought to shape it into a more balanced measure by suggesting an amendment incorporating the term "privilege" to assure its conformity with *United States* v. *Nixon*. The Committee approved this amendment and the following report language:

> In the enumeration of criteria to be applied by the Administrator in establishing guidelines for the management of materials referred to in section 101, the committee added in subparagraph (5) the term "privilege" to "legally or constitutionally based rights" as ground for limitation of access. The committee's purpose is to recognize the legitimacy of the doctrine of executive privilege as stated in the July 24, 1974, ruling of the Supreme Court in *United States* v. *Nixon, President of the United States, et al.*

The regulations proposed by GSA appeared to go at least part way toward addressing my concerns—and those of the Supreme Court—with respect to executive privilege and infringements on privacy. I refer to Section 105–63.402–1, which states:

> (b) The Administrator may restrict access to portions of materials determined to relate to abuses of governmental

> power when the release of those portions would tend to embarrass, damage, or harass living persons, and the deletion of those portions will not distort, and their retention is not essential to an understanding of, the substantive content of the materials.

This, I would emphasize, refers to material related to the illegal abuse of power—the long title for Watergate.

With respect to material unrelated to abuse of governmental power, the draft regulations state at Section 105–63.402–2:

> (b) The Administrator may restrict access to materials of general historical significance, but not related to abuses of governmental power when the release of these materials would:
>
> * * * * * * *
>
> (4) Tend to embarrass, damage, or harass living persons.

On September 18, 1975, with final adoption of the report accompanying the rejection of the GSA draft regulations expressed in H. Res. 710, I sought to give expression to my concerns as follows. First, there is a distinct possibility that in the context of Watergate-related discussions or communications, wholly extraneous material containing derogatory comments about innocent individuals with no culpable involvement in Watergate might arise. Moreover, concerning the vast volumes of materials involved, non-Watergate materials could pose the same dangers many times over.

RIGHTS, PRIVILEGE OVERLAP

We confront two basic considerations here: privacy and executive privilege; each must be addressed in its own right. In the context of presidential discussions, there is an overlap in that those who advise a president directly or through aides must speak with assurance of confidentiality if we are to avoid the phenomenon of a truly isolated presidency, a concern which many purport to share. Though it did not employ the identical terms—embarrassment, damage or harassment—the Supreme Court in *United States* v. *Nixon* was giving voice to precisely these concerns.

But these rights, even where they overlap, are not coextensive philosophically or procedurally. Only a president can assert executive privilege, while the individual must be able to assert his own right to privacy.

I therefore sought to have the Committee report reflect greater concern for both values. The outcome borders on the grotesque. Prompted by my urgings, the Committee recognized that according to the draft regulations, an individual might have grounds for challenging release of information derogatory to him. But he could be totally unable to assert those rights because he was simply unaware of the existence of the material and its impending release. He would be left to challenge its release only after the fact.

THE TUBE AND THE SMEAR

Whatever their inherent relationships otherwise, it can be said equally of television and toothpaste that a smear once out, cannot be stuffed back in the tube. The Committee therefore adopted a recommendation that the next round of GSA regulations provide for notice to potentially aggrieved parties before the fact. But the Committee also voted for rejection of protections against embarrassment, damage or harassment. With one hand it afforded potential subjects of damaging disclosure more timely access to remedy, while with the other hand narrowly restricting the basis for remedy. This amounts to providing free pay-phone dialing to police, fire and rescue services permanently out to lunch.

It is true that the regulations concerning non-Watergate materials would retain prohibitions against "an unwarranted invasion of personal privacy," which I would dismiss as excessively vague. The Committee has heard testimony to the effect that privacy diminishes in inverse proportion to political or public prominence. Indeed, the Committee's Report No. 93–1507, accompanying S. 4016, recognizes the problem here in its discussion of the duties of the National Study Commission on Records and Documents of Federal Officials.

On page 9, that report states:

> Other issues that should be considered include: . . . (5) whether personal and truly political matters could be separated from matters of official jurisdiction in public administration; [and] (8) the need to protect certain materials for personal, political, or national security reasons.

At minimum, the Committee would do well to solicit testimony concerning the applicability of newly enacted privacy legislation when GSA submits its next round of regulations.

Furthermore, throughout debate on the issue, the Committee refused to accord the same deference to executive privilege as reflected in the basic act. As stated earlier, this appears to subject the regulations themselves to challenge; and without the regulations, the Act cannot be administered.

COMMITTEE VERSUS COURT

Of equal concern is the impact of the Committee's deliberations and final action on the regulations upon the current court test of the constitutionality of the Act itself. The Committee has been informed that the court of jurisdiction is weighing not only the Act but the *draft* regulations in determining the intent of Congress expressed in the Act and its interpretation by the agency responsible for administering it. Now available to the Court is the Committee's report giving grounds for rejection of those initial draft regulations by formal resolution. (By action of both its Committee on Government Operations and the membership in a floor vote, the Senate has adopted essentially the same position.) Soon to follow will be the new GSA regulations drafted in compliance with Congressional directive.

Committee debate on H. Res. 710 gives further ground for concern, at least to this supporter of the basic legislation. A principal opponent of my efforts to assure compliance with the doctrine of executive privilege rejected this initiative as last-minute introduction of new material.

(I suppose some would similarly dismiss the Constitution itself if received unsolicited in plain brown wrapper.) I submit that this is not new material—the Chairman of the Subcommittee on Printing inserted the *United States* v. *Nixon* opinion in the Record on July 25, 1974; it was reflected in the Act and accompanying report and in my statement of May 22.

The same opponent questioned the thrust of my amendment as too broad, thus exhibiting an apparent lack of familiarity with the opinion by saying:

> For instance, it hasn't been made very clear yet but it seems apparent at least that conversations with the heads of states were tapped without the knowledge of those heads of states. They could create great damage to our international relations. Yet they may provide us with knowledge which we don't have up until this day of commitments of which we are not aware.

To those who share this interpretation of the Act, I again commend the Supreme Court ruling, whose principal effect was to proclaim broad constitutional grounds for executive privilege and the most narrow of grounds for its breach:

> Absent a claim of need to protect military, diplomatic or sensitive national security secrets, we find it difficult to accept the argument that even the very important interest in confidentiality of presidential communications is significantly diminished by production of such material for in camera inspection with all the protection that a district court will be obliged to provide.

In view of the foregoing, I suggest that Members pay more attention to the fundamental problems raised by our deliberations. Otherwise, the production of regulations and their reconsideration by this Committee could well become the largest recycling operation in town.

I would only add in this connection that another opponent of my amendatory efforts, one wholly disenchanted with both the Act and the regulations, expressed a disinclination to join me in tidying up their constitutionality on grounds no good Englishman of disposing mind should have a hand in building a bridge over the River Kwai.

To those with the wit to relish them, the situation has more than its share of ironies. By mandating the release of the Nixon tapes to the court, the Supreme Court contributed to the chain of events culminating in the resignation of the former president, the pardon and the initial determination of disposition of his materials which we sought to reverse by legislation. It is pertinent to note that many of the Watergate abuses were illegal infringements of privacy.

This Committee now appears prepared to condone further abuses of privacy as part of its response to Watergate. And with respect to executive privilege, it would be the final irony if this Committee, by selective acceptance of only that portion of *United States* v. *Nixon* which released the tapes and rejection of the holding regarding executive privilege, doomed its own legislative effort.

JAMES C. CLEVELAND.

APPENDIX

Declassified in Part - Sanitized Copy Approved for Release 2012/10/17 : CIA-RDP10T01930R000500160012-5

[H. Res. 710, 94th Cong., 1st sess.]

RESOLUTION

Resolved, That pursuant to the provisions of section 104(b) of the Presidential Recordings and Materials Preservation Act (Public Law 93–526), the House of Representatives hereby disapproves paragraph (d) of section 105–63.206 of the regulations issued by the Administrator of General Services on January 13, 1975, and the following provisions of the regulations proposed by the Administrator of General Services in his report to the House of Representatives submitted on March 19, 1975:

(1) Paragraph (c) of section 105–63.401–1.
(2) Paragraph (d) of section 105–63.401–2.
(3) Paragraph (h) of section 105–63.401–2.
(4) Paragraph (d) of section 105–63.401–4.
(5) Paragraph (a) (4) (iv) of section 105–63.402–1.
(6) Paragraph (b) of section 105–63.402–1.
(7) Paragraph (b) of section 105–63.402–2.
(8) Section 105–63.402–4.
(9) Paragraph (c) of section 105–63.404.
(10) Paragraph (a) of section 105–63.405.

[Public Law 93–526 93d Cong., S. 4016]

AN ACT To protect and preserve tape recordings of conversations involving former President Richard M. Nixon and made during his tenure as President, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Presidential Recordings and Materials Preservation Act".

TITLE I—PRESERVATION OF PRESIDENTIAL RECORDINGS AND MATERIALS

DELIVERY AND RETENTION OF CERTAIN PRESIDENTIAL MATERIALS

SEC. 101. (a) Notwithstanding any other law or any agreement or understanding made pursuant to section 2107 of title 44, United States Code, any Federal employee in possession shall deliver, and the Administrator of General Services (hereinafter in this title referred to as the "Administrator") shall receive, obtain, or retain, complete possession and control of all original tape recordings of conversations which were recorded or caused to be recorded by any officer or employee of the Federal Government and which—

(1) involve former President Richard M. Nixon or other individuals who, at the time the conversation, were employed by the Federal Government;

(2) were recorded in the White House or in the office of the President in the Executive Office Buildings located in Washington, District of Columbia; Camp David, Maryland; Key Biscayne, Florida; or San Clemente, California; and

(3) were recorded during the period beginning January 20, 1969, and ending August 9, 1974.

(b) (1) Notwithstanding any other law or any agreement or understanding made pursuant to section 2107 of title 44, United States Code, the Administrator shall receive, retain, or make reasonable efforts to obtain, complete possession and control of all papers, documents, memorandums, transcripts, and other objects and materials which constitute the Presidential historical materials of Richard M. Nixon, covering the period beginning January 20, 1969, and ending August 9, 1974.

(2) For purposes of this subsection, the term "historical materials" has the meaning given it by section 2101 of title 44, United States Code.

AVAILABILITY OF CERTAIN PRESIDENTIAL MATERIALS

SEC. 102. (a) None of the tape recordings or other materials referred to in section 101 shall be destroyed, except as hereafter may be provided by law.

(b) Notwithstanding any other provision of this title, any other law, or any agreement or understanding made pursuant to section 2107 of title 44, United States Code, the tape recordings and other materials referred to in section 101 shall, immediately upon the date of enactment of this title be made available, subject to any rights, defenses, or privileges which the Federal Government or any person may invoke for use in any judicial proceeding or otherwise subject to court subpena or other legal process. Any request by the Office of Watergate Special Prosecution Force, whether by court subpena or other lawful process, for access to such recordings or materials shall at all times have priority over any other request for such recordings or materials.

(c) Richard M. Nixon, or any person whom he may designate in writing, shall at all times have access to the tape recordsings and other materials referred to in section 101 for any purpose which is consistent with the provisions of this title, subsequent and subject to the regulations which the Administrator shall issue pursuant to section 103.

(d) Any agency or department in the executive branch of the Federal Government shall at all times have access to the tape recordings and other materials referred to in section 101 for lawful Government use, subject to the regulations which the Administrator shall issue pursuant to section 103.

REGULATIONS TO PROTECT CERTAIN TAPE RECORDINGS AND OTHER MATERIALS

SEC. 103. The Administrator shall issue at the earliest possible date such regulations as may be necessary to assure the protection of the tape recordings and other materials referred to in section 101 from loss or destruction, and to prevent access to such recordings and materials by unauthorized persons. Custody of such recordings and materials shall be maintained in Washington, District of Columbia, or its metropolitan area, except as may otherwise be necessary to carry out the provisions of this title.

REGULATIONS RELATING TO PUBLIC ACCESS

SEC. 104. (a) The Administrator shall, within ninety days after the date of enactment of this title, submit to each House of the Congress a report proposing and explaining regulations that would provide public access to the tape recordings and other materials referred to in section 101. Such regulations shall take into account the following factors:

(1) the need to provide the public with the full truth, at the earliest reasonable date, of the abuses of governmental power popularly identified under the generic term "Watergate";

(2) the need to make such recordings and materials available for use in judicial proceedings;

(3) the need to prevent general access, except in accordance with appropriate procedures established for use in judicial proceedings, to information relating to the Nation's security;

(4) the need to protect every individual's right to a fair and impartial trial;

(5) the need to protect any party's opportunity to assert any legally or constitutionally based right or privilege which would prevent or otherwise limit access to such recordings and materials;

(6) the need to provide public access to those materials which have general historical significance, and which are not likely to be related to the need described in paragraph (1); and

(7) the need to give to Richard M. Nixon, or his heirs, for his sole custody and use, tape recordings and other materials which are not likely to be related to the need described in paragraph (1) and are not otherwise of general historical significance.

