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H. Public Access Regulations

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Regulations



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§105-63.104 *Definitions.*

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

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

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

(c) Abuses of governmental power popularly identified under the generic term "Watergate." The term "abuses of governmental power popularly identified under the generic term 'Watergate'" (also referred to as "abuses of governmental power"), shall mean those

alleged acts, whether or not corroborated by judicial, administrative or legislative proceedings, which allegedly were conducted, directed or approved by Richard M. Nixon, his staff or persons associated with him in his constitutional, statutory or political functions as President, and (1) are or were within the purview of the charters of the Senate Select Committee on Presidential Campaign Activities or the Watergate Special Prosecution Force; or (2) are circumscribed in the Articles of Impeachment adopted by the House Committee on the Judiciary and reported to the House of Representatives for consideration in House Report No. 93-1305.

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

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

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

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

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

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

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

SUBPART 105-63.4 - ACCESS BY THE PUBLIC

§105-63.400 *Scope of subpart.*

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

§105-63.401 *Processing period.*

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

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

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

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

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

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

§105-63.401-2 *Segregation and review; Senior Archival Panel;
Presidential Materials Review Board.*

(a) During the processing period described in §105-63.401(b), the Administrator will assign archivists to segregate private or personal materials, as defined in §105-63.104(b). The archivists shall have sole responsibility for the initial review and determination of private or personal materials.

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

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

(d) If, during the processing period described in §105-63.401(b), the archivists should discover any materials which they determine reflect an apparent violation of law which has not been the subject of prior investigation, the archivists shall bring the

material to the attention of the Administrator for referral to the Department of Justice or other appropriate action.

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

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

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

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

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

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

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

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

(i) When the matter certified to the Board by the Senior Archival Panel involves a determination

required in paragraph (c) of this subsection, the Board shall recommend an initial determination to the Senior Archival Panel, which shall retain the sole responsibility for the initial determination.

§105-63.401-3 *Notice of determinations.*

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

§105-63.401-4 *Appeals.*

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

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

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

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

§105-63.401-5 Transfer of materials.

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

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

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

§105-63.402 *Restrictions.*

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

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

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

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

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

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

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

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

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

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

aware of Federal criminal statutes which prohibit the compromise or disclosure of this information.

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

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

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

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

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

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

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

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

§105-63.402-3 Periodic review of restrictions.

The Administrator periodically will assign archivists to review materials placed under restriction by §105-63.402 and to make available for public access those materials which, with the passage of time or other circumstances, no longer require restriction. If the archivists are unable to determine whether certain materials should remain restricted, the archivists shall submit the pertinent materials, or representative examples of them, to the Senior Archival Panel described in §105-63.401-2(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.

§105-63.402-4 Appeal of restrictions.

Upon the petition of any researcher who claims in writing to the Administrator that the restriction of specified materials is inappropriate and should be removed, the archivists shall submit the pertinent materials, or representative examples of them, to the Presidential Materials Review Board described in §105-63.401-2(g). The Board shall review the restricted materials, consult with interested Federal agencies as necessary, and make a written recommendation to the Administrator, including dissenting and

concurring opinions, as to the continued restriction of all or part of the pertinent materials. When the determination of the Administrator is different from that recommended by the Board, he will state his reasons in writing. The Administrator will notify the petitioner of the final administrative decision.

§105-63.402-5 Deletion of restricted portions.

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

§105-63.402-6 Requests for declassification.

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

§105-63.403 Reference room locations, hours, and rules.

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

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

(a) To 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.

§105-63.405 Reproduction and authentication of other materials.

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

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

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

§105-63.406 Amendment of regulations.

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

Appendix

I Recent Articles on
Presidential Materials



The following recent newspaper articles by Arthur Schlesinger, Jr. (page 2), and John S. D. Eisenhower (page 8) are particularly relevant to the issues addressed in this report.

WHO OWNS A PRESIDENT'S PAPERS?

by Arthur Schlesinger Jr.

This question, oddly enough, has not been asked very often in the course of American history. Up to Franklin Roosevelt, all Presidents treated their White House files as their private property. They, or their heirs, locked up, deeded, sold or burned presidential papers as they willed. They did so without benefit of legislation or of explicit judicial decision: but neither Congress nor the courts objected to what was accepted as traditional practice.

Franklin Roosevelt changed all that. He inaugurated the idea of depositing the White House files in a special library set up under the National Archives for that purpose. This new practice did not alter the theory of presidential ownership: under the FDR system the President gave his papers to the nation. But it clearly implied an obligation to do so and an overriding public interest in the preservation and orderly opening of the White House files. Until Mr. Nixon the FDR approach seemed a satisfactory solution of a vexed problem.

Mr. Nixon then endeavored to return to the earlier notion that the White House files were the President's private property to be disposed of, even destroyed, as he saw fit. President Ford went amiably along, even to the point of signing an agreement that approved the destruction of the famous tapes within five years. "Historians cannot complain," observed Philip Buchen, the President's counsel, "if evidence for history is not perpetuated which shouldn't have been created in the first place." This weird proposition failed to console either historians or legislators; and Congress last autumn decided not only to reconsider the Nixon-Ford agreement but to open the whole question of ownership.

A Complicated Problem

A number of legislators introduced bills declaring all presidential papers (in some bills, the papers of all elected officials) public property by law. Then, as Congress went further into the matter, especially in very useful hearings before Rep. John Brademas's subcommittee of the House Committee on House Administration, it concluded that the problem was more complicated than it had seemed at first. In the end the Presidential Recordings and Materials Preservation Act of 1974 nullified the Nixon-Ford agreement, providing for the government's "possession and control," though not ownership, of the "the presidential historical materials of Richard M. Nixon." And established a Public Documents Commission to make recommendations on long-run issues raised by the papers of Presidents and other federal officials.

Presumably the Public Documents Commission will go into the question of ownership; nor, despite historical traditions, can anyone doubt the authority of Congress to act in this area. The ancient idea of presidential rather than public ownership has prevailed only in the absence of congressional legislation. In the meantime, the House Committee Report called the ownership of the Nixon material "a matter most appropriately left for the judiciary to decide." On January 31 Judge Charles R. Richey of the District Court of the District of Columbia rushed into the breach. Though the Court of Appeals subsequently derailed his decision, this was on procedural, not substantive, grounds; and in due course higher courts will have to confront Judge Richey's argument on its merits.

Judge Richey, after testing Nixon's claims of ownership against the common law, the Constitution, the practices of former Presidents and the acts of Congress, concluded that "the 'presidential materials and tape-recorded conversations' which were generated, created, produced or kept in the administration and performance of the powers and duties of the Office of

the President belong to the government, and are not personal property of the former President."

On the face, this sounds like a plausible result. On closer examination, however, difficulties arise. I take it that Judge Richey does not quite mean that every piece of presidential paper belongs to the government; but it is not at all clear where he draws the line. The furthest he goes in specification is to define as public property all materials "generated or retained" by the President and others on his behalf during his tenure in office which "relate to the official business of the government of the United States" or "relate directly to the conduct of the office of the President."

Plainly the diaries of John Quincy Adams, James K. Polk and Rutherford B. Hayes relate to the official business of the government and the conduct of the office of the President. But does anyone seriously claim that such diaries belong to the government rather than to the men who kept them? Harry Truman wrote a series of letters to the folks back home filled with colorful descriptions of his presidential thoughts and actions. Are letters of this sort really public rather than private property? John Eisenhower tells us that his father "indulged a habit of using friends as sounding boards by means of personal correspondence," and adds, "A President's letters written for this purpose should, I believe, be considered personal property." Is this an unreasonable position?

More than that, as the highly respected archivist Herman Kahn told the Brademas Committee, "At least 50%, probably more, of what we call the President's papers are political rather than governmental in character." Now political papers are obviously *not* governmental records in the customary sense of "records created by the President in the course of carrying out acts of Congress or otherwise acting in his formal constitutional capacities as Chief Executive or Commander in Chief." These papers have to do rather with public and party leadership, with the rallying of political support, with

relationships to congressional and local chieftains and the like. Does it make any sense to treat such papers as if they were official public records?

