U.S. Department of Justice

Office of Legal Counsel

Office of the
Deputy Assistant Attorney General

Washington, D.C. 20530

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SUBJECT: Archives Rules on Nixon Papers

Attached for your information is a background memo on the Archives rules. It sets out the chronology of events and describes the Act and the rules but goes no further.

Attachment

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MEMORANDUM

RE: National Archives' Proposed Rules on Access to the Nixon Papers

The National Archives and Records Administration (NARA) has recently proposed final rules to govern the preservation and protection of, and public access to, the presidential materials of the Nixon Administration. These rules would implement the Presidential Recordings and Materials Preservation Act of 1974, Pub. L. No. 93-526, 88 Stat. 1695, 44 U.S.C. 2111 note (PRMPA)[1], which directs the Administrator of General Services to take custody of the presidential papers and tape recordings of former President Nixon, and to promulgate regulations that (1) provide for the orderly processing and screening by Executive Branch archivists of such materials for the purpose of returning to President Nixon and his heirs those that are personal and private, and (2) set out the terms and conditions for public access to retained materials. NARA, which has succeeded to those functions under the National Archives and Records Administration Act of 1984, Pub. L. No. 98-497, 98 Stat. 2280, published the rules for public comment last spring, 50 Fed. Reg. 12575 (Mar. 29, 1985), and in July transmitted them to the Office of Management and Budget (OMB) for review under Executive Order No. 12291. The rules are the latest in a series of proposals that have either been vetoed by Congress, withdrawn by the General Services Administration because of congressional opposition or litigation, or struck down by the courts. See discussion infra at 14-19.[2]

This memorandum describes the background of the various attempts by the Executive Branch to implement the requirements of the PRMPA, and the substance of NARA's latest effort to promulgate a set of final rules.

[1] As amended by the National Archives and Records Administration Act of 1984, Pub. L. No. 98-897, 98 Stat. 2280.

[2] OMB has not yet cleared the proposed rules. On December 18, 1985, three plaintiffs filed suit against OMB and NARA, alleging that those agencies have unreasonably delayed implementing the proposed rules, in violation of section 10(e) of the Administrative Procedure Act, 5 U.S.C. 706. Public Citizen et al. v. Burke et al., Civ. No. 85-3987 (D.D.C. filed Dec. 18, 1985). That suit does not challenge the substantive content of the rules.

I.

Nixon-Sampson Agreement

President Nixon resigned as President of the United States effective August 9, 1974. When he left office a large quantity of documents, files, and other materials accumulated by him and his staff during his terms as President remained in the government's custody.[3] After President Nixon's resignation, government archivists began to collect these materials for shipment to California, in accordance with the former President's instructions. Before allowing the release of any materials for disposition according to those instructions, President Ford asked the Attorney General for advice about the ownership of the materials. The Attorney General concluded that the materials were owned by President Nixon by virtue of historical practice and the absence of any statute to the contrary. 43 Op. A.G. No. 1 (Sep. 6, 1974). The Attorney General recognized, however, that the presidential materials "are peculiarly affected by a public interest which may justify subjecting the absolute ownership rights of the ex-President to certain limitations directly related to the character of the documents as records of government activity."

Following President Ford's receipt of the Attorney General's opinion, the Administrator of General Services, Arthur Sampson, executed a depository agreement with President Nixon (Nixon-Sampson Agreement). 10 Weekly Comp. of Pres. Docs. 1104 (1974). Under the Agreement, President Nixon retained title to all of his presidential historical materials but agreed to donate a substantial portion of the materials to the United States at a future date so that they would "be made available, with appropriate restrictions, for research and study." Ibid. While President Nixon reviewed the materials, they were to be deposited with the General Services Administration (GSA) under the Federal Records Act, 44 U.S.C. 2101 et seq.,[4] and transferred to California, where they would be stored in locked areas. Neither President Nixon nor GSA could gain access to the materials without mutual

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[3] These materials included approximately 42 million pages of documents, of which President Nixon estimated that he personally prepared or reviewed 200,000, as well as more than 800 reels of tape recordings of conversations in the Oval Office, the Cabinet Room, and the Lincoln Sitting Room in the White House, and in President Nixon's offices in the Executive Office Building and Camp David. Numerous dictabelt recordings of President Nixon's recollections of daily events also were included.

[4] The Federal Records Act authorized the Administrator of General Services to accept for deposit "the papers and other historical materials of a President or former President of the United States." 44 U.S.C. 2107.

consent. In addition, the Agreement provided that for three years President Nixon would not withdraw any original writing, although he could make and withdraw copies. After the initial three-year period (five years in the case of original tape recordings), during which the President and archivists working under his direction were to review the materials, President Nixon could withdraw any of the materials, and would be entitled to designate any tape recording to be destroyed. Those he did not withdraw or order destroyed would be donated to the United States, with appropriate restrictions on public access. All of the tape recordings were to be destroyed after ten years (September 1, 1984), or upon President Nixon's death, whichever event occurred first.

Implementation of the Nixon-Sampson Agreement was delayed at the request of the Watergate Special Prosecutor. President Nixon then brought suit for specific performance of the agreement. The Special Prosecutor and Jack Anderson, a reporter, intervened; the case was consolidated with actions brought by other plaintiffs who claimed to be interested in President Nixon's presidential materials, all seeking to enjoin transfer of the materials and to gain access to them under the Freedom of Information Act, 5 U.S.C. 552.[5]

II.

Presidential Recordings and Materials Preservation Act of 1974

While these consolidated actions were pending, Congress passed and the President signed the PRMPA. In passing the legislation, Congress stated that information included in President Nixon's papers was "needed to complete the prosecutions of Watergate-related crimes," and that there is "a legitimate public interest in gaining appropriate access to materials of the Nixon Presidency which are of general historical significance." H.R. Rep. No. 1507, 93d Cong., 2d Sess. 2 (1974); see also S. Rep. No. 1181, 93rd Cong., 2d Sess. 4 (1974). At the same time, Congress indicated that public access to the materials "is to be provided in a manner comparable to procedures that have been followed by Presidents in providing access to their materials." H.R. Rep. No. 1507 at 5.

Section 101 of the Act directs the Administrator of General Services, "[n]otwithstanding any other law or any agreement or understanding made pursuant to section 2107 of title 44, United States Code . . ." (i.e., the Nixon-Sampson Agreement), to obtain and retain possession and control of all tape recordings and

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[5] Nixon v. Sampson, 389 F. Supp. 107 (D.D.C. 1975), dismissed as moot (Sep. 21, 1977), rev'd on appeal, The Reporters' Committee for Freedom of the Press v. Sampson, 391 F.2d 944 (D.C. Cir. 1978).