(b) (1) The regulations proposed by the Administrator in the report required by subsection (a) shall take effect upon the expiration of ninety legislative days after the submission of such report, unless such regulations are disapproved by a resolution adopted by either House of the Congress during such period.

(2) The Administrator may not issue any regulation or make any change in a regulation if such regulation or change is disapproved by either House of the Congress under this subsection.

(3) The provisions of this subsection shall apply to any change in the regulations proposed by the Administrator in the report required by subsection (a). Any proposed change shall take into account the factors described in paragraph (1) through paragraph (7) of subsection (a); and such proposed change shall be submitted by the Administrator in the same manner as the report required by subsection (a).

(4) Paragraph (5) is enacted by the Congress—

(A) as an exercise of the rulemaking power of the Senate and the House of Representatives, respectively, and as such it shall be considered as part of the rules of each House, respectively, and such rules shall supersede other rules only to the extent that they are inconsistent therewith; and

(B) with full recognition of the constitutional right of either House to change such rules (as far as relating to the procedures

of that House) at any time, in the same manner, and to the same extent as in the case of any other rule of that House.

(5)(A) Any resolution introduced under paragraph (1) shall be referred to a committee by the Speaker of the House or by the President of the Senate, as the case may be.

(B) If the committee to which any such resolution is referred has not reported any resolution relating to any regulation or change proposed by the Administrator under this section before the expiration of sixty calendar days after the submission of any such proposed regulation or change, it shall then be in order to move to discharge the committee from further consideration of such resolution.

(C) Such motion may be made only by a person favoring the resolution, and such motion shall be privileged. An amendment to such motion is not in order, and it is not in order to move to reconsider the vote by which such motion is agreed to or disagreed to.

(D) If the motion to discharge is agreed to or disagreed to, such motion may not be renewed.

(E) When the committee has reported, or has been discharged from further consideration of, a resolution introduced under paragraph (1), it shall at any time thereafter be in order (even though a previous motion to the same effect has been disagreed to) to move to proceed to the consideration of such resolution. Such motion shall be privileged. An amendment to such motion is not in order, and it is not in order to move to reconsider the vote by which such motion is agreed to or disagreed to.

(6) For purposes of this subsection, the term "legislative days" does not include any calendar day on which both Houses of the Congress are not in session.

(c) The provisions of this title shall not apply, on and after the date upon which regulations proposed by the Administrator take effect under subsection (b), to any tape recordings or other materials given to Richard M. Nixon, or his heirs, pursuant to subsection (a)(7).

(d) The provisions of this title shall not in any way affect the rights, limitations or exemptions applicable under the Freedom of Information Act, 5 U.S.C. § 552 et seq.

JUDICIAL REVIEW

SEC. 105. (a) The United States District Court for the District of Columbia shall have exclusive jurisdiction to hear challenges to the legal or constitutional validity of this title or of any regulation issued under the authority granted by this title, and any action or proceeding involving the question of title, ownership, custody, possession, or control of any tape recording or material referred to in section 101 or involving payment of any just compensation which may be due in connection therewith. Any such challenge shall be treated by the court as a matter requiring immediate consideration and resolution, and such challenge shall have priority on the docket of such court over other cases.

(b) If, under the procedures established by subsection (a), a judicial decision is rendered that a particular provision of this title, or a particular regulation issued under the authority granted by this

title, is unconstitutional or otherwise invalid, such decision shall not affect in any way the validity or enforcement of any other provision of this title or any regulation issued under the authority granted by this title.

(c) If a final decision of such court holds that any provision of this title has deprived an individual of private property without just compensation, then there shall be paid out of the general fund of the Treasury of the United States such amount or amounts as may be adjudged just by that court.

AUTHORIZATION OF APPROPRIATIONS

SEC. 106. There is authorized to be appropriated such sums as may be necessary to carry out the provisions of this title.

TITLE II—PUBLIC DOCUMENTS COMMISSION

SHORT TITLE

SEC. 201. This title may be cited as the "Public Documents Act".

ESTABLISHMENT OF STUDY COMMISSION

SEC. 202. Chapter 33 of title 44, United States Code, is amended by adding at the end thereof the following new sections:

"§ *3315. Definitions*

"For purposes of this section and section 3316 through section 3324 of this title—

"(1) the term 'Federal official' means any individual holding the Office of President or Vice President of the United States, or Senator or Representative in, or Delegate or Resident Commissioner to, the Congress of the United States, or any officer of the executive, judicial, or legislative branch of the Federal Government;

"(2) the term 'Commission' means the National Study Commission on Records and Documents of Federal Officials; and

"(3) the term 'records and documents' shall include handwritten and typewritten documents, motion pictures, television tapes and recordings, magnetic tapes, automated data processing documentation in various forms, and other records that reveal the history of the Nation.

"§ *3316. Establishment of Commission*

"There is established a commission to be known as the National Study Commission on Records and Documents of Federal Officials.

"§ *3317. Duties of Commission*

"It shall be the duty of the Commission to study problems and questions with respect to the control, disposition, and preservation of records and documents produced by or on behalf of Federal officials, with a view toward the development of appropriate legislative recom-

mendations and other recommendations regarding appropriate rules and procedures with respect to such control, disposition, and preservation. Such study shall include consideration of—

"(1) whether the historical practice regarding the records and documents produced by or on behalf of Presidents of the United States should be rejected or accepted and whether such practice should be made applicable with respect to all Federal officials;

"(2) the relationship of the findings of the Commission to the provisions of chapter 19 of this title, section 2101 through section 2108 of this title, and other Federal laws relating to the control, disposition, and preservation of records and documents of Federal officials;

"(3) whether the findings of the Commission should affect the control, disposition, and preservation of records and documents of agencies within the Executive Office of the President created for short-term purposes by the President;

"(4) the recordkeeping procedures of the White House Office, with a view toward establishing means to determine which records and documents are produced by or on behalf of the President;

"(5) the nature of rules and procedures which should apply to the control, disposition, and preservation of records and documents produced by Presidential task forces, commissions, and boards;

"(6) criteria which may be used generally in determining the scope of materials which should be considered to be the records and documents of Members of the Congress;

"(7) the privacy interests of individuals whose communications with Federal officials, and with task forces, commissions, and boards, are a part of the records and documents produced by such officials, task forces, commissions, and boards; and

"(8) any other problems, questions, or issues which the Commission considers relevant to carrying out its duties under section 3315 through section 3324 of this title.

"§ *3318. Membership*

"(a)(1) The Commission shall be composed of seventeen members as follows:

"(A) one Member of the House of Representatives appointed by the Speaker of the House upon recommendation made by the majority leader of the House;

"(B) one Member of the House of Representatives appointed by the Speaker of the House upon recommendation made by the minority leader of the House;

"(C) one Member of the Senate appointed by the President pro tempore of the Senate upon recommendation made by the majority leader of the Senate;

"(D) one Member of the Senate appointed by the President pro tempore of the Senate upon recommendation made by the minority leader of the Senate;

"(E) one Justice of the Supreme Court, appointed by the Chief Justice of the United States;

"(F) one person employed by the Executive Office of the President or the White House Office, appointed by the President;

"(G) three appointed by the President, by and with the advice and consent of the Senate, from persons who are not officers or employees of any government and who are specially qualified to serve on the Commission by virtue of their education, training, or experience;

"(H) one representative of the Department of State, appointed by the Secretary of State;

"(I) one representative of the Department of Defense, appointed by the Secretary of Defense;

"(J) one representative of the Department of Justice, appointed by the Attorney General;

"(K) the Administrator of General Services (or his delegate);

"(L) the Librarian of Congress;

"(M) one member of the American Historical Association, appointed by the counsel of such Association;

"(N) one member of the Society of American Archivists, appointed by such Society; and

"(O) one member of the Organization of American Historians, appointed by such Organization.

"(2) No more than two members appointed under paragraph (1)(G) may be of the same political party.

"(b) A vacancy in the Commission shall be filled in the manner in which the original appointment was made.

"(c) If any member of the Commission who was appointed to the Commission as a Member of the Congress leave such office, or if any member of the Commission who was appointed from persons who are not officers or employees of any government becomes an officer or employee of a government, he may continue as a member of the Commission for no longer than the sixty-day period beginning on the date he leaves such office or becomes such an officer or employee, as the case may be.

"(d) Members shall be appointed for the life of the Commission.

"(e)(1) Members of the Commission shall serve without pay.

"(2) While away from their homes or regular places of business in the performance of services for the Commission, members of the Commission shall be allowed travel expenses in the same manner as persons employed intermittently in the service of the Federal Government are allowed expenses under section 5703(b) of title 5, United States Code, except that per diem in lieu of subsistence shall be paid only to those members of the Commission who are not full-time officers or employees of the United States or Members of the Congress.

"(f) The Chairman of the Commission shall be designated by the President from among members appointed under subsection (a)(1)(G).

"(g) The Commission shall meet at the call of the Chairman or a majority of its members.

"§ *3319. Director and staff; experts and consultants*

"(a) The Commission shall appoint a Director who shall be paid at a rate not to exceed the rate of basic pay in effect for level V of the Executive Schedule (5 U.S.C. 5316).

"(b) The Commission may appoint and fix the pay of such additional personnel as it deems necessary.

"(c) (1) The Commission may procure temporary and intermittent services to the same extent as is authorized by section 3109(b) of title 5, United States Code, but at rates for individuals not to exceed the daily equivalent of the annual rate of basic pay in effect for grade GS–15 of the General Schedule (5 U.S.C. 5332).

"(2) In procuring services under this subsection, the Commission shall seek to obtain the advice and assistance of constitutional scholars and members of the historical, archival, and journalistic professions.

"(d) Upon request of the Commission, the head of any Federal agency is authorized to detail, on a reimbursable basis, any of the personnel of such agency to the Commission to assist it in carrying out its duties under sections 3315 through 3324 of this title.

"§ *3320. Powers of Commission*

"(a) The Commission may, for the purpose of carrying out its duties under sections 3315 through 3324 of this title, hold such hearings, sit and act at such times and places, take such testimony, and receive such evidence, as the Commission may deem desirable.

"(b) When so authorized by the Commission, any member or agent of the Commission may take any action which the Commission is authorized to take by this section.

"(c) The Commission may secure directly from any department or agency of the United States information necessary to enable the Commission to carry out its duties under section 3315 through section 3324 of this title. Upon request of the Chairman of the Commission, the head of such department or agency shall furnish such information to the Commission.

"§ *3321. Support services*

"(a) The Administrator of General Services shall provide to the Commission on a reimbursable basis such administrative support services and assistance as the Commission may request.

"(b) The Archivist of the United States shall provide to the Commission on a reimbursable basis such technical and expert advice, consultation, and support assistance as the Commission may request.

"§ *3322. Report*

"The Commission shall transmit to the President and to each House of the Congress a report not later than March 31, 1976. Such report shall contain a detailed statement of the findings and conclusions of the Commission, together with its recommendations for such legislation, administrative actions, and other actions, as it deems appropriate.

"§ *3323. Termination*

"The Commission shall cease to exist sixty days after transmitting its report under section 3322 of this title.

"§ *3324. Authorization of appropriations*

"There is authorized to be appropriated such sums as may be necessary to carry out section 3315 through section 3324 of this title.".

TECHNICAL AMENDMENT

SEC. 203. The table of sections for chapter 33 of title 44, United States Code, is amended by adding at the end thereof the following new items:

"3315. Definitions.
"3316. Establishment of Commission.
"3317. Duties of Commission.
"3318. Membership.
"3319. Director and staff; experts and consultants.
"3320. Powers of Commission.
"3321. Support services.
"3322. Report.
"3323. Termination.
"3324. Authorization of appropriations.".

Approved December 19, 1974.

LEGISLATIVE HISTORY

House Report No. 93–1507 (Comm. on House Administration).

Senator Report: No. 93–1181 (Comm. on Government Operations) and No. 93–1182 accompanying S.J. Res. 240 (Comm. on Government Operations).

Congressional Record Vol. 120 (1974): Oct. 3, 4, considered and passed Senate. Dec. 3, considered and passed House, amended. Dec. 9, Senate concurred in House amendment with amendments; House concurred in Senate amendments.

Weekly Compilation of Presidential Documents, Vol. 10, No. 51: Dec. 19, Presidential statement.

[From the Federal Register, Tuesday, January 14, 1975, Washington, D.C., Vol. 40, No. 9, Part IV, pp. 2670–2671]

RULES AND REGULATIONS

TITLE 41—PUBLIC CONTRACTS AND PROPERTY MANAGEMENT

CHAPTER 105—GENERAL SERVICES ADMINISTRATION

PART 105–63—PRESERVATION AND PROTECTION OF AND ACCESS TO THE PRESIDENTIAL HISTORICAL MATERIALS OF THE NIXON ADMINISTRATION

These regulations are issued pursuant to and in anticipation of the implementation by the Administrator of General Services of Title I of the Presidential Recordings and Materials Preservation Act. Under the Act, the Administrator assumes custody and control of the Presidential historical materials of the Nixon Administration for the purposes of (1) ensuring their physical protection and preservation and (2) providing for Federal and public access. Because outstanding Federal court orders prevent the immediate implimentation of the Act, and the effective date of these regulations is postponed accordingly, the General Services Administration invites comments and suggestions. These comments and suggestions should be addressed to the General Services Administration (A), Attention of: Executive Assistant to the Administrator, Washington, D.C. 20405. Regulations pertaining to public access, which are required under the Act to be submitted for congressional approval, will be published at a later date.

