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94TH CONGRESS }
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SENATE

{ REPORT
No 94-368

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

REPORT

OF THE

COMMITTEE ON GOVERNMENT OPERATIONS
UNITED STATES SENATE

TO ACCOMPANY

S. Res. 244

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



SEPTEMBER 11, 1975.—Ordered to be printed

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(III)

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

SEPTEMBER 11, 1975.—Ordered to be printed

Mr. Ribicoff, from the Committee on Government Operations, submitted the following

REPORT

[To accompany S. Res. 244]

The Committee on Government Operations reports an original resolution (S. Res. 244) disapproving the regulations proposed by the Administrator of General Services under the Presidential Recordings and Materials Preservation Act, and recommends that the resolution be agreed to.

PURPOSE

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

The regulations here involved will become effective upon the expiration of 90 legislative days² following their submission to the Congress on March 19, 1975, unless disapproved by either House of Congress by the adoption of a simple resolution.

BACKGROUND

Title I of Public Law 93-526, the Presidential Recordings and Materials Preservation Act, provides that the U.S. Government retain custody of the Presidential materials of former President Richard M.

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

² For the purposes of the Act, the term "legislative days" does not include any calendar day on which both Houses of the Congress are not in session.

Nixon and that the Administrator of General Services, who is made responsible for their preservation and custody, propose regulations governing public access to such materials, taking into account certain criteria set forth in section 104 of the Act.

The Act further requires the Administrator, within 90 calendar days following enactment, to submit to the Congress such proposed regulations, together with an explanatory report, and provides that such regulations are to become effective upon the expiration of 90 legislative days following their submission, unless they are disapproved by either House of the Congress by the adoption of a simple resolution.

Pursuant to these provisions, the GSA Administrator submitted the proposed regulations to the Congress on March 19, 1975.

The basic objectives of the Act are (1) to protect and preserve the tape recordings of conversations, and other materials, recorded or prepared in the White House, the Executive Office Building, and certain other specified places, between January 20, 1969 and August 9, 1974; (2) to make them available to the Special Watergate Prosecution Force; (3) to provide for appropriate public access to them; and (4) to make them available to Richard M. Nixon, or his designees, for copying or any other purpose consistent with the Act and with regulations promulgated by the Administrator of General Services relative to their security and preservation.

The specific criteria, which the Administrator is required to take into account in developing the regulations, are set forth in section 104 of the act, as follows:

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

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

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

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

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

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

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

HEARINGS

A hearing on the proposed regulations was held on May 13, 1975 in order to afford the Committee an opportunity to determine whether the proposed regulations were in accord with the basic objectives of the Act, and whether they conformed to the specific criteria set forth in section 104 thereof.

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

Senator Gaylord Nelson, principal sponsor of the legislation, presented comments with respect to the proposed regulations, with special reference to those provisions which, in his judgment, appeared to be ambiguous or inconsistent with the intent of the Act, and suggested alternate language designed to eliminate inconsistencies and clarify ambiguities.

In addition, the Committee received a joint submission from the American Historical Association and the American Political Science Association, statements from the Society of American Archivists, the Organization of American Historians and the Watergate Special Prosecution Force.

At the close of the hearings, the Chairman of the Committee, and Senator Nelson, each submitted to the Administrator a list of questions relative to various aspects of the proposed regulations. Mr. Sampson's replies thereto have been inserted in the hearing record. Thereafter, the American Historical Association and the American Political Science Association submitted responses to some of the legal contentions contained in Mr. Sampson's replies which were also inserted in the record. Senator Nelson also submitted two legal memorandums prepared at his request by the American Law Division of the Congressional Research Service, Library of Congress.

COMMITTEE ACTION

Following a complete review of the proposed regulations and the hearing record, the Committee concluded that many of the regulations complied with the Act and were consistent with the intent of Congress. The Committee found, however, that a significant number of provisions were not consistent and should be disapproved. Since the proposed regulations cannot be revised or amended, except as provided for in the Act, and GSA contends that it would be difficult for them to implement the remaining regulations if only those provisions were disapproved, the Committee concluded that it should recommend disapproval of all of the regulations to prevent the unacceptable provisions from becoming effective.

Although, under the Act, the Administrator of General Services will have 90 calendar days following the adoption by the Senate of the resolution of disapproval, to submit revised regulations, the Committee expects the Administrator to submit revised regulations no later than October 10, 1975, in accordance with the directions of the Committee. Thereafter, the amended regulations will become effective following the expiration of 90 legislative days from the date of submission, unless disapproved by either House of Congress.