"presidential historical materials" from the Nixon Administration.[6] Section 102(a) prohibits the destruction of the tapes or materials except as may be provided by law, and section 102(b) makes them available (giving priority of access to the Watergate Special Prosecutor) in response to court subpoena or other legal process, or for use in any judicial proceeding. This access was made "subject to any rights, defenses, or privileges which the Federal Government or any person may invoke . . . ." Sections 102(c) and (d) provide that President Nixon (or his designate) and the Executive Branch shall have access to the materials, subject to regulations promulgated under section 103, which requires the Administrator to issue regulations to govern custody of the materials in Washington, D.C., and to assure the protection of the materials from loss, destruction, or access by unauthorized persons.

Section 104 requires the Administrator, within ninety days after the date of enactment (Dec. 19, 1974), to issue regulations providing public access to the materials. These regulations must "take into account" seven 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";
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> 2) the need to make such recordings and materials available for use in judicial proceedings;
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> 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;
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> 4) the need to protect every individual's right to a fair and impartial trial;
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> 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;
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> 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

[6] "Historical materials" are defined, by cross-reference to the Federal Records Act, 44 U.S.C. 2101, to include "books, correspondence, documents, papers, pamphlets, works of art, models, pictures, photographs, plats, maps, films, motion pictures, sound recordings, and other objects or materials having historical or commemorative value."

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.

Sec. 104(a).[7]

Section 105(a) vests the District Court for the District of Columbia with exclusive jurisdiction to hear constitutional challenges to the Act, as well as challenges to the validity of any regulation, and to decide actions involving questions of title, ownership, custody, possession, or control of any tape or materials, or involving payment of any award of just compensation required by section 105(c) when a decision of that court holds that any individual has been deprived by the Act of pri-

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[7] As enacted, section 104(a) required the Administrator to submit the public access regulations and any subsequent changes to both Houses of Congress, and provided that the regulations or changes could be disapproved by a resolution of either House within ninety legislative days of submission. The concurrent resolution procedure was struck down as an unconstitutional legislative veto device in Allen v. Carmen, 578 F. Supp. 951 (D.D.C. 1983), but was found to be severable from the underlying authority to promulgate regulations. In the National Archives and Records Administration Act of 1984, Pub. L. No. 98-897, 98 Stat. 2280, Congress amended section 104(b) to delete the legislative veto, and instead to require submission of proposed regulations to Congress sixty days in advance of their effective date. 98 Stat. 2291.

vate property without just compensation.[8] Section 105(b) is a severability provision, and section 106 authorizes appropriations of sums necessary to carry out the provisions of the Act.

III.

Nixon v. Administrator of General Services

The day after President Ford signed the PRMPA, President Nixon filed suit against the Administrator of General Services seeking injunctive and declaratory relief against implementation of the Act. President Nixon alleged that PRMPA is unconstitutional on several grounds: (1) the Act infringes the powers reserved to the Executive Branch, because it interferes with the President's control over the disposition of presidential papers; (2) the Act invades executive privilege; (3) the Act infringes President Nixon's constitutional rights of privacy, free speech, and free association; (4) the Act is an unconstitutional search and seizure; (5) the Act is an unconstitutional bill of attainder.

A three-judge district court was convened pursuant to 28 U.S.C. 2282, 2284 (1970) to hear President Nixon's claims. In its decision the court rejected the constitutional claims. Nixon v. Administrator, 408 F. Supp. 321 (D.D.C. 1976). The court emphasized, however, that because no regulations had yet become effective under the Act and therefore any challenge to implementation of the Act would be premature,[9] the issue before

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[8] The specific mention in section 105 of actions to recover damages for deprivation of private property was a compromise by Congress to avoid the controversial ownership issue. See, e.g., H.R. Rep. No. 1507 at 7 ("The legislation takes no position on the ownership of these materials prior to enactment of this title. The committee believes that at this time the resolution of the question of prior ownership is a matter most appropriately left for the judiciary to decide."); S. Rep. No. 1181 at 4 ("The legislation does not take any position with respect to the ownership of Mr. Nixon's tapes, papers, and other materials . . . . The question of ownership here is pre-eminently a matter of law for the courts to decide. In any case, it is not necessary to decide the question of ownership in order to have the Federal Government assume complete possession and control of the Nixon tapes and papers."). Former President Nixon has filed suit in the District of Columbia seeking compensation for deprivation of right and access to his presidential materials. Nixon v. United States, C.A. No. 80-3277 (D.D.C.) Briefs have been filed by both sides on the United States' motion for summary judgment.

[9] At the time of the district court's decision, the first three sets of regulations proposed by the Administrator had been disapproved by Congress. See discussion infra at 14-18.

it was narrow -- whether "the regulatory scheme enacted by Congress was unconstitutional without reference to the content of any conceivable set of regulations falling within the scope of the Administrator's authority under section 104(a)." 408 F. Supp. at 334-35. Judge McGowan opined for the court that "[w]hen regulations finally become effective, . . . they could, if drafted with careful attention to the directive of subsection 104(a)(5) [preserving the rights of individuals to assert legally or constitutionally based rights and privileges] eliminate the basis for some of the allegations raised by Mr. Nixon that his rights will be infringed." Id. at 335.

The Supreme Court affirmed the three-judge court decision in Nixon v. Administrator, 433 U.S. 425 (1977), adopting the narrow focus of the district court:

> The District Court . . . concluded that as no regulations under [section] 104 had yet taken effect, and as such regulations once effective were explicitly made subject to judicial review under [section] 105, the court could consider only the injury to appellant's constitutionally protected interests allegedly worked by the taking of his Presidential materials into custody for screening by Government archivists . . . . We too, therefore, limit our consideration of the merits of appellant's several constitutional claims to those addressing the facial validity of the provisions of the Act requiring the Administrator to take the recordings and materials into the Government's custody subject to screening by Government archivists.

433 U.S. at 439. As set forth below with respect to each of the claims raised by President Nixon, the Court concluded that the limited intrusion effected by custody and archival screening of the Nixon papers met constitutional requirements.

A. Separation of Powers

President Nixon argued first that the regulation of the custody and disclosure of presidential materials constitutes an impermissible interference by the Legislative Branch with matters inherently the business solely of the Executive Branch, and therefore violates the constitutionally mandated separation of powers. See 433 U.S. at 440. The Court rejected the "'archaic view of the separation of powers as requiring three airtight departments of government,'" inherent in that claim. 433 U.S. at 443, quoting Nixon v. Administrator, 408 F.Supp. at 342. Rather, the "proper inquiry focuses on the extent to which it prevents the Executive Branch from accomplishing its constitutionally assigned functions. Only where the potential for disruption is present must we then determine whether that impact is justified by an overriding need to promote objectives within the constitutional authority of Congress." Id., citing United States v. Nixon, 418 U.S. 683, 711-12 (1974).