Chapter 105 is amended by the addition of new Part 105–63, as follows:

Sec.
105–63.000 Scope of part.

SUBPART 105–63.1—GENERAL PROVISIONS

Sec.

SUBPART 105–63.2—PRESERVATION AND PROTECTION

SUBPART 105–63.3—ACCESS TO MATERIALS BY FORMER PRESIDENT NIXON, FEDERAL AGENCIES, AND FOR USE IN ANY JUDICIAL PROCEEDING

SUBPART 105–63.4—ACCESS BY THE PUBLIC [RESERVED]

§ *105–63.000 Scope of part*

This part sets forth policies and procedures concerning the preservation and protection of and access to the tape recordings, papers, documents, memorandums, transcripts, and other objects and materials which constitute the Presidential historical materials of Richard M. Nixon, covering the period beginning January 20, 1969, and ending August 9, 1974.

SUBPART 105–63.1—GENERAL PROVISIONS

§ *105–63.101 Purpose*

This Part 105–63 implements the provisions of Title I of the Presidential Recordings and Materials Preservation Act (Public Law 93–526; 88 Stat.). It prescribes policies and procedures by which the General Services Administration will preserve, protect, and provide access to the Presidential historical materials of the Nixon Administration.

§ *105–63.102 Application*

This Part 105–63 applies to all of the Presidential historical materials of the Nixon Administration in the custody of the Administrator of General Services pursuant to the provisions of Title I of the Presidential Recordings and Materials Preservation Act (Public Law 93–526; 88 Stat. 1695).

§ *105–63.103 Legal custody*

The Administrator of General Services has exclusive legal custody and control of all Presidential historical materials of the Nixon Administration held pursuant to the provisions of the Presidential Recordings and Materials Preservation Act (Public Law 93–526; 88 Stat. 1695).

§ *105–63.104 Definitions [Reserved]*

§ *105–63.105 Requests or demands for access.*

Except as provided in § 105–63.302–1, each agency which receives a request or legal demand for access to Presidential historical materials of the Nixon Administration shall immediately forward the request or demand to the Administrator of General Services.

SUBPART 105–63.2—PRESERVATION AND PROTECTION

§ *105–63.201 Responsibility.*

The Administrator of General Services or his designated agent is responsible for the preservation and protection of the Presidential historical materials. He may arrange with other Federal agencies, acting pursuant to appropriate Federal authority, for assistance in their preservation and protection.

§ *105–63.202 Security.*

The Administrator of General Services or his designated agent will control access to all areas designated as security areas. That control will include:

(a) Physical possession of all keys that control access to the security areas (A copy of each key will be deposited in locations designated by current fire and/or national security regulations with instructions that these keys may be used only in instances in which the Presidential historical materials or their environs are subject to damage or loss. All such emergency use shall be reported to the Administrator of General Services or his designated agent as soon as possible.); and

(b) Exclusive knowledge of all lock combinations that control access to the security areas. Copies of the combinations will be placed in such locations as are required by current fire and/or national security regulations and with the GSA Security Division (BIS), Office of Administration, in sealed envelopes with instructions that the envelopes may be opened only in instances in which the Presidential historical materials or their environs are subject to damage or loss. All such emergency use shall be reported to the Administrator of General Services or his designated agent as soon as possible.

§ *105–63.203 Security areas.*

All Presidential historical materials currently stored in areas secured by Executive Protection Service controlled alarm systems shall continue to be stored in these or equally secure areas unless they are specifically exempted in writing from such security by the Administrator of General Services or his designated agent.

§ *105–63.204 Work areas.*

The Administrator of General Services or his designated agent will provide appropriate locations within the Metropolitan Area of the District of Columbia as work areas to be used for the purpose of inventorying, indexing, reviewing and/or copying Presidential historical materials in accordance with appropriate authorizations. When such work areas are in use, security shall be equivalent to that in effect in the storage area from which the Presidential historical materials are removed unless the Administrator of General Services or his designated agent waives such equivalent security in writing.

§ *105–63.205 Archival processing*

When authorized by the Administrator of General Services or his designated agent, archivists may enter the security and work areas for the purposes of performing necessary archival processes on the Presidential historical materials. Access for archival processing shall follow the procedures of paragraphs (a), (b), (c), (g), (h), and (i) of § 105–63.206.

§ *105–63.206 Access procedures*

(a) The Administrator of General Services or his designated agent will receive and/or prepare appropriate documentary authorization before each access authorized under this Part 105–63.

(b) The Administrator of General Services or his designated agent shall determine that each access is thoroughly documented. Each documentation shall include:

(1) Reasons for the access;

(2) Time of the access;

(3) Individuals involved in the access including each individual's degree of security clearance;

(4) Record of all activities during the access;

(5) Record of all Presidential historical materials removed, if any; and

(6) Time of the completion of the access.

(c) The Administrator of General Services or his designated agent will determine that each individual having access to the Presidential historical materials has a security clearance equivalent to the highest degree of national security classification that may be applicable to any of the materials examined.

(d) Prior to each access which may result in the examination of Presidential historical materials that relate to matters of national security, the Administrator of General Services or his designated agent shall notify the Counsel to the President who shall be given the opportunity to examine these materials and raise any objections, defenses, or privileges to prevent or limit the proposed access.

(e) The Administrator of General Services or his designated agent will provide former President Nixon or his designated attorney or agent prior notice of, and allow him to be present during, each authorized access.

(f) Each access to the security areas shall occur only in the presence of the Administrator of General Services or his designated agent. At least two persons shall be present at all times that the security areas are occupied.

(g) All security areas which currently require the presence of the U.S. Secret Service during access and such other security areas as are designated by the Administrator of General Services or his designated agent shall continue to require the presence of one or more representatives of the U.S. Secret Service or such other Federal security agency as is designated by the Administrator of General Services or his designated agent.

(h) If any of the materials now located in security areas requiring the presence of U.S. Secret Service during access are moved to other

locations, access to such new locations shall also require the presence of security agents as provided in paragraph (g) of this section, unless their presence is specifically exempted in writing by the Administrator of General Services or his designated agent.

(i) Whenever possible, a copy, which shall be certified upon request, instead of the original documentary Presidential historical material shall be provided to comply with a subpoena or other lawful process or request. Whenever the original documentary material is removed, a certified copy of the material shall be inserted in the proper file until the return of the original.

§ *105–63.207 Extraordinary authority during emergencies*

In the event of an emergency that threatens the physical preservation of the Presidential historical materials or their environs, the Administrator of General Services or his designated agent will take such steps as may be necessary, including removal of the materials to temporary locations outside the Metropolitan Area of the District of Columbia, to preserve and protect the materials.

SUBPART 105–63.3—ACCESS TO MATERIALS BY FORMER PRESIDENT NIXON, FEDERAL AGENCIES, AND FOR USE IN ANY JUDICIAL PROCEEDING

§ *105–63.301 Access by former President Nixon*

In accordance with the provisions of Subpart 105–53.2, former President Richard M. Nixon or his designated agent shall at all times have access to the Presidential historical materials in the custody and control of the Administrator of General Services.

§ *105–63.302 Access by Federal agencies*

In accordance with the provisions of Subpart 105–63.2 any Federal agency or department in the executive branch shall at all times have access for lawful Government use to the Presidential historical materials in the custody and control of the Administrator of General Services.

§ *105–63.302–1 Access by the Special Proescutor*

Pursuant to § 105–63.302, the Special Prosecutor or his designated agent shall at all times have priority access to the Presidential historical materials relevant and important to ongoing criminal investigations and prosecutions within his jurisdiction in accordance with the agreement of November 9, 1974, among the Special Prosecutor, the Counsel to the President, the Director of the Secret Service, and the Administrator General Services. The Administrator of General Services shall provide access pursuant to this subsection after the Counsel to the President has determined that the access is in accordance with the agreement of November 9, 1974, and has transmitted the Special Prosecutor's request for access to the Administrator of General Services for his determination that the access is authorized under this part. The agreement reads as follows:

Whereas, Gerald R. Ford, President of the United States, has determined and informed his Counsel that the due administration of justice and the public interest require that the Special Prosecutor have prompt and effective use of those Presidential materials of the Nixon Administration now located in the White House complex that

are relevant and important to ongoing criminal investigations and prosecutions within the Special Prosecutor's jurisdiction; and

Whereas, this Agreement, if implemented, would accommodate the needs of the Special Prosecutor with respect to such materials;

Now, therefore, the undersigned have agreed as follows:

1. Upon letters from the Special Prosecutor to Counsel to the President specifying those materials that he has reason to believe are relevant to specified criminal investigations or prosecutions within the Special Prosecutor's jurisdiction and explaining why access to such materials is important to a full and fair resolution of those investigations and prosecutions the Special Prosecutor or his designees shall be afforded access to the materials under the following procedures:

a. *Documents.* 1. Where files are organized by subject matter, only those files may be examined which, because of their titles, may contain documents relevant to these specified investigations and prosecutions.

2. Where files are organized chronologically, only that portion of the files covering the time period relevant to the request may be examined.

3. Where no chronological or subject label is on a file, the file may be examined to determine whether the file contains revelant materials.

4. In order to assist in these searches, the Special Prosecutor may request the assistance of members of the archival staff assigned to the White House in making a list of file titles or other index.

b. *Tape Recordings.* Only the tape recordings of conversations specified by letters, according to the above procedures may be listened to.

2. The Special Prosecutor shall be allowed to make copies of only those tapes of conversations and documents that he determines are relevant to criminal investigations or prosecutions within his jurisdiction. Prior to the Special Prosecutor receiving such copies, Counsel to the President may review the copies to determine whether they may not be disclosed for reasons of national security. The originals of any tapes and documents, copies of which are provided to the Special Prosecutor, shall be retained and, if necessary for a criminal proceeding, will be given to the Special Prosecutor for such proceeding in exchange for the copies.

3. Richard M. Nixon or his attorney or designated agent shall be given notice of, and may be present during, searches pursuant to this Agreement. Also, Mr. Nixon or his attorney or designated agent, shall be afforded access to and/or copies of those tapes of conversation and documents for which the Special Prosecutor is allowed copies. The Counsel to the President also may designate individuals to be present during these searches.

4. No Presidential materials shall be removed to locations in Washington, D.C. other than the White House complex without the approval of the Special Prosecutor and no portions of such materials shall be removed to locations outside of the District of Columbia without an indication from the Special Prosecutor that he has no further need for such portions, except upon court order.

5. The parties to this Agreement shall move jointly to modify, if necessary, the temporary restraining order as now outstanding in Civil Action No. 74–1518 and in consolidated cases in the United States District Court for the District of Columbia to permit implementation of this Agreement.

PHILIP W. BUCHEN,
Counsel to the President.
ARTHUR F. SAMPSON,
Administrator of General Services.
H. STUART KNIGHT,
Director, U.S. Secret Service.
HENRY S. RUTH, Jr.
Special Prosecutor, Watergate Special Prosecution Force.

§ *105–63.303 Access for use in judicial proceedings.*

In accordance with the provisions of Subpart 105–63.2, and subject to any rights, defenses, or privileges which the Federal Government or any person may invoke, the Presidential historical materials in the custody and control of the Administrator of General Services will be made available for use in any judicial proceeding, and are subject to subpoena or other lawful process. Requests by the Special Prosecutor for access to the Presidential historical materials, whether by court subpoena or other lawful process, including access pursuant to § 105–63.302–1 shall at all times have priority over any other request for the materials.

SUBPART 105–63.4—ACCESS BY THE PUBLIC [RESERVED]

Effective date. This Part 105–63 is effective upon the vacation of Federal court orders preventing the implementation of Title I of the Presidential Recordings and Materials Preservation Act.

Dated: January 13, 1975.

ARTHUR F. SAMPSON,
Administrator of General Services.

PROPOSED REGULATIONS TO IMPLEMENT TITLE I OF PUBLIC LAW 93–526 SUBMITTED TO THE CONGRESS ON MARCH 19, 1975

SUBPART 105–63.1—GENERAL PROVISIONS

SUBPART 105–63.4—ACCESS BY THE PUBLIC

§ *105-63.104 Definitions*

For the purposes of this Part 105-63, the following terms have the meaning ascribed to them in this § 105-63.104.

(*a*) *Presidential historical materials.*—The term "Presidential historical materials" (also referred to as "historical materials" and "materials") shall mean all papers, correspondence, documents, pamphlets, books, photographs, films, motion pictures, sound and video recordings, machine-readable media, plats, maps, models, pictures, works of art, and other objects or materials made or received by former President Richard M. Nixon or by members of his staff in connection with his constitutional or statutory duties or political activities as President and retained or appropriate for retention as evidence of or information about these duties and activities. Excluded from this definition are documentary materials of any type that are determined to be the official records of an agency of the Government; private or personal materials; stocks of publications, processed documents, and stationery; and extra copies of documents produced only for convenience of reference, when they are clearly so identified.

