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UNITED STATES OF AMERICA
GENERAL SERVICES ADMINISTRATION

Office of General Counsel
Washington, D C 20405



APR 13 1976

Honorable Philip W. Buchen
Counsel to the President
The White House
Washington, D. C. 20500

Dear Phil:

Enclosed please find the revised regulations concerning public access to the papers and materials of former President Richard Nixon and a legal explanation of those regulations. We have formally dispatched copies of the regulations to the President of the Senate and the Speaker of the House of Representatives this date.

The cooperation of you and your staff in assisting us in conducting the review of the constitutionality of the October 15, 1975, version of the regulations is deeply appreciated. Should you have any questions concerning the regulations, please don't hesitate to call either myself or Mr. Garfinkel.

Sincerely,

A handwritten signature in black ink, appearing to be "D. Young".

DONALD P. YOUNG
Acting General Counsel

Enclosure (3)



GSA

Wednesday 3/31/76

Meeting
3/31/76
10:30 a.m.

10:00 The following people will be coming to the meeting
at 10:30 this morning (Wednesday 3/31):

- Jack Eckerd
- Rex Lee
- Don Young (Acting General Counsel)
- Ken Duberstein (Director of Congressional Affairs)



THE WHITE HOUSE
WASHINGTON

Date March 27, 1976

TO: Phil Buchen

FROM: BARRY ROTH

ACTION:

Approval/Signature

Comments/Recommendations

For Your Information

REMARKS:

For your meeting next week with Jack
Eckerd and Rex Lee.



SUMMARY OF CHANGES

§105-63.104(k)

(k) Political activities. The term "political activities" shall mean those acts, motivated by a partisan interest or the desire to promote a specific political party or person, which have or are intended to have some effect on a constitutional or statutory duty, including any act which reflects an abuse of governmental power.

§105-63.401(c) Notice of openings

(c) At least 30 calendar days prior to the opening to public access of any integral file segment of the materials, the Administrator will publish notice in the Federal Register of the proposed opening.

§105-63.401-1(a)

Notwithstanding any other provision of this part, the incumbent President, at any time, may assert executive privilege.

§105-63.401-2(d)

Delete.





Department of Justice
Washington, D.C. 20530

ASSISTANT ATTORNEY GENERAL
CIVIL DIVISION

23 MAR 1976

REL:DJAnderson:mno

145-171-133

Honorable Jack Eckerd
Administrator, General Services
Administration
Washington, D. C. 20405

Dear Mr. Eckerd:

I am in receipt of Acting General Counsel Young's letter of March 16, 1976. We appreciate the opportunity to comment upon your proposed changes in the regulations which are to be resubmitted to Congress pursuant to the Presidential Recordings and Materials Preservation Act, 44 U.S.C. §2107. In my letter to you of January 16, 1976, I recommended that the pending regulations be withdrawn from the Congress in order to allow comprehensive consideration of the guidance provided by the three-judge court in its opinion of January 7, 1976.

You have proposed, following your review, two changes in the regulations which you intend to resubmit to Congress. The first change on page 3 of the regulations is, we believe, well taken and ameliorative of the concerns expressed by the court in its opinion regarding the protection of an individual's private political associations. The second change, to Section 105-63.401(c), appears to go part of the way toward curing the concerns expressed by the court in footnote 23 of its decision. However, in light of the court's conclusion "that Mr. Nixon's right to challenge particular archival decisions as respects his privacy interests is hardly a meaningful one without notification of decisions that might threaten those rights", *id.*, we believe that it would be useful to have the regulations provide for individualized notice to any individuals whose interests can, on the face of the material, be seen to be implicated in any dissemination. Cf., Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950).

D/G
Side
copy



We are deeply concerned, however, by the fact that other areas suggested by the court as ones where carefully drafted regulations could ameliorate what otherwise might be constitutional problems are not addressed by your proposed changes. For example, footnote 7 on page 13 of the opinion points out that all parties agree that Mr. Nixon is permitted to reproduce materials retained in government custody but that such a provision does not appear in the regulations. Another significant area for consideration is that referred to on pages 27 and 28 of the court's opinion, where it suggested that regulations broadening the restrictions on access by the public, to coincide with the basic set of donor-imposed restrictions formulated by previous Presidents, "could eliminate the basis for plaintiff's objections to public access."

At least two other areas of substantial importance were treated by the court's opinion. On pages 28-30, the court noted that archival practices might be instituted which would limit intrusion into material in which Mr. Nixon might have a privacy interest. It appears that the court's concern could be eliminated by some kind of practice which would provide for the screening of papers initially determined to be private on less than a "word-by-word" basis. To the extent that such a system would be consistent with sound archival principles, we believe that a provision establishing such a procedure would go a long way toward easing the defense of a constitutional challenge to the regulations. To the extent this is not consistent with archival principles, it should be remembered that the Fourth Amendment principles would govern. Alternatively, the court suggests that Mr. Nixon might be given some voice in the selection of archival personnel to inspect his private papers, which might be done through submitting to him a list of those considered by the Archives to be qualified.

Finally, the court expresses strong reservations toward the portion of your existing regulations which require archivists to refer to law enforcement officials materials reflecting an apparent violation of the law. While the court indicates no final determination as to the constitutionality of such a provision, it is clear



from the opinion (pp. 85-86), that the court entertains serious questions about such a practice. In view of the fact that the court found Mr. Nixon's privacy contention to be the most difficult to overcome (p. 88), we would suggest that serious consideration be given to deleting this provision of the regulations from the resubmission to Congress.

Not only will the regulations which are finally adopted under the Act be the subject of a future constitutional challenge in the courts, but the regulations in force when the appeal to the Supreme Court goes forward will undoubtedly be in the background of the arguments and final decision in the case. Mr. Nixon's counsel will no doubt be resourceful in attempting to persuade the Court that any deficiencies in the regulations submitted by GSA to Congress demonstrate the unworkability of the Act in any constitutional manner. Moreover, the attention given by the three-judge district court to regulations which it repeatedly acknowledged were not in force, suggests the likelihood that the Supreme Court may take a similar approach. The three-judge court dealt only with the facial validity of the statute because it was aware of "the Administrator's duty to scrupulously protect the constitutional rights of all parties concerned" (p. 31). It is clear that the Administrator cannot so protect these constitutional rights. The Supreme Court may well deal with the constitutionality of the statute in that context.

Sincerely,

REX E. LEE
Assistant Attorney General



Public Access Regulations

Presidential Recordings and Materials Preservation Act P.L. 93-526

Revised October 15, 1975



General Services Administration



Index of Changes to Public Access Regulations (P.L. 93-526)

<u>Section Reference</u>	<u>Short Title</u>	<u>Page number of change</u>
105-63.104(k)	Definition: Political activities	H-5, G-19a
105-63.401(c)	Notice of opening	H-6, G-20,22
105-63.401-1(d)	Executive privilege paragraphs)	H-8, G-23a,26a
105-63.401-2(d)	Referral of possible criminal violations (& referral paragraphs)	H-9,10,11, G-27,28,29,30



SUBPART 105-63.1 - GENERAL PROVISIONS

- 105-63.104 Definitions.
- 105-63.104(a) Presidential historical materials.
- 105-63.104(b) Private or personal materials.
- 105-63.104(c) Abuses of governmental power popularly identified under the generic term Watergate.
- 105-63.104(d) General historical significance.
- 105-63.104(e) Archivist.
- 105-63.104(f) Agency.
- 105-63.104(g) Administrator.
- 105-63.104(h) Initial archival processing.
- 105-63.104(i) Staff.
- 105-63.104(j) National security classified information.

SUBPART 105-63.4 - ACCESS BY THE PUBLIC

- 105-63.400 Scope of subpart.
- 105-63.401 Processing period; notice of opening.
- 105-63.401-1 Rights and privileges; right to a fair trial.
- 105-63.401-2 Segregation and review; Senior Archival Panel; Presidential Materials Review Board.
- 105-63.401-3 Notice of determinations.
- 105-63.401-4 Appeals.
- 105-63.401-5 Transfer of materials.



105-63.402 Restrictions.
105-63.402-1 Materials related to abuses of governmental power.
105-63.402-2 Materials of general historical significance unrelated to abuses of governmental power.
105-63.402-3 Periodic review of restrictions.
105-63.402-4 Appeal of restrictions.
105-63.402-5 Deletion of restricted portions.
105-63.402-6 Requests for declassification.
105-63.403 Reference room locations, hours, and rules.
105-63.404 Reproduction of tape recordings of Presidential conversations.
105-63.405 Reproduction and authentication of other materials.
105-63.406 Amendment of regulations.