The major issues which developed from the hearings and subsequent discussions between members of the Committee staff and representatives of the General Services Administration related to (1) the validity and propriety of restrictions on access involving national security and personal embarrassment, and (2) whether final determinations for the purposes of judicial review should be vested solely in the Administrator, a political appointee, or whether they should be vested in the Presidential Materials Review Board, to be established

by the regulations and composed of persons professionally trained in archival science, with respect to (a) whether materials are historically significant and are to be retained by the Government, or are of a purely personal nature, to be returned to Mr. Nixon; and (b) whether materials should be withheld from public access.

The Administrator of General Services has contended that he does not have authority irrevocably to delegate judgmental responsibilities imposed upon him by the Congress pursuant to the Act, since the Act does not authorize such delegation. Based upon its own studies, supported by the legislative history of the Act and a memorandum from the American Law Division of the Congressional Research Service of the Library of Congress, the Committee believes that the Act grants the Administrator authority only to propose and explain regulations and not to control and regulate access to the materials. However, if such authority had been delegated to the Administrator, such a subdelegation would have been authorized. (A copy of the memorandum from the Library of Congress is set forth in the appendix.)

Finally, the Committee believes that in order to carry out the intent of the Act, final judgment relative to public access should be lodged in persons competent in archival sciences such as the members of the proposed Presidential Materials Review Board.¹

Set forth below is an analysis of 10 provisions of the proposed regulations which, in the judgment of the Committee, require amendment or modification. Accompanying each such provision is an explanation and proposed substitute language to guide the Administrator of General Services in submitting amended regulations.² Where appropriate, the new submission by the GSA Administrator should include amended section headings to reflect changes in substance.

PROVISIONS WHICH SHOULD BE REVISED

1. *Section 105-63.401-1.* Rights and privileges; rights to a fair trial. Subsection (c) provides as follows:

(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.

This provision must be read in conjunction with the other provisions to which it refers. Paragraph (a) allows an individual (i.e. Mr. Nixon or a former White House aide) to petition GSA, within 90 calendar days after the effective date of the regulations, to restrict access to certain Presidential materials because of a legal or constitutional right or privilege possessed by the petitioner (i.e. right to privacy). Paragraph (b) allows a Federal, State or local government attorney to petition the GSA, within 90 calendar days after the effective date of the regulations, to restrict access to Presidential materials whose public disclosure would prejudice a particular individual's right to a fair and impartial trial.

Paragraph (c) provides that a person will have no *right* to have a petition considered after the 90 days have passed. While the Ad-

¹ The Presidential Materials Review Board is to be composed of the Archivist of the United States, the Librarian of Congress and a representative of the Society of American Archivists.

² The full text of the pertinent regulations is set forth in the appendix, at pp. 25, 31.

ministrator may, in his discretion, consider petitions filed after that date, the GSA states that it will not consider any petition concerning material already made public.

This provision raises a very significant issue. Since a concerned individual is not likely to have any knowledge or reason to know that the materials include information about him which can lawfully be restricted, he may not learn of the existence of such information until the 90-day period has expired. Likewise, a Government attorney may not learn of the inclusion of relevant materials until the expiration of such period.

To provide adequate protection of individual rights, GSA should be required to consider a petition filed after 90 days, even if the material has already been made available to the public. Otherwise, a person would be powerless to exercise his legal rights meaningfully in situations in which he may suffer a violation of a constitutional or legal right. (Although available, the materials might not have been inspected by anyone before the late petition is filed; or if someone has already inspected the relevant materials, he may not publish them to the world.)

To remedy these problems, it is recommended that this subsection be amended as follows:

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

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

Subsection (d) provides as follows:

(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 investigations, the archivists shall bring the material to the attention of the Administrator for referral to the Department of Justice or other appropriate action.

This subsection places an unnecessary qualification on the archivists' and Administrator's responsibilities. Archivists may not be familiar with all "prior investigations;" and even if they were, the prior investigation may be ongoing or capable of being reopened. Therefore, the archivists should refer *all* information bearing on potential criminal activity to the Administrator. The Administrator, in turn, should be required to forward all such material—however innocuous in appearance—to the Justice Department. The Administrator is in no position to evaluate the relevance of any material to any ongoing investigation which may or may not be known to him. Further, the

determination of what information may be relevant to an ongoing investigation is not an appropriate function of the Administrator. To remedy this problem, this subsection should be amended as follows:

(d) If, during the processing period described in §105-63.401(b), the archivists should discover materials which 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.] *or any other appropriate agency of the United States which has the responsibility for investigating violations of law.*

3. Section 105-63.401-2.—Same.

Subsection (h) provides as follows:

(h) When the matter certified to the Board¹ by the Senior Archival Panel involves a determination required in paragraphs (a) or (b) of this subsection, the Administrator will publish notice in the Federal Register of the materials to be considered by the Board. In order to protect the privacy of persons who may have such an interest in the materials, the notice shall consist only of a generic description and listing of the materials to be considered by the Board. Any person may intervene in the Board's consideration by petitioning the Administrator in writing within 30 calendar days of publication of notice. The Board shall submit to the Administrator its written recommendation, together with dissenting and concurring opinions, of the proper categorization and disposition of the pertinent materials. The Administrator will make the final administrative determination. If the determination of the Administrator is different from that recommended by the Board, he will state his reasons in writing. The Administrator will notify the petitioner by certified mail, return receipt requested, of the final administrative determination. The Administrator will refrain from transferring any materials in accordance with §105-63.401-5(a) as a result of the final administrative determination for at least 30 calendar days from the petitioner's receipt of such notice.

The problem with this subsection is that it affords the Administrator unfettered discretion to make the final administrative determination as to which materials should be retained for public access.² It is ill-advised to provide the Administrator with such power for at least two reasons.

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

¹ The Presidential Materials Review Board is to be composed of the Archivist of the United States, the Librarian of Congress and a representative of the Society of American Archivists.

² This regulation concerns *only* whether particular items are historically significant and therefore within the legislative definition of "presidential historical materials." This regulation does *not* concern the restrictions on public access, such as national security limitations.

in archival science—can add little to the substance of nonpartisan, archival decisions. The Presidential Materials Review Board is composed of three individuals trained in archival sciences.

Second, granting the Administrator unchecked power is likely to increase the risk—both in reality and in appearance—that partisan political concerns will govern decisions concerning the retention of the Nixon Presidential materials. This is not intended as a criticism of the current Administrator. The Congress and the American people should not have to be concerned with the possibility that at some future time under some future circumstances, the Administrator might succumb to political temptations.

To eliminate these problems, this subsection should be amended as follows:

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

4. *Section 105-63.401-4.—Appeals.*

Subsection (d) provides as follows:

(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.

This provision, like section 105-63.401-2(h), affords the Administrator unfettered discretion to dispose of petitions concerning the retention of certain materials.¹

Therefore, this subsection should be amended as follows:

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

5. *Section 105-63.402-1.*—Restrictions; materials related to abuses of governmental power.

Subsection (a) provides, in pertinent part, as follows:

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

* * * * *

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

* * * * *

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

There are two principal difficulties with this subsection.

First, it would restrict access to materials whose disclosure would "compromise" national security classified information. This standard

¹ This regulation concerns *only* the retention of the materials and *not* the restrictions to be imposed on public access.

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

Second, if a researcher is otherwise authorized to review classified material and has signed a sworn statement that he will not disclose the sensitive material, that should be sufficient to allow him access. The sworn statement should not, in addition, have to be "satisfactory" to the Administrator or any Federal agency. No standards are offered to determine when a statement would be deemed "satisfactory." Use of the term, consequently, would allow government officials arbitrarily to deny access to otherwise authorized persons.

To correct these problems, this subsection should be amended as follows:

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

* * * * *

(4) [The release of the materials would disclose or compromise national security classified information.] *The materials are authorized under criteria established by Executive Order to be kept secret in the interest of national defense or foreign policy and are in fact properly classified pursuant to any executive order.* However, the Administrator may waive this restriction when:

* * * * *

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

6. Section 105-63.402-1.—Same.
Subsection (b) provides as follows:

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

The intent of this restriction is understandable and acceptable: to protect the reputations of living persons from unnecessary embarrassment. To the extent that such concern is legitimate, this regulation

seems largely superfluous. Any purely personal items would automatically be exempt from disclosure and perhaps even retention by GSA. (See sections 105-63.104(b); 105-63.401-5.)

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

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

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

To remedy this problem, this subsection should be amended as follows:

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

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

Subsection (b) provides as follows:

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

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

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

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

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

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

In addition, subparagraph (4), like subsection (b) of section 105-63.402-1 (item 7, above), is too vague: It is not at all clear how this exemption is to be applied. (GSA's report contains virtually no information to communicate an understanding of how similar terms were in fact applied by custodians of other Presidential papers.) In any event, this regulation seems superfluous. Any investigative or purely personal information—which are presumably the materials GSA has in mind—are already withheld from disclosure under other exemptions. To remedy these problems, this subsection should be amended as follows:

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

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

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

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

(i) *interfere with enforcement proceedings,*

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

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

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

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

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

8. Section 105-63.402-4.—Appeal of restrictions.

This section provides as follows:

Upon the petition of any researcher who claims in writing to the Administrator that the restriction of specified materials is inappropriate and should be removed, the archivists shall submit the pertinent materials, or representative examples of them, to the Presidential Materials Review Board

described in § 105-63.401-2(g). The Board shall review the restricted materials, consult with interested Federal agencies as necessary, and make a written recommendation to the Administrator, including dissenting and concurring opinions, as to the continued restriction of all or part of the pertinent materials. When the determination of the Administrator is different from that recommended by the Board, he will state his reasons in writing. The Administrator will notify the petitioner of the final administrative decision.