(*b*) *Private or personal materials.*—The term "private or personal materials" shall mean those papers and other documentary or commemorative materials in any physical form relating solely to a person's family or other nonpublic activities and having no connection with his constitutional or statutory duties or political activities as President or as a member of the President's staff.

(*c*) *Abuses of governmental power popularly identified under the generic term "Watergate."*—The term "abuses of governmental power popularly identified under the generic term 'Watergate'" (also referred to as "abuses of governmental power"), shall mean those alleged acts, whether or not corroborated by judicial, administrative or legislative proceedings, which allegedly were conducted, directed or approved by Richard M. Nixon, his staff or persons associated with him in his constitutional, statutory or political functions as President, and (1) are or were within the purview of the charters of the Senate Select Committee on Presidential Campaign Activities or the Watergate Special Prosecution Force; or (2) are circumscribed in the Articles of Impeachment adopted by the House Committee on the Judiciary and reported to the House of Representatives for consideration in House Report No. 93-1305.

(*d*) *General historical significance.*—The term "general historical significance" shall mean having administrative, legal, research or other historical value as evidence of or information about the constitutional or statutory duties or political activities of the President, which an archivist has determined is of a quality sufficient to warrant the retention by the United States of materials so designated.

(*e*) *Archivist.*—The term "archivist" shall mean an employee of the General Services Administration who, by education or experience, is specially trained in archival science.

(*f*) *Agency.*—The term "agency" shall mean an executive department, military department, independent regulatory or nonregulatory agency, Government corporation, Government-controlled corporation, or other establishment in the executive branch of the Government, including the Executive Office of the President. For purposes of § 105–63.302 only, the term "agency" shall also include the White House Office.

(*g*) *Administrator.*—The term "Administrator" shall mean the Administrator of General Services, or his delegate as provided herein or by separate instrument.

(*h*) *Initial archival processing.*—The term "initial archival processing" shall mean the following generic acts performed by archivists with respect to the Presidential historical materials: shelving boxes of documents in chronological, alphabetical, numerical or other sequence; surveying and developing a location register and cross-index of the boxes; arranging materials; reboxing the documents and affixing labels; producing finding aids such as folder title lists, cross-indexes, and subject lists; reproducing and transcribing tape recordings; reviewing the materials to identify items that appear subject to restriction; identifying items in poor physical condition and assuring their preservation; and identifying materials requiring further processing.

(*i*) *Staff.*—The term "staff" shall mean those persons whose salaries were paid fully or partially from appropriations to the White House Office or Domestic Council, or who were detailed on a nonreimbursable basis to the White House Office or Domestic Council from any other Federal activity; or those persons who were otherwise designated as assistants to the President, in connection with their service in that capacity; or any other persons whose files were sent to the White House Central Files Unit or Special Files Unit, for purposes of those files.

(*j*) *National security classified information.*—The term "national security classified information" shall mean any matter which is security classified under existing law, and has been or should be designated as such.

SUBPART 105–63.4—ACCESS BY THE PUBLIC

§ 105–63.400 Scope of subpart

This subpart sets forth policies and procedures concerning public access to the Presidential historical materials of Richard M. Nixon.

§ 105–63.401 Processing period

(a) For 30 calendar days following the effective date of the regulations in this subpart or the vacation of court orders preventing their

implementation, whichever is later (hereinafter, the "effective date"), the Administrator will refrain from archival processing of any of the Presidential historical materials in the Administrator's custody and control to permit any person to take such action as he deems appropriate to protect his legal rights. During this 30-day period, the Administrator will limit activity involving the materials to authorized accesses under Subpart 105–63.3 of this part.

(b) At the end of the 30-day period described in paragraph (a) of this section, the Administrator will commence the initial archival processing of the materials. As soon thereafter as is possible, the Administrator will open for public access all of the materials in the Administrator's custody and control which are neither restricted pursuant to § 105–63.402 nor subject to outstanding claims or petitions seeking such restriction. The Administrator will open for public access each integral file segment of the materials upon completion of initial archival processing on that segment. Insofar as practicable, the Administrator will give priority in such initial archival processing to materials relating to abuses of governmental power, as defined in § 105–63.104(c).

§ 105–63.401–1 Rights and privileges; right to a fair trial

(a) Within 90 calendar days from the effective date, any person claiming the need to protect an opportunity to assert a legal or constitutional right or privilege which would prevent or limit public access to any of the materials shall notify the Administrator in writing of the claimed right or privilege and the specific materials to which it relates. After consultation with appropriate Federal agencies, the Administrator will notify the claimant by certified mail, return receipt requested, of his decision regarding public access to the pertinent materials. If that decision is adverse to the claimant, the Administrator will refrain from providing public access to the pertinent materials for at least 30 calendar days from receipt by the claimant of such notice.

(b) Within 90 calendar days from the effective date, officers of any Federal, State, or local court and other persons who believe that public access to any of the materials may jeopardize an individual's right to a fair and impartial trial should petition the Administrator, setting forth the relevant circumstances that warrant withholding specified materials. After consultation with appropriate Federal agencies, the Administrator will notify the petitioner by certified mail, return receipt requested, of his decision regarding public access to the pertinent materials. If that decision is adverse to the petitioner, the Administrator will refrain from providing public access to the pertinent materials for at least 30 calendar days from receipt by the petitioner of such notice.

(c) In his discretion, the Administrator may consider claims and petitions described in paragraphs (a) and (b) of this subsection after the expiration of 90 calendar days from the effective date.

§ 105–63.401–2 Segregation and review; Senior Archival Panel; Presidential Materials Review Board

(a) During the processing period described in § 105–63.401(b), the Administrator will assign archivists to segregate private or personal

materials, as defined in § 105–63.104(b). The archivists shall have sole responsibility for the initial review and determination of private or personal materials.

(b) During the processing period described in § 105–63.401(b), the Administrator will assign archivists to segregate materials neither relating to abuses of governmental power, as defined in § 105–63.104(c), nor otherwise having general historical significance, as defined in § 105–63.104(d). The archivists shall have sole responsibility for the initial review and determination of those materials which are not related to abuses of governmental power and do not otherwise have general historical significance.

(c) During the processing period described in § 105–63.401(b), the Administrator will assign archivists to segregate materials subject to restriction, as prescribed in § 105–63.402. The archivists shall have sole responsibility for the initial review and determination of materials that should be restricted. The archivists shall insert a notification of withdrawal at the front of the file folder or container affected by the removal of restricted material. The notification shall include a brief description of the restricted material and the basis for the restriction as prescribed in § 105–63.402.

(d) If, during the processing period described in § 105–63.401(b), the archivists should discover any materials which they determine reflect an apparent violation of law which has not been the subject of prior investigation, the archivists shall bring the material to the attention of the Administrator for referral to the Department of Justice or other appropriate action.

(e) If the archivists are unable to make a determination required in paragraphs (a), (b), or (c) of this subsection, or if the archivists conclude that the required determination raises significant issues involving interpretation of these regulations or will have far-reaching precedential value, the archivists shall submit the pertinent materials, or representative examples of them, to a panel of senior archivists selected by the Archivist of the United States. The panel shall then have the sole responsibility for the initial determination required in paragraphs (a), (b), or (c) of this subsection.

(f) If the Senior Archival Panel is unable to make a determination required in paragraph (e) of this subsection, or if the panel concludes that the required determination raises significant issues involving interpretation of these regulations or will have far-reaching precedential value, the panel shall certify the matter and submit the pertinent materials, or representative examples of them, to the Presidential Materials Review Board.

(g) The Presidential Materials Review Board ("Board") shall consist of the following members, appointed by the Administrator:

(1) The Archivist of the United States or, on those occasions when he is unable to be present, his delegate, who shall serve as chairman;

(2) The Librarian of Congress or, on those occasions when he is unable to be present, his delegate; and

(3) A person, distinguished in archival science, history or political science, who shall not be a Federal employee or official, nominated by the Council of the Society of American Archivists.

The Board shall meet at the call of the Chairman. The Board may consult with officials of interested Federal agencies in formulating its recommendations.

(h) When the matter certified to the Board by the Senior Archival Panel involves a determination required in paragraphs (a) or (b) of this subsection, the Administrator will publish notice in the Federal Register of the materials to be considered by the Board. In order to protect the privacy of persons who may have such an interest in the materials, the notice shall consist only of a generic description and listing of the materials to be considered by the Board. Any person may intervene in the Board's consideration by petitioning the Administrator in writing within 30 calendar days of publication of notice. The Board shall submit to the Administrator its written recommendation, together with dissenting and concurring opinions, of the proper categorization and disposition of the pertinent materials. The Administrator will make the final administrative determination. If the determination of the Administrator is different from that recommended by the Board, he will state his reasons in writing. The Administrator will notify the petitioner by certified mail, return receipt requested, of the final administrative determination. The Administrator will refrain from transferring any materials in accordance with §105–63.401–5(a) as a result of the final administrative determination for at least 30 calendar days from the petitioner's receipt of such notice.

(i) When the matter certified to the Board by the Senior Archival Panel involves a determination required in paragraph (c) of this subsection, the Board shall recommend an initial determination to the Senior Archival Panel, which shall retain the sole responsibility for the initial determination.

§ 105–63.401–3 Notice of determinations.

The Administrator will publish in the Federal Register notice of the initial archival determinations described in paragraphs (a) and (b) of §105–63.401–2 and of the final administrative determinations described in paragraph (h) of §105–63.401–2 and paragraph (d) of § 105–63.401–4. In order to protect the privacy of persons who may have such an interest in the segregated materials, the notice shall consist only of a generic description and listing of the materials that the Administrator proposes to transfer as provided in §105.63.401–5.

§ 105–63.401–4 Appeals.

(a) Within 30 calendar days of publication of the notice prescribed in § 105–63.401–3, any person may petition the Administrator on the grounds that an initial archival determination described in §105–63.401–2(a) or (b) is in error.

(b) Richard M. Nixon, or his designated agent or heirs, may petition the Administrator, at any time, on the grounds that an initial archival determination described in §105–63.401–2(a) or (b) is in error.

(c) Upon receipt by the Administrator of a petition described in paragraphs (a) or (b) of this subsection, the archivists shall submit the pertinent materials, or representative examples of them, to the Presidential Materials Review Board.

(d) Upon consideration of appeals as described in paragraphs (a) or (b) of this subsection, the Board shall submit to the Administra-

tor its written recommendation, together with dissenting and concurring opinions, of the proper categorization and disposition of the pertinent materials. The Administrator will make the final administrative determination. If the determination of the Administrator is different from that recommended by the Board, he will state his reasons in writing. The Administrator will notify the petitioner by certified mail, return receipt requested, of the final administrative determination. The Administrator will refrain from transferring any materials in accordance with § 105–63.401–5(a) as a result of the final administrative determination for at least 30 calendar days from the petitioner's receipt of such notice.

§ *105–63.401–5 Transfer of materials*

(a) No sooner than 30 calendar days from the publication of notice prescribed in § 105–63.401–3, or, in the event of a certified determination or an appeal described in § 105–63.401–2(h) or § 105–63.401–4, respectively, no sooner than 30 calendar days from the petitioner's receipt of notice of the final administrative determination, the Administrator will transfer sole custody and use of those materials determined, in whole, to be private or personal, or to be neither related to abuses of governmental power nor otherwise of general historical significance, to former President Nixon or his heirs or, when appropriate and after notifying Mr. Nixon or his designated agent, to the former staff member having primary proprietary or commemorative interest in the materials.

(b) Materials determined to be neither related to abuses of governmental power nor otherwise of general historical significance, and transferred pursuant to paragraph (a) of this subsection, shall upon such transfer no longer be deemed Presidential historical materials as defined in § 105–63.104(a).

(c) When it has been determined that only a segment or portion of a document, recording, or other material is private or personal, or is neither related to abuses of governmental power nor otherwise of general historical significance, the Administrator will retain custody of the whole recording document, or other material, but will restrict access to the identified segment or portion. Copies of the pertinent materials will be transferred to former President Nixon or his heirs or, when appropriate and after notifying Mr. Nixon or his designated agent, to the former staff member having primary proprietary or commemorative interest in the materials.