Measured against this standard, the Court concluded that "nothing contained in the Act renders it unduly disruptive of the Executive Branch and, therefore, unconstitutional on its face." 433 U.S. at 445. The Court considered "highly relevant" that the Act provides for custody and screening of the materials by officials of the Executive Branch,[10] and that employees of that Branch could have access only "for lawful Government use, subject to [the Administrator's] regulations" (sec. 102(d)). Although the Act also provides for access to the materials for use in judicial proceedings, and for eventual public access, the Act expressly recognizes the need both "to protect any party's opportunity to assert any legally or constitutionally based right or privilege" (sec. 104(a)(5)), and to return purely private materials (sec. 104(a)(7)). Thus, the Court found that "[t]he Executive Branch remains in full control of the Presidential materials, and the Act facially is designed to ensure that the materials can be released only when release is not barred by some applicable privilege inherent in that branch." Id. at 444. Although the Court recognized "future possibilities for constitutional conflict in the promulgation of regulations respecting public access to particular documents," it concluded that "nothing contained in the Act renders it unduly disruptive of the Executive Branch and, therefore, unconstitutional on its face." Id. at 445.[11]

B. Executive Privilege

Second, President Nixon alleged that the screening and potential public disclosure of communications given to him in confidence would adversely affect the ability of future Presidents to obtain the candid advice necessary for effective

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[10] "The Administrator of General Services, who must promulgate and administer the regulations that are the keystone of the statutory scheme, is himself an official of the Executive Branch, appointed by the President. The career archivists appointed to do the initial screening for the purpose of selecting out and returning to appellant his private and personal papers similarly are Executive Branch employees." 433 U.S. at 441.

[11] The Court also noted that there was "abundant statutory precedent for the regulation and mandatory disclosure of documents in the possession of the Executive Branch," such as the Freedom of Information Act, the Privacy Act, the Government in the Sunshine Act, the Federal Records Act, and other specific purpose statutes, which regulation "has never been considered invalid as an invasion of its autonomy." Id. at 445.

decisionmaking.[12] See 433 U.S. at 450. The former President asserted that by authorizing the Administrator to take custody of all presidential materials and authorizing future publication except where a privilege is affirmatively established, the Act offends the presumptive confidentiality of presidential communications recognized in United States v. Nixon, 481 U.S. 683 (1974). See 433 U.S. at 440.

Because President Nixon's executive privilege claim was raised against the Executive Branch itself, the Court first considered whether a former president can raise executive privilege claims. While recognizing that the incumbent President both has a greater need for the privilege, and is in a better position to assert the privilege,[13] the Court adopted the view espoused by the Solicitor General that former presidents may assert executive privilege:

> This Court held in United States v. Nixon . . . that the privilege is necessary to provide the confidentiality required for the President's conduct of

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[12] President Nixon's executive privilege argument was limited to what is generally considered the "deliberative process privilege" -- i.e., communications made in confidence as part of the government's decisionmaking process. See United States v. Nixon, 418 U.S. at 705. In both the district court and the Supreme Court President Nixon acknowledged that the "state secrets privilege" -- "the very specific privilege protecting against disclosure of state secrets and sensitive information concerning military or diplomatic matters (433 U.S. at 440) -- may be asserted only by an incumbent President. Ibid.

[13] "It is true that only the incumbent is charged with performance of the executive duty under the Constitution. And an incumbent may be inhibited in disclosing confidences of a predecessor when he believes that the effect may be to discourage candid presentation of views by his contemporary advisers. Moreover, to the extent that the privilege serves as a shield for executive officials against burdensome requests for information which might interfere with the proper performance of their duties, a former President is in less need of it than an incumbent. In addition, there are obvious political checks against an incumbent's abuse of the privilege . . . . [T]he fact that neither President Ford nor President Carter supports appellant's claim detracts from the weight of his contention that the Act impermissibly intrudes into the executive function and the needs of the Executive Branch. This necessarily follows, for it must be presumed that the incumbent President is vitally concerned with and in the best position to assess the present and future needs of the Executive Branch, and to support invocation of the privilege accordingly." 433 U.S. at 448-49 (citations omitted).

> office. Unless he can give his advisers some assurance of confidentiality, a President could not expect to receive the full and frank submissions of facts and opinions upon which effective discharge of his duties depends. The confidentiality necessary to this exchange cannot be measured by the few months or years between the submission of the information and the end of the President's tenure; the privilege is not for the benefit of the President as an individual, but for the benefit of the Republic. Therefore the privilege survives the individual President's tenure.

433 U.S. at 449, quoting Brief for Federal Appellees at 33.

Nonetheless, the Court concluded (433 U.S. at 451) that the "mere screening of the materials by the archivists" represents only "a very limited intrusion by personnel in the Executive Branch sensitive to executive concerns" -- an intrusion that was both consistent with historical practice[14] and justified by the perceived need to preserve the materials for legitimate historical and governmental purposes, and the substantial public interests in restoring public confidence and improving Congress's understanding of how the political processes had worked. Id. at 452-53. Because its review was limited to the facial constitutionality of the Act and archival screening procedures, the Court did not need to consider whether eventual public access to the presidential materials would present more substantial executive privilege concerns. The Court did, however, suggest that the provisions in the Act directing the Administrator to take into account "the need to protect any party's opportunity to assert any . . . constitutionally based right or privilege," and the need to return purely private materials, coupled with the historical practice of past Presidents, would provide protection against intrusion into confidential communications of the President and his advisers:

> In view of these specific directions, there is no reason to believe that the restriction on public access ultimately established by regulation will not be adequate to preserve executive confidentiality. An absolute barrier to all outside disclosure is not practically or constitutionally necessary. As the

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[14] The Court noted (433 U.S. at 452) that archivists "have performed the identical task in each of the Presidential libraries without any suggestion that such activity has in any way interfered with executive confidentiality," and that therefore "past and present executive officials must be well aware of the possibility that, at some time in the future, their communications may be reviewed on a confidential basis by professional archivists."

> careful research by the District Court clearly demonstrates, there has never been an expectation that the confidences of the Executive Office are absolute and unyielding. All former Presidents from President Hoover to President Johnson have deposited their papers in Presidential libraries (an example appellant has said he intended to follow) for governmental preservation and eventual disclosure. The screening processes for sorting materials for lodgment in these libraries also involved comprehensive review by archivists, often involving materials upon which access restrictions ultimately have been imposed. The expectation of the confidentiality of executive communications thus has always been limited and subject to erosion over time after an administration leaves office.