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 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.

(k) Political activities. The term "political activities" shall mean those acts, motivated by a partisan interest or the desire to promote a specific political party or person, which have or are intended to have some effect on a constitutional or statutory duty, including any act which reflects an abuse of governmental power.



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; notice of opening.*

(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 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).

(c) At least 30 calendar days prior to the opening to public access of any integral file segment of the materials, the Administrator will publish notice in the Federal Register of the proposed opening.



(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) The Administrator will consider claims and petitions described in paragraphs (a) and (b) of this subsection which are filed after the expiration of 90 calendar days from the effective date if:



(1) In the opinion of the Administrator, the claimant or petitioner has demonstrated good cause for his failure to file a claim or petition within the prescribed 90-day period, and,

(2) the claim or petition actually is filed within 90 calendar days after:

(a) The claimant or petitioner becomes aware of the release of such materials, or;

(b) the claimant or petitioner has reasonable cause to file such claim or petition to prevent release of such material.

(d) Notwithstanding any other provision of this part, the incumbent President, at any time, may assert executive privilege.

§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 materials which reflect an apparent violation of law, the archivists shall bring the material to the attention of the Administrator for referral to the Department of Justice or any other appropriate agency of the United States which has responsibility for investigating a violation of law.]

(d) [(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.

(e) [(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.

(f) [(g)] The Presidential Materials Review Board ("Board") shall consist of the Administrator of General Services, who shall serve as Chairman, and the following members, appointed by the Administrator:

(1) The Archivist of the United States;

(2) The Librarian of Congress;

(3) An official of the Department of Justice, nominated by the Attorney General;
and

(4) 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. Three members of the Board shall constitute a quorum for the conduct of the Board's business, although each member of the Board may participate in all of the Board's decisions. Members of the Board may be represented by their delegates on those occasions when they are unable to attend the meetings of the Board. The Board may consult with officials of interested Federal agencies in formulating its decisions.

(g) [(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 prepare a final written decision, together with dissenting and concurring opinions, of the proper categorization and disposition of the pertinent materials. The Board's decision will be the final administrative determination. The Administrator will notify the petitioner by certified mail, return receipt requested, of the final administrative determination within 60 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.

- (h) [(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 prepare a final written decision, together with dissenting and concurring opinions, of the proper categorization and disposition of the pertinent materials. The Board's decision will be the final administrative determination. The Administrator will notify the petitioner by certified mail, return receipt requested, of the final administrative determination within 60 calendar days following receipt of the 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.

§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 materials 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 materials are authorized under criteria established by Executive order to be kept secret in the interest of national defense or foreign policy, provided that any question as to whether materials are in fact properly classified or are properly subject to classification shall be resolved in accordance with the applicable Executive order or as otherwise provided by law. However, the Administrator may waive this restriction when:

(i) (A) The requester is engaged in an 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, 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 will restrict access to any portion of materials determined to relate to abuses of governmental power when the release of those portions would constitute a clearly unwarranted invasion of personal privacy or result in the defamation of a living person: 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 portions thereof, is essential to an understanding of the abuse of governmental power.

8105-63.402-2 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 8105-63.402-1(a).



(b) The Administrator will 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 trade secrets and commercial or financial information obtained from a person and privileged or confidential; or

(2) constitute a clearly unwarranted invasion of personal privacy or result in the defamation of a living person; or

(3) disclose investigatory materials compiled for law enforcement purposes, but only when the disclosure of such records would:

(a) Interfere with enforcement proceedings;

(b) constitute an unwarranted invasion of personal privacy;

(c) 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;

(d) disclose investigative techniques and procedures, or;

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

§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 §105-63.401-2(e), which shall then have the responsibility for determining if the materials should remain restricted. The Senior Archival Panel may seek the recommendations 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 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, and consult with interested Federal agencies as necessary. The Board shall prepare a final written decision, including dissenting and concurring opinions, as to the continued restriction of all or part of the pertinent materials. The Board's decision shall be the final administrative determination. The Administrator will notify the petitioner of the final administrative determination within 60 calendar days following receipt of such petition.

§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 ensure 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.

(d) Within two years of the effective date, the Presidential Materials Review Board shall make a written report to the Administrator which shall evaluate the advisability of continuing the restriction imposed in paragraph (c) above. The Administrator will then determine if the restriction prescribed in paragraph (c) of this section shall be retained, revoked or modified to permit controlled reproduction of the reference copies of the tape recordings.

§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.



Legal Explanation of
Public Access Regulations

Presidential Recordings
and Materials
Preservation Act
P.L. 93-526



General Services Administration



LEGAL EXPLANATION OF PROPOSED REGULATIONS

The regulations proposed by the General Services Administration in accordance with Section 104(a) of the Presidential Recordings and Materials Preservation Act (the "Act") are proposed as an integral portion of a new Part 105-63 of Title 41, Code of Federal Regulations. The pertinent regulations are those setting forth the definitions (§105-63.104) and provisions governing public access (Subpart 105-63.4).

The review which resulted in the current version of the regulations was prompted by the decision of the three-judge panel of the Federal District Court for the District of Columbia in Nixon v. Administrator of General Services (January 7, 1976, Civil Action No. 74-1852). The constitutional issues raised by the court with regard to the proposed regulations are discussed in the attached memorandum.

Revised March 11, 1976.



§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.

EXPLANATION:

The Act provides, in Section 101(b)(1), for the Administrator's possession and control of "the Presidential historical materials of Richard M. Nixon, covering the period beginning January 20, 1969, and ending August 9, 1974." Section 101(b)(2) states that the term "historical materials" has the meaning given it by 44 U.S.C. 2101, which contains the definitions applicable to the Presidential Libraries Act.

The Presidential Libraries Act definition is therefore circumscribed and limited in three fundamental respects: The historical materials must be "Presidential" in character; they must be those "of Richard M. Nixon"; and they must fall within the prescribed period.

"Presidential" materials are described in the regulations as those associated with ". . . constitutional and statutory duties and political activities as President and retained or appropriate for retention as evidence of or information about these duties and activities." Identification of such materials to Richard M. Nixon is reflected in



the language "...made or received by former President Nixon or by members of his staff..." The inclusion of materials generated by staff in the White House Office is traditional and clearly contemplated by the scope and purposes of the Act.

There are a number of specific exclusions from the definition of Presidential historical materials, including, for purposes of reference, "private or personal materials." These are defined (§105-63.104(b)) as those materials "relating solely to a person's family or other nonpublic activity" and having "no connection" with his official and political activities. In effect, this affirmatively restates the converse or reciprocal of the concept "Presidential", and identifies an important segment of materials not therefore subject to the Act.

Also excluded are "official records of an agency of the government, stocks of publications, processed documents and stationery; and extra copies of documents produced only for convenience of reference" Official records of an agency, as defined in 44 U.S.C. 3301, are by virtue of that authority the property of the Government and subject to the Administrator's custody and control. The remaining exclusions for stocks of publications, processed documents and stationery and extra copies are based on identical exclusions from the definition of records in 44 U.S.C. 3301. Extra copies which bear annotations or other distinguishing features, however, would remain within the coverage of the regulations.



(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.

EXPLANATION:

The definition of "private or personal materials" provides a means of identifying, for purposes of the regulations, those historical materials which are not "Presidential" in character, and therefore not subject to substantive provisions of the Act. This distinction is important to obviate potential constitutional problems which might be raised by the taking of a purely private or personal item in which the public does not have a defensible interest. Although Section 105(c) of the Act provides for compensation for the taking of private property, that taking must be for a valid public purpose to be within generally acknowledged constitutional standards.

Materials determined by archivists to constitute "private or personal materials" would be returned to Mr. Nixon or, when appropriate and after notice to him, to the former staff member having the primary proprietary or commemorative interest in the materials (§105-63.401-5). Examples of materials which might fall within this category include correspondence between family members involving family relationships, private correspondence, personal or family financial papers, medical records, and religious communications.

A document or tape reflecting both private or personal matters and public or political matters would not fall within the definition of "private or personal materials" and would not thereby qualify for return. However, those portions of the document determined to be purely private or personal would be subject to permanent restriction from public access (§105-63.401-5(c)).



