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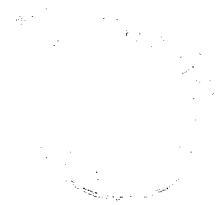
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G. Explanation of
Public Access Regulations

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Explanation
of Regulations



LEGAL EXPLANATION OF PROPOSED REGULATIONS

The regulations which the General Services Administration now submits to the Congress 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 portions before the Congress are those setting forth the definitions (§105-63.104) and provisions governing public access (Subpart 105-63.4).

The regulations implementing Sections 102 and 103 of the Presidential Recordings and Materials Preservation Act, which are not required to be placed before the Congress, were first published in the Federal Register on January 14, 1975. These are Subpart 105-63.1, "General Provisions"; Subpart 105-63.2, "Preservation and Protection"; and Subpart 105-63.3, "Access to Materials by Former President Nixon, Federal Agencies, and for Use in Any Judicial Proceeding". With the exception of the definition section of Subpart 105-63.1, which GSA reserved for submission to the Congress, these already published regulations relate to the immediate requirements of implementing the Act before archival processing has progressed to the point that significant segments of the materials are open for public access. Under these already published regulations, which are to become effective upon the vacation of outstanding court orders preventing their implementation, the Administrator undertakes his statutory responsibilities of (1) assuming custody and control of the Presidential historical materials of the Nixon administration; (2) preserving and protecting the materials; and (3) providing authorized access to the materials to the individuals and institutions recognized by the Congress as having an immediate and legitimate need for access.

§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.

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

(a) PRESIDENTIAL HISTORICAL MATERIALS. (cont.)

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 (8105-63.104(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

(a) PRESIDENTIAL HISTORICAL
MATERIALS. (cont.)

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.

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,

(b) PRIVATE OR PERSONAL
MATERIALS. (cont.)

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)).

(b) PRIVATE OR PERSONAL
MATERIALS. (cont.)

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 govern-
mental power"), shall mean those
alleged acts, whether or not cor-
roborated by judicial, admini-
strative or legislative proceed-
ings, which allegedly were con-
ducted, directed or approved
by Richard M. Nixon, his staff
or persons associated with him
in his constitutional, statutory
or political functions as Presi-
dent, and (1) are or were within
the purview of the charters of
the Senate Select Committee on
Presidential Campaign Activities
or the Watergate Special Prose-
cution Force; or (2) are cir-
cumscribed in the Articles of
Impeachment adopted by the House
Committee on the Judiciary and
reported to the House of Repre-
sentatives for consideration in
House Report No. 93-1305.

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

(c) ABUSES OF GOVERNMENTAL
POWER POPULARLY IDENTIFIED
UNDER THE GENERIC TERM
"WATERGATE." (cont.)

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

(c) ABUSES OF GOVERNMENTAL
POWER POPULARLY IDENTIFIED
UNDER THE GENERIC TERM
"WATERGATE." (cont.)

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":

(c) ABUSES OF GOVERNMENTAL
POWER POPULARLY IDENTIFIED
UNDER THE GENERIC TERM
"WATERGATE." (cont.)

(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 wire-tapping . . . 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, wire-tapping, or surveillance;

* * * * *

(9) Any fabrication, dissemination, or publication

(c) ABUSES OF GOVERNMENTAL
POWER POPULARLY IDENTIFIED
UNDER THE GENERIC TERM
"WATERGATE." (cont.)

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

(c) ABUSES OF GOVERNMENTAL
POWER POPULARLY IDENTIFIED
UNDER THE GENERIC TERM
"WATERGATE." (cont.)

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, Presi-
dent of the United States".
Report No. 93-1305 of the
House Committee on the
Judiciary reported to the
House of Representatives
three Articles of Impeach-
ment adopted by the Committee.

Article I charges the Presi-
dent with obstructing justice

(c) ABUSES OF GOVERNMENTAL
POWER POPULARLY IDENTIFIED
UNDER THE GENERIC TERM
"WATERGATE." (cont.)

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

(c) ABUSES OF GOVERNMENTAL
POWER POPULARLY IDENTIFIED
UNDER THE GENERIC TERM
"WATERGATE." (cont.)