433 U.S. at 450-51. The Court cautioned, however, that "[i]f the broadly written protections of the Act should nevertheless prove inadequate to safeguard appellant's rights or to prevent usurpation of executive powers, there will be time enough to consider that problem in a specific factual context." Id. at 455.

C. Personal Privacy

Third, President Nixon argued that the Act violates fundamental rights of personal privacy guaranteed to him by the Fourth and Fifth Amendments, because it operates to seize all of his records and tape recordings, including materials that may be private or personal in nature, and provides for screening and review of those materials by individuals not chosen or supervised by President Nixon. The District Court considered this to be "[t]he most troublesome challenge," because the historical practice of past Presidents had been, for the most part, to exclude or to prohibit review of private materials, such as materials relating to personal, financial, or family relations.[15] The court concluded that "the manner in which such materials have been treated by past Presidents, together with the legislative approval of such treatment, gave rise to a legitimate expectation on Mr. Nixon's part that not all of the materials would be subject to comprehensive review by government personnel without his consent." 408 F. Supp. at 361. Nonetheless, the court found (id. at 362) that archival screening under the PRMPA met "the touchstone . . . of reasonableness."

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[15] The court characterized those materials as embracing, for example, "extremely private communciations between him and, among others, his wife, his daughters, his physician, lawyer, and clergyman, and his close friends, as well as personal diary dictabelts and his wife's personal files . . . ." 408 F. Supp. at 359.

On appeal, the Supreme Court adopted the conclusion of the district court that the Act "is a reasonable response to the difficult problem caused by the mingling of personal and private documents and conversations in the midst of a vastly greater number of nonprivate documents and materials related to government objectives." 433 U.S. at 456, quoting 408 F. Supp. at 367. Recognizing that "public officials, including the President, are not wholly without constitutionally protected privacy rights in matters of personal life unrelated to any acts done by them in their public capacity," and that President Nixon had a legitimate expectation of privacy in such materials, the Court concluded that the President's privacy interests were relatively weak, "when weighed against the public interest in subjecting the Presidential materials to archival screening." Id. at 458. The Court found particularly relevant that the government would return purely private papers and recordings to the President after screening; that the President's privacy claim related only to "a very small fraction of the massive volume of official materials with which they are presently commingled;" and that separation of purely private matters can be achieved only by screening of the materials. Id. at 458-62.

D. First Amendment

Both the district court and the Supreme Court treated separately a second privacy argument made by President Nixon -- that the Act's archival screening process necessarily entails invasion of his constitutionally protected rights of associational privacy and political speech, because the materials to be reviewed by the archivists include records from his partisan political activities. The gist of President Nixon's claim was

> that the Act invades the private formulation of political thought critical to free speech and association, imposing sanctions upon past expressive activity, and more significantly, limiting that of the future because individuals who learn the substance of certain private communications by [President Nixon] -- especially those critical of themselves -- will refuse to associate with him. The Act is furthermore said to chill [his expression] because he will be 'saddled' with prior positions communicated in private, leaving him unable to take inconsistent positions in the future.

408 F. Supp. at 367-68.

The Supreme Court acknowledged the validity of President Nixon's argument that involvement in partisan politics is closely protected by the First Amendment, and that "compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment." Buckley v. Valeo, 424 U.S. 1, 64 (1976). However, the Court concluded that "the important governmental interests promoted by the Act"

outweighed the First Amendment interests, particularly as the archival screening was the least restrictive way of promoting the governmental interests, and any burden imposed by the screening was "speculative in light of the Act's terms protecting appellant from improper public disclosures and guaranteeing him full judicial review before any public access is permitted." 433 U.S. at 467. Moreover, the Court found no merit in President Nixon's further argument that the Act's scheme for custody and screening "necessarily inhibits [the] freedom of political activity [of future Presidents]" (id. at 468), noting that such concerns had not deterred President Ford from signing the Act, or President Carter from urging affirmance of the judgment of the district court.

E. Bill of Attainder Clause

Finally, President Nixon argued that PRMPA constitutes a bill of attainder proscribed by Art. I, sec. 9 of the Constitution,[16] because Congress intended the Act as a "legislative judgment of blameworthiness, which singled out the President, as opposed to all other Presidents or members of the Government, for disfavored treatment." 433 U.S. at 468, 470. The Supreme Court rejected this claim, concluding that the Bill of Attainder Clause could not be read as broadly as President Nixon urged -- i.e., to invalidate every statute that burdens some persons or groups but not all other plausible individuals -- and that Congress did not intend the legislation to "inflict punishment" within the historical meaning of bills of attainder. Id. at 473-84.

Four Justices wrote separate concurring opinions in Nixon v. Administrator. Justice Stevens concurred in the opinion of the Court, but wrote a separate opinion on the bill of attainder issue. 433 U.S. at 484. Justice White also wrote separately, taking the opportunity to observe that section 104(a)(7) of PRMPA suggests that the only private materials to be returned to President Nixon are those that "are not otherwise of general historical significance." 433 U.S. at 487. He noted that "the validity of the Act would be questionable if mere historical significance sufficed to withhold purely private letters or diaries," but concluded that the section need not be so construed. Id. at 488. Justice Blackmun, in his partial concurrence, expressed the hope that PRMPA "will not become a model for the disposition of the papers of each President who leaves office at a time when his successor or the Congress is not of his political persuasion." Id. at 491. Finally, Justice Powell wrote a lengthy partial concurrence, setting out his view of the separation of powers claim, and emphasizing the extraordinary, emergency nature of the legisla-

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[16] "No Bill of Attainder or ex post facto Law shall be passed . . . ."

tion. Justice Powell noted in particular that "[t]he difficult constitutional questions lie ahead" (id. at 503), because the Act "deliberately left to the rulemaking process, and to subsequent judicial review, the difficult and sensitive task of reconciling the long-range interests of President Nixon, his advisors, the three branches of Government, and the American public, once custody was established" (id. at 495).

Chief Justice Burger and Justice Rehnquist filed lengthy dissenting opinions. The Chief Justice disagreed with the majority on virtually every point, finding persuasive the arguments raised by President Nixon. Justice Rehnquist wrote only on the separation of powers issue. He concluded that the Act violates the principle of separation of powers, because its effect "will undoubtedly restrain the necessary free flow of information to and from the present President and future Presidents." 433 U.S. at 547. Justice Rehnquist specifically rejected the notion that any substantial intrusion upon the effective discharge of the duties of the President could be "balanced" against the interests assertedly fostered by the Act. Ibid. Finally, he expressed considerable concern that the majority opinion "countenances the power of any future Congress to seize the official papers of an outgoing President as he leaves the inaugural stand. In so doing, it poses a real threat to the ability of future Presidents to receive candid advice and to give candid instructions." Id. at 545.