Even though it did not fall within the strict definition of "private or personal materials" because, for example, it contained some reference to official or political affairs, an item might still be subject to transfer in accordance with Section 104(a)(7) of the Act if the archivists determined that the item was neither related to "abuses of governmental power popularly identified under the generic term 'Watergate'," nor otherwise of "general historical significance." (§105-63.401-5(a)).

The concept "private or personal" should be distinguished from the constitutional "right of privacy." The former refers solely to a proprietary claim which would require transfer from the custody and control of the Administrator to the custody and control of some other person. The latter refers to a claim that specified materials should be withheld from public view on grounds founded in the Bill of Rights. Therefore, a claim of privacy could be asserted by an individual independent of any claim of right of custody or control.



(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.

EXPLANATION:

In proposing regulations to provide public access to the Presidential historical materials, Section 104(a) of the Act requires the Administrator to "take into account" seven factors. The first of these factors is "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'." The approach of the regulations in accommodating this need is to provide priority processing and maximum access to the Watergate related materials. This will permit historians, journalists, researchers and other members of the public to make their own evaluations and draw their own conclusions with respect to these matters, rather than relying upon a Government agency's interpretation of the facts. This is consistent with both the fundamental preservation and access objectives of the Act, and the traditional role of the National Archives as a provider of source materials for researchers rather than as an interpreter of those materials.

In describing "Watergate," the statute speaks of a "generic" concept and requires reference to that which is "popularly identified" by the term. The definition in the regulations is based on the premise that the public identification of this term is best reflected by reference to the charter of the Senate Select Committee on Presidential



Campaign Activities, the charter of the Watergate Special Prosecution Force, and 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. Archivists assigned to identify materials related to abuses of governmental power will review the charters and the Articles of Impeachment, and actions subsequent thereto, to determine whether the subject matter of a particular item corresponds to any alleged act, or falls within any of the broad categories of abuses of governmental power enumerated therein.

The definition of materials related to abuses of governmental power is significant for two reasons. First, the Administrator will give priority to the processing of such materials (§105-63.401(b)). Second, materials related to abuses of governmental power are subject to fewer restrictions on access than those controlling materials not so designated.

Because of the broad coverage apparently intended by the Congress in adopting the term "abuses of governmental power," the definition of the term extends to "alleged acts, whether or not corroborated by judicial, administrative or legislative proceedings." The archivists, consequently, will segregate and give priority in initial archival processing to materials concerning both judicially "proven" or otherwise formally established abuses and alleged abuses.

Suggestions of the kinds of materials which the archivists are likely to identify for special treatment as "abuses of governmental power" are reflected in the charters and actions of the relevant investigative bodies:

1. Senate Resolution 60, February 7, 1973. Senate Resolution 60, adopted on February 7, 1973, established a select committee of the United States Senate to conduct an investigation and study, among other "matters and questions":



(1) The breaking, entering, and bugging of the headquarters or offices of the Democratic National Committee in the Watergate Building in Washington, District of Columbia;

* * * * *

(7) Any efforts to disrupt, hinder, impede, or sabotage in any way any campaign, canvass, or activity conducted by or in behalf of any person seeking nomination or election as the candidate of any political party for the Office of President of the United States in 1972 by infiltrating any political committee or organization or headquarters or offices or home or whereabouts of the person seeking such nomination or election or of any person aiding him in so doing, or by bugging or eavesdropping or wiretapping . . . or by exercising surveillance over the person . . . or by reporting to any other person or to any political committee or organization any information obtained by such infiltration, eavesdropping, bugging, wiretapping, or surveillance;

* * * * *

(9) Any fabrication, dissemination, or publication of any false charges or other false information having the purpose of discrediting any person seeking nomination or election as the candidate of any political party to the Office of President of the United States in 1972; and

* * * * *

(14) Whether any books, checks, canceled checks, communications, correspondence, documents, papers, physical evidence, records, recordings, tapes, or materials relating to any of the matters or questions the select committee is authorized and directed to investigate and study have been concealed, suppressed or destroyed by any persons acting individually, or in combination with others and, if so, the identities and motives of any such person or groups of persons



2. Order No. 551-73, Department of Justice, Issued November 2, 1973. Order No. 551-73 of the Department of Justice, issued November 2, 1973, established the Office of Watergate Special Prosecution Force under the direction of the Special Prosecutor appointed by the Attorney General. The Appendix to Order No. 551-73 provides that:

The Special Prosecutor shall have full authority for investigating and prosecuting offenses against the United States arising out of the unauthorized entry into Democratic National Committee Headquarters at the Watergate, all offenses arising out of the 1972 Presidential Election for which the Special Prosecutor deems it necessary and appropriate to assume responsibility, allegations involving the President, members of the White House staff, or Presidential appointees, and any other matters which he consents to have assigned to him by the Attorney General.

3. Report of the House Committee on the Judiciary, No. 93-1305, "Impeachment of Richard M. Nixon, President of the United States." Report No. 93-1305 of the House Committee on the Judiciary reported to the House of Representatives three Articles of Impeachment adopted by the Committee.

Article I charges the President with obstructing justice in connection with the Watergate break-in investigation, personally, and through his subordinates, by:

(1) making or causing to be made false or misleading statements to lawfully authorized investigative officers and employees of the United States;

* * * * *

(4) interfering or endeavoring to interfere with the conduct of investigations by the Department of Justice of the United States, the Federal Bureau of Investigation, the Office of Watergate Special Prosecution Force, and Congressional Committees;



(5) approving, condoning, and acquiescing in, the surreptitious payment of substantial sums of money for the purpose of obtaining the silence or influencing the testimony of witnesses, potential witnesses or individuals who participated in such unlawful entry and other illegal activities; and

* * * * *

(8) making false or misleading public statements for the purpose of deceiving the people of the United States into believing that a thorough and complete investigation had been conducted with respect to allegations of misconduct on the part of personnel of the Executive Branch of the United States and personnel of the Committee for the Re-election of the President, and that there was no involvement of such personnel in such misconduct.

Article II charged Mr. Nixon with violation of his Presidential oath by disregarding the constitutional rights of citizens and by misuse of governmental agencies, including specific allegations that he had:

(1) . . . endeavored to obtain from the Internal Revenue Service . . . confidential information contained in income tax returns for purposes not authorized by law, and to cause . . . income tax audits or other income tax investigations to be initiated or conducted in a discriminatory manner;

(2) . . . misused the Federal Bureau of Investigation, the Secret Service, and other executive personnel . . . by directing or authorizing such agencies or personnel to conduct or continue electronic surveillance or other investigations for purposes unrelated to national security, the enforcement of laws, or any other lawful function of his office; he did direct, authorize, or permit the use of information obtained thereby for purposes unrelated to national security, the enforcement of laws, or any other lawful function of his office; and he did direct the concealment of certain records made by the Federal Bureau of Investigation of electronic surveillance; and



(3) . . . authorized and permitted to be maintained a secret investigative unit within the office of the President, financed in part with money derived from campaign contributions, which unlawfully utilized the resources of the Central Intelligence Agency, engaged in covert and unlawful activities, and attempted to prejudice the constitutional right of an accused to a fair trial.

Article III charged that Mr. Nixon:

. . . in violation of his constitutional duty to take care that the laws be faithfully executed, has failed without lawful cause or excuse to produce papers and things as directed by duly authorized subpoenas issued by the Committee on the Judiciary of the House of Representatives on April 11, 1974, May 15, 1974, May 30, 1974, and June 24, 1974, and willfully disobeyed such subpoenas.



(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.

EXPLANATION:

Among the other factors which the Administrator is required to take into account in proposing these regulations is "the need to provide public access to those materials which have general historical significance," and "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 /abuses of governmental power/ and are not otherwise of general historical significance."

The definition of "general historical significance" calls for a judgment by an archivist as to whether an item is "of a quality sufficient to warrant retention by the United States" as evidence of or information about the official duties or political activities of the President.

No specific definition of "general historical significance" currently exists in any United States statute. The legislative provisions governing disposal of Federal records, however, provide some guidance by analogy. 44 U.S.C. 3303 describes those records which should be considered for disposal as those ". . . that do not appear to have sufficient administrative, legal, research, or other value to warrant their further preservation by the Government . . ." (Emphasis added.) In practice, archivists routinely apply this definition to determine which records the General Services Administration will authorize for disposal, and, conversely, which records must be retained. The regulations under the Act adopt these criteria for determining which Presidential historical materials do not warrant retention by the Government. The archivists will make this



determination as the second step in their segregation procedure, after identifying private or personal materials. They will then segregate materials neither relating to abuses of governmental power, nor otherwise having general historical significance. All remaining materials within the Administrator's custody will be retained.