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

(c) ABUSES OF GOVERN-
MENTAL POWER POPULARLY
IDENTIFIED UNDER THE
GENERIC TERM "WATERGATE."
(cont.)

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

(c) ABUSES OF GOVERNMENTAL
POWER POPULARLY IDENTIFIED
UNDER THE GENERIC TERM
"WATERGATE." (cont.)

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.*

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.

(d) GENERAL HISTORICAL SIGNIFICANCE. (cont.)

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.

(d) GENERAL HISTORICAL
SIGNIFICANCE. (cont.)

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 to 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.

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

(e) ARCHIVIST. (cont.)

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 non-regulatory 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.

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.

"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; re-boxing 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.

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

(h) INITIAL ARCHIVAL
PROCESSING. (cont.)

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.

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,

(i) STAFF. (cont.)

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.*

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.

*§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 follow-
ing the effective date of the
regulations in this subpart or
the vacation of court orders pre-
venting 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 Admini-
strator will limit activity in-
volving 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 Administra-
tor will commence the initial
archival processing of the
materials. As soon thereafter
as is possible, the Administra-
tor will open for public access
all of the materials in the
Administrator's custody and con-
trol which are neither restricted
pursuant to §105-63.402 nor
subject to outstanding claims or
petitions seeking such restric-
tion. The Administrator will
open for public access each in-
tegral file segment of the ma-
terials upon completion of
initial archival processing on
that segment. Insofar as practi-
cable, the Administrator will give
priority in such initial archival*

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

§105-63.401 PROCESSING
PERIOD (cont.)

*processing to materials relating
to abuses of governmental power
as defined in §105-63.104(c).*

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

§105-63.401 PROCESSING
PERIOD (cont.)

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.

§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.

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 of 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

§105-63.401-1 RIGHTS AND PRIVILEGES; RIGHT TO A FAIR TRIAL (cont.)

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

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

§105-63.401-1 RIGHTS AND PRIVILEGES; RIGHT TO A FAIR TRIAL (cont.)

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 archivists 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

§105-63.401-1 RIGHTS AND PRIVILEGES; RIGHT TO A FAIR TRIAL (cont.)

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 the consideration of claims of rights or privileges or petitions regarding fair and impartial trials received after that initial period of 90 days. Since the materials will be

§105-63.401-1 RIGHTS AND
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opened in processed segments after the 90-day period, however, paragraph (c) of this subsection provides that the Administrator may consider such claims or petitions received by him after that time. Unless a claim or petition is dilatory, frivolous or repetitious, the Administrator will consider those received after the 90-day period if the pertinent materials have not as yet been opened for public access.

§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.

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.

§105-63.401-2 SEGREGATION
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(d) If, during the processing period described in §105-63.401(b), the archivists should discover any materials which they determine reflect an apparent violation of law which has not been the subject of prior investigation, the archivists shall bring the material to the attention of the Administrator for referral to the Department of Justice or other appropriate action.

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

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

The archivists, 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

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

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

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

(3) *A person, distinguished in archival science, history or political science, who shall not be a Federal employee or official, nominated by the Council of the Society of American Archivists. The Board shall meet at the call of the Chairman. The Board may consult with officials of interested Federal agencies in formulating its recommendations.*

(h) *When the matter certified to the Board by the Senior Archival Panel involves a determination required in paragraphs (a) or (b) of this subsection, the Administrator will publish notice in the Federal Register of the materials to be considered by the Board. In order to protect the privacy of persons who may have such an interest in the materials, the notice shall consist only of a generic description and listing of the materials to be considered by the Board. Any person may intervene in the Board's consideration by petitioning the Administrator in writing within 30 calendar days of publication of notice. The Board shall sub-*

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.

Paragraph (d) of this subsection requires any archivist who comes across materials he believes reflect an apparent violation of law that has not been the subject of prior investigation to bring the matter to the attention of the Administrator for referral to the Department of Justice, or such other action as is appropriate under Federal law.