The true distinction, I would think, lies between records that are essential to the continuity of the public business and materials that express political and personal concerns of the President. The first unquestionably belong to the government and should stay in the White House files. No President should ever have to apply to the library of one of his predecessors, as President Kennedy had to apply to the Eisenhower Library in 1962 to find the memorandum of a presidential conversation with an English Prime Minister, or as President Johnson had to apply to the same library in 1967 for presidential correspondence with a Prime Minister of Israel. But political and personal papers, it seems to me, belong to the President and should go with him to the presidential library. Even this line may be hard to draw in specific cases since politics, in the best as well as in the worst sense of the word, pervades so many presidential documents. But at least it escapes the fatal, all-embracing looseness of the Richey doctrine.

Moreover, it avoids the dangers that will inevitably spring from turning every paper in the White House into public property. Suppose, for example, there is a change of parties. If one President's files are available to his successor of another party, then the new crowd can roam at will through political and personal papers in search of ammunition. Think what a field day Colson and the Plumbers would have had if the Richey doctrine had been controlling in 1969!

Obviously this doctrine would have an appalling effect on presidential documentation--an effect ignored by scholars who think that making presidential papers public property will benefit the writing of history. The real interest of the historian is in a rich, honest and revealing record rather than in instant access; and the more he pushes for instant access, the more

he will impoverish the record. "A President," John Eisenhower has said, "will find ways of doing his communicating other than by official presidential papers if he knows that his papers will soon be public." The certainty of immediate disclosure would have a chilling effect; and the result would be the degeneration of the research quality of documentary evidence.

Declarations and Accessibility

Nor would historians necessarily even gain quicker access into what is left. Declaring papers public property does not automatically open them to the public; and access to presidential files would undoubtedly be confined to the Plumbers or their latter-day equivalents. Actually, under the present system, historians get faster, even if not instant, access to papers in presidential libraries--85% of the holdings are open within a decade after the President leaves the White House--than they get to, say, the official records of the State Department, which are public property all right but which scholars have to wait more than a quarter of a century to see. It is only because presidential papers are *not* treated as official governmental records that they can be opened with such relative speed.

The case against declaring political and personal presidential materials to be public property seems very strong to me. But the FDR system had the defect that it assumed that Presidents would always be honorable men. Mr. Nixon's determination to burn his tapes suggests the wretched necessity of taking precautions against dishonorable Presidents. The answer to this, it seems, would be to enact a law defining the political and personal papers of a President as private property of a particular sort--private property clothed with a public interest and subject to public regulation. If someone owns a house that has been declared an historic site, he cannot sell the house, deface it, alter it or tear it down. The personal and political papers of a

President should be placed in a like category. A former President can retain ownership of his political and personal papers until he gives them to the government, and he can give them under stipulated conditions of access. But he must be bound by law to leave his papers to the government; and in the meantime the National Archives should have day-to-day control of the papers in whatever depository the owner decides.

Where does this leave the Nixon tapes? I think Judge Richey is wrong in declaring such fugitive and informal material public property. If these tapes are governmental records, then every presidential letter, diary or doodle becomes a governmental record, whether or not it is essential to the continuity of the public business. But governmental records, if the term is to be of any use, must refer to records created by the President acting in his formal constitutional capacity, not in various extra-constitutional capacities as party leader, family correspondent, diarist, bull-sessionist with his cronies or even cheap crook.

The case ought better to have been decided not on the large ground of ownership but on the narrow and sufficient ground that, so long as the tapes are required for judicial or legislative purposes, they must remain in the custody of the government. That, indeed, has already been provided for by the 1974 act. Let us hope that higher courts will dispose of the Richey doctrine and that the Public Documents Commission--which lamentably is yet to be appointed--will set to work without undue delay.

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THOSE PRESIDENTIAL PAPERS

by John S. D. Eisenhower

Valley Forge, Pa. -- Who owns an elected official's papers after he leaves office? The problem, only recently opened, applies to Presidents, Senators and others. But the current target is the White House -- or, more accurately, San Clemente.

President Ford has signed a bill giving the Government custody of former President Nixon's official tapes and papers. The bill also provides for a study of the ownership of official papers of future Presidents. This is essential because there is still much confusion about the use of important documents originating in the White House.

Last September, with the blessings of President Ford, an agreement was made between Arthur F. Sampson, who heads the General Services Administration, and former President Nixon. The G.S.A. would maintain Mr. Nixon's papers and tapes somewhere near San Clemente, allowing him complete control of access and -- a frightening thought -- allowing him to withdraw and destroy all papers he desired after a period of three years (and all tapes after five). The tapes would be automatically destroyed if the former President died before the five years were up.

In response to a suit instituted by the Reporters Committee for the Freedom of the Press, Judge Charles R. Richey issued an order temporarily maintaining the status quo -- that is, preventing implementation of the agreement. Mr. Nixon then filed a countersuit against the G.S.A. to enforce implementation of the agreement. In October the Senate nullified the agreement and sent the bill to the House.

In mid-November, the White House backed off partially, allowing the special prosecutor access to all of Mr. Nixon's records relating to the Watergate cover-up trials.

Traditional Republicans then tried to prevent further tape disclosures, arguing that from the days of George Washington a President's papers have been regarded as his personal property, to dispose of as he sees fit. Though lacking a formal legal basis, Mr. Nixon's supporters hold that, after a sufficient passage of time, custom carries the full effect of law. Changing the rules simply because the papers have overnight become of such great interest is, they say, unwarranted.

Congress, however, challenged the Presidential ownership concept on a longer-term basis. The new legislation nullified last September's agreement.

Out of respect for history, few would like to see actual recorded facts intentionally blotted out of human knowledge. On the other hand, privacy is of particular importance to a politician. In our history, for example, we have had two former Presidents enter the halls of Congress: John Quincy Adams in the House and Andrew Johnson in the Senate; one former President, William Howard Taft, became Chief Justice of the United States.

Certainly, premature disclosure of the intimate, subjective, combative exchanges behind the doors of the Oval Office could easily damage the usefulness of former Presidents who wish to continue in public service. And the quality of the advice a President would receive in office would certainly degenerate, or be unrecorded, if advisers spoke "for the record," conscious that their words would be made public at the end of the President's term.

Bulk is another serious consideration. The notes and letters of the 500 members of the White House staff, all considered Presidential papers, literally fill up several rooms full of four-drawer safes. For the G.S.A. (actually the Archivist) to go through them all, as proposed by Senator Birch Bayh, would be a gargantuan task. In the case of former President Dwight D. Eisenhower, furthermore, all letters written by him during eight years in office -- whether official, strictly personal, or a mixture of the two -- were filed together. It is taking years for the Archivist to sort out the personal from the official.

A reasonable compromise, it seems, would be to regard Presidential papers as public property, forbid their sale or destruction, but allow the former President to control them throughout his lifetime, subject only to subpoena. Then, upon his death, his papers could move to the sole custody of the Archivist. This is the way matters were handled in the case of Mr. Eisenhower, with whose papers I was involved.

Whether the committee provided for in the recent law will come up with an answer resembling the one proposed here is, of course, questionable. But one thing is certain: The solution must be bipartisan. Because, presuming that our two-party system will continue, we can expect repeated instances of an outgoing President being succeeded by another of different political persuasion. It is therefore in the interest of both Republicans and Democrats to see to it that future ex-Presidents are treated fairly.

John S. D. Eisenhower was formerly chairman of the interagency classification committee and consultant to President Nixon. He is currently a member of the National Archives Advisory Council and the author of "The Bitter Woods" and "Strictly Personal."

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II Historical Perspective
of Presidential Materials

HISTORICAL PERSPECTIVE ON PRESIDENTIAL MATERIALS

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PRESIDENTIAL PAPERS: THE HISTORICAL PERSPECTIVE

In the early spring of 1950, about 85 percent of the papers of President Franklin D. Roosevelt were opened to public access. Only three years before, the seal had been removed from the remnant papers of Abraham Lincoln. And the public did not get access to the papers of John Adams and John Quincy Adams, the Nation's second and sixth Presidents, until 1952.

Colonel Hayes, son of President Rutherford B. Hayes, sold his father's papers and materials to the State of Ohio for \$50,000, and a State library was opened in 1916.