It is important to illustrate the interrelationship between the two segregation steps. A primarily personal item might initially be determined to be a "Presidential historical material" because of an incidental reference to an official or political matter, or because the item evidenced a matter of historical importance primarily to the individual involved. However, so long as it was not Watergate-related, that item could be determined to be not of general historical significance, and, consequently, transferred under §105-63.401-5.

In summary, the regulations employ this definition to identify a class of materials (in addition those relating to abuses of governmental power) which will be retained and open to public access. In accordance with Section 104(a)(7) of the Act, however, materials which are not likely to be related to abuses of governmental power and are not otherwise of general historical significance may be transferred to Richard M. Nixon, or his heirs. Although the Act is not specific in this respect, the Administrator has interpreted this provision to authorize such transfer "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." (§105-63.401-5). Examples of items which might be transferred under this provision include autographed photographs and commission certificates given to staff members.



(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.

EXPLANATION:

The Act assigns to the Administrator, directly or by implication, the task of reviewing and segregating large quantities of material. The Administrator is assigned similar tasks regarding records of the United States Government in the custody of the National Archives and Records Service and materials donated to Presidential archival depositories (44 U.S.C. Chap. 21). Traditionally, the Administrator has delegated responsibility for review of records and other documents and materials to the Archivist of the United States, who, in turn, has assigned the duty to his archival staff.

In practice, initial segregation and review often may involve support staff in addition to the archivists. Support personnel will include, for example, stenographers, technicians, archival assistants, and attorneys. Particularly in the processing of tape recordings, stenographers and attorneys will be involved in listening to the tape recordings and assisting in transcription and legal review. Significantly, however, the responsibility for initial determinations on segregation of materials under §105-63.401-2 will rest with the archivists, not with support personnel or the Administrator.



(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.

EXPLANATION:

The definition of "agency" in the regulations derives from the definition contained in the Freedom of Information Act, as amended (5 U.S.C. 552(e)). The specific addition of the White House Office for purposes of §105-63.302, guarantees for that office the same rights of immediate access to the materials in the Administrator's custody for lawful Government use as Federal agencies and departments in the executive branch, such rights to become effective upon the lifting of the court orders barring implementation of the Act.



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

EXPLANATION:

"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.

(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.

EXPLANATION:

Prior to opening the materials for public access, the regulations require that the Administrator assign archivists to review the materials in his custody and control, and to segregate specified portions of them. The regulations (§105-63.401-2) require archivists to segregate materials which are private or personal; which neither relate to abuses of governmental power nor otherwise have general historical significance; and which are subject to restriction from public access. In thereby performing the tasks required in §105-63.401-2 and otherwise preparing the materials for public access and use by researchers, the archivists will subject the materials to "initial archival processing".

Such processing is professional archival practice, is routine at Presidential Libraries and other archival facilities, and is necessary to protect the rights and privileges guaranteed by the Act and the regulations. The list in the definition describes the functions which the archivists will undertake during the initial processing period: In order to begin to make significant portions of the materials available for public access at the earliest possible date, the Administrator will open each integral file segment of the materials upon completion of initial archival processing on that segment (§105-63.401(b)).



(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.

EXPLANATION:

Many of the "Presidential historical materials" will have been produced or received by members of the President's staff, rather than by the President himself. The definition of "staff" adopted in the regulations relies upon the traditional indicia of Presidential staff, namely, those persons funded out of or detailed to the White House Office. Also included, however, are three other categories of persons. First it includes the staff of the Domestic Council, which, although established formally by Reorganization Plan No. 2 of 1970, did not separate its files from the files of the President. Second, it includes persons otherwise designated as an assistant to the President, in connection with their service in that capacity. The latter phrase is intended to identify, among others, the Director of the Office of Management and Budget to the extent of his service as a designated assistant to former President Nixon, and the so-called super-Cabinet officers, to the extent to which they made or received materials in their capacities as designated assistants to the President. Third, it includes all other persons whose files were sent to the White House Central Files Unit or Special Files Unit, but only for purposes of those files.

The definition excludes other portions of the Executive Office of the President, such as the Office of Management and Budget, whose materials are regarded as Federal records and thereby otherwise subject to the custody and control of the Administrator.



(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.

EXPLANATION:

Executive Order 11652, "Classification and Declassification of National Security Information and Material" (37 F.R. 5209) sets forth the law governing national security classified material. Executive Order 11652 establishes three classification categories - "Top Secret," "Secret," and "Confidential" - for material which "because it bears directly on the effectiveness of our national defense and the conduct of our foreign relations, must be subject to some constraints for the security of our Nation and the safety of our people and our allies." The Executive Order designates those offices within the executive branch of the Government which have the authority originally to classify information or material, and provides for declassification of material which no longer needs the protection of a national security classification.



(k) Political Activities. The term "political activities" shall mean those acts, motivated by partisan interest or the desire to promote a specific political party or person, which have or are intended to have some effect on a constitutional or statutory duty, including any act which reflects an abuse of governmental power.

Explanation:

Both the definition of "Presidential historical materials" (§105-63.104(a)) and the definition of "Private or personal materials" (§105-63.104(b)) contain a reference to an individual's "political activities as President" or "as a member of the President's staff." The purpose of the definition of "political activities" is to assure the protection of the rights of Free Speech and Assembly of individuals whose records of political activities may be under the custody of the Administrator pursuant to the Act. In the event that an individual's partisan political activities evince an effect on the constitutional or statutory duties of the President as national leader, or reflect an abuse of governmental power (as defined in §105-63.104(c)), records of such political activities will be considered "Presidential historical materials" and will be retained by the Government. To the extent that records of the exercise of political influence do not reflect an effect on the constitutional or statutory duties of the President, those records will be considered "Private or personal materials" and will be segregated for return to the individual with the primary proprietary interest.



§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). (c) At least 30 calendar days prior to the

opening to public access of any integral file segment of the materials, the Administrator will publish notice in the Federal Register of the proposed opening.

EXPLANATION:

The tasks to be performed during the processing period, both routine and unique to the Nixon materials, are the heart of the implementation of the public access provisions of the Presidential Recordings and Materials Preservation Act.

Paragraph (a) of this section postpones the undertaking of initial archival processing of the materials for 30 calendar days from the effective date of the regulations. The purpose of a 30-day grace period is to permit any individual who believes that the archival processing in and of itself will violate a constitutional or other legal right, including the right of privacy, to take such steps as he deems appropriate to guarantee this right before any archivist has examined and



processed any of the materials. For example, an individual, including former President Nixon, who believes that the examination by an archivist of specified materials would violate his right of privacy, could seek declaratory relief in a court of appropriate jurisdiction that the materials are in fact private or personal and should be removed from the custody and control of the Administrator before any archivist examines them. The only permissible activity that may take place with respect to the materials during these 30 days will be accesses by former President Nixon, Federal agencies, and by other persons for use in judicial proceedings, as authorized under Section 102 of the Act.

Paragraph (b) of this section provides for the commencement, after the 30-day period, of initial archival processing of the materials, except for those materials which a court is in the process of considering or has determined to be beyond the jurisdiction of the Administrator. To accomplish the most expeditious opening of materials, each integral file segment of the materials will be opened upon the completion of its initial archival processing. While "integral file segment" is not defined in the regulations and is not based on quantitative formulae, the term refers to a portion of processed materials, having a logical integrity, whose opening to the public, as determined by the processing archivist, will not impede the processing, including the arrangement and preparation of finding aids, of other segments of the materials. For example, while in many instances an integral file segment may consist solely of the office files of a particular White House staff member, in some instances it may include related materials which had been transferred to the White House Central Files Unit; and in other instances a staff member's office files may be divided conveniently into separate integral file segments on chronological, functional, or other bases.

Further, this paragraph provides that the Administrator will give priority to the processing and opening of materials relating to abuses of



governmental power. In practice, the archivists will rely on three sources in determining which of the materials are most likely to include materials related to abuses of governmental power: (1) the investigative efforts of the Watergate Special Prosecution Force, the Senate Select Committee on Presidential Campaign Activities and the Articles of Impeachment adopted by the House Committee on the Judiciary; (2) the nature of files that are most likely to contain sensitive materials, e.g., the office files of staff members whose names are associated with the Watergate investigations and those files maintained in the White House Special Files Unit; and (3) the archivists' initial examination of representative materials. The White House tapes will be among those materials given priority treatment in processing and opening.