IV.

GSA Proposed Regulations

The set of regulations proposed by NARA is the sixth set to be promulgated under PRMPA, the first five sets having been prepared by GSA. GSA transmitted the first set to Congress, pursuant to section 104(a) of the Act, on March 19, 1975, within the required ninety-day period. On May 13, 1975 the Senate Government Operations Committee held a hearing on this set of regulations.[17] During the hearing Senator Gaylord Nelson criticized the regulations and suggested specific alternative language designed to eliminate alleged inconsistencies between the

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17 GSA Regulations Implementing Presidential Recordings and Materials Preservation Act, Hearing Before the Senate Committee on Government Operations, 94th Cong., 1st Sess. 271-73 (1975). The House of Representatives also held hearings on these regulations, see GSA Regulations to Implement Title I of the Presidential Recordings and Materials Preservation Act, Hearings Before the Subcommittee on Printing of the House Committee on House Administration, 94th Cong., 1st Sess. (1975), and a committee report was issued. H.R. Rep. No. 560, 94th Cong., 1st Sess. (1975). However, there was no floor action in the House on this set of regulations.

regulations and congressional intent under the Act.[18] On September 11, 1975 the Committee filed a report which suggested that ten specific provisions of the regulations should be disapproved, but that the balance of the regulations should become effective as scheduled.[19] The ten objections described in the Committee report focused on the following four areas:[20]

1) vesting final administrative judgment over who should have access to the tapes and papers in the Administrator of General Services. The Committee suggested, instead, that such power should be vested in the Presidential Materials Review Board, a body which would include a non-government professional archivist, the Librarian of Congress, and the Archivist of the United States;

2) restricting access to any material that "would tend to embarrass, damage, or harass living persons . . . ." The Committee recommended deletion of this language and substitution of language authorizing restrictions on access to materials relating to "an individual's personal affairs, such as personnel and medical files" if the individual involved expresses in writing a desire to withhold such records from public access;[21]

3) restricting access to material involving national security, personal privacy, law enforcement investigations and trade secrets. The Committee suggested specific alternative language concerning each of these areas designed to ease such restrictions; and

4) prohibiting reproduction of tape recordings of presidential conversations. The Committee recommended that copying of the tapes be permitted.

In general, the Committee's recommendations were intended to expand public access to the material subject to the Act. Because no provision existed for revising or amending the proposed regulations in part, and GSA contended that it would be difficult to implement the remaining, approved regulations, the Committee concluded that it should recommend disapproval of all the regulations. S. Rep. No. 368, at 3.

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18 See Senate Hearings at 33-66.

19 S. Rep. No. 368, 94th Cong., 1st Sess. 15 (1975).

20 Id. at 4-15.

21 S. Rep. No. 368 at 9-10. The Committee also recommended that the Administrator be required to make such personal information available "if such personal information or portion thereof, is essential to an understanding of the abuse of governmental power." Ibid.

GSA submitted a second, revised set of regulations to Congress on October 15, 1975. This set of regulations recognized and accommodated almost all of the objections found in the Senate report concerning the first set. In particular, in place of the "tend to embarrass, damage or harass" language used in the first set, the proposed regulation provided that:

> The Administrator will restrict access to any portion of materials determined to relate to abuses of governmental power when the release of those portions would constitute a clearly unwarranted invasion of personal privacy or result in the defamation of a living person: Provided, that if materials relating to an abuse of governmental power refers to, involves or incorporates such personal information, the Administrator will make available such personal information, if such personal information, or portions thereof, is essential to an understanding of the abuse of governmental power.

See Allen v. Carmen, 578 F. Supp. 951, 957 (D.D.C. 1983). With regard to materials of general historical significance unrelated to abuses of governmental power, the proposed regulations provided that the Administrator will restrict access when the release of the materials would:

> . . . constitute a clearly unwarranted invasion of personal privacy or result in the defamation of a living person; . . .

Ibid.

While these regulations were pending in Congress, the district court issued its opinion in Nixon v. Administrator upholding the facial constitutionality of the Act. On January 19, 1976, former Assistant Attorney General Rex Lee formally advised the Administrator of General Services to withdraw the second set of regulations from congressional consideration in order to permit a comprehensive reconsideration of those

regulations in light of the court's decision.[22] On January 21, 1976, the Administrator notified Congress that he was withdrawing the second set of regulations upon advice of the Assistant Attorney General. The Administrator committed himself to resubmitting the regulations "with or without changes as necessitated by the decision in Nixon v. Administrator . . . on or before April 19, 1976."[23] The Senate Government Operations Committee, however, determined that the Administrator lacked legal authority to withdraw regulations once they were submitted to Congress.[24] On April 8, 1976, the Senate voted to disapprove seven of the proposed regulations.[25] These seven provisions concerned:

1) the composition of the Review Board

2) the adequacy of notice to affected individuals

3) the Administrator's consideration of petitions to protect legal and constitutional rights by limiting access to specific materials;

4) the reproduction of presidential tape recordings;

5) the restrictions on personal and defamatory material; and

6) the restrictions upon disclosure of material of general historical interest.[26]

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22 Assistant Attorney General Lee noted that the Court's opinion "raises questions of possible constitutional infirmity." He specifically mentioned only two such questions: 1) the need "to differentiate among political activities of the former President that relate to his constitutional freedom of association and those that relate to his performance as Chief Executive;" and 2) "the requirement that screening archivists refer materials which reflect an apparent violation of law to the Administrator for subsequent referral to the Department of Justice." The latter provision was eliminated from later sets of the regulations and the definitions of "presidential historical materials" and "private or personal materials" have been revised to accomodate the first concern.

23 S. Rep. No. 748, 94th Cong., 2d Sess. 3 (1976).

24 Id. at 4-5.

25 122 Cong. Rec. 10159-10160 (1976).