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

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

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

Archivist of the United States, from among the staff archivists of the National Archives and Records Service, because of the quality of their scholarship and experience. When an archivist refers an initial determination required in paragraphs (a), (b), or (c) of this subsection to the Senior Archival Panel, the archivist is relieved of his responsibility for making that determination. The Senior Archival Panel, presented with the pertinent materials or representative examples of them, then has the sole responsibility for making the initial archival determination.

It is anticipated that there will be instances when the matters referred to the Senior Archival Panel by the processing archivists are so complex, or involve a significant interpretation of the regulations or decisions establishing major precedents, that it is appropriate for the Panel to certify the questions presented it to a body reflecting broader representation of the archival and historical community. Paragraph (f) of this subsection provides that such matters may be certified to the Presidential Materials Review Board.

The three member Board is composed of the Archivist of the United States, the Librarian

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of Congress, and a third person, distinguished in archival science, history, or political science, who is not a Federal employee or official, nominated by the Council of the Society of American Archivists. The Archivist and Librarian are, respectively, those persons within the executive and legislative branches of the United States Government who best represent the combined scholarship and administrative experience necessary to approach the kind of problems which will be certified to them. The governing body of the Society of American Archivists, will nominate the third member, who not being a Federal employee or official, will provide the Board with appropriate representation from the private community.

In accordance with paragraph (g) of this subsection, the Archivist will serve as Chairman of the Board, and he will convene the Board when he is aware of matters requiring its resolution. Because the Board is advisory, its product will be in the form of written recommendations to the Administrator or to the Senior Archival Panel. In formulating these recommendations, the Board may consult with those Federal agencies having subject matter interest in the materials or expertise in the legal or policy issues raised.

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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's recommendation is preliminary to a final, rather than initial, administrative determination on the issue. 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

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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 recommendation to the Administrator.

The Board will submit its written recommendation to the Administrator, including dissenting and concurring opinions. The Administrator may adopt the recommendation of the Board, but when his decision is other than that recommended by the Board, he must state his reasons in writing. The Administrator will notify all petitioners of his final administrative determination. 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

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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 recommendation in these circumstances will be back to the Senior Archival Panel rather than to the Administrator. It 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 recommendations to the Administrator for 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.

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 by the Administrator. 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

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OF DETERMINATIONS (cont.)

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

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

§105-63.401-4 APPEALS
(cont.)

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 recommendation to the Administrator, including dissenting and concurring opinions. The Administrator may adopt the Board's recommendation without additional comment, but when his decision is different from that recommended by the Board, he must state his reasons in writing. Implementation of any final administrative determination that will result in the subsequent

§105-63,401-4 APPEALS
(cont.)

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

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 governmental 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

§105-63.401-5 TRANSFER OF MATERIALS (cont.)

after notifying Mr. Nixon or his designated agent, to the former staff member having primary proprietary or commemorative interest in the materials.

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

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

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

(iii) The Administrator has determined that the heads of

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

§105-63.402-1 MATERIALS
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agencies having subject matter interest in the material do not object to the granting of access to the materials; and

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

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

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.

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

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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 or compromise 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)

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derives 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 policymaking 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

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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) Section (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.

§105-63.402-1 MATERIALS
RELATED TO ABUSES OF
GOVERNMENTAL POWER (cont.)

The only permissive restriction in §105-63.402-1 is contained in paragraph (b) in which the Administrator reserves the authority to restrict access to portions of materials determined to relate to abuses of governmental power when the release of those portions (1) would tend to embarrass, damage, or harass living persons, and when (2) the deletion of those portions will not distort, and their retention is not essential to an understanding of, the substantive content of the materials.

Paragraph (b) derives from language traditionally included in letters from Presidents of the United States to the Administrator expressing the President's intent to donate materials to a Presidential archival depository. Paragraph 2(c) of the letter of intent from President Lyndon B. Johnson to Lawson B. Knott, Jr., Administrator of General Services, dated August 17, 1965, for example, provides that "Archival personnel of the United States designated by the Administrator of General Services shall review the Materials to which this agreement applies and any Materials in the following categories shall be placed under the seal of restriction: (i) Materials containing

§105-63.402-1 MATERIALS
RELATED TO ABUSES OF
GOVERNMENTAL POWER (cont.)

statements which may in any manner be used to injure, embarrass, or harass any person" The original conception of the restriction for matters which may be embarrassing to a living person had its origin in a memorandum from President Franklin D. Roosevelt to the Director of the Franklin D. Roosevelt Library dated July 16, 1943, which created a Committee of Three to administer his Presidential papers and to develop restrictions for them.