Paragraph (c) provides for general notice, through publication in the Federal Register of the proposed opening to public access of integral units of the Nixon materials. Under paragraph (c), the Administrator will delay 30 days after the archivists complete processing on an integral file segment, or group of files or file segments, before permitting the public to have access to the processed materials. During the 30 day period, any individual may take such action as he deems necessary to protect his rights as regards the materials proposed to be opened.



§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) *The Administrator will consider claims and petitions described in paragraphs (a) and (b) of this subsection which are filed after the expiration of 90 calendar days from the effective date if:*

(1) *In the opinion of the Administrator, the claimant or petitioner has demonstrated good cause for his failure to file a claim or petition within the prescribed 90-day period, and,*

(2) *the claim or petition actually is filed within 90 calendar days after:*

(a) *The claimant or petitioner becomes aware of the release of such materials, or:*

(b) *the claimant or petitioner has reasonable cause to file such claim or petition to prevent release of such materials.*

(d) Notwithstanding any other provision of this part, the incumbent President, at any time, may assert executive privilege.

G-23a



EXPLANATION:

Among the factors that the Administrator is required to take into account in providing public access to the Presidential historical materials of the Nixon Administration is "the need to protect any party's opportunity to assert a legally or constitutionally based right or privilege which would prevent or otherwise limit access to such recordings and materials." To give affected parties the opportunity to make assertions of right or privilege, paragraph (a) of this subsection calls for a mandatory 90-day period following the effective date of the regulations for the Administrator to receive claims filed by such parties. No integral file segment will have been processed and opened for public access prior to 90 days from the effective date the regulations.

This opportunity to assert such a claim is in addition to the right to seek remedial action before the commencement of archival processing inherent in the 30-day grace period provided in §105-63.401(a). However, unlike the 30-day grace period, during the last 60 days of the 90-day period for asserting a right or privilege, archivists will be engaged in initial archival processing of the materials.

More significantly, this provision reflects an administrative procedure in which the Administrator is committed to an affirmative role in considering and rendering the final administrative determination on the claim. Upon receipt of a claim, the Administrator will require the immediate segregation and examination of the specified materials so that he might consult with other Federal agencies, including the Department of Justice, to evaluate the legal validity of the claim. The Administrator will then notify the claimant of his decision, which is the final administrative determination on the claim.

When that determination is adverse to the claimant, the Administrator will prohibit public access to the pertinent materials for at least 30 days from the claimant's receipt of the Administrator's decision. During this period, the claimant has an opportunity to pursue whatever



additional remedies, presumably judicial review, that may be available to prevent public access before his alleged right or privilege is violated. Absent judicial restraint, pertinent materials that have been processed will be opened for public access at the end of the 30-day period.

Another factor that the Administrator is required to take into account is "the need to protect every individual's right to a fair and impartial trial." Accordingly, the Administrator is obligated to take reasonable steps to assure that materials opened to the public not contain information which, if disseminated and publicized, would jeopardize an individual's right to a fair and impartial trial. However, the Administrator and the archivist cannot be aware of each individual presently under indictment in a Federal, State, or local court whose prosecution might be affected by the release of any of the information contained in the materials. Much less can the Administrator and the archivists be aware of prospective indictments either being sought or to be sought by prosecutors throughout the country. Therefore, paragraph (b) of this subsection calls for a mandatory 90-day period following the effective date of the regulations for the Administrator to receive petitions from officers of Federal, State, or local courts, or other affected individuals, which state that public access to specified materials will have an adverse effect on an individual's right to a fair and impartial trial.

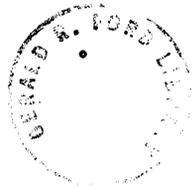
As in the case of claims regarding threatened rights or privileges, the Administrator will segregate and examine the pertinent materials as a prelude to consultation with interested Federal agencies, including the Department of Justice. The Administrator will then notify the petitioner of his decision, which is the final administrative determination on the petition. Again, when the Administrator's determination is adverse to the petitioner, public access to the pertinent materials will be prohibited for at least 30 days from the petitioner's receipt of the decision. During this period the petitioner has an opportunity to



pursue whatever additional remedies, presumably judicial review, that may be available to prevent public access before an individual's right to a fair and impartial trial allegedly is violated. Absent judicial restraint, pertinent materials that have been processed will be opened for public access at the end of the 30-day period.

Because the archivists may very well have completed the initial archival processing of some integral file segments of the materials, including materials relating to abuses of governmental power, after 90 days from the effective date of the regulations, the Administrator cannot guarantee claims of rights or privileges or petitions regarding fair and impartial trials will not have been opened for public access. However, paragraph (c) of this subsection prescribes those instances in which the Administrator will consider claims and petitions of right or privilege even after the expiration of the 90-day period.

The claimant or petitioner must give proof of the existence of two factors before the Administrator will consider a claim or petition received after the 90-day period: (1) Good cause for his failure to file a timely claim or petition, and (2) that once he became aware of the release or potential release of the materials in question, he filed his claim or petition within 90 calendar days thereafter.



Paragraph (d) makes clear that the public access regulations are not intended to, and do not attempt to abridge the incumbent President's constitutional right to assert executive privilege (also known as "executive confidentiality") to protect the deliberative process behind decisions of the incumbent President and otherwise to protect the public interest.



(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 materials which reflect an apparent violation of law, the archivists shall bring the material to the attention of the Administrator for referral to the Department of Justice or any other appropriate agency of the United States which has responsibility for investigating a violation of law.]

(d) [(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.

(e) [(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.

(f) [(g)] The Presidential Materials Review Board ("Board") shall consist of the Administrator of General Services, who shall serve as Chairman, and the following members, appointed by the Administrator:

(1) The Archivist of the United States;

(2) The Librarian of Congress;

(3) An official of the Department of Justice, nominated by the Attorney General; and

(4) 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. Three members of the Board shall constitute a quorum for the conduct of the Board's business, although each member of the Board may participate in all of the Board's decisions. Members of the Board may be represented by their delegates on those occasions when they are unable to attend the meetings of the Board. The Board may consult with officials of interested Federal agencies in formulating its decisions.

(g) [(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 prepare a final written decision, together with dissenting and concurring opinions, of the proper categorization and disposition of the pertinent materials. The Board's decision will be the final administrative determination. The Administrator will notify the petitioner by certified mail, return receipt requested, of the final administrative determination within 60 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.

- (h) [(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.

EXPLANATION:

In addition to the routine functions associated with initial archival processing as defined in §105-63.104(h), the distinctive treatment afforded the Nixon Presidential historical materials as a result of the Act requires that the archivists undertake two unique efforts during the processing period. The first is that the archivists must identify and segregate material which they determine to be "private or personal." The second is that the archivists must identify and segregate materials neither relating to abuses of governmental power nor otherwise having general historical significance.

This is the first time these processes will have been performed on Presidential materials by GSA archivists.

The archivist, under paragraph (c) of this subsection, will also have the responsibility for identifying and segregating those materials subject to the particular restrictions authorized under §105-63.402. Although the restrictions pertinent to materials relating to abuses of governmental power are kept to a minimum consistent with the provisions of the Act and other



Federal law, each tape and each document must be examined individually, word for word, to protect the national security, a constitutional or other legal right or privilege, or the reputation of individuals not involved in the abuses or other historical questions at which the Act is directed.

As is the practice in the other archival depositories of the National Archives and Records Service, each file folder or container from which restricted materials have been removed will have at the front a notice of withdrawal. The notice of withdrawal will put the researcher on notice that materials formerly included in the file folder or container have been restricted and removed. It will briefly describe the restricted materials and state the basis for the restriction as provided in §105-63.402. The notice of withdrawal provides the researcher with the information necessary for him to appeal the restriction of materials, as prescribed in §105-63.402-4. It has long been the position of the National Archives and Records Service that Federal Register notice of each restriction imposed on materials within its custody is a physical impossibility, encompassing as it does millions of restricted documents among its vast holdings.

Previous versions of the proposed regulations included a provision for archivists to refer materials which reflect an apparent violation of law to an appropriate Federal agency, for the purpose of investigating potential violations of law. The provision did not require a properly authorized search warrant prior to referral of material for investigation. To avoid the possibility of an unconstitutional search of materials which may be an individual's personal property, rather than the property of the Government, the provision for referral of materials for investigation has been deleted.