§ *105–63.402 Restrictions*

§ *105–63.402–1 Materials related to abuses of governmental power*

(a) The Administrator will restrict access to materials determined during the processing period to relate to abuses of governmental power, as defined in § 105–63.104(c), when:

(1) The Administrator, in accordance with § 105–63.401–1, is in the process of reviewing or has determined the validity of a claim by any person of the need to protect an opportunity to assert a legal or constitutional right or privilege; or

(2) The Administrator, in accordance with § 105–63.401–1, is in the process of reviewing or has determined the validity of a petition by any person of the need to protect an individual's right to a fair and impartial trial; or

(3) The release of the materials would violate a Federal statute; or

(4) The release of the materials would disclose or compromise national security classified information. However, the Administrator may waive this restriction when:

(i) (A) The requester is engaged in a historical research project; or (B) the requester is a former Federal official who had been appointed by the President to a policymaking position and who seeks access only to those classified materials which he originated, reviewed, signed, or received while in public office; and

(ii) The requester has a security clearance equivalent to the highest degree of national security classification that may be applicable to any of the materials to be examined; and

(iii) The Administrator has determined that the heads of agencies having subject matter interest in the material do not object to the granting of access to the materials; and

(iv) The requester has signed a statement, satisfactory to the Administrator and to the heads of agencies having subject matter interest in the material, which declares that the requester will not publish, disclose, or otherwise compromise the classified material to be examined and that the requester has been made aware of Federal criminal statutes which prohibit the compromise or disclosure of this information.

(b) The Administrator may restrict access to portions of materials determined to relate to abuses of governmental power when the release of those portions would tend to embarrass, damage, or harass living persons, and the deletion of those portions will not distort, and their retention is not essential to an understanding of, the substantive content of the materials.

§ 105-63.402-2 Materials of general historical significance unrelated to abuses of governmental power.

(a) The Administrator will restrict access to materials determined during the processing period to be of general historical significance, but not related to abuses of governmental power, under one or more of the circumstances specified in § 105-63.402-1(a).

(b) The Administrator may restrict access to materials of general historical significance, but not related to abuses of governmental power, when the release of these materials would:

(1) Disclose or compromise trade secrets or commercial or financial information obtained from a person and privileged or confidential; or

(2) Constitute a clearly unwarranted invasion of personal privacy; or

(3) Disclose or compromise investigatory materials compiled for law enforcement purposes; or

(4) Tend to embarrass, damage, or harass living persons.

§ 105-63.402-3 Periodic review of restrictions.

The Administrator periodically will assign archivists to review materials placed under restriction by § 105-63.402 and to make available for public access those materials which, with the passage of time

or other circumstances, no longer require restriction. If the archivists are unable to determine whether certain materials should remain restricted, the archivists shall submit the pertinent materials, or representative examples of them, to the Senior Archival Panel described in § 105–63.401(e), which shall then have the responsibility for determining if the materials should remain restricted. The Senior Archival Panel may seek the recommendation of the Presidential Materials Review Board, in the manner prescribed in paragraphs (f) and (i) of § 105–63.401–2, in making its determination.

§ 105–63.402–4 Appeal of restrictions

Upon the petition of any researcher who claims in writing to the Administrator that the restriction of specified materials is inappropriate and should be removed, the archivists shall submit the pertinent materials, or representative examples of them, to the Presidential Materials Review Board described in § 105–63.401–2(g). The Board shall review the restricted materials, consult with interested Federal agencies as necessary, and make a written recommendation to the Administrator, including dissenting and concurring opinions, as to the continued restriction of all or part of the pertinent materials. When the determination of the Administrator is different from that recommended by the Board, he will state his reasons in writing. The Administrator will notify the petitioner of the final administrative decision.

§ 105–63.402–5 Deletion of restricted portions

The Administrator will provide a requester any reasonably segregable portions of otherwise restricted materials after the deletion of the portions which are restricted under this § 105–63.402.

§ 105–63.402–6 Requests for declassification

Challenges to the classification and requests for the declassification of national security classified materials shall be governed by the provisions of § 105–61.104, as that may be amended from time to time.

§ 105–63.403 Reference room locations, hours, and rules

The Administrator shall, from time to time, separately prescribe the precise location or locations where the materials shall be available for public reference, and the hours of operation and rules governing the conduct of researchers using such facilities. This information may be obtained by writing to: Office of Presidential Libraries (NL), The National Archives, Washington, DC 20408.

§ 105–63.404 Reproduction of tape recordings of Presidential conversations

(a) To insure the preservation of original tape recordings of conversations which were recorded or caused to be recorded by any officer or employee of the Federal Government and which:

(1) Involve former President Richard M. Nixon or other individuals who, at the time of the conversation, were employed by the Federal Government; and

(2) Were recorded in the White House or in the office of the President in the Executive Office Buildings located in Washington, District of Columbia; Camp David, Maryland; Key Biscayne, Florida; or San Clemente, California; and

(3) Were recorded during the period beginning January 20, 1969, and ending August 9, 1974.

the Administrator will produce duplicate copies of such tape recordings in his custody for public and official reference use. The original tape recordings shall not be available for public access.

(b) Since the original tape recordings may contain information which is subject to restriction in accordance with § 105–63.402, the archivists shall review the tapes and delete restricted portions from copies for public and official reference use.

(c) No researcher may reproduce or have reproduced sound recordings of the reference copies of the tape recordings described in paragraph (a) of this section.

§ *105–63.405 Reproduction and authentication of other materials*

(a) The copying for researchers of materials other than tape recordings described in § 105–63.404 normally will be done by personnel of the General Services Administration using government equipment. With the permission of the Administrator or his designated agent, a researcher may use his own copying equipment. Permission shall be based on the determination that such use will not harm the materials or disrupt reference activities. Equipment shall be used under the supervision of GSA personnel.

(b) The Administrator may authenticate and attest copies of materials when necessary for the purpose of the research.

(c) The fees for reproduction and authentication of materials under this section shall be those prescribed in the schedule set forth in Subpart 105–61.52, or pertinent successor regulation, as that schedule is amended from time to time.

§ *105–63.406 Amendment of regulations*

The Administrator may amend the regulations of this Subpart 105–63.4 only after the proposed amendments have been placed before the Congress for 90 legislative days. Proposed amendments shall become effective upon the expiration of this period, unless the proposed amendments are disapproved by a resolution adopted by either House of Congress during such period.

UNITED STATES OF AMERICA,
GENERAL SERVICES ADMINISTRATION,
Washington, D.C., June 27, 1975.

Hon. JOHN BRADEMAS,
Chairman, Subcommittee on Printing, Committee on House Administration, House of Representatives, Washington, D.C.

DEAR MR. BRADEMAS: During the course of our testimony on GSA's proposed regulations implementing the Presidential Recordings and Materials Preservation Act, before the Subcommittee on Printing, you requested clarification of the degree of detail to be included in Federal Register notices to the public. These notices would inform the public of the proposed transfer of materials determined by the archivists to be private or personal materials or materials neither related to abuses of power nor otherwise of general historical significance.

Attached is a sample of what GSA envisions in formulating these notices. Because of the need to protect personal privacy, the description of the materials is necessarily of a general nature. We believe, as concurred in by the Department of Justice, that greater detail jeopardizes our ability to defend the constitutionality of the Act and its implementing regulations. Please note that the degree of detail is similar to that which Federal agencies will be required to publish in the Federal Register inventory of systems of records covered by the Privacy Act of 1974.

We enclose a corrected copy of our testimony before the Subcommittee. Please advise us if we can be of further assistance.

Sincerely,

ARTHUR F. SAMPSON,
Administrator.

Enclosures.

DRAFT NOTICE

NOTICE OF PROPOSED TRANSFER OF NIXON ADMINISTRATION MATERIALS PURSUANT TO PUBLIC LAW 93–526

This notice of proposed transfer is issued pursuant to the provisions of Public Law 93–526, the Presidential Recordings and Materials Preservation Act, and regulations of the General Services Administration implementing that Act.

Materials Proposed to be Transferred.—Sixteen letters dated within the time period June 16, 1973 to November 30, 1973, between former President Nixon and members of the White House Office staff and respective family members.

Topics Covered in the Materials Proposed for Transfer.—Invitations to family parties; vacation plans; birthday wishes; reports on health; advice on financial matters.

Persons to Whom Materials are Proposed for Transfer.—

Richard M. Nixon, eight letters dated June 16, 17, 19, and August 5, 6, 7, and November 28 and 30, 1973.

H. R. Haldeman, four letters dated October 1, and November 3 and 4, and December 5, 1973.

John Dean, four letters dated December 1, 15, 17, and 20, 1973.

Reason for Proposed Transfer of Materials.—In the opinion of archivists processing the Nixon materials the described materials are personal and private; they are not Presidential historical materials of general historical significance and they are not related to "abuses of governmental power popularly identified under the generic term 'Watergate' ".

Date of Expected Return of Materials.—No sooner than 30 calendar days from the publication of this notice or, in the event of appeal by a member of the public, no sooner than 30 days from the petitioner's receipt of notice of the final administrative determination.

Procedure for Public Comment on Proposed Transfer of Materials.—Pursuant to Section 105–63.401–4, of GSA's regulations governing public access to the Nixon Presidential materials, within 30 calendar days of publication of this notice, any person may petition the Administrator of GSA on the grounds that the determination to trans-

fer the described materials is in error. The petition should include a statement of the reasons the petitioner believes the materials should not be returned. Upon receipt by the Administrator of a petition, the archivists processing the Nixon materials pursuant to GSA's regulations governing public access to such materials, shall submit the pertinent materials or representative examples of them, to the Presidential Materials Review Board, described in Section 105–63.401–2 (f) and (g) of the regulations. Upon consideration of the petition, the Board shall submit to the Administrator its written recommendation, together with dissenting and concurring opinions, of the proper categorization and disposition of the pertinent materials. The Administrator will make the final administrative determination, and will state his reasons in writing if the final determination is different from that recommended by the Board. The Administrator will notify the petitioner by certified mail, return receipt requested, of the final administative determination.

Authority of GSA to Vest Final Administrative Authority for Public Access to Presidential Tapes and Materials in the Presidential Materials Review Board

(By Vincent E. Treacy, Legislative Attorney, American Law Division, July 16, 1975)

Issue Presented

The question addressed by this memorandum is whether the Administrator of General Services may promulgate regulations under the Presidential Recordings and Materials Preservation Act which vest the final administrative authority for decisions with respect to public access to the tapes and materials in the Presidential Materials Board, a body consisting of the Archivist of the United States, the Librarian of Congress, and a representative of the Society of American Archivists.

Introduction

The Presidential Recordings and Materials Preservation Act, Public Law 93–526, (hereinafter referred to as "Act") directed the Administrator of General Services ("Administrator") to submit a report to Congress proposing and explaining regulations that would provide public access to the tape recordings and other materials of former President Nixon. The Administrator submitted the "Report to Congress on Title I" in March 1975. Under the regulations, the initial archival processing would be performed by archivists employed by the General Services Administration ("GSA"). Section 105–63.400(b) (All section citations are to the proposed regulations, which would add a new Part 105–63 to Title 41 of the Code of Federal Regulations). These archivists would, in turn, refer materials which raised significant issues or had far-reaching precedential value to a panel of senior archivists appointed by the Archivist of the United States ("Archivist"). Section 105–63.401–2(e). This Senior Archival Panel would then refer significant or far-reaching matters to the Presidential Materials Review Board ("Board"), whose members

would include the Archivist or his delegate, the Librarian of Congress or his delegate, and a person distinguished in archival science, history, or political science to be nominated by the Council of the Society of American Archivists. Section 105–63.401–2 (f) and (g). The Board would submit to the Administrator its written recommendation of the proper categorization and disposition of the materials referred to it; the Administrator would then make the final administrative determination. Section 105–63.402(h).

The provision in the Regulations granting the Administrator the authority to make the final administrative determination concerning the public release of Presidential materials has been criticized. It has been recommended that the decisions should instead be made, to the extent possible, by a non-partisan group, based on general principles of archival science. To satisfy this standard, it has been recommended that the final determinations be made by the Presidential Materials Review Board, instead of the Administrator.

The objections to vesting final administrative authority in the Administrator have been summarized as follows:

> The problem is that the Administrator is a political appointee serving at the grace of the President. Having such a political appointee decide how the materials should be categorized, (and thus which materials will be retained by the government) exposes the process to serious risks.
>
> To begin with, there is the risk that the Administrator's judgment will be influenced, either consciously or unconsciously, by partisan concerns. This observation is not intended as a criticism of the present Administrator. These regulations are to be applied not only by the current Administrator but by succeeding Administrators as well. Congress should not have to hope that at some future time, in some future circumstance, a future Administrator will apply the regulations without any regard to partisan concerns.
>
> Even assuming that every Administrator, present and future, would apply the regulations in a non-partisan manner, there is another risk in allowing the Administrator to make the final administrative determination: to the public it may *appear* that access is being governed by partisan considerations. This is a significant risk. The public should have confidence that the regulations are being applied in a non-partisan manner. And it may be virtually impossible to secure this confidence if the Administrator is allowed to make the final decisions. The public must have confidence that the regulations are being applied with strict objectivity.
>
> A large number of difficult and controversial decisions will have to be made respecting the classification of a massive amount of material. There wil be close judgmental decisions which will be challenged by interested parties. There will be public discussion and debate over various classifications. So far as possible, those responsible for the decision making should be insulated from question, doubt, or criticism on political or partisan grounds. It would be virtually impossible

to secure this confidence if any Administrator, now or in the future, were given authority to make final decisions.[1]

In order to evaluate this position, we must first review the legislative history of the Act, the position taken by the GSA in its Memorandum of Law, and the applicable legal principles and authorities.