It was the fate of President Grover Cleveland's papers to be shunted about the country for many years. A collection was gathered, finally, but it was not until 1932, 35 years from the end of Cleveland's term, that all access restrictions were removed.

These examples illustrate the erratic treatment applied to many of our past President's papers. The common theme, however, is that a former President or his heirs owned and controlled all his papers.

But that concept has not been tested in court and there is no specific legal definition of Presidential materials. As a practical matter, every President from Washington through Lyndon B. Johnson has considered materials accumulated in his office to be under his ownership and control to utilize as he saw fit.

Some papers have been lost, others have been deposited in State or local institutions, still others have been destroyed; but many, in fact most, have been purchased or given to the Federal Government. At various times in the 19th century, the Congress appropriated funds and directed first the Department of State and later the Library of Congress to purchase papers from the heirs of deceased Presidents. Today

the Library of Congress holds 23 collections of Presidential papers. Many others exist around the country outside Federal possession. The papers of Presidents Hoover through Johnson are deposited in the Presidential library system of the National Archives.

Early Presidents claimed as their "personal" papers no more than what they and a few clerks wrote or received. For example, President Monroe's collection contains only 4,200 items. In this century, the Presidential staff has grown to include hundreds of people who produce and accumulate millions of pages each year. Today the term "papers" has expanded to encompass new technological forms of documentation such as computer datatape, still and motion pictures, and audio and video tape recordings. Recent Presidents have claimed items in these categories in addition to their central files and the papers of aides, advisors, and confidential secretaries.

Also among the papers of a President are documents from White House staff offices, executive branch units, and commissions, committees, and task forces. A very brief history of the treatment of these types of papers follows:

White House Staff Offices. White House records have never been considered to be subject to the various provisions of law regarding the preservation or disposal of Federal records. Presidents have sometimes claimed all papers generated by staff as belonging to the President. That claim was often difficult to enforce. Some staff members left their papers while others removed all or a portion of them. Papers which were removed might have gone to a Presidential library or another repository, but there was no guarantee that they would not be purged, scattered, sold, or destroyed.

Executive Office Units Other Than the White House Office. Presidents have seldom claimed papers of agencies set up by statute in the Executive Office of the President (Office of Management and Budget, Central Intelligence Agency, or Council of Economic Advisers), but they have removed designated portions of National Security Council documents.

Presidential Commissions, Committees, or Task Forces. When a President has appointed a special group of private citizens or Government officials to advise him on a subject, the commission, committee, or task force might have deposited its records in the White House Central Files or in the files of a White House staff member. When so deposited, the records have become Presidential papers. However, if the commission deposited its records in the files of an agency which provided administrative support, or if the commission kept its records as a separate entity altogether, the records have been deemed Federal records and thereby, have been subject to the regular process of appraisal and accession by the National Archives and Records Service of the General Services Administration. In this case, after the records have been accessioned, NARS may deposit them in the National Archives Building or in the relevant Presidential library. In instances where commissions have had a minimal staff and seldom met, their records have sometimes been dispersed among the members or even lost.

Deciding what constitutes a President's papers, while perplexing and intriguing, has been avoided during the middle years of the 20th century since, following the example of Franklin Roosevelt, succeeding Presidents have deposited their Presidential material in national archival facilities shortly after they left the White House. This practice was formalized in the Presidential Libraries Act of 1955 (44 U.S.C. 2107-2108) which authorizes the Administrator of General Services to accept the historical materials of a President on behalf of the United States to be preserved as part of the national

archival system. Under this Act, the papers of Presidents Hoover, Truman, Eisenhower, Kennedy, and Johnson have been donated to the United States. The Act represents a compromise in which the private property assumptions about Presidential papers are recognized, while the public interest in the preservation of the materials is protected.

The Presidential Libraries Act also offers a compromise on the difficult question of access to Presidential materials. Following the Franklin Roosevelt practice of stipulating classes or categories of material for restriction while opening the remainder to public review, the Act authorizes a donor to set restrictions on use of the material provided they are agreeable to the Administrator of General Services. These restrictions allow the former President to protect the confidentiality of certain materials while providing a guard against arbitrary and capricious restrictions.

The papers of earlier Presidents were nearly always acquired by research institutions under stringent restrictions as to their use and publication. During the 19th century, these restrictions usually amounted to closure for many years. For instance, the Abraham Lincoln papers donated to the Library of Congress by Robert Todd Lincoln were closed to all research until 1947; the papers of the Adams family, including two Presidents, were opened to researchers at the Massachusetts Historical Society only in 1952.

The practice of stipulating classes or categories of material for restriction while opening the remainder of the materials was established by Franklin D. Roosevelt, a pattern reflected in the Presidential Libraries Act.

At the time of his death, Franklin Roosevelt had not formally deeded his papers and other historical materials to the Government nor provided for their transfer through his last will and testament. The

executors of the Roosevelt estate submitted the question of ownership of the papers to the Surrogate Court, Dutchess County, New York, which determined that President Roosevelt had, during his lifetime, made a valid and effective gift of all his papers and files, including those in his custody at the time of his death.

A committee of three designated by President Roosevelt prepared guidelines to be used by the archival staff of his library in reviewing the papers. The guidelines which were promulgated in 1949 established categories of materials which were to be restricted, including investigative reports on individuals; applications and recommendations for positions; documents containing derogatory remarks concerning the character, loyalty, integrity, or ability of individuals; documents containing information concerning personal or family affairs of individuals; documents containing information of a type that could be used in the harassment of living persons or the relatives of recently deceased persons; documents containing information which if released would be prejudicial to national security; and documents containing information which if released would be prejudicial to the maintenance of friendly relations with foreign nations. Also closed temporarily were communications to the President in confidence.

The guidelines used at the Roosevelt Library are significant; because with some slight modifications of language, they were used by succeeding Presidents in establishing restricted categories among their papers. Only a category restricting papers relating to personal family affairs was added to other Presidents' offers of their papers. The current practice is to place six basic classes of materials temporarily under seal. These categories are:

- . Material relating to the personal, family, and confidential business affairs of the donor or of persons who have had correspondence with him.

- . Material relating to investigations of individuals and organizations, to proposed appointments to office, or to other personnel matters.

- . Material containing statements made by or to the donor in confidence, unless in the judgment of the Library Director the reason for the confidentiality no longer exists.

- . All other material which contains information or statements that might be used to embarrass, damage, injure, or harass any living person.

- . Material containing statements or information the divulgence of which might prejudice the conduct of foreign relations of the United States.

- . Materials which are security-classified pursuant to law or executive order, or which contain information which if released would adversely affect the security of the United States.

The other precedent set by the Roosevelt Library experience is the use of a review committee designated by the donor to establish review guidelines to be used by the library staffs. This device has been used at the Eisenhower, Hoover, and Kennedy Libraries. At the Johnson Library, the Director holds the responsibility for review of non-classified materials. And that is essentially so at the Truman Library.

HOW RECENT PRESIDENTS TREATED THEIR PAPERS

Herbert Hoover. After President Herbert Hoover left Office in 1933, many of his Presidential and other papers were eventually deposited in the Hoover Institution of War, Revolution, and Peace, a research center at Stanford University. Access to the papers was restricted to those persons designated by Mr. Hoover.

Sometime later, friends and associates of the former President through the Herbert Hoover Birthplace Foundation, Inc. began construction of a library building in West Branch, Iowa, with the understanding that Mr. Hoover would agree to transfer his papers from Stanford to the library in West Branch. On December 15, 1960, Mr. Hoover wrote then General Services Administrator Franklin Floete offering his papers to the United States to be housed in the library at West Branch.

Mr. Hoover designated a coordinating committee to exercise all powers reserved to Mr. Hoover in the statement of conditions in the event of Mr. Hoover's death. Materials placed under seal were to be re-examined periodically and subject to the approval of Herbert Hoover or the committee, opened to research use as soon as the passage of time or other circumstances.