26 See id.; S. Rep. No. 748, at 5.

On April 13, 1976, GSA submitted to Congress a third revised set of regulations. It was the view of the Committee on House Administration that because the Administrator had no authority to withdraw the second set of regulations submitted to Congress on October 15, 1975, all regulations that had not been specifically disapproved by the Senate on April 8, 1976 became effective upon the expiration of ninety legislative days following October 15, 1975. Consequently, the House Committee reviewed only the revised version of those seven provisions that had been disapproved by the Senate on April 8, 1976. It concluded that six of the seven previously disapproved and revised provisions were still unacceptable. The Committee report did not, however, provide alternative language for the six disapproved provisions, or explain its objections to them.[27] On September 14, 1976, the House voted to disapprove the six provisions specified in the Committee report. Only the provision concerning the procedure to be followed by the Administrator in considering petitions to protect the legal and constitutional rights of individuals was found acceptable.[28]

On June 2, 1977, GSA submitted a fourth set of regulations. Neither House vetoed these regulations, and they became effective on December 16, 1977. See 42 Fed. Reg. 63626-29 (1977). President Nixon promptly challenged the validity of the fourth set of regulations on several grounds, including that section 104(a) of the Act unconstitutionally permits a one-house veto. On February 14, 1979, the parties to the Nixon lawsuit reached a settlement agreement which called for certain revisions to the regulations and disposed of all of President Nixon's challenges except those concerning creation of public listening centers for presidential tape recordings, and archival screening of tapes and dictabelts containing President Nixon's personal diary. By the terms of the settlement, the parties agreed to litigate the two remaining issues while the regulations were submitted to Congress for review.

The remaining issues were considered in Nixon v. Solomon, C.A. No. 77-1395 (D.D.C.), aff'd on other grounds sub nom. Nixon v. Freeman, 670 F. 2d 346 (D.C.Cir.), cert. denied, 459 U.S. 1035 (1982) (hereafter Nixon v. Freeman). In that case, the court of appeals upheld the district court's decision granting summary judgment in favor of GSA, finding that:

1) the provision in the regulations for the creation of archival centers where members of the public could listen to copies of certain tape recordings made by the former president did not invade his constitutional right of privacy;

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27 H.R. Rep. No. 1485, 94th Cong., 2d Sess. (1976).

28 See H.R. Rep. No. 1485, 94th Cong., 2d Sess. (1976); 122 Cong. Rec. 30250-52 (1976).

2) the listening center regulation did not infringe President Nixon's rights of associational privacy;

3) the listening center regulation did not infringe unduly on the presidential privilege of confidentiality, even though less intrusive means of accomplishing the Act's purposes could have been chosen; and

4) the procedure by which government archivists planned to screen and identify tapes containing President Nixon's personal diary was not an unreasonable infringement of the President's privacy rights.

Meanwhile, GSA submitted the revised portions of the regulations, which had been agreed upon by the parties, to Congress for approval. The regulations became effective after ninety legislative days. 45 Fed. Reg. 14855 (March 7, 1980). Under this fifth set of regulations, the Administrator was authorized to restrict access to Watergate materials and those of general historical significance when release would "constitute a clearly unwarranted invasion of personal privacy or constitute libel of a living person." With respect to the Watergate materials, the fifth set of regulations contained the proviso, as had the fourth set, authorizing the Administrator to make available personal information that was essential to an understanding of the abuses of governmental power. The fifth set also revised the definition of "private or personal materials." Materials relating to family or other nongovernmental activities, including private political associations, were included under the new definition, but materials of President Nixon or his staff related to the constitutional or statutory powers or duties as President or as a member of the President's staff were excluded. The regulations also required the Administrator to give priority to the processing and return of private and personal materials and in the initial archival processing to materials relating to abuses of governmental power. See Allen v. Carmen, 578 F. Supp. at 959.

Pursuant to the regulations, the Administrator published notice in the Federal Register on August 12, 1983 advising that a portion of the Nixon presidential materials known as the White House Special Files (Special Files) would be made public for the first time on or after September 26, 1983.[29] The notice stated that "[a]ny person who believes it necessary to bar public access to all or portions of the above materials to protect an individual's rights, privileges or defenses, shall notify the Administrator" no later than September 12, 1983. 48 Fed. Reg. 36655 (Aug. 12, 1983). The deadline for submitting objections

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[29] According to the National Archives, the Special Files are likely to contain most, if not all, of the "Watergate" materials (material related to an abuse of governmental power).

to public release of the documents was subsequently extended by the Administrator to November 10, 1983, and again to January 3, 1984. See 48 Fed. Reg. 40561 (Sep. 18, 1983); 48 Fed. Reg. 51533 (Nov. 9, 1983).

Meanwhile, on October 20, 1983, twenty-nine named plaintiffs, all of whom were either members of the White House staff, Cabinet officials or policy-making officials during the Nixon Administration, filed suit challenging the constitutionality of the regulations promulgated by the Administrator. Plaintiffs alleged that Congress had improperly influenced the formulation and modification of the regulations by repeatedly exercising an unconstitutional legislative veto over the regulations that were submitted to Congress pursuant to section 104(b) of the Act. Plaintiffs urged that section 104(b) and the regulations promulgated thereunder be declared unconstitutional in light of INS v. Chadha, 462 U.S. 919 (1983).

On December 30, 1983, the district court held, inter alia, that section 104(b) and the regulations promulgated thereunder were invalid under the reasoning of the Chadha decision. Allen v. Carmen, 578 F. Supp. at 968. Defendants were enjoined from further implementing or taking any actions pursuant to the existing public access regulations until such time as newly promulgated regulations become effective. The court found, however, that the authority delegated to the Administrator under section 104(a) to issue regulations was severable from the legislative veto provision contained in section 104(b), and that such authority remained fully valid along with the remainder of the Act. Id. at 971. The government did not take an appeal from the district court's decision.

V.

NARA's Proposed Regulations

A. Report of Nixon Materials Review Group

Following the Allen v. Carmen decision, the Archivist established the Nixon Materials Review Group (Nixon Group) to study and make recommendations on possible changes in, or alternatives to, the invalidated regulations. The Nixon Group, which consisted of three federal employees experienced in the archival processing of presidential materials, was charged "with the broad responsibility of rigorously reviewing all of the . . . regulations to determine if changes are necessary for reasons of (a) archival efficiency and compliance with commonly accepted archival standards; (b) consistency with the practices of Presidential libraries; and (c) compliance with [PRMPA]." It did not review the legal sufficiency of the regulations.

On March 28, 1984, the Nixon Group issued a report concluding that the set of regulations challenged in Allen v. Carmen should be issued unchanged. The report discusses in

some detail many of the potential problem areas, including the exclusion of materials relating to President Nixon's private political associations, the processing and opening of materials by integral file segments, the adequacy of notification procedures, the minimization of archival intrusion into personal materials, the preservation of confidentiality of communications, and the language of the privacy restriction. Based on historical practice with respect to other presidential materials and the specific requirements of the PRMPA, the Nixon Group concluded that "the effect of the implementation of these regulations would be the archival administration of the Nixon materials in a manner similar to the materials of other modern Presidents." Much of the analysis contained in the report is reflected in NARA's supporting documentation for the proposed regulations.