This provision is unclear in that it does not state explicitly that the Administrator has the authority to make the final administrative determination. However, it is known that it was the Administrator's intention to vest that authority in the Administrator, and the provision is likely to be so interpreted. Since, as in subsection (h) of section 105-63.401-2 (item 4, above), this would vest in the Administrator unfettered discretion to make such final determination (here with respect to the limits of public access), it is unacceptable. The Administrator is a political appointee serving at the pleasure of the President. If he has unfettered discretion to make the final decision concerning the availability of materials, there is a risk that, in reality or appearance, his decision will be influenced—consciously or subconsciously—by partisan political considerations.

There is no need to assume that risk. Application of the restrictions only requires a decision as to whether or not a particular item falls within one or more specified categories. This is precisely the kind of judgment which archivists are trained to make. Therefore, the final administrative determination should be made by the Presidential Materials Review Board after consultation with appropriate federal departments and agencies.

To remedy the problem, this section should be amended as follows:

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] *submit* to the Administrator *its written decision*, including dissenting and concurring opinions, as to the continued restriction of all or part of the pertinent materials. [When the determination of the Administrator is different from that recommended by the Board, he will state his reasons in writing.] *For purposes of judicial review, the Board's decision will be the final administrative decision.* The Administrator will notify the petitioner of the final administrative decision *within 60 calendar days following receipt of the petition.*

9. Section 105-63.404.—Reproduction of tape recordings of presidential conversations.

Subsection (c) provides as follows:

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

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

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

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

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

This subsection should be deleted:

[(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.]

10. Section 105-63.405.—Reproduction and authentication of other materials.

Subsection (a) provides as follows:

(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.

In item 10, the Committee proposes the deletion of subsection (c) of section 105-63.404 which forbids reproduction of the reference copies of the tape recordings described in subsection (a) thereof.

Section 105-63.405 provides procedures for the reproduction of materials other than the tapes for use by researchers. Since the prohibition against reproduction of the tape recordings will be deleted,

¹ It should be noted here that the U.S. District Court in Washington, D.C. rejected a petition by the television networks to release to the public the recordings used in evidence. The court was primarily concerned that release of the recordings would result in commercial exploitation and that this, in turn, might prejudice an individual's right to a fair trial (especially since some of the Watergate defendants might have to be retried). The court implicitly recognized that, at some point in the future after all the trials have been completed, the recordings might be available for reproduction. *United States v. Mitchell*, Misc. No. 74-128 (D.D.C. April 4, 1975).

it will be necessary to provide a procedure for their reproduction. Accordingly, subsection (a) of section 105-63.404 should be amended to include reference copies of the tape recordings, as follows:

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

In addition to the above provisions, which the Committee has found to be unacceptable, attention is called to a provision in the so-called "safety regulations"—section 105-63.206(d)—which appears to allow the Counsel to the President to limit access or restrict materials for so-called "national security" reasons, even though the material itself is not classified and no such authority has been delegated to the Counsel to the President. The Committee believes that this provision should be revised, as indicated below.¹

Section 105-63.206.—Access Procedures.

Subsection (d) provides as follows:

(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.

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

It would appear more appropriate to refer such requests to the National Security Council which does have such authority. It would also appear more appropriate to rely on language already approved by the Congress in the Freedom of Information Act.

To remedy these problems, the Committee recommends that this subsection be amended, as follows:

"(d) Prior to each access which may result in the examination of Presidential historical materials [that relate to matters of national security,] *which are required to be kept secret in the interest of the national defense of foreign policy,* the Administrator of General Services or his designated agent shall notify the [Counsel to the President] *National Security Council* [who] *which* shall be given the opportunity to examine these materials and raise any objections, defenses, or privi-

¹The safety regulations are set forth in the appendix, pp. 25-31.

leges to prevent or limit the proposed access. *In asserting any such objections, defense or privilege, the National Security Council shall state in writing why the materials involved are to be kept secret, under existing law or executive order: Provided, That this provision shall not be construed to allow the restriction of public access to material which is not and cannot be properly withheld from the public under existing law or executive order.*

CONCLUSION

Following a careful analysis of the proposed regulations and the hearing record, the Committee has concluded that, with the exception of the 11 provisions discussed above, the Administrator of General Services has performed creditably in drafting regulations to implement the Presidential Recordings and Materials Preservation Act.