LEGISLATIVE HISTORY

The Presidential Recordings and Materials Preservation Act originated as Senate Bill S. 4016, introduced by Senators Nelson, Ervin, and Javits, and referred to the Committee on Government Operations. The bill was reported favorably on September 26, 1974. Sen. Rep. No. 93–1181, 93d Congress, 2d Sess. (1974). It was debated on the Senate floor on October 3d and 4th, 1974, and was passed by a 56 to 7 vote on October 4th. 120 Con. Rec. S18230–263 (daily ed., Oct. 3, 1974); 120 Cong. Rec. 18318–336 (daily ed., Oct. 4, 1974). The Committee on House Administration reported the bill favorably to the House of Representatives on November 26, 1974. H.R. Rep. No. 93–1507, 93d Cong., 2d Sess. (1974). The bill was passed by the House on December 3, 1974, under Suspension of the Rules, by unanimous voice vote. 120 Cong. Rec. H. 11204 (daily ed., Dec. 3, 1974). There was no Conference Committee Report on the differences between the House and Senate versions of the bill; instead, on December 9, 1974, the Senate concurred in the House amendment, after adding amendments of its own, and the House concurred in the Senate amendments to the House bill. 120 Cong. Rec. S. 20809, H. 11445 (daily ed., Dec. 9, 1974). The bill was signed into law by the President on December 19, 1974. 88 Stat. 1695.

THE GSA MEMORANDUM OF LAW

In a memorandum issued by the General Services Administration on June 2, 1975, it was concluded that the Administrator does not have the authority irrevocably to subdelegate judgmental responsibilities imposed on him by Congress pursuant to the Presidential Recordings and Materials Preservation Act: "Although the Administator, acting as the agent of Congress, may subdelegate ministerial acts, he must retain at least review authority over decisions requiring the exercise of discretion, skill, and judgment." In support of this conclusion, the memorandum stated that the Act "nowhere authorizes a subdelegation by the Administrator to another party of the responsibility to take complete possession and control of the Nixon Presidential historical materials or to provide public access to these materials." In a subsequent discussion of the question, the Memorandum relied on at least two "established principles of agency law" to the effect that a) absent specific statutory authority, an agent is barred from subdelegating responsibility for acts requiring skill, discretion, and judment, and b) an agent may solicit recommendations or assistance from others in matters requiring discretion, skill, or judgment, so long as the agent retains the right to make the final review or decision. After discussing three cases involving the subdelegation of the subpoena power

[1] Comments of Senator Gaylord Nelson on GSA Regulations to Implement Public Law 93–526, before the Committee on Government Operations, U.S. Senate, May 13, 1975.

by Federal administrative agencies, the memorandum reached the following conclusions, which are quoted in full:

> 1. Since the Presidential [Recordings and Materials] Preservation Act contains no authority for the Administrator of General Services to subdelegate his responsibility to obtain complete possession and control over the Nixon historical materials, and to provide and regulate public access to the materials, the Administrator may not subdelegate such acts of discretion, skill and judgment to the Presidential Materials Review Board.
>
> 2. The Administrator, however, *may* seek assistance from the Presidential Materials Review Board in coming to a final agency decision which requires discretion, skill and judgment, so long as the Administrator retains the right to review and revise the Board's recommendations. (Emphasis in original.)

PROVISIONS OF THE ACT

Because of the emphasis placed on the responsibilities imposed on the Administrator by the Act, it is important to review the explicit language of that statute to determine exactly what duties and responsibilities the Administrator is in fact authorized to perform. Section 101(a) of the Act provides that the Administrator "shall receive, obtain, or retain, complete possession and control of all original tape recordings" involving former President Nixon at designated locations between January 20, 1969, and August 9, 1974. Section 101(b)(1) provides that the Administrator "shall receive, retain, or make reasonable efforts to obtain, complete possession and control of all papers, documents, memorandums, transcripts, and other objects and materials which constitute the Presidential historical materials of Richard M. Nixon" between January 20, 1969, and August 9, 1974. The third major duty is imposed by section 103, which requires the Administrator to "issue at the earliest possible date such regulations as may be necessary to assure the protection of the tape recordings and other materials referred to in section 101 from loss or destruction, and to prevent access to such recordings and materials by unauthorized persons." Finally, section 104(a) provides that the Administrator "shall, within ninety days after the date of enactment of this title, submit to each House of the Congress a report proposing and explaining regulations that would provide public access to the tape recordings and other materials referred to in section 101." The Act requires the regulations to take into account seven enumerated factors, and provides that such regulations shall take effect ninety days after the submission of the report unless disapproved by a resolution adopted by either House of the Congress during that period.

The Congressional veto provisions of section 104 of the Act were clearly modeled on the corresponding sections of the Executive Reorganization Act, 5 United States Code §§ 901–13 (1970). As the Supreme Court has observed, the "value of the reservation of the power to examine proposed rules, laws and regulations before they become effective is well understood by Congress. It is frequently, as here, employed to make sure that the action under the delegation squares with

the Congressional purpose." *Sibbach* v. *Wilson & Co.*, 312 U.S. 1, 15 (1941). The court noted the disapproval mechanism then embodied in section 5 of the Reorganization Act of 1939, 53 Stat. 562, the predecessor to later reorganization acts. 312 U.S. at 15 n. 17.

ANALYSIS OF GSA MEMORANDUM

The GSA Memorandum of Law relies on *Cudahy Packing Co.* v. *Holland*, 315 U.S. 357 (1941), in which the Supreme Court held that the Fair Labor Standards Act did not grant the Administrator of the Wage and Hour Division of the Labor Department the authority to delegate his statutory power to sign and issue a subpoena duces tecum. According to the Memorandum, the "rule of *Cudahy*, as applied to the statutory scheme of the [Act], requires the conclusion that the Administrator of General Services may *not* delegate to the Presidential Materials Review Board the final agency decision on such judgmental and discretionary matters as restrictions and transfer of material." (Emphasis in original.) If examined closely, however, the holding of the *Cudahy* case neither requires nor supports the conclusion of the GSA Memorandum.

The *Cudahy* court expressly noted that the entire history of legislation controlling the use of subpoenas by administrative officers indicated a Congressional purpose not to authorize by implication the delegation of the subpoena power. 315 U.S. at 364. The court noted that the subpoena power is capable of oppressive use, especially if indiscriminately delegated and not returnable before a judicial officer, and that it has a coercive tendency. 315 U.S. at 363. The Court thus found a Congressional purpose that the *subpoena power* shall be delegable only when an authority to delegate is expressly granted. 315 U.S. at 366. It found support for that conclusion in the legislative history of the Act under consideration, which showed that the authority to delegate the subpoena power had been expressly granted in bills passed by the Senate and considered by the House, but had been eliminated by the Conference Committee. 315 U.S. at 362 n.3, 366. In the *Cudahy* case, then, the Court carefully applied the long standing rule of statutory construction that a court should not interpret a statute so as to give it a meaning which Congress considered in the legislative process but finally rejected. As many cases have held, the deletion of a provision indicates that Congress did not intend the bill to include the rejected provisions. *United States* v. *Henning*, 344 U.S. 66 (1952); *Bindczyck* v. *Finucane*, 342 U.S. 76, 83 (1951); *Wright* v. *Vinton Branch, Mountain Trust Bank*, 300 U.S. 440, 463 n.8 (1937); *Norwegian Nitrogen Products Co.* v. *United States*, 288 U.S. 294, 306 (1933); *United States* v. *Great Northern R. Co.*, 287 U.S. 144, 155 (1932); *Federal Trade Commission* v. *Raladam Co.*, 283 U.S. 643, 648 (1931); *United States* v. *Pfitsch*, 256 U.S. 547, 551 (1921); *Lapina* v. *Williams*, 232 U.S. 78, 89–91 (1914).

In *Fleming* v. *Mohawk Wrecking & Lumber Co.*, 331 U.S. 111 (1947), the Court construed a provision granting subpoena power to the Emergency Price Administrator in terms that were practically identical to the language at issue in the *Cudahy* case. The Court rejected the argument that *Cudahy* controlled the present case. Instead,

the Court noted the following distinguishing factors: (1) The legislative history in *Cudahy* showed that a provision granting authority to delegate the subpoena power had been eliminated in Conference, but no such history accompanied the provision in *Fleming*; (2) The *Cudahy* Act made the powers to gather data and to make investigations expressly delegable, while the *Fleming* Act contained no provision which specifically authorized the delegation of a specific function; (3) the *Cudahy* Act made the restrictive provisions of the Federal Trade Commission Act applicable to the issuance of subpoenas, while the subpoena power in the *Fleming* Act was not dependent on the provision of another Act having a history of its own; and (4) the *Cudahy* Act contained no broad rulemaking power, while the Act in *Fleming* gave the Administrator authority to issue regulations necessary and proper to carry out its purposes and provisions. 331 U.S. at 120–21. The Court continued:

> Such a rule-making power may itself be an adequate source of authority to delegate a particular function, unless by express provision of the Act or by implication it has been withheld. There is no provision in the present Act negativing the existence of such authority, so far as the subpoena power is concerned. Nor can the absence of such authority be fairly inferred from the history and content of the Act. Thus the presence of the rule-making power, together with the other factors differentiating this case from the *Cudahy* case, indicates that the authority granted by [the Act] should not be read restrictively. 331 U.S. at 121–22 (citation omitted).

Accordingly, the Court upheld the authority of the Price Administrator to delegate his subpoena power.

The *Fleming* case would appear to be far more applicable than the *Cudahy* case to the question of the GSA Administrator's authority under the Presidential Recordings and Materials Preservation Act. The legislative history of the Act contains no indication that Congress intended to limit the Administrator's authority to assign the responsibility for controlling public access to an expert body. Since there are no provisions in the Act making other powers expressly delegable, there is noting to give rise to the inference that the power to control public access is not delegable. The Act does not make the Administrator's authority dependent on any other law. Moreover, the Act *does* contain broad authority to issue regulations governing public access. In the words of the *Fleming* Court, this rulemaking authority may in itself be an adequate source of authority for the Administrator to delegate a particular function, unless it has been withheld by express provision of the Act or by implication. There is nothing in the Act to negative the existence of such authority, nor can its absence be fairly inferred from the history and content of the Act. Thus, it can be concluded. on the authority of the *Fleming* case, that the presence of the rule-making power. together with the other factor differentiating the Act from the *Cudahy* case, that the authority granted by he Act should not be read restrictively.

The Court has upheld the delegability of administrative powers on numerous other occasions. In *Jay* v. *Boyd*, 351 U.S. 345 (1956), the Court ruled that the discretion conferred on the Attorney General in

suspension cases was conferred upon him as an administrator in his capacity as such, and that under his rule-making authority, as a matter of administrative convenience, he could delegate his authority to special inquiry officers, with review by the Board of Immigration Appeals. Numerous cases in the lower Federal courts have also upheld the delegability of administrative powers in the absence of express or implied statutory provisions or legislative history to the contrary. *Federal Trade Comm'n* v. *Gibson*, 460 F. 2d 605 (5th Cir. 1972); *Wirtz* v. *Atlantic States Construction Co.*, 357 F. 2d 442, 445 (5th Cir. 1966); *Stone* v. *E.D.S. Federal Corp.*, 351 F. Supp. 340 (N.D. Cal. 1972).

It should also be noted that the arguments against delegability contained in the GSA Memorandum of Law are in apparent conflict with the position taken by the Administrator himself in his Report to Congress proposing the regulations governing public access. In that Report, it is stated:

> "Administrator" means the Administrator of General Services or any delegate whom the Administrator may appoint in writing, or whom the regulations designate, directly or by implication. Although the Act gives full responsibility to the Administrator to fulfill its provisions in regard to the Presidential historical materials, the intention of the Act clearly is that the Administrator may designate other officials or employees to carry out specified tasks for which they are particularly suited.[2]

Taken as a whole, the statutory scheme and legislative history of the Presidential Recording and Materials Preservation Act provide overwhelming support for the conclusion that Congress may, under section 104, give its approval to regulations which vest the final authority for decisions on public access in the Presidential Materials Review Board. In the first place, no amount of repetition in the GSA Memorandum of Law can serve to mask the fact that the statutory scheme of the Act simply does *not* vest in the Administrator the "responsibility * * * to provide public access to these materials." Rather, as demonstrated earlier, the Act requires the Administrator to "submit to each House of the Congress a report proposing and explaining regulations that would provide public access to the tape recordings and other materials * * *." Public Law 93–526, § 104(a) (emphasis supplied). In its conclusion that the Administrator has no authority "to subdelegate his responsibility * * * to provide and regulate public access to the materials," the Memorandum completely begs the question whether the Administrator has been granted such authority in the first place. The Memorandum thus repeatedly elides the statutory duty of the Administrator to propose and explain regulations, and arrogates to him the statutory function of providing public access, which was expressly left subject to Congressional approval under section 104(b).

