Case Number: 2006-1066-F

FOIA MARKER

This is not a textual record. This is used as an administrative marker by the Clinton Presidential Library Staff.

Folder Title: Legal Research: Disclosure of Security Information [1]
Staff Office-Individual: Counsel's Office-White, Wendy
Original OA/ID Number: CF 802

Row:	Section:	Shelf:	Position:	Stack:
21	5	1	1	V

June 14, 1996

Criminal Liability for Unwarranted Disclosure of Security Files

1. Under the Privacy Act, 5 USC 552a (1996):

> "Any officer or employee of an agency, who by virtue of his employment or official position, has possession of, or access to, agency records which contain individually identifiable information the disclosure of which is prohibited by this section . . . and who knowing that disclosure of the specific material is so prohibited, willfully discloses the material in any manner to any person or agency not entitled to receive it, shall be guilty of a misdemeanor and fined not more than $5,000. 5 U.S.C. 552a(i)(1)

2. The White House is not, however, an "agency" subject to the Privacy Act. _See_ _Kissinger_ v. _Reporters Comm. for Freedom of the Press_, 455 U.S. 136, 156 (1980). _See also_ _Meyer_ v. _Bush_, 981 F.2d 1288, 1291 n.1 (D.C. Cir. 1993).

3. The Privacy Act has a separate provision that applies to any "person" and this section would appear to cover the White House. This provision states:

> "Any person who knowingly and willfully requests or obtains any record concerning an individual from an agency under false pretenses shall be guilty of a misdemeanor and fined no more than $5,000. 5 U.S.C. 552a(i)(3).

"Person" is defined broadly in the Act to include any individual and any business, public or private organization other than an agency. 5 U.S.C. 551.

4. Executive Order 10450, 5 C.F.R., 1989 Compilation at 47, provides that in the interest of national security investigations shall be conducted as a condition of government employment. The Order further provides that background information obtain shall be "maintained in confidence." _Id_. at 9(c). It does not provide sanctions, however, for improper disclosure.

5. 18 U.S.C. 1001 (1996) provides that any person who "knowingly and willfully falsifies, conceals or covers up . . . or makes or uses any false writing of document knowing the same to contain any false . . . statement or entry, shall be fined under this title or imprisoned not more than five years, or both.

6. 18 U.S.C. 1924 imposes criminal liability for knowingly removing "materials containing classified information" without authority and "with the intent to retain such documents or materials at an unauthorized location...." This provision does not appear, however, to apply.

THE WHITE HOUSE

WASHINGTON

MEMORANDUM FOR PROSPECTIVE APPOINTEES

FROM: OFFICE OF COUNSEL TO THE PRESIDENT

This memorandum confirms in writing your express consent for the Federal Bureau of Investigation to investigate your background or conduct appropriate file reviews in connection with the consideration of your application for employment.

The FBI investigation will include the collection and use of relevant information concerning your personal history, and it is necessary that you authorize the disclosure of such information to the FBI. Information may be disseminated outside the FBI when necessary to fulfill obligations imposed by law.

By volunteering information concerning activities protected by the First Amendment, it will be assumed that you are expressly authorizing the maintenance of this information in the records of any Federal agency.

If you consent to such inquiries, please sign your name below and return this original memorandum of consent to me.

Name (please print or type) ______________________________

Signature ______________________________ Date __________

THE WHITE HOUSE
WASHINGTON

Date ______________________

To: Federal Bureau of Investigation
Attn: ________________________________

From: The White House
☐ Office of Personnel Security
☐ White House Counsel's Office

Subject's Full Name ____

Other names used ____

Social Security Number ____________ Date of Birth __________ Place of Birth ____________________

Permanent Address ____

Current Employer ____

☐ I hereby authorize the FBI to provide the information specified below to the White House.

________________________________ (Signature) ____________ (Date)

Request of FBI (Subject's consent or written explanation from White House Counsel is required for any request seeking copies of, or information from, FBI files.)

☐ Name/Indices check
☐ Expanded name check
☐ Copy of previous report
☐ Full field investigation ☐ Level 1 ☐ Level 2 ☐ Level 3
☐ Limited update investigation
☐ Other (specify) ____

The applicant is being considered for:
☐ Presidential appointment
☐ White House employee ☐ detailee ☐ intern ☐ volunteer
☐ Presidential recognition
☐ Other (specify) ____

Attachments: ☐ SF-86 ☐ SF-86 Supplement ☐ SF-87 Fingerprint Card

Remarks/special instructions: ____

____

I certify, subject to 18 U.S.C. Section 1001, that the above is sought for official purposes only and I understand that any unauthorized disclosure may be a violation of the Privacy Act, 5 U.S.C. Section 552a.