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

Accordingly, the Committee has identified those provisions of the proposed regulations which, in its judgment, unduly delay or restrict public access, or are otherwise likely to thwart the expressed intention of the Congress. In this connection, care has been taken to preserve or strengthen those provisions which are designed to protect individual constitutional and legal rights, including the right to privacy.

Adoption of this resolution of disapproval will permit the balance of the proposed regulations to become effective now, and will provide the GSA Administrator with an additional 90 calendar days, under the terms of Public Law 93-526, to submit amended regulations with respect to the provisions covered by this report.

In view of the foregoing, the Committee urges favorable action by the Senate on this resolution.

ROLLCALL VOTE IN COMMITTEE

In compliance with section 133 of the Legislative Reorganization Act of 1946, as amended, the rollcall vote taken during committee consideration of this legislation is as follows:

Final Passage: Ordered Reported: 9 yeas—0 nays.

Yeas:

Metcalf.
Allen.
Chiles.
Glenn.
Percy.
Javits.
Brock.
Weicker.
Ribicoff.
(Proxy).
Muskie.

Nays:

None.

Calendar No. 358

94TH CONGRESS
1ST SESSION

S. RES. 244

IN THE SENATE OF THE UNITED STATES

SEPTEMBER 10, 1975

Mr. RIBICOFF, from the Committee on Government Operations, reported the following resolution; which was ordered to be placed on the calendar

RESOLUTION

Disapproving the regulations proposed by the Administrator of General Services under section 104 of the Presidential Recordings and Materials Preservation Act.

1 *Resolved*, That pursuant to the provisions of section
2 104 (b) of the Presidential Recordings and Materials Pres-
3 ervation Act (Public Law 93-526), the Senate hereby
4 disapproves the regulations proposed by the Administrator
5 of General Services in his report to the Senate submitted on
6 March 19, 1975.

V

APPENDIX



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 Pre-
servation 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

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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.

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(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).

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(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

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88 STAT. 1699

“(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 Officials.
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

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

44 USC 3318.

“(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

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88 STAT. 1700

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).

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88 STAT. 1701

"(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.

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

RULES AND REGULATIONS

TITLE 41—PUBLIC CONTRACTS AND PROPERTY MANAGEMENT

CHAPTER 105—GENERAL SERVICES ADMINISTRATION

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

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, D.C. 20405. Regulations pertaining to public access, which are required under the Act to be submitted for congressional approval, will be published at a later date.

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

Sec.

105-63.000 Scope of part.

SUBPART 105-63.1—GENERAL PROVISIONS

- 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.

(25)

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 or his designated agent.

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

§ 105-63.207 Extraordinary authority during emergencies

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

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

§ 105-63.301 *Access by former President Nixon*

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

§ 105-63.302 *Access by Federal agencies*

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

§ 105-63.302-1 *Access by the Special 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 files covering the time period relevant to the request may be examined.

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

PROPOSED REGULATIONS TO IMPLEMENT TITLE I [EXCERPT]

PRESIDENTIAL RECORDINGS AND MATERIALS PRESERVATION ACT—
PUBLIC LAW 93-526

(General Services Administration)

§ 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, in the case of tape recordings, 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.

§ 105-6.3402-2 *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 § 105-63.402-2(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 § 105-63.402-1, 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 material shall be available for public reference, and the hours of operation and rules governing the conduct of researchers using such facilities. This information may be obtained by writing to: Office of Presidential Libraries (NL), The National Archives, Washington, DC 20408.

§ 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 an 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.

AUTHORITY OF GSA TO VEST FINAL ADMINISTRATIVE AUTHORITY
FOR PUBLIC ACCESS TO PRESIDENTIAL TAPES AND MATERIALS IN
THE PRESIDENTIAL MATERIALS REVIEW BOARD

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

ISSUE PRESENTED

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

INTRODUCTION

The Presidential Recordings and Materials Preservation Act, Public Law 93-526, (hereinafter referred to as "Act") directed the Administrator of General Services ("Administrator") to submit a report to Congress proposing and explaining regulations that would provide public access to the tape recordings and other materials of former President Nixon. The Administrator submitted the *Report to Congress on Title I* in March 1975. Under the regulations, the initial archival processing would be performed by archivists employed by the General Services Administration ("GSA"). Section 105-63.401-2(a-d). (All section citations are to the proposed regulations, which would add a new Part 105-63 to Title 41 of the Code of Federal Regulations). These archivists would, in turn, refer materials which raised significant issues or had far-reaching precedential value to a panel of senior archivists appointed by the Archivist of the United States ("Archivist"). Section 105-63.401-2(e). This Senior Archival Panel would then refer significant or far-reaching matters to the Presidential Materials Review Board ("Board"), whose members would include the Archivist or his delegate, the Librarian of Congress or his delegate, and a person distinguished in archival science, history, or political science to be nominated by the Council of the Society of American Archivists. Section 105.63.401-2 (f) and (g). The Board would submit to the Administrator its written recommendation of the proper categorization and disposition of the materials referred to it; the Administrator would then make the final administrative determination. Section 105-63.402(h).