Franklin D. Roosevelt. On July 18, 1939, a joint resolution to provide for the establishment and maintenance of the Franklin D. Roosevelt Library and for other purposes was approved by Congress (53 Stat. 1062-1066). The resolution authorized the Archivist of the United States to accept title to a site for the Franklin D. Roosevelt Library. The Archivist was also authorized to permit the Franklin D. Roosevelt Library Inc., a nonprofit New York corporation, to construct the library building. Care, maintenance, and protection of the buildings and grounds were the responsibility of the U.S. Commissioner of Public Buildings, but the immediate custody and control of the buildings and their contents were the responsibility of the

Archivist of the United States. Upon completion of the project, the Archivist was to accept for the Library such historical material as should be donated by President Roosevelt and others.

The search room at the Roosevelt Library was opened to the public May 1, 1946. Although at that time the Library had only a small portion of Mr. Roosevelt's papers, sections of the President's White House Central Files (1933-41) were opened. These included materials on the administration of Federal agencies, social security legislation, business, Pan-American affairs, and other subjects. Among other materials open to research were collections of about 1,200 letters and other documents relating to the Roosevelt family, papers relating to prominent Hudson Valley families in the 17th and 18th centuries, and more than 1,000 naval history manuscripts. The first formal regulations governing the use of material in the Library provided that material would be available for research, except when it contained information which if disclosed would be prejudicial to the national interest or security of the U.S., or contrary to the conditions under which the historical material was acquired by the Library, or contrary to standards of propriety (except in cases where the public interest nevertheless requires disclosure).

The Archivist of the U.S. relied on a committee which had been named by President Roosevelt to prepare guidelines for reviewing materials. The sheer bulk of the President's papers prevented the committee from personally examining every item. So it was arranged for the library staff to segregate the papers according to previously agreed upon standards.

The review process has continued at the Roosevelt Library, and as of this year, only an estimated 1 percent of the papers are restricted, most of which contain classified information.

Harry S. Truman. Following the precedent established by Franklin Roosevelt, President Harry S. Truman wrote General Services Administrator Jess Larson on January 17, 1953, expressing his intention to deposit his personal papers in the National Archives. Although President Truman expected to retain his papers in his personal possession after leaving Office and to move them to secure storage in Kansas City, Missouri, he requested that Mr. Larson assign two or three experienced archivists to assist him with his work on the papers. This was to be done with the full expectation that these papers would be turned over to the U.S. Government at a future date and with restrictions on access imposed by President Truman. The archivists were provided.

President Truman's offer of his papers was contingent upon the Government's acceptance and agreement to maintain and operate the library building under construction in Independence, Missouri. Excluded from the offer were certain papers to be determined by President Truman, or in the event of his death, by his executors or personal representatives, which were related to his business, personal, or family affairs.

The transferred papers were to be freely available to President Truman or to persons designated by him in writing during his lifetime or by persons designated in his will in the event of his death. In addition, employees of the National Archives and Records Service were to have access to the transferred papers to perform their professional duties.

Papers that were security classified, contained information which if disclosed might prejudice the conduct of foreign relations or harass living persons, or contained statements made by or to the President in his official capacity were temporarily closed to research. Provision was made for periodic review and opening of this material.

When the bulk of the White House papers was transferred to Federal ownership in July 1957, President Truman retained control and ownership of two files: the so-called "President's Secretary's File," which had been maintained by President Truman's personal secretary in the White House, Miss Rose Conway, and the "Confidential File" from the White House Central Files. These two files were bequeathed to the Government under terms of President Truman's will.

Upon review by employees of the National Archives and Records Service, materials which were withdrawn from the collection and placed in sealed files were, for the time being, to be available only to Mrs. Truman, Mrs. Margaret Truman Daniel, and employees of the National Archives and Records Service. The restricted materials were to be reviewed periodically and opened when possible upon the approval of the Archivist of the U.S.

In October 1974, acting as Executor of Mr. Truman's estate, Mrs. Daniel began turning over to the Library certain materials in Mr. Truman's suite in the Library. This included 60 filing cabinets of materials, consisting of 21 five drawer and 39 four-drawer cabinets. Other small segments were transferred, and it is anticipated that more small portions will be transferred. These materials will be reviewed by the Library staff.

Dwight D. Eisenhower. President Dwight D. Eisenhower made preparations to transfer his papers to the U.S. under the provisions of the Presidential Libraries Act of 1955 by offering his papers in a letter to General Services Administrator Franklin Floete dated April 13, 1960. A library building was then being constructed at Abilene, Kansas, financed by public subscription.

Certain materials determined by President Eisenhower or his representative to be of private or personal interest were excluded from the offer. Although he

expressed his desire that the materials be made available for research as soon as possible, he followed the practice of other Presidents by specifying classes of materials which were to be placed under seal until such time as the reasons for their original restriction had been removed. In addition, he retained at his Gettysburg, Pennsylvania, home certain Presidential materials which he used in his publication projects. Subsequently, these were turned over to the Library.

In his will, former President Eisenhower bequeathed his papers to the United States, except those materials "of a private or personal interest to me or to a member of my family." John Eisenhower, who was executor of his father's estate, created a Committee of Review to help him determine which materials restricted by the Eisenhower letter of intent could be opened for research. As established, the committee consisted of John Eisenhower, William J. Hopkins, Bryce Harlow, and Henry Roemer McPhee. Since the committee's formation, the group has met several times to review certain classes of documents and establish review guidelines to be used by the staff of the Eisenhower Library.

John F. Kennedy. At the time of his death, President John Kennedy had not prepared a letter of intent to offer his papers to the United States or executed a deed for his papers. It was clear from his public and private statements, however, that he had intended to follow the precedent of former Presidents and give his papers to the Government to be housed in a Kennedy Presidential Library.

President Kennedy's papers were donated to the U.S. on February 25, 1965, by Mrs. Jacqueline B. Kennedy and the executors of the estate of John F. Kennedy. The deed of gift included instructions to restrict certain categories of materials. On August 20, 1968, Mrs. Kennedy transmitted a memorandum of agreement to the Archivist of the United States supplementing the original donation and establishing a committee

to act for the donors and executors in implementing the provisions of the original deed of gift. The committee has since its creation developed guidelines used by the staff of the Kennedy Library in their review of the Kennedy papers.

Lyndon B. Johnson. President Lyndon B. Johnson offered his papers to the U.S. on August 13, 1965, in a letter to the General Services Administration. He indicated that a library to house his papers would be constructed by the University of Texas on the campus in Austin. President Johnson specified that certain classes of materials were to be withheld for varying periods of time, and he reserved the right to restrict the use and availability of any materials transferred to the Government. During his term of Office, any deposited materials were subject to restrictions imposed at the time of transfer, restrictions imposed by other sections of the agreement, or restrictions specified by President Johnson or his representative. Archival personnel were to review the materials and restrict them in accordance with the categories he had specified. (By this time the classes of information which were to be placed under seal had become fairly standard in all offers of papers or deeds of gift on Presidential papers accepted by the Administrator of General Services or the Archivist of the United States.)

Materials which had been restricted upon review by archival employees could be opened as conditions changed, except that during Mr. Johnson's tenure as President this action required the approval of Mr. Johnson or his representative. Unrestricted materials were to be equally available to private persons after his tenure as President.

After this initial offer, President Johnson began transferring all "right, title, and interest" in portions of his papers and other historical materials to the United States through formal deeds of gift. Two deeds were executed in 1965 and one each in 1966,

1968, 1970, and 1971. The remainder of Mr. Johnson's papers were conveyed to the U.S. by his will, filed for probate on February 14, 1973.

As may be seen from the foregoing brief descriptions, the guidelines established at the Roosevelt Library to restrict Presidential material were adopted with some modifications of language by succeeding Presidents.

The action taken by Franklin Roosevelt that day in December 1938 changed the haphazard pattern of disposition of Presidential materials. Each succeeding President took advantage of the Roosevelt precedent to create a Presidential library and deposit his materials in it.

Archival personnel have been employed to arrange, describe, and preserve these materials; scholars have been given access; former Presidents and their heirs have been able to exercise negotiated control over the papers. The Presidential libraries have been imperfect institutions in many ways, serving as they do a wide variety of clientele. Yet they have been one means to balance the contending interests and to prevent the historical record of an Administration from being dispersed or destroyed. When he created his library, Franklin Roosevelt remarked, "I have destroyed practically nothing. As a result, we have a mine for which future historians will curse me as well as praise me."