B. Public Comments

With one exception,[30] NARA adopted the recommendations of the Nixon Group, and proposed the previous set of regulations unchanged for public comment. During the 60-day comment period NARA received comments from three parties: R. Stan Mortenson, on behalf of Richard Nixon and unnamed former Nixon administration staff members; David Ginsburg, on behalf of Henry Kissinger; and Howard Minderer, on behalf of the National Broadcasting Company, Inc. NARA made only one minor revision to the regulations in response to those comments,[31] before submitting the proposed final regulations to OMB for Executive Order 12291 review.

[30] NARA modified the regulations governing composition of the Presidential Materials Review Board (a board authorized to make determinations concerning the identification of private and personal material, and material relating neither to abuses of governmental power nor having general historical significance) to meet constitutional objections raised by the Department of Justice. Under prior sets of regulations the Board included an archivist or historian nominated by the Council of the Society of American Archivists, "who shall not otherwise be a Federal employee or official." The Department of Justice advised NARA that this regulation is unconstitutional, because vesting decisionmaking responsibility for screening presidential materials in the hands of someone outside the Executive Branch is inconsistent with the theory adopted by the Supreme Court in Nixon v. Administrator to sustain the constitutionality of the Act -- i.e., that the materials would be within the exclusive control of the Executive Branch. The newly proposed regulations require appointment of a historian from a federal agency to this position.

[31] The one change made by NARA was to amend the section governing access by President Nixon to record storage areas to clarify that authorized access included Nixon's designated attorney or agent.

C. Proposed Final Rules

NARA takes the position that the proposed set of regulations "provides for archival treatment of the Nixon materials that is comparable to the treatment of similar materials of other Presidents in the Presidential libraries," except insofar as the PRMPA requires otherwise. 50 Fed. Reg. 12576 (Mar. 29, 1985). The "principal departure from standard Presidential library practice is the extraordinary requirement to notify former staff members and other interested parties before any Nixon materials are opened to the public, and to allow persons to object to proposed openings of the materials." Id.

The regulations require the Archivist to obtain exclusive legal custody and control of all "Presidential historical materials of the Nixon Administration." Sec. 1275.14.[32] "Presidential historical materials" include:

> 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 powers or duties as President and retained or appropriate for retention as evidence of or information about these powers or duties. Included in this definition are materials relating to the political activities of former President Nixon or members of his staff, but only when those activities directly relate to or have a direct effect upon the carrying out of constitutional duties.

Sec. 1275.16(a). The regulations govern two major aspects of control of the Nixon materials: archival processing of the materials, including segregation of materials that either should be returned to the originator or should be restricted from public access;[33] and access to the materials.

1. Archival processing and segregation of materials

Section 1275.46 of the proposed regulations requires the archivists to process the materials for the purpose of segregat-

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[32] In fact, the Archivist has already gained possession of all such materials.

[33] Materials deemed to be "private or personal materials" are returned to their originator; all other segregated materials remain in the control of the Archivist, but are removed from the files available for public access.

ing -- i.e., removing from the original files -- certain types of materials.[34] First, the archivists must segregate "private or personal materials" for the purpose of transferring them to their "proprietary or commemorative owner." Sec. 1275.46(a). "Private or personal materials" are defined to include:

> those papers and other documentary or commemorative materials in any physical form relating solely to a person's family or other non-governmental activities, including private political associations, and having no connection with his constitutional or statutory powers or duties as President or as a member of the President's staff

Sec. 1275.16(b). Second, the archivists must segregate materials that relate neither to "abuses of governmental power,"[35] (i.e., Watergate materials) nor otherwise have "general historical significance."[36] Sec. 1275.46(b). Finally, the archivists must segregate materials subject to certain enumerated restrictions. Sec. 1275.46(c).

Those restrictions differ depending on whether the material is Watergate-related. Under section 1275.50, the archivists must segregate Watergate materials if:

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[34] The required archival processing of the Nixon materials in fact involves three phases. In the first phase, the archivists examine the materials to establish physical and documentary control over them, and to take any necessary steps to preserve the materials. In the second phase, the archivists review the materials to develop finding aids, such as folder title lists, series descriptions, and subject logs. Finally, in the third phase the archivists actually segregate the materials prior to opening the files for public access. See Nixon v. Freeman, 670 F.2d at 353.

[35] "Abuses of governmental power popularly identified under the generic term 'Watergate,'" is defined to include alleged acts within the purview of the charters of the Senate Select Committee on Presidential Campaign Activities or the Watergate Special Prosecution Force, or as circumscribed by the Articles of Impeachment adopted by the House Judiciary Committee. Sec. 1275.16(c).

[36] "General historical significance" is defined to mean "having administrative, legal, research or other historical value as evidence of or information about the constitutional or statutory powers or duties 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." Sec. 1275.16(d).

1) the Archivist is in the process of reviewing or has determined the validity of a claim by any person of a legal or constitutional right or privilege;[37]

2) the Archivist 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;[38]

3) the release of the materials would violate a federal statute;

4) the materials are authorized under criteria established by executive order to be kept classified, "provided that any question as to whether materials are in fact properly classified or are properly subject to classification shall be resolved in accordance with the applicable executive order or as otherwise provided by law".[39]

Sec. 1275.50(a). He must also restrict access to any portion of materials determined to relate to abuses of governmental power if --

the release of those portions would constitute a clearly unwarranted invasion of personal privacy or constitute libel of a living person: Provided, That if material related to an abuse of governmental power refers to, involves or incorporates such personal information, the Archivist will make available such personal information, or portions thereof, if such personal information, or portions thereof, is essential to an understanding of the abuses of governmental power.

Sec. 1275.50(b).

Non-Watergate materials are subject to several additional restrictions, set out in section 1275.52. In addition to the circumstances enumerated for Watergate materials, the Archivist must segregate non-Watergate materials if:

1) release would disclose trade secrets and commercial or financial information obtained from a person and privileged or confidential;

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[37] See infra at 28-29.

[38] See infra at n.45.

[39] The Archivist may waive this restriction, upon certain conditions, for individuals engaged in historical research. Sec. 1275.50(a)(4).

2) release would constitute a clearly unwarranted invasion of personal privacy or constitute libel of a living person;[40] or

3) release would disclose investigatory materials compiled for law enforcement purposes, and disclosure of such records would (a) interfere with enforcement proceedings; (b) deprive a person of a right to a fair trial or an impartial adjudication; (c) constitute an unwarranted invasion of personal privacy; (d) disclose the identity of a confidential source; (e) disclose investigative techniques or procedures; or (f) endanger the life or physical safety of law enforcement personnel.

Sec. 1275.52(b).