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

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

The problem is that the Administrator is a political appointee serving at the grace of the President. Having such a political appointee decide how the materials should be categorized (and thus which materials will be retained by the government) exposes the process to serious risks.

To begin with, there is the risk that the Administrator's judgment will be influenced, either consciously or unconsciously, by partisan concerns. This observation is not intended as a criticism of the current Administrator. These regulations are to be applied not only by the current Administrator but by succeeding Administrators as well. Congress should not have to hope that at some future time, in some future circumstance, a future Administrator will apply the regulations without any regard to partisan concerns.

Even assuming that every Administrator, present and future, would apply the regulations in a non-partisan manner, there is another risk in allowing the Administrator

to make the final administrative determination: to the public it may *appear* that access is being governed by partisan considerations. This is a significant risk. The public should have confidence that the regulations are being applied in a non-partisan manner. And it may be virtually impossible to secure this confidence if the Administrator is allowed to make the final decisions. The public must have confidence that the regulations are being applied with strict objectivity.

A large number of difficult and controversial decisions will have to be made respecting the classification of a massive amount of material. There will be close judgmental decisions which will be challenged by interested parties. There will be public discussion and debate over various classifications. So far as possible, those responsible for the decision making should be insulated from question, doubt, or criticism on political or partisan grounds. It would be virtually impossible to secure this confidence if any Administrator, now or in the future, were given authority to make final decisions. (Comments of Senator Gaylord Nelson on GSA Regulations to Implement P.L. 93-526, before the Committee on Government Operations, United States Senate, May 13, 1975.)

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

LEGISLATIVE HISTORY

The Presidential Recordings and Materials Preservation Act originated as Senate Bill S. 4016, introduced by Senators Nelson, Ervin, and Javits, and referred to the Committee on Government Operations. The bill was reported favorably on September 26, 1974. Sen. Rep. No. 93-1181, 93d Congress, 2d Sess. (1974). It was debated on the Senate floor on October 3d and 4th, 1974, and was passed by a 56 to 7 vote on October 4th. 120 Cong. Rec. S. 18230-263 (daily ed., Oct. 3, 1974); 120 Cong. Rec. S. 18318-336 (daily ed., Oct. 4, 1974). The Committee on House Administration reported the bill favorably to the House of Representatives on November 26, 1974. H.R. Rep. No. 93-1507, 93d Cong., 2d Sess. (1974). The bill was passed by the House on December 3, 1974, under Suspension of the Rules, by unanimous voice vote. 120 Cong. Rec. H. 11204 (daily ed., Dec. 3, 1974). There was no Conference Committee Report on the differences between the House and Senate versions of the bill; instead, on December 9, 1974, the Senate concurred in the House amendment, after adding amendments of its own, and the House concurred in the Senate amendments to the House bill. 120 Cong. Rec. S. 20809, H. 11445 (daily ed., Dec. 9, 1974). The bill was signed into law by the President on December 19, 1974. 88 Stat. 1695.

THE GSA MEMORANDUM OF LAW

In a memorandum issued by the General Services Administration on June 2, 1975, it was concluded that the Administrator does not have the authority irrevocably to subdelegate judgmental responsibilities imposed on him by Congress pursuant to the Presidential Recordings

and Materials Preservation Act. Although the Administrator, acting as the agent of Congress, may subdelegate ministerial acts, he must retain at least review authority over decisions requiring the exercise of discretion, skill, and judgment. In support of this conclusion, the memorandum stated that the Act "nowhere authorizes a subdelegation by the Administrator to another party of the responsibility to take complete possession and control of the Nixon Presidential historical materials or to provide public access to these materials." In a subsequent discussion of the question, the Memorandum relied on at least two "established principles of agency law" to the effect that a) absent specific statutory authority, an agent is barred from subdelegating responsibility for acts requiring skill, discretion, and judgment, and b) an agent may solicit recommendations or assistance from others in matters requiring discretion, skill, or judgment, so long as the agent retains the right to make the final review or decision. After discussing three cases involving the subdelegation of the subpoena power by Federal administrative agencies, the memorandum reached the following conclusions, which are quoted in full:

1. Since the Presidential [Recordings and Materials] Preservation Act contains no authority for the Administrator of General Services to subdelegate his responsibility to obtain complete possession and control over the Nixon historical materials and to provide and regulate public access to the materials, the Administrator may *not* subdelegate such acts of discretion, skill and judgment to the Presidential Materials Review Board.