SUMMARY OF INTERVIEWS

GSA's research into the historical perspective of Presidential papers and their disposition included several interviews with family, aides, and close associates of former Presidents. The interviews provided a degree of personal insight regarding the procedures followed and the intent of former Presidents.

Over the last three months, GSA discussed this issue with the following individuals:

- . Mrs. Margaret Truman Daniel, daughter of President Harry S. Truman
- . Mrs. Lyndon B. Johnson, wife of President Johnson
- . Professor Arthur Schlesinger, scholar and Special Assistant to President Kennedy
- . Miss Rose Conway, Personal Secretary to President Truman
- . Mr. Charles Murphy, Counsel to President Truman
- . Mr. John S. D. Eisenhower, son of President Eisenhower
- . Mr. Dan Fenn, Jr., aide to President Kennedy and Director of the Kennedy Library
- . Mr. Burke Marshall, Special Assistant to President Kennedy
- . Mrs. Lynda Johnson Robb, daughter of President Johnson
- . Mr. Harry Middleton, aide to President Johnson and Director of the Johnson Library
- . Dr. Herman Kahn, former National Archives Assistant for Presidential Libraries and a Director of the Roosevelt Library

- . Mr. William Hopkins, Executive Clerk of the Mails at the White House serving Presidents from Hoover through Nixon, now retired
- . Professor Raul Berger, Harvard School of Law and recognized expert on constitutional law

A common theme emerging from these interviews was the concept that a President owned his papers, that he could restrict them as he saw fit, but that most of the papers should be made available for research.

Mr. Charles Murphy, Counsel to President Truman, noted that during President Truman's administration all Presidential papers were considered to be under Mr. Truman's control and ownership. It was understood that when he left office the papers of his administration would go with him for disposition by him. Mrs. Margaret Truman Daniel adds that her father intended that all his official papers be made available for research. The family still holds those papers which they consider personal and private, which has been the practice of Presidents before and after the Truman era.

President Eisenhower, upon leaving office, shipped many papers to the Government for his library and kept many files for his own research. These, too, eventually were deposited in the library. This is yet another example of the ownership concept.

In Austin, Texas, Mrs. Johnson supported the tradition of Presidential ownership of papers but noted the availability of official papers to the public.

Dr. Herman Kahn, now Archivist of Yale University, who has spent some 35 years in the Federal Government and was in the Office of Presidential Libraries in Washington, takes what he describes as the orthodox view that Presidential papers are not official records. He adds that no President from George Washington has

taken the position that his papers ought to be regarded as such. And to the point that the records reflect political activity they cannot be in any sense regarded as official. The ownership of the papers is the Presidents'.

Professor Arthur Schlesinger, a special assistant in the Kennedy administration, expressed belief in the tradition of ownership; but supports the need for a clear definition of private versus official materials.

Concurrence on the issue of ownership is demonstrated among the former staff and families of Presidents. Another topic is the opinions on the question of access and restriction of material.

Here too there is evidence of the tradition of the right of Presidents to make restrictions on the use of nonclassified material under their control as Presidential papers. The categories of restrictions discussed in Section C of this report have been closely followed and largely form the basis for the archival working guidelines in existing Presidential libraries. It has been a clear prerogative of each President (Truman through Johnson) or his heirs that materials may be restricted in some manner. However, not all or even most materials were restricted to access; and it was the expressed desire of the persons interviewed to see materials opened wherever possible.

Two additional points were made by the Presidents' relatives and associates. First, they felt, unanimously, that under the Presidential Library system the public gets relatively rapid access to materials. An administration can be studied within five to eight years after the end of a President's term. If a President's materials were deemed Federal records, many more possibly would remain closed to research for as much as 25 to 30 years.

A second point made by those persons interviewed was the possible effect of Government custody and release of materials on future Presidents. If that responsibility is misused, it was felt it could compromise the frankness often necessary for Presidential decisionmaking.

III Regulations and Explanation - -
Sections 101, 102, and 103 of
the Act

EXPLANATIONS OF REGULATIONS TO IMPLEMENT
SECTIONS 101, 102 AND 103 OF THE ACT

Sections 101, 102 and 103 of the Act govern short-term possession, security, and accessibility of tape recordings and other materials of the former President.

Specifically, Section 101 requires GSA to gain possession and control of the White House tapes and make reasonable efforts to obtain possession and control of the papers and other materials which constitute the Presidential historical materials of Richard M. Nixon.

WHAT PRESIDENTIAL MATERIALS ARE NOW IN GOVERNMENT CUSTODY?

The Nixon materials now in the custody of the United States Government amount to an estimated 35,000 cubic feet of materials. Included are all materials in the White House Central Files and various staff office files in the White House complex at the time of Mr. Nixon's resignation. Also included are materials sent during the administration to the National Archives for temporary storage.

The materials take various forms. In addition to written material such as letters and memoranda, there are collections of still photographs, sound recordings, film and video tapes and large crates of gifts and other three-dimensional objects received or accumulated during the Presidential period.

In addition to the materials outlined above, the National Archives and Records Service has during the past 5 years collected other materials that relate in various ways to the public service career of Richard Nixon or to the activities of the Nixon administration. These include his pre-Presidential papers, various campaign files including those of the Republican National Committee and the Committee to Re-elect the President,

the papers and records of various Presidential task forces, commissions, committees, boards, etc., audio-visual materials created by the Government documenting the Nixon administration, the personal papers of those who have been prominent in the Nixon administration, and a large collection of publications both Government and non-Government reflecting the period of the Nixon administration. While these materials are not technically part of the Presidential historical materials subject to P.L. 93-526, their subject matter makes them appropriate for preservation.

Materials currently under the control of the Counsel to the President (Mr. Buchen) include tapes, staff files, personnel files, and national security files. Either originals or copies of all known tape recordings described in Section 101(a) of the Act are currently in the possession of the Counsel to the President. In those instances where duplicates are in his possession, the originals have been delivered to identifiable parties, such as the Watergate Special Prosecutor. These materials are currently located within the White House complex.

There are materials known to be in the possession of other identifiable parties such as the courts, the Watergate Special Prosecution Force, and others. These materials are in the possession of these individuals as a result of subpoenas, court orders, ongoing Government business, etc.

There may be materials in the possession of other persons -- quantity and location unknown. These would include materials which may have been removed by various Government officials and employees since January 20, 1969, and now subject to P.L. 93-526. Such individuals might include Presidential appointees, persons working in the White House complex, persons working for individuals in the White House complex, and other unknown parties.

WHERE ARE THE PRESIDENTIAL MATERIALS UNDER GOVERNMENT CONTROL?

The Presidential historical materials under Government control are stored in three locations: the Executive Office Building, the National Archives Building, and the Washington National Records Center (a part of the National Archives). The White House Central Files are divided between the E.O.B. and the Archives Building; White House staff files are in the E.O.B.; audio-visual material, gifts, and other collections of papers are in the Archives Building; and printed material and bulk mail are in the Washington National Records Center.

WHAT STEPS WILL GSA TAKE TO OBTAIN COMPLETE CONTROL OF MATERIALS?

No further action is required regarding materials already under the control of the Administrator.

As soon as applicable court orders are lifted, the Administrator will make demand on the Counsel to the President for the materials under his control. At that time, the Administrator will also make demand on other identifiable parties known to possess Presidential historical materials of the Nixon administration and request that they be delivered to the Administrator or his agent. If the materials are still needed for ongoing Government business, judicial proceedings, etc., this fact will have to be certified to the Administrator.

To obtain control of materials in the possession of other persons not presently identifiable, the following steps will be taken:

- . A notice will be published in the Federal Register calling attention to the requirements in Section 101 of the Act.

- . A mailing will be made to all individuals who have been employed by or detailed to the White House between January 20, 1969 and August 9, 1974. This mailing will contain a letter from the Administrator calling their attention to the Act, and calling for the return of any Presidential historical materials they may possess.

- . After a reasonable amount of time, probably about 45 days, we will do a follow-up mailing to all those individuals who have not responded to our first mailing.