It is misleading to ask, as does the GSA Memorandum, whether the Act authorizes the Administrator to subdelegate the responsibility

[2] Report to Congress on Title I, "Legal Explanation of Proposed Regulations," Explanation of proposed section 105–63.104(g), p. G–22.

to regulate public access to the tape recordings and materials, because nothing in the language of the Act grants the Administrator himself any such responsibility. The Act merely authorizes the Administrator to submit to Congress a report proposing and explaining regulations that would provide public access. There is nothing in that language conferring any responsibility on the Administrator to provide, regulate, or control such access. If Congress had desired to confer such responsibility on the Administrator, it could have done so very easily by using language authorizing and directing the Administrator to provide public access to the tape recordings and other materials, subject to regulations submitted to Congress for approval. No such language appears in the Act; instead, the Administrator's authority and responsibility is limited to drafting and explaining regulations, with the ultimate responsibility for determining the procedure for public access reserved to Congress itself by means of a Congressional veto.

Second, the legislative history of the Act strongly supports the conclusion that final authority over public access need not be vested in the Administrator. The strongest evidence of the intent of Congress is found in the following colloquy on the floor of the House:

> Mr. YATES. Mr. Speaker, will the gentleman yield for another question?
>
> Mr. BRADEMAS. Yes.
>
> Mr. YATES. Who will determine under the provisions of the bill whether the materials are historical, and, therefore, subject to custody of the United States, and which materials are not?
>
> Mr. BRADEMAS. I would say in response to the gentleman that the bill contemplates that the same types of procedures which are presently used with respect to the papers of former Presidents would be employed.
>
> Mr. YATES. What provisions are those?
>
> Mr. BRADEMAS. While I do not pretend to be an expert, it is my understanding that the procedures involve judgments of the Archivist of the United States, who is an employee of the Administrator of the General Services Administration.
>
> Mr. YATES. Does the gentleman have some compunctions about leaving this decision to the Administrator of the General Services Administration, he being the one who made the agreement with the President of the United States?
>
> Mr. BRADEMAS. I think the gentleman's point is very well taken. It is precisely because of the apprehension of the members of the committee with respect to that particular point that the bill contains language which directs the Administrator to submit to Congress, within 90 days after the enactment of the measure, regulations which would provide public access to the materials.
>
> Second, it is precisely because we shared that apprehension that those regulations would not go into effect without

> an opportunity for both the House and Senate to review the regulations and to exercise a veto if we disapprove of them.[3]

This colloquoy is especially authoritative because Representative Brademas, who interpreted the bill, was not only its Floor Manager during the House debate, but also was chairman of the House Subcommittee on Printing, which held hearings on the subject matter of the bill on September 30, 1974 and October 4, 1974, and marked up the Senate passed bill on November 20, 1974. *The "Public Documents Act"*, Hearings before the Subcommittee on Printing of the Comm. on House Administration, on H.R. 16902 and related legislation, 93d Cong., 2d Sess. (1974).

The colloquoy is very informative. In response to the question of who will determine whether the materials are historical, Mr. Brademas stated that "the bill contemplates that the same types of procedures which are presently used with respect to the papers of former Presidents would be employed." He further noted that the procedures "involve judgments of the Archivist of the United States, who is an employee of the General Services Administration." Then, in a key passage, he was asked if he had any compunction about leaving this decision to the same official who had made the Nixon-Sampson Agreement with the former President. Mr. Brademas replied that it was *precisely because of apprehension with respect to that particular point that the bill contained language which directed the Administrator to submit to Congress regulations which would provide public access to the materials.* Mr. Brademas added that the same apprehension led Congress to reserve the right to review the regulations and to exercise a veto if it disapproved them.

Nothing in the colloquoy reveals any intent to vest the authority or responsibility for public access in the Administrator. Indeed, the exchange indicates that a major role was contemplated for the Archivist of the United States rather than the Administrator. Furthermore, the exchange shows that Congress had in mind procedures similar to those presently used with respect to the papers of former Presidents. The GSA Report to Congress itself demonstrated that on no previous occasion has the final decision on public access been vested in the Administrator of General Services. Rather, the preferred method in recent years has been to rely on professional archivists for this purpose. See *Report to Congress on Title I*, Appendix II. Finally, the colloquoy demonstrates that it was precisely because of apprehension about leaving final decisions to the Administrator of General Services that he was authorized only to propose and explain regulations, subject to Congressional approval, and not to grant public access to the tapes and materials themselves.

Third, the contention that the Administrator cannot "subdelegate" the responsibility he maintains is granted to him by the Act has little

[3] 120 Cong. Rec. H. 11209 (daily ed., Dec. 3, 1974).

merit. There is no need to reach the issue of subdelegation, since the Act does not permit *any* delegation of the legislative authority of Congress with respect to public access to the tapes and materials, to the Administrator or to any other official or body, until ninety days have elapsed after the submission of the proposed regualtions to Congress. Clearly, the question of subdelegation cannot arise until a delegation has occurred. Moreover, the Administrator's concern that the subdelegation of this responsibility to an independent body might constitute an "abdication by the Administrator * * * of his responsibilities to his principal, the Congress" would appear to be of little consequence. Congress has very carefully provided a mechanism in the Act which enables it to review the proposed decision making process and to disapprove any portion of it which fails to meet its approval. In short, the danger that conferring final administrative decision making authority on the Presidential Materials Review Board would contravene the intent of Congress is remote in the light of the veto power retained by Congress.

Fourth, it should be noted that the GSA Memorandum of Law refers to the relationship between Congress and the Administrator as that of principal and agent. In the three Supreme Court cases treated in the Memorandum, however, there is no mention of the principles of agency in this regard. In fact, it is virtually unheard of to apply such principles, which developed out of the common law of business associations, to the relationship between Congress and the Executive Branch, which is defined by the Constitution and statutes enacted thereunder. While the separation of powers may occasionally be analogized to an agency relationship, it would appear that there are too many distinctions to make this a useful analytical tool. For example, the doctrine of apparent authority and the principle that an agent acting within the scope of his authority can bind his principal have little applicability to Congressional-Executive relations. Thus it would not appear that the established principles of agency relied on by the Administrator should preclude the regulations from vesting authority in the Board. In any event, the application of those principles in the GSA Memorandum is founded on the premise that Congress, as principal, granted the Administrator, as agent, the responsibility to regulate public access to the tapes and materials. As noted repeatedly above, there is no such grant of authority in the Act; the question of agency is thus moot.

CONCLUSION

It is concluded that the Administrator does have authority under the Act to promulgate regulations which, subject to Congressional approval, would vest the final administrative authority for controlling public access to Presidential tapes and materials in the Presidential Materials Review Board. This conclusion is supported by the fact that the Act grants broad rule-making authority to the Administrator, and contains no restrictions on delegability, either expressly, or by inference, or in its leigslative history. Moreover, the express language of the Act grants the Administrator the authority to propose and explain regulations, not the authority to control and regulate access to the tapes. The intent of Congress, as expressed in the statute, is confirmed by the legislative history, especially by the colloquy

between Representatives Brademas and Yates. Finally, the principles of agency and the Supreme Court cases relied upon by the GSA Memorandum of Law do not, for the reasons set forth in this memorandum, appear to require a different conclusion.

ARNOLD & PORTER,
Washington, D.C., June 16, 1975.

Hon. JOHN BRADEMAS,
Chairman, Subcommittee on Printing; Committee on House Administration, House of Representatives, Washington, D.C.

DEAR CONGRESSMAN BRADEMAS: As you requested, we enclose a memorandum prepared on behalf of the American Historical Association, the American Political Science Association and The Reporters Committee for Freedom of the Press in response to certain legal contentions made by the General Services Administration in its memorandum of June 2, 1975.

If we can be of any further assistance, please let us know.

Sincerely yours,

MARK J. SPOONER.

Enclosure.

The American Historical Association, the American Political Science Association and the Reporters Committee for Freedom of the Press jointly submit this memorandum in response to a Memorandum of Law submitted by the Administrator of General Services on June 2, 1975.

Several of the regulations proposed by the Administrator of General Services under the Presidential Recordings and Materials Preservation Act, Public Law No. 93-426 ("the Act"), provide that the Administrator will make final administrative decisions regarding public access to the Presidential materials of the Nixon Administration. In comments previously submitted with respect to these regulations, we have outlined several policy reasons why the Administrator, a political appointee with no archival experience, should not be permitted to upset the determinations of an objective and professional panel of archivists.

GSA contends that regulations giving the Presidential Materials Review Board ultimate authority on public access to the materials would be improper and unlawful, because the Administrator cannot "delegate" his authority in this regard. This contention assumes that Congress has required the Administrator to participate personally in the review of the Presidential materials. GSA's legal conclusion is wholly invalid since (a) the Administrator has not been given the authority to make these determinations, so no question of delegability is involved; and (b) in any event, the powers which the Administrator has under the Act are delegable.

I. THE ACT DOES NOT EMPOWER THE ADMINISTRATOR OF GENERAL SERVICES TO MAKE FINAL DETERMINATIONS AS TO PUBLIC ACCESS, SO HIS AUTHORITY TO "DELEGATE" THAT POWER IS NOT INVOLVED HERE

The Administrator's memorandum of law sets up a "straw man" of delegability, although as we point out below, the memorandum fails to

knock even that straw man down. No question of delegability is raised here, since the Administrator has no authority in this area to delegate.

The Act empowers the Administrator to do the following:

1. He shall receive, obtain, or retain, complete possession and control of all original tape recordings covered by the Act. § 101(a).

2. He shall receive, retain, and make reasonable efforts to obtain complete possession and control of papers, documents, memoranda, transcripts and other objects and materials covered by the Act. § 101(b)(1).

3. He shall issue at the earliest possible time regulations to assure the protection of the tape recordings and materials referred to above from loss and destruction, and to prevent access to such recordings and materials by unauthorized persons. § 103.

4. He shall submit to each House of Congress a report proposing and explaining regulations that would provide public access to the tape recordings and other materials referred to in § 101, taking into account certain enumerated factors. § 104(a).

Nowhere does the Act provide that the Administrator shall make final administrative determinations concerning public access. Rather, he is authorized only to collect and retain the materials, and to draft regulations. Those regulations, which are subject to disapproval by Congress, could place ultimate responsibility for making determinations concerning public access with any person or entity. The Act leaves that question open. GSA's contentions concerning its power to delegate that authority are premature, since it has not yet been given the authority in the first instance. Rather, the question is simply one of policy. As we have previously noted, there are strong policy considerations against granting this authority to the Administrator of General Service.

II. THE AUTHORITY OF THE ADMINISTRATOR UNDER THIS ACT IS DELEGABLE

Not only has the Administrator set up a straw man, but he has failed to knock that straw man down. The Administrator contends that he cannot "subdelegate" his authority under the Act. Although it is clear that he has no authority to make final determinations concerning public access (see section I, *supra*), it is equally clear that all of the authority he does have under the Act is delegable.

The case of *Cudahy Packing Company* v. *Holland*, 315 U.S. 357 (1941), relied upon by the Administrator to support his contention that he cannot delegate his authority under this Act, does not support that proposition. In that case, the Supreme Court held that the Wage-Hour Administrator could not delegate his statutory authority to issue subpoenas to a Regional Director. That ruling, the precedental value of which has been eroded and the correctness of which has been questioned,[1] is distinguishable from the situation presented here in several ways.

[1] Professor Kenneth Culp Davis, the leading authority on administrative law, calls *Cudahy* "extreme" and "one of the queerest decisions the Supreme Court has ever rendered," and notes that "the movement away from the Cudahy case [is] hardly surprising." K. Davis, *Administrative Law Treatise*, §§ 9.04–.05 (1958 ed. and 1970 Supp.) Although *Cudahy* has never been specifically overruled, it has been limited to its particular facts. *See Fleming* v. *Mohawk Wrecking & Lumber Co., infra; FTC* v. *Gibson*, 460 F. 2d 605 (5th Cir. 1972); *Stone* v. *E.D.S. Federal Corp.*, 351 F. Supp. 340 (N.D. Cal. 1972); *Wirtz* v. *Atlantic States Construction Co.*, 357 F. 2d 442 (5th Cir. 1966).

First, the delegability of subpoena power has been afforded unique treatment by the courts, involving painstaking evaluation of legislative intent. The courts have taken an entirely different approach to powers of adjudication and rulemaking—consistently ruling that these powers can be delegated. *Jay* v. *Boyd*, 351 U.S. 345, 351, (1956); *United States Health Club* v. *Major* 292 F. 2d 665 (3d Cir. 1961); *See also*, *Service* v. *Dulles*, 354 U.S. 363 (1957).

Second, even in the area of subpoena power, the controlling element is the intent of Congress. Compare *Cudahy Packing Company*, *supra*, with *Fleming* v. *Mohawk Wrecking and Lumber Co.*, 331 U.S. 111 (1947). The factual circumstances of the two cases were nearly identical. Nevertheless, in *Fleming* the subpoena power was held to be delegable while in *Cudahy* it was not. The Court's rulings in both cases revolve around the intent of Congress, since neither case involved clear statutory language concerning delegability. In *Cudahy*, statutory provisions allowing delegation of subpoena power had been included in earlier versions of the Act, but were deleted at Conference. The Court concluded that Congress did not intend to allow the Administrator to delegate that authority. In *Fleming*, no such legislative intent was clear, so the Court ruled that delegation was proper. That decision, and numerous recent cases,[2] demonstrate that the courts presume that authority can be delegated, holding to the contrary only when such a result is mandated by clear statutory language or legislative history.