If the archivists are unable to determine whether segregation is required by any of these provisions, or they conclude that the required determination "raises significant issues involving interpretation of these regulations or will have far-reaching precedential value," they are to submit the materials to a panel of senior archivists selected by the Archivist of the United States, which would then have responsibility for making the initial determination whether the materials should be segregated. Sec. 1275.46(d). The panel may, in turn, certify the determination to the Presidential Materials Review Board,[41] which may either make a final administrative determination (in the case of materials segregated because they are private and personal or because they neither relate to Watergate nor otherwise have any general historical significance), or may recommend an initial decision to the Senior Archival Panel (in the case of materials subject to restrictions enumerated in

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[40] This is the same standard used for restriction of Watergate materials (see sec. 1275.50(b)), except it does not include the further proviso that information "essential to an understanding of the abuses of governmental power" shall not be restricted.

[41] The Presidential Materials Review Board consists of the Archivist of the United States, the Assistant Archivist for the Office of the National Archives, the Assistant Archivist for the Office of the Presidential Libraries, the Director of the Legal Counsel Staff of NARA, and a historian of a federal agency selected by the Archivist. Sec. 1275.46(f).

sections 1275.50 and 1275.52). Sec. 1275.46(g), (h).[42]

2. Access to Nixon Materials

During archival processing, the regulations allow only limited access to the Nixon materials. President Nixon or his agent may have access to the materials at any time, in the presence of two other persons, including a representative of the Archivist. Secs. 1275.26(b), 1275.30. Any federal agency or department in the Executive Branch may have access "for lawful Government use . . . to the extent necessary for ongoing Government business," upon a written request.[43] Sec. 1275.32. The materials are subject to subpoena or other lawful process, for use in judicial proceedings, subject to any rights, defenses, or privileges the federal government or any person may invoke.[44] Sec. 1275.34.

Once archival processing has been completed for an

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[42] The regulations also provide for periodic review of the materials placed under restriction, so that the archivists may make available for public access "those materials which, with the passage of time or other circumstances, no longer require restriction," and for appeal by researchers (presumably after records have been opened to the public) for removal of specific restrictions. Secs. 1275.54, 1275.56. The Archivist must comply with the notice requirements of section 1275.42 before opening any previously restricted records. Id.

[43] The request must be made by the head or deputy head of the agency or department, or by the head of a major organizational component or function within an agency or department. Sec. 1275.32.

[44] The Archivist must give President Nixon prior notice of any search necessary to comply with a request for access under section 1275.32 or section 1275.34, and of any proposed release of materials in response to such requests. President Nixon may file a claim objecting to the release of all or portions of the covered materials and detailing the alleged rights and privileges that would be violated by a release. If the Archivist determines nonethless to release the materials, he must notify President Nixon and give him five workdays in which to seek judicial relief. Sec. 1275.26(f), (g).

"integral file segment,"[45] the Archivist must open for public access all of the materials that have not been segregated pursuant to section 1275.46, nor are subject to outstanding claims or petitions seeking such restrictions. Sec. 1275.42(a). At least thirty days prior to opening any records to public access, the Archivist must publish notice in the Federal Register identifying the material to be opened. The notice must also include a reference to the right of any interested person to claim, under the provisions of section 1275.44 (see infra), a legal or constitutional right or privilege which would prevent or limit public access to any of the materials. Ibid. Copies of the notice must also be sent to the following individuals:

1) the incumbent President or his agent;

2) President Nixon or his designated agent or heirs;

3) any former staff member reasonably identifiable as the individual responsible for creating or maintaining the file segment proposed to be opened;

4) any individual named in the material that the Archivist may not restrict in accordance with section 1275.50(b) (i.e., material that is "private or personal" but that may not be restricted because it is essential to an understanding of an abuse of governmental power); and

5) any persons named in the materials who are registered with NARA.[46]

Sec. 1275.42.

Objections to disclosure of any materials must be filed with the Archivist within the 30-day period after publication of the notice. Individuals may file objections claiming --

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[45] The regulations prescribe that the Archivist will process and open the Nixon materials by "integral file segment," which refers to "an archival determination that a particular group of processed documents constitutes an intelligible and complete unit for purposes of historical research." Nixon v. Freeman, 670 F.2d at 352 n.11, quoting "Nixon Materials Archival Processing Manual." The Archivist must give priority, "insofar as practicable," to processing of Watergate materials. Sec. 1275.42(a).

[46] Section 1275.42(c) of the regulations authorizes the Archivist to maintain a registry of person who wish to receive personal notice of the proposed opening of integral file segments when those segments contain references about them.

1) a legal or constitutional right or privilege which would prevent or limit public access to any of the materials (sec. 1275.44(a));

2) that public access to any of the materials may jeopardize an individual's right to a fair and impartial trial (sec. 1275.44(b));[47] or

3) that the materials are private or personal and that he or she is the proprietary or commemorative owner (sec. 1275.44(d)).

The claim must be in writing and must identify the specific materials to which it relates. Sec. 1275.44. Unless the claim is that the materials are private and personal, and must therefore be returned, the Archivist is responsible for making the final administrative decision regarding access. Ibid. In making that decision, he "may consult with other appropriate Federal agencies." Sec. 1275.44(c). If the claim alleges that the materials are private or personal, the Archivist must transmit the claim to the Presidential Materials Review Board (see n. 42, supra), which is then responsible for issuing a final administrative decision.[48] Secs. 1275.44(d), 1275.46(i).

Pending an administrative determination on claims objecting to release, the Archivist may not grant public access to the materials covered by the claim. If the administrative determination is adverse to the claimant, the Archivist must refrain from opening the material to public access for at least thirty days after the claimant receives notification of the decision. Sec. 1275.44(a). Although not spelled out in the regulations, presumably within that thirty-day period the claimant can seek judicial review in the United States District Court for the District of Columbia under section 105(a) of the PRMPA. See supra at 5.

Presidential materials that are not restricted (either by the Archivist or by court order) become available for public

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[47] This right is expressly accorded to "officers of any Federal, State, or local court and other persons . . . ." Sec. 1275.44(b).

[48] Upon receiving such a claim, the Board must notify the claimant of its impending consideration, and allow him to supplement his reasons for the claim. The Board must also publish notice of its consideration in the Federal Register, and then receive and take into account the views of any member of the public respecting the public or private nature of the materials. After considering all the positions put forth, the Board must issue a written decision, including any concurring or dissenting opinions. Sec. 1275.46(i).

reference, in locations and under rules that the Administrator shall prescribe. Sec. 1275.62. In particular, the regulations provide (as has been provided since the settlement agreement in Nixon v. Freeman) that researchers may listen to reference copies of tape recordings at the National Archives Building in Washington, D.C. and at other locations chosen by the Archivist. Sec. 1275.64. The regulations do not allow members of the public to reproduce the tapes. Sec. 1275.64(a)(3).