Because of the complexities involved in the initial determinations required of the archivists in paragraphs (a), (b), and (c) of this subsection, the regulations establish review panels to which very difficult determinations, or those involving interpretation of the regulations or of far-reaching precedential value, may be referred. The first body to which these matters may be referred, as provided in paragraph (e) of this subsection, is the Senior Archival Panel. This Panel is composed of three archivists who have been selected by the Archivist of the United States, from among



In accordance with paragraph (g) of this subsection, the Administrator will serve as Chairman of the Board, and he will convene the Board when he is aware of matters requiring its resolution. Except in those instances when the Board makes recommendations to the Senior Archival Panel on the imposition of restrictions, the Board's product will be in the form of written decisions which constitute final administrative determinations. In formulating these decisions, the Board may consult with those Federal agencies having subject matter interest in the materials or expertise in the legal or policy issues raised.

Paragraph (h) of this subsection provides that when the certified matter before the Board is a question of whether specified materials are private or personal, or whether they are not related to abuses of governmental power and do not otherwise have general historical significance, the Board will issue the final administrative determination on the question. Therefore, in order to provide an administrative procedure for interested parties to present their viewpoint, without duplicating the Board's consideration of the same matter on a future appeal, the Administrator will publish notice in the Federal Register of the Board's prospective consideration of matters certified to it by the Senior Archival Panel when the final administrative determination may result in the transfer of certain materials from the Administrator's custody and control.

In order to guard against a violation of the right of privacy of persons who may have a proprietary or commemorative interest in the pertinent materials if the final administrative determination finds them private or personal, or not related to abuses of governmental power and not otherwise of general historical significance, the Federal Register notice will be limited to a generic listing and description of the materials under consideration. Interested parties may petition the Administrator setting forth their views in writing, within 30 days of the publication of notice. After that period, the Board, having received all written public comment from the Administrator, will meet to formulate its decision.



The Board will make a written decision including dissenting and concurring opinions, of the proper categorization and disposition of the pertinent materials. The Board's decision will be the final administrative determination. The Administrator will notify all petitioners of the final administrative determination within 60 calendar days of receipt of the petition. If that determination will result in the transfer of certain materials from his custody (§105-63.401-5), the Administrator will not transfer any materials for at least 30 days from the petitioners' receipt of notice of the final determination. During that time, interested parties may seek non-administrative legal remedies, presumably judicial review, to prevent the Administrator from implementing his decision.

Paragraph (i) of this subsection provides that the Senior Archival Panel may also certify to the Board initial determinations concerning the imposition of restrictions on certain materials. However, because of the impracticality of publishing notice of all restrictions in the Federal Register, informed public intervention is not possible. Therefore, the Board's product in these circumstances will be recommendations to the Senior Archival Panel. The Panel then retains the responsibility for making what is still the initial, and not the final, archival determination. As provided in §105-63.402-4, the Board also makes final administrative determinations regarding disputed restrictions, when the challenge to an existing restriction is raised by a researcher who has notice of the restriction because of the notice of withdrawal located in the front of affected file folders or containers.



§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.

EXPLANATION

In the vast majority of instances, determinations of whether certain materials are private or personal, or are not related to abuses of governmental power or otherwise of general historical interest, will be made by an archivist or Senior Archival Panel as initial archival determinations and not certified to the Presidential Materials Review Board for an eventual final administrative determination. Because an initial determination that materials are private or personal, or are not related to abuses of governmental power or otherwise of general historical significance, will result in the subsequent transfer of these materials from the Administrator's custody and control, it is necessary that interested members of the public who wish to dispute the prospective transfer have an administrative procedure available to do so.

In those instances in which the implementation of an initial archival determination or a final administrative determination will result in a transfer of materials from the Administrator's custody and control, he is required to publish notice in the Federal Register to that effect. As in the case of certified determinations before the Board, in order to protect privacy considerations the notice will consist of only a generic listing and description of the materials the Administrator proposes to transfer.



§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 prepare a final written decision, together with dissenting and concurring opinions, of the proper categorization and disposition of the pertinent materials. The Board's decision will be the final administrative determination. The Administrator will notify the petitioner by certified mail, return receipt requested, of the final administrative determination within 60 calendar days following receipt of the 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.

EXPLANATION:

Two distinct parties may potentially dispute an initial archival determination. First, an interested member of the public may dispute an initial determination which will result in the subsequent transfer of certain materials from the custody and control of the Administrator. Therefore, paragraph (a) of this subsection provides that any person may appeal the decision to transfer materials initially determined to be private or personal, or not related to abuses of powers or otherwise of general historical significance. The written



appeal must be received by the Administrator no later than 30 days from the publication of notice of an initial archival determination prescribed in §105-63.401-3.

Second, former President Nixon may dispute a determination that materials are not private or personal, or are related to abuses of power or otherwise of general historical significance, thereby preventing their transfer to him. Because there is no Federal Register notice of determinations which will not result in the transfer of materials from the Administrator's custody and control and such determinations are not otherwise formally communicated to Mr. Nixon, his right of appeal cannot be limited to a certain time period. As he is likely to become aware that processed materials have been determined to be Presidential historical materials during the course of his exercising his own right of access, paragraph (b) of this subsection provides that former President Nixon, his agent or heirs, may appeal an initial archival determination under paragraphs (a) or (b) of §105-63.401-2 at any time.

Upon the Administrator's receipt of a petition appealing an initial archival determination, the archivists shall submit the pertinent materials, or representative examples of them, to the Presidential Materials Review Board. The Board will make a written decision, including dissenting and concurring opinions, of the proper categorization and disposition of the pertinent materials. The Board's decision will be the final administrative determination. The Administrator will notify all petitioners of the final administrative determination within 60 calendar days of receipt of the petition. Implementation of any final administrative determination that will result in the subsequent transfer of certain materials must not be undertaken for at least 30 days from the petitioners' receipt of such final determination.



§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.*

EXPLANATION:

Pursuant to Section 104(a)(7) of the Act, the regulations require the Administrator to transfer to former President Nixon or his heirs, or when appropriate, to the former staff member having primary proprietary or commemorative interest, those materials determined to be private or personal, or neither related to abuse of government power nor otherwise of general historical significance. This, of course, is only to be done after notice requirements and appeals have been



processed and completed, and in the absence of contravening court orders. The reference to former staff members recognizes the presence of certain items such as autographed books and photographs and commission certificates among those materials presently in the Old Executive Office Building, which either belong or have primary value to a former Nixon staff member. However, GSA will provide Mr. Nixon notice before transferring materials to anyone other than him, so that he might have the opportunity to dispute this decision.

Many individual tapes or documents may contain both private or personal material, or material having no general historical significance, that is not physically segregable from Presidential historical materials. In these instances, paragraph (c) of this subsection provides that GSA will transfer copies of the pertinent materials to Mr. Nixon, his heirs or former staff members, while retaining custody of the original materials. The Administrator will restrict permanently those portions of the materials which are determined to be private or personal.



§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 materials are authorized under criteria established by Executive order to be kept secret in the interest of national defense or foreign policy, provided that any question as to whether materials are in fact properly classified or are properly subject to classification shall be resolved in accordance with the applicable Executive order or as otherwise provided by law. 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, 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 will restrict access to any portion of materials determined to relate to abuses of governmental power when the release of those portions would constitute a clearly unwarranted invasion of personal privacy or result



in the defamation of a living person: 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 portions thereof, is essential to an understanding of the abuse of governmental power.

EXPLANATION:

The sections of the regulations devoted to restrictions represent a balance between the need to provide public access to the materials at the earliest reasonable date, and the need to protect the rights and interests of individuals and the Government. During the processing period, archivists will segregate materials subject to restriction using the criteria set forth in §105-63.402.

The restrictions in §105-63.402-1 apply to materials related to abuses of governmental power, and are narrower than the restrictions set forth in §105-63.402-2, which apply to materials of general historical significance unrelated to abuses of governmental power.

Under subparagraph (a)(1) of this subsection, the Administrator will restrict access to materials related to abuses of governmental power when the Administrator 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. This restriction is necessary to prevent a violation of a legal or constitutional right or a privilege, through public opening of materials claimed by a petitioner to be subject to such a right or privilege (1) during the Administrator's review of such claim, and (2) after the Administrator has adjudged the claim to be valid, that is, has determined that the materials are subject to the claimed right or privilege.