CONCLUSION

For these reasons, we respectfully suggest that the legislation does not bind Congress to approve, or GSA to propose, regulations giving final authority on matters of public access to the Administrator. In fact, the legislation lacks any provision which would permit the Administrator to assert such authority for himself. Accordingly, the regulations should be revised to place final administrative authority on matters concerning public access with the Presidential Materials Review Board.

Respectfully submitted.

ROBERT E. HERZSTEIN,
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JUNE 16, 1975.

Here we have no indication at all of a legislative intent to require the Administrator himself to perform this function. Indeed, such an intent is belied by the fact that passage of the Act was precipitated, in part, by the terms of the Nixon-Sampson Agreement. To suggest that Congress, in attempting to remedy that situation, intended to give Mr. Sampson final decision-making authority is strange indeed.

[2] *FTC* v. *Gibson*, 460 F. 2d 605 (5th Cir. 1972); *Wirtz* v. *Atlantic States Construction Co.*, 357 F. 2d 442 (5th Cir. 1966); *Stone* v. *E.D.S. Federal Corp.*, 351 F. Supp. 340 (N.D. Cal. 1972).

Therefore, whatever authority the Administrator has under the Act can be freely delegated.

Further, it must be remembered that Congress has the ultimate responsibility for reviewing the regulations in question. If Congress insists that final authority be placed with a Presidential Materials Review Board (or elsewhere), this would appear to be an appropriate exercise of the review function which Congress has reserved for itself. The Administrator's argument is presumptuous and misplaced—he is attempting to instruct Congress as to its own intent.[3]

Congressional Review of Regulations Issued by Administrator of General Services Under Presidential Recordings and Materials Preservation Act

(By Vincent E. Treacy, Legislative Attorney, American Law Division, March 19, 1975)

INTRODUCTION

The Presidential Recordings and Materials Preservation Act ("Act"), Public Law 93–526, 88 Stat. 1695, requires the Administrator of the General Services Administration (GSA) to take control of all of the tape recordings recorded in the White House and related offices during the Nixon administration. The Act requires the Administrator to submit to Congress a report proposing and explaining regulations that would provide public access to the tape recordings and other materials covered by the Act. The Act sets forth seven factors to be taken into account when the regulations are formulated. The regulations must be reported to Congress within 90 days after the effective date of the Act, and they will take effect upon the expiration of 90 legislative days after the submission of the report by the Administrator, unless disapproved by a resolution adopted by either House of the Congress during that 90 days period. Act, section 104 (a) and (b). This type of procedure is referred to as a legislative veto or a congressional veto. The best known example of its use is found in the Executive Reorganization Act, codified in 5 United States Code, sections 901–913 (1970).

Several questions have arisen concerning the operation of this procedure. First, does the statutory procedure require the Congress to disapprove the proposed regulations as a whole, or may it approve parts of the regulations and disapprove others? Second, does the procedure permit the Congress to incorporate changes into the proposed regulations and approve them as amended? Third. if the Congress does disapprove the proposed regulations in whole or in part, does the Administrator have a statutory obligation to resubmit the proposed regulations until Congressional approval is secured?

I. PARTIAL DISAPPROVAL OF PROPOSED REGULATIONS

In answer to the first question, it is clear from the legislative history of the Act that Congress may approve the regulations in part or in

[3] The Administrator's memorandum of law also suggests that principles of agency preclude this "subdelegation." Aside from all we have said above, it should be clear that no agency relationship exists between Congress and GSA under this Act, since GSA cannot bind Congress to any extent.

whole. In its report on the proposed bill S. 4016, the Committee on House Administration made the following statement:

> The Congress may disapprove all the regulations which are submitted at the same time by the Administrator, or the Congress may disapprove some of the proposed regulations while accepting others. In the latter case, those regulations which are not expressly disapproved would take effect after the 90-legislative-day period.

H.R. Rep. No. 93–1507, 93d, Cong., 2d Sess. 12 (1974), filed 120 Cong. Rec. H. 11261 (daily ed., December 3, 1974). As first reported to the Senate, S. 4016 simply required the Administrator to issue regulations governing access to the regulations. 120 Cong Rec. S. 18234 (daily ed., October 3, 1974). At the request of GSA, the provision was amended to give the Administrator 90 days to report the regulations to the Congress. The bill was also amended so that the regulations would take effect 90 days after their submission to the Congress. 120 Cong. Rec. S. 18234–35 (daily ed., October 3, 1974) and 120 Cong. Rec. S. 18336 (daily ed., October 4, 1974). The language permitting disapproval of the regulations by either House of the Congress first appeared in the bill as it was reported to the House floor. 120 Cong. Rec. H. 11205 (daily ed., December 3, 1974). The explanatory language quoted above is from the report which accompanied the bill when it passed the House. 120 Cong. Rec. H. 11212 (daily ed., December 3, 1974). On December 9, 1974, the Senate concurred in the House-passed amendment, subject to a number of technical and other amendments which did not affect the language of section 104(b)(1). 120 Cong. Rec. S. 20809 (daily ed., December 9, 1974). The quoted language, since it was before both Houses of the Congress during the consideration of the bill, would appear to be persuasive as to the meaning of section 104(b)(1).

It is true that it is the practice under the Executive Reorganization Act that reorganization plans be approved or disapproved as a whole. This requirement, however, is observed because the Reorganization Act itself prescribes the exact wording of the resolution of disapproval. 5 U.S. Code, section 909 (1970). There is no equivalent provision in the present Act. The omission of a statutorily prescribed resolution of disapproval, together with the express language in the legislative history, leads us to the conclusion that Congress may disapprove the regulations proposed by GSA in part or in whole.

II. APPROVAL OF PROPOSED REGULATIONS AS AMENDED

The second question is whether the Act gives Congress the power to incorporate changes into the proposals submitted by the Administrator and thereupon approve the regulations as amended. In our view, the Act does not authorize such a procedure. Rather, it restricts the Congress to two basic options: (1) To disapprove the proposed regulations in whole or in part by simple resolution of either the House or the Senate, or (2) to approve the regulations in whole by permitting them to become effective through inaction during the 90-day period. This interpretation would appear to be consistent both with the language of the Act and its legislative history, and with the

established practice under analogous laws such as the Executive Reorganization Act.

The legislative history of the Executive Reorganization Act indicates that the power of disapproval reserved to each House does not delegate to either House the right to make revisions in the plans, but simply enables each House to prevent a plan which its disapproves from becoming law.:

> By reserving to either House the power to disapprove, Congress retains in itself the power to determine whether reorganization plans submitted to the Congress by the President shall become law. The power of disapproval reserved to each House by the bill does not delegate to either House the right to make revisions in the plans, but it will enable each House to prevent any such plan of which it disapproves from becoming law. (Senate Report No. 232, 81st Cong., 1st Sess. (1949).)

The earliest example of the executive reorganization acts permitted the Congress to block a reorganization plan by passing "a resolution disapproving such Executive order or any part thereof". Act of June 30, 1932, 47 Stat. 414. The constitutionality of this measure was questioned by the Attorney General, not because of the provision for partial disapproval, but because it represented an "attempt to give to either House of Congress, by action which is not legislation, power to disapprove administrative acts." 37 Op. Atty. Gen. 64–65 (1933) (William D. Mitchell). Congress withdrew the disapproval mechanism and instead placed a two-year limitation on the duration of the authority delegated to the President. Act of March 3, 1933, 47 Stat. 1519.

In the Reorganization Act of 1939, Congress was authorized to disapprove reorganization plans in their entirety by concurrent resolution. President Roosevelt had objected to the use of a concurrent resolution in this context on the grounds that such a resolution would be immune from his constitutional veto power.

The Congress, however, proceeded on the constitutional theory that the Act conferred contingent legislative authority on the President. As the House Committee stated in its report, "[t]he failure of Congress to pass such a concurrent resolution is the contingency upon which the reorganizations take effect. . . . That the taking effect of action legislative in character may be dependent upon conditions or contingencies is well recognized." H.R. Rep. No. 120, 76th Cong., 1st Sess. 4–6 (1939), *citing Currin* v. *Wallace*, 306 U.S. 1 (1939) (exercise of authority by Secretary of Agriculture validly made contingent on referendum of farmers). See also *United States* v. *Rock Royal Cooperative, Inc.*, 307 U.S. 533 (1939); *Marshall Field & Co.* v. *Clark*, 143 U.S. 649 (1892); *J. W. Hampton, Jr. & Co.* v. *United States*, 276 U.S. 394 (1928); *Hirabayashi* v. *United States*, 320 U.S. 81 (1943).

After an unsuccessful effort in 1945, the concurrent resolution requirement was changed in 1949 to permit either House to disapprove a plan by a simple resolution.

Disavowing Attorney General Mitchell's 1932 opinion, the Justice Department advised Congress that the "approval or disapproval by the Congress or either House thereof [of a reorganization plan] is not a legislative act. Nor is it, in the circumstances, an improper

legislative encroachment upon the Executive in the performance of functions delegated to him by the Congress." Memorandum Re: Constitutionality of Provisions in Proposed Reorganization Bills Now Pending in Congress, in Sen. Rep. No. 232, 81st Cong., 1st Sess. 18–20 (1949).

In the view of the Senate Committee which reported the bill, the power reserved to each House to disapprove plans seemed "essentially the same as that possessed by each House in the ordinary legislative process, in which process no new law or change in existing law can be made if either House does not favor it." The Committee report continued:

> No significant difference would seem to exist by reason of the fact that under the ordinary legislative process the unwillingness of either House to approve the making of new laws or a change in existing law is manifested by the negative act of refusing to register a favorable vote, whereas under the bill the unwillingness must be manifested by the affirmative act of the passage of a resolution of disapproval of a reorganization plan. The unessential character of this difference becomes even more apparent when regard is had to the stringent rule contained in the bill which makes impossible actions calculated to delay or prevent consideration of resolutions of disapproval which have been favorably reported by the appropriate committees. (Sen. Rep. No. 232, 81st Cong., 1st Sess. (1949).)

The constitutional theory underlying the legislative veto thus requires that Congressional action be limited to simple approval or disapproval. Any effort to modify or amend the proposed regulations could arguably constitute a "legislative act." As such, it would be necesssary to comply with the Constitutional requirement that all legislation be passed by both Houses and signed by the President. See *U.S. Const.*, Art. 1, sec. 7, cl. 2.

III. ADMINISTRATOR'S OBLIGATION TO REVISE AND RESUBMIT

The third question is whether the Administrator must continue to resubmit the proposed regulations until Congressional approval is secured. Although there is no express provision for resubmittal, it would appear, both from the overall purpose of the Act and from its express language, that the Administrator is under an obligation to revise and amend the regulations until they meet the satutory requirements.

The statutory language provides that the "Administrator *shall* * * * submit to each House of the Congress a report proposing and explaining regulations" and that such "regulations *shall* take into account the following factors." Act, section 104(a) (emphasis added). The Act sets forth seven factors to be taken into account. In the Senate Report, it was stated that "the regulations promulgated by the Administrator *must* provide" for 1) use in judicial proceedings, 2) public access, and 3) access by Mr. Nixon. Sen. Rep. No. 93–1181, 93d Cong., 2d Sess. 2 (1974) (emphasis in original). Moreover, the Act provides an express mechanism for approval of revisions to the regula-

tions. Section 104(b)(2) provides that the Administration "may not issue any regulation *or make any change in a regulation* if such regulation *or change* is disapproved by either House of the Congress under this subsection," (emphasis added). It would thus appear that Congress anticipated the need to alter and amend the regulations, both to adjust to changing circumstances and to comport with the will of the Congress.

Furthermore, it would be inconsistent with the underlying purpose of the Act to permit the Administrator's statutory obligation to lapse after his initial submission. The purpose of the Act is to preserve the tape recordings and other materials relating to the Nixon Presidency and to provide appropriate access to them. Sen. Rep. No. 93–1181 at 1; H.R. Rep. No. 93–1507 at 1. This aim would be defeated if the Administrator was not required to revise any regulations which did not accomplish the statutory purpose. The Administrator's obligation to revise and resubmit his proposed regulations arises from the statutory mandate that he develop and promulgate regulations which are acceptable to both Houses of the Congress. Since Congressional approval must be manifested by inaction during the prescribed 90 day period, the Administrator's statutory obligation would not be discharged until he has promulgated regulations which have survived Congressional review.

CONCLUSION

Under the Act, either House of the Congress may disapprove the proposed regulations in whole or in part by simple resolution. The Congress may not alter or amend the proposed regulations except by supervening legislation. The partial or total disapproval of the proposed regulations does not relieve the Administrator of his statutory obligation to revise the proposal to meet Congressional objections and to resubmit them for approval in accordance with the Act.

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