2. The Administrator, however, *may* seek assistance from the Presidential Materials Review Board in coming to a final agency decision which requires discretion, skill and judgment, so long as the Administrator retains the right to review and revise the Board's recommendations. (Emphasis in original.)

PROVISIONS OF THE ACT

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

submit to each House of the Congress a report proposing and explaining regulations that would provide public access to the tape recordings, and other materials referred to in section 101." The Act requires the regulations to take into account seven enumerated factors, and provides that such regulations shall take effect ninety days after the submission of the report unless disapproved by a resolution adopted by either House of the Congress during that period.

The Congressional veto provisions of section 104 of the Act were clearly modeled on the corresponding sections of the Executive Reorganization Act, 5 U.S. Code §§ 901-13 (1970). As the Supreme Court has observed, the "value of the reservation of the power to examine proposed rules, laws and regulations before they become effective is well understood by Congress. It is frequently, as here, employed to make sure that the action under the delegation squares with the Congressional purpose." *Sibbach v. Wilson & Co.*, 312 U.S. 1, 15 (1941). The court noted the disapproval mechanism then embodied in section 5 of the Reorganization Act of 1939, 53 Stat. 562, the predecessor to later reorganization acts. 312 U.S. at 15 n.17.

ANALYSIS OF GSA MEMORANDUM

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

The *Cudahy* court expressly noted that the entire history of legislation controlling the use of subpoenas by administrative officers indicated a Congressional purpose not to authorize by implication the delegation of the subpoena power. 315 U.S. at 364. The court noted that the subpoena power is capable of oppressive use, especially if indiscriminately delegated and not returnable before a judicial officer, and that it has a coercive tendency. 315 U.S. at 363. The Court thus found a Congressional purpose that the subpoena power shall be delegable only when an authority to delegate is expressly granted. 315 U.S. at 366. It found support for that conclusion in the legislative history of the Act under consideration, which showed that the authority to delegate the subpoena power had been expressly granted in bills passed by the Senate and considered by the House, but had been eliminated by the Conference Committee. 315 U.S. at 362 n. 3, 366. In the *Cudahy* case, then, the Court carefully applied the long standing rule of statutory construction that a court should not interpret a statute so as to give it a meaning which Congress considered in the legislative process but finally rejected. As many cases have held, the deletion of a provision indicates that Congress did not intend the

bill to include the rejected provisions. *United States v. Henning*, 344 U.S. 66 (1952); *Bindczyk v. Finucane*, 342 U.S. 76, 83 (1951); *Wright v. Vinton Branch, Mountain Trust Bank*, 300 U.S. 440, 463 n. 8 (1937); *Norwegian Nitrogen Products Co. v. United States*, 288 U.S. 294, 306 (1933); *United States v. Great Northern R. Co.*, 287 U.S. 144, 155 (1932); *Federal Trade Comm'n v. Raladam Co.*, 283 U.S. 643, 648 (1931); *United States v. Pfitsch*, 256 U.S. 547, 551 (1921); *Lapina v. Williams*, 232 U.S. 78, 89-91 (1914).

In *Fleming v. Mohawk Wrecking & Lumber Co.*, 331 U.S. 111 (1947), the Court construed a provision granting subpoena power to the Emergency Price Administrator in terms that were practically identical to the language at issue in the *Cudahy* case. The Court rejected the argument that *Cudahy* controlled the present case. Instead, the Court noted the following distinguishing factors: 1) The legislative history in *Cudahy* showed that a provision granting authority to delegate the subpoena power had been eliminated in Conference, but no such history accompanied the provision in *Fleming*; 2) The *Cudahy* Act made the powers to gather data and to make investigations expressly delegable, while the *Fleming* Act contained no provision which specifically authorized the delegation of a specific function; 3) the *Cudahy* Act made the restrictive provisions of the Federal Trade Commission Act applicable to the issuance of subpoenas, while the subpoena power in the *Fleming* Act was not dependent on the provision of another Act having a history of its own; and 4) the *Cudahy* Act contained no broad rule-making power, while the Act in *Fleming* gave the Administrator authority to issue regulations necessary and proper to carry out its purposes and provisions. 331 U.S. at 120-21. The Court continued:

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

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

The *Fleming* case would appear to be far more applicable than the *Cudahy* case to the question of the GSA Administrator's authority under the Presidential Recordings and Materials Preservation Act. The legislative history of the Act contains no indication that Congress intended to limit the Administrator's authority to assign the responsibility for controlling public access to an expert body. Since there are no provisions in the Act making other powers expressly delegable, there is nothing to give rise to the inference that the power to control public access is not delegable. The Act does not make the Administrator's authority dependent on any other law. Moreover, the Act *does* contain broad authority to issue regulations governing

public access. In the words of the *Fleming* Court, this rule-making authority may in itself be an adequate source of authority for the Administrator to delegate a particular function, unless it has been withheld by express provision of the Act or by implication. There is nothing in the Act to negative the existence of such authority, nor can its absence be fairly inferred from the history and content of the Act. Thus, it can be concluded, on the authority of the *Fleming* case, that the presence of the rule-making power, together with the other factor differentiating the Act from the *Cudahy* case, that the authority granted by the Act should not be read restrictively.