Requested by: ________________________________

This request has been reviewed and approved by the White House Counsel's Office.

Approved by: ________________________________
White House Counsel's Office

1 - Original - To FBI
2 - Canary - To FBI (Office of the General Counsel)
3 - Pink - To FBI (Return to White House)
4 - Gold - White House Copy

Standard Form 86
Revised September 1995
U.S. Office of Personnel Management
5 CFR Parts 731, 732, and 736

Form approved:
O.M.B. No. 3206-0007
NSN 7540-00-634-4036
86-111

UNITED STATES OF AMERICA

AUTHORIZATION FOR RELEASE OF INFORMATION

Carefully read this authorization to release information about you, then sign and date it in ink.

I Authorize any investigator, special agent, or other duly accredited representative of the authorized Federal agency conducting my background investigation, to obtain any information relating to my activities from individuals, schools, residential management agents, employers, criminal justice agencies, credit bureaus, consumer reporting agencies, collection agencies, retail business establishments, or other sources of information. This information may include, but is not limited to, my academic, residential, achievement, performance, attendance, disciplinary, employment history, criminal history record information, and financial and credit information. I authorize the Federal agency conducting my investigation to disclose the record of my background investigation to the requesting agency for the purpose of making a determination of suitability or eligibility for a security clearance.

I Understand that, for financial or lending institutions, medical institutions, hospitals, health care professionals, and other sources of information, a separate specific release will be needed, and I may be contacted for such a release at a later date. Where a separate release is requested for information relating to mental health treatment or counseling, the release will contain a list of the specific questions, relevant to the job description, which the doctor or therapist will be asked.

I Further Authorize any investigator, special agent, or other duly accredited representative of the U.S. Office of Personnel Management, the Federal Bureau of Investigation, the Department of Defense, the Defense Investigative Service, and any other authorized Federal agency, to request criminal record information about me from criminal justice agencies for the purpose of determining my eligibility for access to classified information and/or for assignment to, or retention in, a sensitive National Security position, in accordance with 5 U.S.C. 9101. I understand that I may request a copy of such records as may be available to me under the law.

I Authorize custodians of records and other sources of information pertaining to me to release such information upon request of the investigator, special agent, or other duly accredited representative of any Federal agency authorized above regardless of any previous agreement to the contrary.

I Understand that the information released by records custodians and sources of information is for official use by the Federal Government only for the purposes provided in this Standard Form 86, and that it may be redisclosed by the Government only as authorized by law.

Copies of this authorization that show my signature are as valid as the original release signed by me. This authorization is valid for five (5) years from the date signed or upon the termination of my affiliation with the Federal Government, whichever is sooner. Read, sign and date the release on the next page if you answered "Yes" to question 21.

Signature *(Sign in ink)*	Full Name *(Type or Print Legibly)*			Date Signed
Other Names Used			Social Security Number	
Current Address *(Street, City)*	State	ZIP Code	Home Telephone Number *(Include Area Code)* ( )	

28 YOUR FINANCIAL DELINQUENCIES

	Yes	No
a In the last 7 years, have you been over 180 days delinquent on any debt(s)?		
b Are you currently over 90 days delinquent on any debt(s)?		

If you answered **"Yes"** to a or b, provide the information requested below:

Incurred Month/Year	Satisfied Month/Year	Amount	Type of Loan or Obligation and Account Number	Name/Address of Creditor or Obligee	State	ZIP Code

29 PUBLIC RECORD CIVIL COURT ACTIONS

	Yes	No
In the last 7 years, have you been a party to any public record civil court actions not listed elsewhere on this form?		

If you answered "Yes," provide the information about the public record civil court action requested below.

Month/Year	Nature of Action	Result of Action	Name of Parties Involved	Court *(Include City and county/country if outside U.S.)*	State	ZIP Code

30 YOUR ASSOCIATION RECORD

	Yes	No
a Have you ever been an officer or a member or made a contribution to an organization dedicated to the violent overthrow of the United States Government and which engages in illegal activities to that end, knowing that the organization engages in such activities with the specific intent to further such activities?		
b Have you ever knowingly engaged in any acts or activities designed to overthrow the United States Government by force?		

If you answered "Yes" to a or b, explain in the space below.