- . We will keep careful documentation of the number of individuals solicited, the number of responses obtained, and the amount of materials collected. This will be incorporated into a subsequent report to Congress.

GSA WILL CONSOLIDATE THE PRESIDENTIAL MATERIALS.

Simultaneous with and subsequent to gaining possession of Presidential historical materials as required under Section 101, GSA will move them to a single location. This will facilitate both the protection and processing of these materials.

Selection of a suitable location for storage and processing of, as well as public access to, the Nixon Presidential material is an important element in the fulfillment of GSA's responsibilities under the Presidential Recordings and Materials Preservation Act. Under the law, these materials must be stored in the Metropolitan Washington, D. C. area.

In order to carry out this task, the National Archives staff first prepared estimates of the required size of

the space and other mandatory features common to facilities of this type. It was determined that approximately 40,000 square feet of space would be required, as well as adequate protection from fire, theft, or unauthorized access. The Archives staff also determined that a floor load capacity of 130-200 pounds per square foot would be an essential prerequisite for the storage area.

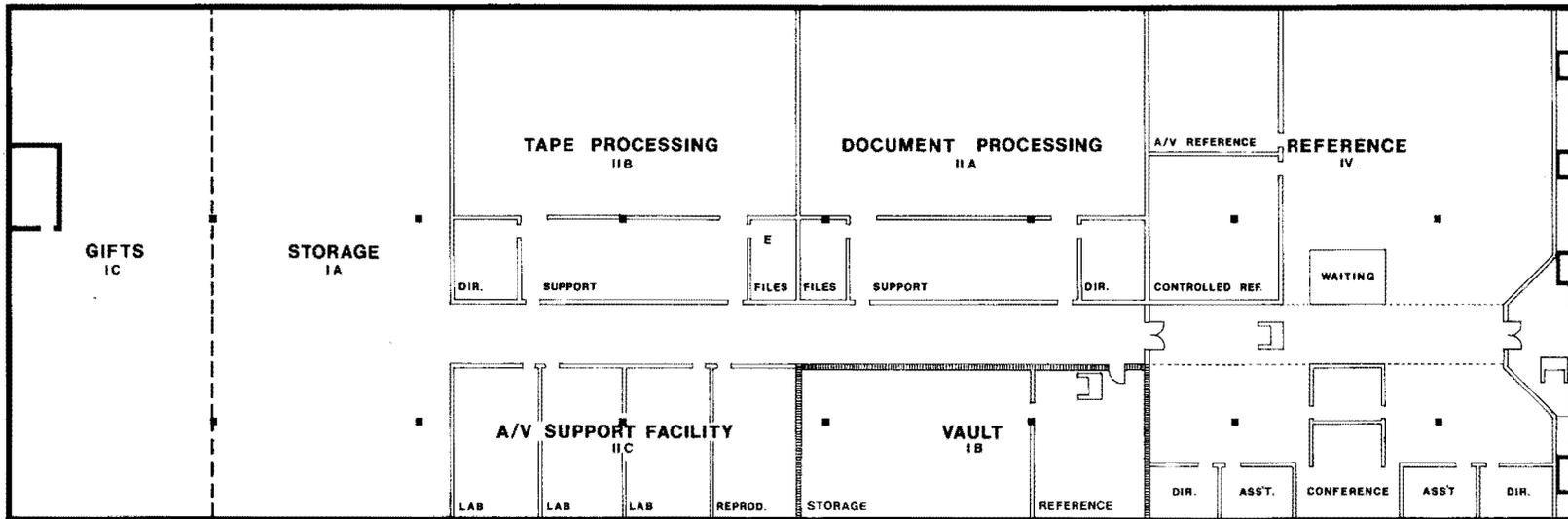
Based on these guidelines, GSA's Office Space Management identified the federally owned, federally leased, or potentially leased space in the D.C. area, that would meet the requirements for size and floor load, and that is currently vacant or would be vacated in the near future. The Space Management staff also identified space that met the two basic requirements, and might be vacated if suitable arrangements for relocation could be made.

Based on these considerations, eight potential locations were identified and evaluated under the following criteria:

- . Space Configuration.
- . Availability.
- . Transportation Access.
- . Lack of Disruption of Agencies or Plans.

The Suitland Federal Records Center, already under the operation and control of GSA's National Archives and Records Service, received the highest rating.

This building was built by GSA in order to house Federal records. It is, therefore, a highly suitable location in terms of archival processing and security. The space



DIAGRAMATIC PLAN

STACK 12 PLAN

LEGEND

STACK 12

FEDERAL RECORDS CENTER
SUITLAND, MARYLAND

-  EXISTING CONSTRUCTION
-  NEW CONSTRUCTION
-  VAULT CONSTRUCTION
-  SECURITY CONTROL

THE COURTS, THE SPECIAL PROSECUTOR, MR. NIXON AND CERTAIN FEDERAL OFFICIALS HAVE IMMEDIATE ACCESS TO THE MATERIALS,

Section 102 of the Act recognizes the need to provide immediate access to the materials for:

- . Use in a judicial proceeding by the Special Prosecutor or other persons who obtain a court subpena.
- . Use by Richard M. Nixon or his designate.
- . Lawful Government use by Federal agencies or departments.

In addition, Section 103 of the Act requires GSA to issue regulations, as necessary, relating to the possession, security and custody of the materials.

On January 14, 1975, GSA issued draft regulations in the Federal Register to implement these provisions of the Act. A copy of these regulations appears at the end of this section.

Because of our desire to maintain the highest possible degree of integrity in administration of the Act, the rules governing access to materials prior to Congressional approval of public access regulations are especially demanding. These demanding rules will continue to be applied to access to materials until they are available to the public.

For example, the regulations provide that each access to the materials be thoroughly documented. This includes a record -- for each access -- which includes:

is sprinklered, has an unlimited floor load capacity, and is well secured.

It is adequately served by public transportation, as well as a regular GSA shuttle from the National Archives Building. It also has adequate parking in the immediate vicinity.

The space will still have to undergo significant renovation, however, because the Nixon materials will have to be segregated from other Suitland records, and provision has to be made for public research space and administrative offices. Also, the smoke detectors currently installed have to be repaired or replaced, and the space needs to be air-conditioned in order to maintain temperature and humidity control.

In light of its higher overall rating in the quantitative analysis, and the fact that a corps of Federal Protective Officers already protects the Suitland facility around the clock, the National Records Center at Suitland was chosen to house the Nixon Presidential materials.

GSA has prepared a preliminary layout for the facility, which is shown on the next page. The space has been designed with an eye to both processing efficiency and security. As required in our regulations, the security of the materials will be at least equivalent to the current level of security.

Estimated costs for renovation and installation of security equipment are \$300,000.

- . Reasons for access.
- . Time of access.
- . Individuals involved in the access, including each individual's degree of security clearance.
- . Record of all activities during the access.
- . Record of any materials removed.
- . Time of the completion of access.

By going through this complex procedure during the pre-public-access period, we will maintain the integrity of the materials. To provide an even greater degree of protection of the public interest, other additional steps are provided. For example:

- . When an access may involve an examination of materials relating to matters of national security, the Counsel to the President is notified, permitted to examine the materials and raise any objections, defenses or privileges to prevent or limit the proposed access.
- . The former President is notified of any access, and given the opportunity to be present.
- . Each access to a security area occurs only in the presence of the Administrator or his agent -- at least two persons must be present at all times.

- Where materials are currently under the protection of the Secret Service, access shall require the presence of a representative of the Secret Service or another Federal security agency as may be designated by the Administrator.

- Whenever materials requiring the presence of the Secret Service are moved to a new location, the Secret Service protection will continue to be maintained, unless specifically exempted in writing by the Administrator or his Agent.

- Whenever possible, a certified copy of Presidential materials will be supplied to comply with a subpoena or other lawful process or request. If an original document is removed, a certified copy of that original shall be inserted in the file until the original is returned.

Title 41—Public Contracts and Property Management

CHAPTER 105—GENERAL SERVICES ADMINISTRATION

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

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

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

Sec.

105-63.000 Scope of part.