The Court has upheld the delegability of administrative powers on numerous other occasions. In *Jay v. Boyd*, 351 U.S. 345 (1956), the Court ruled that the discretion conferred on the Attorney General in suspension of deportation cases was conferred upon him as an administrator in his capacity as such, and that under his rule-making authority, as a matter of administrative convenience, he could delegate his authority to special inquiry officers, with review by the Board of Immigration Appeals. Numerous cases in the lower Federal courts have also upheld the delegability of administrative powers in the absence of express or implied statutory provisions or legislative history to the contrary. *Federal Trade Comm'n. v. Gibson*, 460 F. 2d 605 (5th Cir. 1972); *Wirtz v. Atlantic States Construction Co.*, 357 F. 2d 442, 445 (5th Cir. 1966); *Stone v. E.D.S. Federal Corp.*, 351 F. Supp. 340 (N.D. Cal. 1972).

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

"Administrator" means the Administrator of General Services or any delegate whom the Administrator may appoint in writing, or whom the regulations designate, directly or by implication. Although the Act gives full responsibility to the Administrator to fulfill its provisions in regard to the Presidential historical materials, the intention of the Act clearly is that the Administrator may designate other officials or employees to carry out specified tasks for which they are particularly suited. (*Report to Congress on Title I, "Legal Explanation of Proposed Regulations,"* Explanation of proposed section 105-63.104(g), p. G-22.)

Taken as a whole, the statutory scheme and legislative history of the Presidential Recording and Materials Preservation Act provide overwhelming support for the conclusion that Congress may, under section 104, give its approval to regulations which vest the final authority for decisions on public access in the Presidential Materials Review Board. In the first place, no amount of repetition in the GSA Memorandum of Law can serve to mask the fact that the statutory scheme of the Act simply does *not* vest in the Administrator the "responsibility . . . to provide public access to these materials." Rather, as demonstrated earlier, the Act requires the Administrator to "submit to each House of the Congress a report proposing and explaining regulations that would provide public access to the tape

recordings and other materials." P.L. 93-526, § 104(a) (emphasis supplied). In its conclusion that the Administrator has no authority "to subdelegate his responsibility to provide and regulate public access to the materials," the Memorandum completely begs the question whether the Administrator has been granted such authority in the first place. The Memorandum thus repeatedly elides the statutory duty of the Administrator to propose and explain regulations, and arrogates to him the statutory function of providing public access, which was expressly left subject to Congressional approval under section 104(b).

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

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

Mr. YATES. Mr. Speaker, will the gentleman yield for another question?

Mr. BRADEMAS. Yes.

Mr. YATES. Who will determine under the provisions of the bill whether the materials are historical, and, therefore, subject to custody of the United States, and which materials are not?

Mr. BRADEMAS. I would say in response to the gentleman that the bill contemplates that the same types of procedures which are presently used with respect to the papers of former Presidents would be employed.

Mr. YATES. What provisions are those?

Mr. BRADEMAS. While I do not pretend to be an expert, it is my understanding that the procedures involve judgments of the Archivist of the United States, who is an employee of the Administrator of the General Services Administration.

Mr. YATES. Does the gentleman have some compunctions about leaving this decision to the Administrator of the General Services Administration, he being the one who made the agreement with the President of the United States?

Mr. BRADEMAS. I think the gentleman's point is very well taken. It is precisely because of the apprehension of the

members of the committee with respect to that particular point that the bill contains language which directs the Administrator to submit to Congress, within 90 days after the enactment of the measure, regulations which would provide public access to the materials.

Secondly, it is precisely because we shared that apprehension that those regulations would not go into effect without an opportunity for both the House and Senate to review the regulations and to exercise a veto if we disapprove of them. (120 Cong. Rec. H. 11209 (daily ed., Dec. 3, 1974).)

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

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

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

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

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

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

CONCLUSION

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

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

[The following text is extremely faint and largely illegible due to the quality of the scan. It appears to be a continuation of the memorandum's reasoning, possibly discussing the application of the principles mentioned in the first paragraph to specific facts or legal precedents.]