6 Under subparagraph (a)(2) of this subsection the Administrator will restrict access to materials which are subject to a claim of the need to protect an individual's right to a fair and impartial trial, or which the Administrator has determined are validly subject to such a claim. This restriction is necessary to prevent a violation of any party's rights or privileges involved in a judicial proceeding.



As in the case of material subject to a claim of constitutional or legal right or privilege, persons submitting petitions concerning the right to a fair trial during the initial 90-day period will be assured that the pertinent material will not be made public.

The restriction in subparagraph (a)(3) of this subsection prohibits public access to materials when "the release of the materials would violate a Federal statute." This restriction derives from the list of exemptions contained in the Freedom of Information Act, as amended. That section provides that the mandatory disclosure provisions of the Freedom of Information Act do not apply to Government records "specifically exempted from disclosure by statute." In restricting materials under subparagraph (a)(3), the Administrator will cite the specific Federal statute and provisions of that statute which forbid disclosure to the public of the pertinent materials.

Subparagraph (a)(4) requires the Administrator to restrict materials the release of which would disclose national security classified information. The Administrator, however, may waive this restriction under the specified circumstances.

Section 104(a)(3) of the Act provides that the Administrator, in drafting public access regulations, shall take into account "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." The terms of the restriction contained in subparagraph (a)(4) derive from Executive Order 11652, "Classification and Declassification of National Security Information and Material" (37 F.R. 5209). Section 12 of Executive Order 11652, "Historical Research and Access by Former Government Officials," provides that the "requirement in Section 6(A) that access to classified information or material be granted only as is necessary for the performance of one's duties shall not apply to persons outside the executive branch who are engaged in historical research projects or who have previously occupied policymaking positions to which they were appointed by



the President; Provided, however, that in each case the head of the originating Department shall: (i) determine that access is clearly consistent with the interests of national security; and (ii) take appropriate steps to assure that classified information or material is not published or otherwise compromised. Access granted a person by reason of his having previously occupied a policy-making position shall be limited to those papers which the former official originated, reviewed, signed or received while in public office." Section 6, paragraph (A), Executive Order 11652 provides that "No person shall be given access to classified information or material unless such person has been determined to be trustworthy and unless access to such information is necessary for the performance of his duties." Paragraph (A) has been interpreted to mean that an individual must have a security clearance equivalent to the highest degree of national security classification that may be applicable to any of the materials to be examined.

Subparagraph (a)(4) of this subsection also corresponds to the first exemption in the Freedom of Information Act, as amended, (5 U.S.C. 552). Subsection (b)(1) of the Freedom of Information Act exempts from the mandatory disclosure provisions of that Act records that are "specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and are in fact properly classified pursuant to such Executive order."

In practice, when the archivists find material which they believe may be improperly classified, or which should be classified, but is not so designated, they will refer the materials to the National Security Council for review and appropriate action.

Paragraph (b) of §105-63.402-1 reserves for the Administrator the authority to restrict access to portions of materials determined to relate to abuses of governmental power when the release of those portions would constitute a clearly unwarranted invasion of personal privacy



or result in the defamation of a living person and when this personal information is not essential to an understanding of the abuse of governmental power.

Paragraph (b) derives from the sixth statutory exception to mandatory disclosure of Federal records under the Freedom of Information Act, as amended (5 U.S.C. 552). The creators of what have traditionally been considered Presidential Materials have assumed that the President would have ultimate authority over their accessibility and disposition. In contrast, access to and disposition of Federal records are governed by statute, e.g., the Federal Records Act of 1950 (44 U.S.C. 2101, et. seq.), the Freedom of Information Act, as amended, and the Privacy Act of 1974 (5 U.S.C. 552a). Consequently, Presidential Materials traditionally contain far more defamatory references to individuals than do Federal records. For this reason, paragraph (b) broadens the Freedom of Information Act language to include a reference to the concept of defamation of a living person. In administering this provision, the archivists will be guided by judicial interpretations of the sixth exemption and precedential judicial decisions on the law of defamation.

The provision in paragraph (b) is intended to strike a balance between, on one hand, the Act's emphasis on opening to public access all relevant materials relating to abuses of governmental power, and, on the other hand, the tradition in the Presidential Libraries of protecting living persons from a clearly unwarranted invasion of personal privacy and from defamation. As regards the materials relating to abuses of power, in contrast to the other materials of general historical significance (§105-63.402-2), the private or defamatory portions will not be deleted, but will be opened to the public, if such information is essential to an understanding of the abuse of governmental power.



§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 will 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 trade secrets and commercial or financial information obtained from a person and privileged or confidential; or

(2) Constitute a clearly unwarranted invasion of personal privacy or result in the defamation of a living person; or

(3) Disclose investigatory materials compiled for law enforcement purposes, but only when the disclosure of such records would:

(a) Interfere with enforcement proceedings;

(b) constitute an unwarranted invasion of personal privacy;

(c) 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;

(d) disclose investigative techniques and procedures, or;

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

EXPLANATION:

Section 105-63.402-2 sets forth the restrictions applicable to materials of general historical significance unrelated to abuses of governmental power. Paragraph (a) of this section requires the Administrator to apply the restrictions specified in section 105-63.402-1(a).

Paragraph (b) of this section sets forth additional restrictions applicable to materials of general historical significance unrelated to abuses of governmental power. The regulations adopt the view that materials of general historical



significance unrelated to abuses of governmental power are "more restrictable" than materials related to abuses of power, because, as regards the former materials, in the balance, the rights and privileges of individuals are of greater significance in relation to the public need to know.

The first of the additional restrictions, in subparagraph (b)(1), requires the Administrator to restrict materials that would "disclose trade secrets and commercial or financial information obtained from a person and privileged or confidential." This restriction derives from the fourth exemption to the Freedom of Information Act, as amended (5 U.S.C. 552), which excepts from mandatory disclosure Government records which involve matters that are "trade secrets and commercial or financial information obtained from a person and privileged or confidential."

The second additional restriction in subparagraph (b)(2), requires the Administrator to restrict materials when the release of such materials would "constitute a clearly unwarranted invasion of personal privacy or result in the defamation of a living person." This restriction also derives from the Freedom of Information Act. Exemption six of that Act provides that matters relating to "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy" are exempt from mandatory disclosure. The addition of the phrase "or result in the defamation of a living person" is discussed under §105-63.402-1(b), above.

The third additional restriction, in subparagraph (b)(3), requires the Administrator to restrict materials which would disclose investigatory materials compiled for law enforcement purposes. This restriction, too, comes from an exemption to the Freedom of Information Act. The seventh exemption excepts from mandatory disclosure "investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) 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, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel."

In keeping with the rationale that materials of general historical significance unrelated to abuses of governmental power are "more restrictable" than materials related to abuses of governmental power, the limiting clause contained in §105-63.402-1(b) is not included in the §105-63.402-2(b)(2) restriction.



§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 §105-63.401-2(e), which shall then have the responsibility for determining if the materials should remain restricted. The Senior Archival Panel may seek the recommendations of the Presidential Materials Review Board, in the manner prescribed in paragraphs (f) and (i) of §105-63.401-2, in making its determination.

EXPLANATION:

The Administrator, on his own initiative, will assign archivists to review periodically materials which have been placed under restriction and to make available for public access those materials which no longer require restriction.

In the event that the archivists are unable to determine whether certain materials should remain restricted, the procedure outlined in §105-63.401-2(f) and (i) is available. Under that procedure, the archivists may refer the pertinent materials to the Senior Archival Panel for a determination, possibly after consultation with the Presidential Materials Review Board.



§105-63.402-4 Appeal of restrictions.

Upon 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, and consult with interested Federal agencies as necessary. The Board shall prepare a final written decision, including dissenting and concurring opinions, as to the continued restriction of all or part of the pertinent materials. The Board's decision shall be the final administrative determination. The Administrator will notify the petitioner of the final administrative determination within 60 calendar days following receipt of such petition.

EXPLANATION:

This section provides a procedure for a researcher to request review of restrictions placed on materials. Under §105-63.401-2(c), the researcher will have notice of the restrictions through "withdrawal sheets" which the Administrator will instruct the archivists involved in segregation and review of the materials to place in the front of the file folder or container affected by the removal of restricted material.