Subpart 105-63.1—General Provisions

- 105-63.101 Purpose.
- 105-63.102 Application.
- 105-63.103 Legal custody.
- 105-63.104 Definitions. [Reserved]
- 105-63.105 Requests or demands for access.

Subpart 105-63.2—Preservation and Protection

- 105-63.201 Responsibility.
- 105-63.202 Security.
- 105-63.203 Security areas.
- 105-63.204 Work areas.
- 105-63.205 Archival processing.
- 105-63.206 Access procedures.
- 105-63.207 Extraordinary authority during emergencies.

Subpart 105-63.3—Access to Materials by Former President Nixon, Federal Agencies, and for Use in Any Judicial Proceeding

- 105-63.301 Access by former President Nixon.
- 105-63.302 Access by Federal agencies.
- 105-63.302-1 Access by the Special Prosecutor.
- 105-63.303 Access for use in judicial proceedings.

Subpart 105-63.4—Access by the Public [Reserved]

§ 105-63.000 Scope of part.

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

Subpart 105-63.1—General Provisions

§ 105-63.101 Purpose.

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

§ 105-63.102 Application.

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

§ 105-63.103 Legal custody.

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

§ 105-63.104 Definitions. [Reserved]

§ 105-63.105 Requests or demands for access.

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

Subpart 105-63.2—Preservation and Protection

§ 105-63.201 Responsibility.

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

§ 105-63.202 Security.

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

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

(b) Exclusive knowledge of all lock combinations that control access to the security areas. Copies of the combinations will be placed in such locations as are required by current fire and/or national security regulations and with the GSA Security Division (BIS), Office of

Administration, in sealed envelopes with instructions that the envelopes may be opened only in instances in which the Presidential historical materials or their environs are subject to damage or loss. All such emergency use shall be reported to the Administrator of General Services or his designated agent as soon as possible.

§ 105-63.203 Security areas.

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

§ 105-63.204 Work areas.

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

§ 105-63.205 Archival processing.

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

§ 105-63.206 Access procedures.

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

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

- (1) Reasons for the access;
- (2) Time of the access;
- (3) Individuals involved in the access, including each individual's degree of security clearance;
- (4) Record of all activities during the access;
- (5) Record of all Presidential historical materials removed, if any; and
- (6) Time of the completion of the access.

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

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

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

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

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

(h) If any of the materials now located in security areas requiring the presence of U.S. Secret Service during access are moved to other locations, access to such new locations shall also require the presence of security agents as provided in paragraph (g) of this section, unless their presence is specifically exempted in writing by the Administrator of General Services of his designated agent.

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

§ 105-63.207 Extraordinary authority during emergencies.

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

Subpart 105-63.3—Access to Materials by Former President Nixon, Federal Agencies, and for Use in Any Judicial Proceeding

§ 105-63.301 Access by former President Nixon.

In accordance with the provisions of Subpart 105-53.2, former President Richard M. Nixon or his designated agent

shall at all times have access to the Presidential historical materials in the custody and control of the Administrator of General Services.

§ 105-63.302 Access by Federal agencies.

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

§ 105-63.302-1 Access by the Special Prosecutor.

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

Whereas, Gerald R. Ford, President of the United States, has determined and informed his Counsel that the due administration of justice and the public interest require that the Special Prosecutor have prompt and effective use of those Presidential materials of the Nixon Administration now located in the White House complex that are relevant and important to ongoing criminal investigations and prosecutions within the Special Prosecutor's jurisdiction; and

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

Now, therefore, the undersigned have agreed as follows:

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

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

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

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

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

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

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

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

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

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

Philip W. Buchen,
Counsel to the President.
Arthur F. Sampson,
Administrator of General Services.
H. Stuart Knight,
Director, U.S. Secret Service.
Henry S. Ruth, Jr.,
Special Prosecutor,
Watergate Special Prosecution Force.

§ 105-63.303 Access for use in judicial proceedings.

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

Subpart 105-63.4—Access by the Public [Reserved]

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

Dated: January 13, 1975.

ARTHUR F. SAMPSON,
Administrator of General Services.

[FR Doc.75-1440; Filed 1-13-75; 12:55 pm]

IV Copy of the
Presidential Recordings
and Materials Preservation Act



Public Law 93-526
 93rd Congress, S. 4016
 December 19, 1974

An Act

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

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

Presidential Recordings and Materials Preservation Act. 44 USC 2107 note.

TITLE I—PRESERVATION OF PRESIDENTIAL RECORDINGS AND MATERIALS

DELIVERY AND RETENTION OF CERTAIN PRESIDENTIAL MATERIALS

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

44 USC 2107 note.

- (1) involve former President Richard M. Nixon or other individuals who, at the time of the conversation, were employed by the Federal Government;
- (2) were recorded in the White House or in the office of the President in the Executive Office Buildings located in Washington, District of Columbia; Camp David, Maryland; Key Biscayne, Florida; or San Clemente, California; and
- (3) were recorded during the period beginning January 20, 1969, and ending August 9, 1974.

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

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

"Historical materials." 88 STAT. 1695 88 STAT. 1696

AVAILABILITY OF CERTAIN PRESIDENTIAL MATERIALS

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

44 USC 2107 note.

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

Special Prosecution Force, whether by court subpoena or other lawful process, for access to such recordings or materials shall at all times have priority over any other request for such recordings or materials.

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

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

REGULATIONS TO PROTECT CERTAIN TAPE RECORDINGS AND OTHER
MATERIALS

44 USC 2107
note.

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

REGULATIONS RELATING TO PUBLIC ACCESS

Report to
Congress.
44 USC 2107
note.

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

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

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

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

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

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

88 STAT. 1696
88 STAT. 1697

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

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

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

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

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

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

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

(B) with full recognition of the constitutional right of either House to change such rules (as far as relating to the procedures of that House) at any time, in the same manner, and to the same extent as in the case of any other rule of that House.

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

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

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

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

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

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

"Legislative days."

88 STAT. 1697

88 STAT. 1698

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

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

JUDICIAL REVIEW

44 USC 2107
note.

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

Separability.

(b) If, under the procedures established by subsection (a), a judicial decision is rendered that a particular provision of this title, or a particular regulation issued under the authority granted by this title, is unconstitutional or otherwise invalid, such decision shall not affect in any way the validity or enforcement of any other provision of this title or any regulation issued under the authority granted by this title.

Compensation.

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

AUTHORIZATION OF APPROPRIATIONS

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

Public Documents Act.

TITLE II—PUBLIC DOCUMENTS COMMISSION

SHORT TITLE

44 USC 3315
note.

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

ESTABLISHMENT OF STUDY COMMISSION

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

44 USC 3315.
Post, pp. 1699,
1701.

“§ 3315. Definitions

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

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

88 STAT. 1698
88 STAT. 1699

“(2) the term ‘Commission’ means the National Study Commission on Records and Documents of Federal Officials; and

“(3) the term ‘records and documents’ shall include hand-written and typewritten documents, motion pictures, television tapes and recordings, magnetic tapes, automated data processing documentation in various forms, and other records that reveal the history of the Nation.

“§ 3316. Establishment of Commission

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

44 USC 3316.
National Study
Commission on
Records and
Documents of
Federal Of-
ficials.
44 USC 3317.

“§ 3317. Duties of Commission

“It shall be the duty of the Commission to study problems and questions with respect to the control, disposition, and preservation of records and documents produced by or on behalf of Federal officials, with a view toward the development of appropriate legislative recommendations and other recommendations regarding appropriate rules and procedures with respect to such control, disposition, and preservation. Such study shall include consideration of—

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

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

44 USC 1901.
44 USC 2101,
2108.

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

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

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

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

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

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

“§ 3318. Membership

44 USC 3318.

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

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

“(B) one Member of the House of Representatives appointed

by the Speaker of the House upon recommendation made by the minority leader of the House;

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

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

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

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

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

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

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

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

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

“(L) the Librarian of Congress;

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

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

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

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

Vacancies.

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

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

Compensation.