Continuation Space

Use the continuation sheet(s) (SF 86A) for additional answers to items 9, 10, and 11. Use the space below to continue answers to all other items and any information you would like to add. If more space is needed than is provided below, use a blank sheet(s) of paper. Start each sheet with your name and Social Security Number. Before each answer, identify the number of the item.

After completing Parts 1 and 2 of this form and any attachments, you should review your answers to all questions to make sure the form is complete and accurate, and then sign and date the following certification and sign and date the release on page 10.

Certification That My Answers Are True

My statements on this form, and any attachments to it, are true, complete, and correct to the best of my knowledge and belief and are made in good faith. I understand that a knowing and willful false statement on this form can be punished by fine or imprisonment or both. (See section 1001 of title 18, United States Code).

Signature *(Sign in ink)*	Date

Enter your Social Security Number before going to the next page →

Mayaguez Sector Headquarters, Box 467-Ramey, PR 00604.

McAllen Sector Headquarters, 2301 South Main Street, McAllen, TX 78503.

Miami Sector Headquarters, 7201 Pembroke Rd., Pembroke Pines, FL 33023.

New Orleans Sector Headquarters, 3819 Patterson Drive, New Orleans, LA 70114.

San Diego Sector Headquarters, P.O. Box 439022, San Ysidro, CA 92143-0022.

Spokane Sector Headquarters, North 10710 Newport Highway, Spokane, WA 99218.

Swanton Sector Headquarters, Grand Avenue, Swanton, VT 05488.

Tucson Sector Headquarters, 1970 West Ajo Way, Tucson, AZ 85713.

Yuma Sector Headquarters, 350 First Street, Yuma, AZ 85364.

Border Patrol Academy:

DOJ/INS (FLETC) Artesia, 1300 West Richey Avenue, Artesia, NM 88210.

Officer Development and Training Facility, Building 64 FLETC Glynco, GA 31524.

District Offices in Foreign Countries:

Bangkok District Office, U.S. Immigration and Naturalization Service, c/o American Embassy, Box 12, APO San Francisco, CA 96346.

Mexico District Office, U.S. Immigration Naturalization Service, c/o American Embassy, Room 118, P.O. Box 3087, Laredo, TX 78044.

Rome District Office, U.S. Immigration and Naturalization Service, c/o American Embassy, APO New York, NY 09794.

Suboffices (Files Control Offices) in Foreign Countries:

Athens Office, U.S. Immigration and Naturalization Service, c/o American Embassy, Athens, Greece, PSC 108 Box 25 APO AE 09842.

Frankfurt Office, U.S. Immigration and Naturalization Service, American Consulate General, Frankfurt, Unit 25401 APO AE 213.

Guadalajara Office, U.S. Immigration and Naturalization Service, Box 3088, Guadalajara Laredo, TX 70844-3088.

Hong Kong Office, U.S. Immigration and Naturalization Service, c/o American Consulate General, Hong Kong, PSC 464, Box 30, FPO AP 96522-0002.

London Office, U.S. Immigration and Naturalization Service, c/o American Embassy, London, England, PSC 801, Box 06, FPO AE 09498-4006.

Mexico Office, U.S. Immigration and Naturalization Service, c/o American Embassy, Mexico City, Mexico, P.O. Box 7, Room 118, Laredo, TX 78044.

Monterrey Office, U.S. Immigration and Naturalization Service, c/o American Consulate, P.O. Box 3098, Laredo, TX 78044-3098.

Moscow Office, U.S. Immigration and Naturalization Service, c/o American Embassy, Moscow, USSR, PSC 77, APO AE 09721.

Nairobi Office, U.S. Immigration and Naturalization Service, c/o American Embassy, Nairobi, Kenya Unit 64100, Box 21, APO AE 09831-4100.

New Delhi Office, U.S. Immigration and Naturalization Service, c/o American Embassy, New Delhi, India, Department of State, Washington, DC 20521-9000.

Rome Office, U.S. Immigration and Naturalization Service, c/o American Embassy, Rome Italy, PSC 59, APO AE 09624.

Seoul, Korea Office, U.S. Immigration and Naturalization Service, c/o American Embassy, Seoul, Korea Unit 15550, APO AP 96205-0001.

Shannon Office, U.S. Immigration and Naturalization Service, c/o AER-RIANTA, Attn: Port Director, Shannon Airport, Shannon, Co., Clare, Ireland.

Singapore Office, U.S. Immigration and Naturalization Service, c/o American Embassy, Singapore, FPO AP 96534.