A researcher dissatisfied with a restriction, may petition the Administrator in writing, stating his belief that the restriction of specified materials is inappropriate. Upon notification by the Administrator of the filing of such a petition, the archivists will submit the pertinent materials or representative examples of them to the Presidential Materials Review Board under a procedure similar to that in §105-63.401-2(h), but without the requirement of publication of notice in the Federal Register. Under this procedure, the Board will review the restricted materials and, if necessary, consult with Federal agencies which are either "originating agencies" for national security classified material within the meaning of Executive Order 11652, or are otherwise interested

in the restriction. The Board will made a written decision, including dissenting and concurring opinions, on the retention or removal of restrictions on all or part of the pertinent materials. The Board's decision will be the final administrative determination. The Administrator will notify the petitioner of the final determination within 60 calendar days of receipt of the appeal.



8105-63.402-5 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 8105-63.402.

EXPLANATION:

In keeping with the intent of the Act, only those portions of materials which are restricted will be withheld from public access, if the archivists are able reasonably to segregate the non-restricted portions. This section adopts provisions contained in Executive Order 11652, "Classification and Declassification of National Security Information and Material" (37 F.R. 5209) and the Freedom of Information Act, as amended (5 U.S.C. 552). Executive Order 11652 provides that each classified document shall show on its face "the office of origin, the date of preparation and classification and, to the extent practicable, be so marked as to indicate which portions are classified, at what level, and which portions are not classified in order to facilitate excerpting and other use." The Freedom of Information Act, as amended, provides that "(a)ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt...."



§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.

EXPLANATION:

This section is intended to provide for challenges to the classification and for requests for the declassification of national security classified materials. The section references the procedures set forth in 41 CFR 105-61.104, which in turn, is based on the requirements in Executive Order 11652, "Classification and Declassification of National Security Information and Material" (37 F.R. 5209) and in the National Security Council Directive of May 17, 1972 (37 F.R. 10053). The terms of 41 CFR 105-61.104 provide procedures for public requests for review of classified material and mandatory review of records.



§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 material 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.

This is self-explanatory.



§105-63.404 *Reproduction of tape recordings of Presidential conversations.*

(a) *To ensure 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, unless such reproduction is authorized by subsequent Federal court decisions concerning these or related tape recordings.

(d) Within two years of the effective date, the Presidential Materials Review Board shall make a written report to the Administrator which shall evaluate the advisability of continuing the restriction imposed in paragraph (c) above. The Administrator will then determine if the restriction prescribed in paragraph (c) of this section shall be retained, revoked or modified to permit controlled reproduction of the reference copies of the tape recordings.

EXPLANATION:

This section is intended to provide public access to the tape recordings specified in Section 101(a) of the Act, while insuring protection of



the originals of such recordings. Paragraph (a) of this section describes the tape recordings which the Administrator will order copied by reference to the criteria set forth in Section 101(a) of the Act. Section 101(a) describes those tape recordings over which the Administrator obtains complete possession and control by virtue of the Act. Paragraph (b) of this section provides that the archivists shall review the tape recordings for restrictable material in accordance with procedures in §105-63.401-2(c) and §105-63.402. The purpose of paragraph (c) is to prevent unwarranted commercial exploitation of the tape recordings. Paragraph (d) provides for an automatic review by the Presidential Materials Review Board of the prohibition contained in paragraph (c) on reproduction of the tape recordings. No later than two years after the effective date of these proposed regulations, the Board will review public access to the tape recordings and other relevant factors and prepare a recommendation to the Administrator, who will determine whether to retain, revoke, or modify the regulation preventing reproduction of the reference copies of the tape recordings.

§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.*

EXPLANATION:

This section provides procedures for preparing copies of materials other than the tape recordings described in Section 101(a) of the Act. To insure protection of the original materials, the Administrator will order personnel of the General Services Administration to do the copying, using government equipment. The Administrator will grant a request by a researcher to use his own equipment provided the Administrator can ascertain that the researcher will not damage the materials or disrupt other reference activities. This is accepted procedure in the National Archives and the Presidential Libraries.

The Administrator will arrange to have authenticated and attested copies of materials when the requester needs such service for some special purpose connected with his research.

The Administrator will charge reasonable fees for reproduction and authentication of materials, in keeping with the schedule set forth in 41 CFR 105-61.52. That subpart was adopted under the



Freedom of Information Act, as amended (5 U.S.C. 552), and is the governing fee schedule for records in the custody of the National Archives and Records Service.



§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.

EXPLANATION:

This Section on amendment of these regulations derives from Section 104(b) (3) of the Act, which provides that 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 (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)." Subsection 104(a) of the Act which requires the Administrator, "within 90 days after the date of enactment of the Act, 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 Presidential historical materials, taking into account seven enumerated factors. This section requires the Administrator to submit any proposed amendment to the regulations to the Congress for a 90 legislative day review. In the event that both Houses of Congress fail to adopt a resolution of disapproval before the expiration of the 90 legislative days, the proposed amendments will become effective at the expiration of the period.



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OF COUNSEL

April 16, 1976

Dr. James B. Rhoads
Archivist of the United States
National Archives and Records Service
18th and F Streets,
Washington, D.C. 20405

Dear Doctor Rhoads:

I appreciate your April 13 response to my letter in which I inquired about the regulation concerning requests by the Special Prosecutor for access to the Nixon Presidential Materials. Although I understand from your letter that the provision was not intended to provide the Special Prosecutor any special rights, that fact certainly is not evident on the face of the regulations. Moreover, as for the archivists' "readiness of response" to requests by the Special Prosecutor, the continuing agreement between the Special Prosecutor and this office has never involved the Special Prosecutor directing requests to the Archives. Any request the Special Prosecutor desires to make is directed to Mr. Nixon through this office as his agent. If we consent to the request, we, in turn, request access to the materials on Mr. Nixon's behalf. Copies of the Special Prosecutor's requests have been provided the GSA as a matter of convenience but are not an element of the continuing agreement. In sum, the special classification for requests by the Special Prosecutor is unwarranted since any request he may make must either be directed to this office or otherwise qualified as a request for "current government business." That is not the import of the regulation as it now stands and therefore I believe the regulation should be amended.

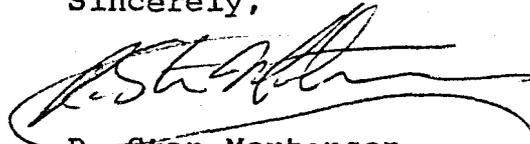
With respect to the transfer of materials



Dr. James B. Rhoads
Page 2
April 16, 1976

Suitland, Maryland, I appreciate your commitment to keep me informed as a tentative schedule develops. I expect that with sufficient advanced planning on both our parts the transfer can be scheduled for a time convenient to all concerned.

Sincerely,



R. Stan Mortenson

RSM/tc
cc Philip Buchen, Esquire ✓
Barry Roth
Thomas Wolf
Steve Garfinkel



Copy to Barry

SEP 27 1976

Mr. Donald P. Young
General Counsel
General Services Administration
Washington, D. C. 20405

Dear Mr. Young:

Thank you for your letter of September 22, 1976, forwarding to us your draft letter to the Congress and the proposed regulations which you intend to submit pursuant to the Presidential Recordings and Materials Preservation Act. After examining your draft letter and the proposed regulations we recommend that they not be submitted to the Congress at this time. The reasons for this recommendation are essentially threefold.

First, as you know, the validity of the legislative veto is in issue at the present time in a case before the United States Court of Appeals for the District of Columbia Circuit. The Department of Justice intervened in that case to urge the unconstitutionality of the legislative veto device. One of the vices of the legislative veto is, we argue, the fact that legislative representatives can utilize their veto power to impose their ideas on those promulgating the regulations. Your draft letter gives great currency to such fears.

Second, a one House veto provision is specifically provided for in the Presidential Recordings and Materials Preservation Act which is at issue in the Nixon tapes litigation now pending before the Supreme Court. We believe it will substantially increase the ability of Mr. Nixon's counsel to successfully challenge that legislation on



separation of powers grounds if this material were submitted to the Congress at this time.

Third, it is unlikely that these regulations will become effective in the foreseeable future. Since this Congress is, of course, about to adjourn before expiration of the necessary legislative days during which these proposed regulations would be required to lay before it, they will have to be resubmitted to the new Congress. Moreover, as you know, the effectiveness of any regulations under this provision of the Act is presently stayed by court order.

For these reasons, it is our recommendation that the proposed regulations not be submitted to Congress at this time.

Sincerely,

REX E. LEE
Assistant Attorney General

cc: Mr. Philip W. Buchen
Counsel to the President
The White House
Washington, D. C. 20500