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

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

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

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

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

“§ 3319. Director and staff; experts and consultants

44 USC 3319.

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

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

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

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

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

“§ 3320. Powers of Commission

44 USC 3320.

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

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

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

“§ 3321. Support services

44 USC 3321.

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

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

“§ 3322. Report

44 USC 3322.

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

Report to
President and
Congress.

“§ 3323. Termination

44 USC 3323.

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

“§ 3324. Authorization of appropriations

44 USC 3324.

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

TECHNICAL AMENDMENT

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

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

Approved December 19, 1974.

LEGISLATIVE HISTORY:

- HOUSE REPORT No. 93-1507 (Comm. on House Administration).
- SENATE REPORTS: No. 93-1181 (Comm. on Government Operations) and No. 93-1182 accompanying S.J. Res. 240 (Comm. on Government Operations).
- CONGRESSIONAL RECORD, Vol. 120 (1974):
- Oct. 3, 4, considered and passed Senate.
 - Dec. 3, considered and passed House, amended.
 - Dec. 9, Senate concurred in House amendment with amendments; House concurred in Senate amendments.
- WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS, Vol. 10, No. 51:
- Dec. 19, Presidential statement.

V History and
Current Status
of Related
Court Cases

HISTORY AND CURRENT STATUS OF RELATED COURT CASES

On September 6, 1974, Attorney General William B. Saxbe issued an opinion that the Nixon Presidential materials and tape-recorded conversations are the property of the former President, but that the Government has a right to use the materials for ongoing governmental purposes and, as custodian, has the responsibility of responding to subpoenas or court orders relating to the tapes and other materials. (43 Op. Att'y. Gen. 1)

Pursuant to that opinion, on September 7, 1974, the Administrator of General Services signed an Agreement on behalf of the Government with former President Nixon. The Agreement provides that Mr. Nixon will transfer his Presidential materials to the Government for deposit, but will retain title, including literary property rights, to the materials.

An essential element of the Agreement concerned control of the materials. Neither Mr. Nixon nor the Administrator were to have sole control. Rather, the Agreement specifically called for a "two-key" system in which Mr. Nixon would have one key and the Administrator would have one key. Both keys, used together, would be required to gain access to the materials. Under the Agreement, the Government would retain possession of the materials in a Government facility.

The access clause provided that for a period of 3 years, Mr. Nixon would withdraw materials only in order to respond to subpoenas or other judicial orders, or for temporary redeposit. Thereafter, Mr. Nixon had the right to withdraw the materials, except for the tape recordings. With respect to the tape recordings, Mr. Nixon gave these to the United States effective September 1, 1979, reserved the right to order their destruction after that date, and required their destruction on September 1, 1984, or his death, whichever first occurred.

Between October 17 and October 24, 1974, three suits were filed seeking enforcement or cancellation of the Agreement: Nixon v. Sampson, Civ. No. 74-1518 (D.D.C.); Reporters Comm. for Freedom of the Press v. Sampson, Civ. No. 74-1533 (D.D.C.); and Hellman v. Sampson, Civ. No. 74-1551 (D.D.C.).

These cases were consolidated and assigned to District Judge Charles R. Richey. In Nixon v. Sampson, former President Nixon asked that the Administrator of General Services be compelled to implement the September 7 Agreement. In Reporters Committee for Freedom of the Press v. Sampson, the plaintiffs asked the court to grant them access to Presidential materials of the Nixon administration under the Freedom of Information Act; to declare void the September 7 Agreement; and to declare that the Presidential materials of Richard M. Nixon are public property rather than Mr. Nixon's personal property.

On October 21, 1974, Judge Richey granted a motion for a temporary restraining order, which Order was amended on October 22. The Government was thereby enjoined from disclosing, transferring, disposing or otherwise making known to any person the Presidential materials of the Nixon administration in the custody and control of the President, the Administrator, or other Government officials. The Order also enjoined the Government from effectuating the terms and conditions of the September 7 Agreement. The Order specifically exempted from the injunction, however, the production of the materials pursuant to a subpoena, discovery demand, or court order; the production of the materials in regard to the Watergate criminal trial then pending before District Judge John Sirica; the production of the materials in response to requests by the Special Prosecutor or a jury; or the use of materials for purposes of current Government business after notification of Mr. Nixon and with the consent of the Counsel to the President. The Order also granted Mr. Nixon access to the materials for the sole purpose of asserting privileges or defenses, and granted access to former White House staff members for purposes relating

to criminal investigations or prosecutions. The Order required any search conducted pursuant to the Order to be conducted jointly by the Counsel to the President and Counsel for Mr. Nixon.

On November 8 and 9, 1974, the Special Prosecutor, the Counsel to the President, the Director of the United States Secret Service, and the Administrator signed an Agreement to provide the Special Prosecutor with access to those Presidential historical materials located in the White House complex which are relevant and important to ongoing criminal investigations and prosecutions within the Special Prosecutor's jurisdiction. The November 9 Agreement permitted the Special Prosecutor to request the assistance of members of the GSA archival staff assigned to the White House in preparing indexes of the documentary materials. Although the Special Prosecutor also obtained access rights to the tape recordings under the Agreement, prior to his receiving copies of the recordings, Counsel to the President was given the right to review the copies to determine whether national security considerations prohibited such access. Former President Nixon or his agent were permitted to be present during searches of the tape recordings and materials. The Agreement also provided that no Presidential materials could be moved without the approval of the Special Prosecutor, and that the parties, if necessary, would move jointly to modify the outstanding temporary restraining order in Nixon v. Sampson and consolidated cases to permit implementation of the Agreement.

On December 19, 1974, the Presidential Recordings and Materials Preservation Act (P.L. 93-526; 88 Stat. 1695) became law.

On December 20, 1974, Richard M. Nixon brought an action in the Federal District Court for the District of Columbia to enjoin permanently the enforcement of the Presidential Recordings and Materials Preservation Act

on the grounds that it violated the Constitution of the United States (Nixon v. Administrator of General Services, Civ. No. 74-1852 (D.D.C.)). Mr. Nixon also asked that a three-judge court be convened to hear and determine the Constitutional claims asserted in his action.

On January 28, 1975, Mr. Nixon filed a petition in the Court of Appeals for the District of Columbia for a writ of mandamus directing Judge Richey to grant the application for a three-judge court immediately and to give the case challenging the constitutionality of the Presidential Recordings and Materials Preservation Act priority over the consolidated cases in Nixon v. Sampson. (Nixon v. Richey, No. 75-1063 (C.A.D.C.)).

On January 31, 1975, the Court of Appeals for the District of Columbia, per curiam, issued an opinion that Judge Richey had erred in delaying action on the three-judge court request and in ignoring the statutory priority of the case challenging the constitutionality of the Presidential Recordings and Materials Preservation Act. The Court ordered Judge Richey to decide immediately whether to call for a three-judge court, but the Court refrained from issuing a writ of mandamus compelling Judge Richey to call a three-judge court on the reliance of the Court of Appeals that Judge Richey would act in accordance with the Court's opinion.

Also on January 31, 1975, Judge Richey issued an opinion in the consolidation cases holding that all Presidential materials of the Nixon administration are property of the United States Government. The Court of Appeals for the District of Columbia thereupon issued an order staying any order that Judge Richey might issue to implement his opinion in the consolidated cases.

On February 4, 1975, Judge Richey requested the Chief Judge, Court of Appeals for the District of Columbia, to convene a three-judge court to determine initially,

whether the case challenging the constitutionality of the Presidential Recordings and Materials Preservation Act should be heard and decided by a three-judge court, under 28 U.S.C. 2284(1).

On February 14, 1975, the United States Court of Appeals for the District of Columbia Court issued an order continuing the stay of any order which might issue pursuant to Judge Richey's January 31, 1975, Order and refusing, on reconsideration, to grant a writ of mandamus to Judge Richey to call a three-judge court, on the grounds that Judge Richey had transferred that question to a three-judge court by his February 4, 1975, request.

SUMMARY OF CURRENT STATUS

Court orders now in effect prevent both the movement and the archival processing of the materials as contemplated under these regulations. The Administrator may not move the materials from their present location or begin archival processing until these outstanding court orders, or successor court orders having the same effect, are vacated. Current and anticipated litigation may, therefore, prevent any archival processing for a year or more.