The modification contained in the words "and the deletion of those portions will not distort, and their retention is not essential to an understanding of, the substantive content of the materials" (§105-63.402-1(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 unnecessary embarrassment, damage, and harassment. As regards the materials relating to abuses of power, in contrast to the other materials of general historical significance (§105-63.402-2), the embarrassing portions will not be deleted, but will be opened to the public, if a deletion would significantly distort the substantive meaning of the document or tape passage in question.

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

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

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

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

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

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

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

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 mandatory restrictions specified in section 105-63.402-1(a).

Paragraph (b) of this section sets forth the permissive 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 permissive restrictions, in subparagraph (b)(1), authorizes the Administrator to restrict materials that would "disclose or compromise trade secrets or commercial or financial information obtained from a person and privileged or confidential." This restriction derives from the fourth

§105-63.402-2 MATERIALS
OF GENERAL HISTORICAL
SIGNIFICANCE UNRELATED
TO ABUSES OF GOVERNMENTAL
POWER (cont.)

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 permissive restriction, in subparagraph (b)(2), authorizes the Administrator to restrict materials when the release of such materials would "constitute a clearly unwarranted invasion of personal privacy." This restriction also derives from the Freedom of Information Act. Exemption six of that Act provides that matters relating to "personal and medical files and similar files the disclosure of which constitute a clearly unwarranted invasion of personal privacy" are exempt from mandatory disclosure.

The third permissive restriction, in subparagraph (b)(3), authorizes the Administrator to restrict materials which would disclose or compromise investigatory materials compiled for law enforcement purposes. This restriction, too, comes from an exemption to the Freedom of Information Act. The

§105-63.402-2 MATERIALS
OF GENERAL HISTORICAL
SIGNIFICANCE UNRELATED
TO ABUSES OF GOVERNMENTAL
POWER (cont.)

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, . . . 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."

The final permissive restriction in this section authorizes the Administrator to restrict materials which would "tend to embarrass, damage, or harass living persons." This restriction is language traditionally contained in letters and deeds from Presidents of the United States stating their intention to donate materials to a Presidential archival depository. In keeping with the rationale that materials of general historical significance unrelated to abuses

§105-63.402-2 MATERIALS
OF GENERAL HISTORICAL
SIGNIFICANCE UNRELATED
TO ABUSES OF GOVERNMENTAL
POWER (cont.)

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)(4) restriction.

§105-63.402-3 Periodic review of restrictions.

The Administrator periodically will assign archivists to review materials placed under restriction by this §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 recommendation of the Presidential Materials Review Board, in the manner prescribed in paragraphs (f) and (i) of §105-63.401-2, in making its determination.

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

This 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; consult with Federal agencies which are either "originating agencies" for national security

§105-63.402-4 APPEAL
OF RESTRICTIONS (cont.)

classified material within the meaning of Executive Order 11652, or are otherwise interested in the restriction; and make a written recommendation to the Administrator, with the option of submitting dissenting and concurring opinions. The Administrator will make the final determination, and when this determination differs from the recommendation of the Board, the Administrator will state his reasons in writing.

The Administrator's decision will constitute a final agency decision on the pertinent restriction.

§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.

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.

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.

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 the procedures in §105-63.401-2(c), §105-63.402-1 and §105-63.402-5. The purpose of paragraph (c) is to prevent unwarranted commercial exploitation 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 regulations, as that schedule is amended from time to time.

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),

§105-63.405 REPRODUCTION
AND AUTHENTICATION OF
OTHER MATERIALS (cont.)

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.

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 (a) referred to in the quoted passage is Section 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 either House of Congress fails to adopt a resolution of disapproval before the expiration

§105-63.406 AMENDMENT
OF REGULATIONS (cont.)

of the 90 legislative days,
the proposed amendments
will become effective at
the expiration of the
period.