Tijuana Office, U.S. Immigration and Naturalization Service, c/o American Consulate General, Tijuana, P.O. Box 439039, San Diego, CA 92143-9039.

Vienna Office, U.S. Immigration and Naturalization Service, c/o American Embassy, Vienna, Austria Unit 27937, Box 21, APO AE 09222.

JUSTICE/FBI-002

SYSTEM NAME:

The FBI Central Records System.

SYSTEM LOCATION:

a. Federal Bureau of Investigation, J. Edgar Hoover Building, 10th and Pennsylvania Avenue, NW., Washington DC 20535; b. 56 field divisions (see Appendix); c. 16 Legal Attaché (see Appendix).

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

a. Individuals who relate in any manner to official FBI investigations including, but not limited to subjects, suspects, victims, witnesses, and close relatives and associates who are relevant to an investigation.

b. Applicants for and current and former personnel of the FBI and persons related thereto who are considered relevant to an applicant investigation, personnel inquiry, or other personnel matters.

c. Applicants for and appointees to sensitive positions in the United States Government and persons related thereto who are considered relevant to the investigation.

d. Individuals who are the subject of unsolicited information, who offer unsolicited information, request assistance, and make inquiries concerning record material, including general correspondence, and contacts with other agencies, businesses, institutions, clubs; the public and the news media.

e. Individuals associated with administrative operations or services including pertinent functions, contractors and pertinent persons related thereto.

(All manner of information concerning individuals may be acquired in connection with and relating to the varied investigative responsibilities of the FBI which are further described in "CATEGORIES OF RECORDS IN THE SYSTEM." Depending on the nature and scope of the investigation this information may include, among other things, personal habits and conduct, financial information, travel and organizational affiliation of individuals. The information collected is made a matter of record and placed in FBI files.)

CATEGORIES OF RECORDS IN THE SYSTEM:

The FBI Central Records Systems—The FBI utilizes a central records system of maintaining its investigative, personnel, applicant, administrative, and general files. This system consists of one numerical sequence of subject matter files, an alphabetical index to the files, and a supporting abstract system to facilitate processing and accountability of all important mail placed in files. This abstract system is both a textual and an automated capability for locating mail. Files kept in FBI field offices are also structured in the same manner, except they do not utilize an abstract system.

The 281 classifications used by the FBI in its basic filing system pertain primarily to Federal violations over which the FBI has investigative jurisdiction. However, included in the *281 classifications are* personnel, applicant, and administrative matters to facilitate the overall filing scheme. These classifications are as follows (the word "obsolete" following the name of the classification indicates the FBI is no longer initiating investigative cases in these matters, although the material is retained for reference purposes):

1. Training Schools; National Academy Matters: FBI National Academy Applicants. Covers general information concerning the FBI National Academy, including background investigations of individual candidates.

2. Neutrality Matters. Title 18, United States Code, Sections 956 and 958 962; Title 22, United States Code, Sections 1934 and 401.

3. Overthrow or Destruction of the Government. Title 18, United States Code, Section 2385.

4. National Firearms Act, Federal Firearms Act; State Firearms Control Assistance Act; Unlawful Possession or Receipt of Firearms. Title 26, United States Code, Sections 5801-5812; Title 18, United States Code, Sections 921-928; Title 18, United States Code, Sections 1201-1203.

5. Income Tax. Covers violations of Federal income tax laws reported to the FBI. Complaints are forwarded to the

Commissioner of the Internal Revenue Service.

6. Interstate Transportation of Strikebreakers. Title 18, United States Code, Section 1231.

7. Kidnapping. Title 28, United States Code, Sections 1201 and 1202.

8. Migratory Bird Act. Title 18, United States Code, Section 43; Title 16, United States Code, Section 703 through 718.

9. Extortion. Title 18, United States Code, Sections 876, 877, 875, and 873.

10. Red Cross Act. Title 18, United States Code, Sections 706 and 917.

11. Tax (Other than Income). This classification covers complaints concerning violations of Internal Revenue law as they apply to other than alcohol, social security and income and profits taxes, which are forwarded to the Internal Revenue Service.

12. Narcotics. This classification covers complaints received by the FBI concerning alleged violations of Federal drug laws. Complaints are forwarded to the headquarters of the Drug Enforcement Administration (DEA), or the nearest district office of DEA.

13. Miscellaneous. Section 125, National Defense Act, Prostitution; Selling Whiskey Within Five Miles of An Army Camp, 1920 only. Subjects were alleged violators of abuse of U.S. flag, fraudulent enlistment, selling liquor and operating houses of prostitution within restricted bounds of military reservations. Violations of Section 13 of the Selective Service Act (Conscription Act) were enforced by the Department of Justice as a war emergency measure with the Bureau exercising jurisdiction in the detection and prosecution of cases within the purview of that Section.

14. Sedition. Title 18, United States Code, Sections 2387, 2388, and 2391.

15. Theft from Interest Shipment. Title 18, United States Code, Section 859; Title 18, United States Code, Section 660; Title 18 United States Code, Section 2117.

16. Violations of Federal Injunction (obsolete). Consolidated into Classification 69, "Contempt of Court".

17. Fraud Against the Government, Department of Veterans Affairs, Department of Veterans Affairs Matters. Title 18, United States Code, Section 287, 289, 290, 371, or 1001, and Title 38, United States Code, Sections 787(a), 787(b), 3405, 3501, and 3502.

18. May Act. Title 18, United States Code, Section 1384.

19. Censorship Matter (obsolete). Pub. L. 77th Congress.

20. Federal Grain Standards Act (obsolete) 1920 only. Subjects were alleged violators of contracts for sale. Shipment of Interstate Commerce, Section 5, U.S. Grain Standards Act.

21. Food and Drugs. This classification covers complaints received concerning alleged violations of the Food, Drug and Cosmetic Act; Tea Act; Import Milk Act; Caustic Poison Act; and Filled Milk Act. These complaints are referred to the Commissioner of the Food and Drug Administration of the field component of that Agency.

22. National Motor Vehicle Traffic Act, 1922–27 (obsolete). Subjects were possible violators of the National Motor Vehicle Theft Act, Automobiles seized by Prohibitions Agents.

23. Prohibition. This classification covers complaints received concerning bootlegging activities and other violations of the alcohol tax laws. Such complaints are referred to the Bureau of Alcohol, Tobacco and Firearms, Department of the Treasury, or field representatives of the Agency.

24. Profiteering 1920–42 (obsolete). Subjects are possible violators of the Lever Act—Profiteering in food and clothing or accused company was subject of file. Bureau conducted investigations to ascertain profits.

25. Selective Service Act; Selective Training and Service Act. Title 50, United States Code, Section 462; Title 50, United States Code, Section 459.

26. Interstate Transportation of Stolen Motor Vehicle; Interstate Transportation of Stolen Aircraft. Title 18, United States Code, Sections 2311 (in part), 2312, and 2313.

27. Patent Matter. Title 35, United States Code, Sections 104 and 105.

28. Copyright Matter. Title 17, United States Code, Sections 104 and 105.

29. Bank Fraud and Embezzlement. Title 18, United States Code, Sections 212, 213, 215, 334, 655–657, 1004–1006, 1008, 1009, 1014, and 1306; Title 12, United States Code, Section 1725(g).

30. Interstate Quarantine Law, 1922–25 (obsolete). Subjects alleged violators of Act of February 15, 1893, as amended, regarding interstate travel of persons afflicted with infectious diseases. Cases also involved unlawful transportation of animals, Act of February 2, 1903. Referrals were made to Public Health Service and the Department of Agriculture.

31. White Slave Traffic Act. Title 18, United States Code, Section 2421–2424.

32. Identification (Fingerprint) Matters. This classification covers general information concerning Identification (fingerprint) matters.

33. Uniform Crime Reporting. This classification covers general information concerning the Uniform Crime Reports, a periodic compilation of statistics of criminal violations throughout the United States.

34. Violation of Lacy Act. 1922–43. (obsolete) Unlawful Transportation and shipment of black bass and fur seal skins.

35. Civil Service. This classification covers complaints received by the FBI concerning Civil Service matters which are referred to the Office of Personnel Management in Washington or regional offices of that Agency.

36. Mail Fraud. Title 18, United States Code, Section 13341.

37. False Claims Against the Government. 1921–22. (obsolete) Subjects submitted claims for allotment, vocational training, compensation as veterans under the Sweet Bill. Letters were generally referred elsewhere (Veterans Bureau). Violators apprehended for violation of Article No. 1, War Risk Insurance Act.

38. Application for Pardon to Restore Civil Rights. 1921–35. (obsolete) Subjects allegedly obtained their naturalization papers by fraudulent means. Cases later referred to Immigration and Naturalization Service.

39. Falsely Claiming Citizenship. (obsolete) Title 18, United States Code, Sections 911 and 1015(a)(b).

40. Passport and Visa Matter. Title 18, United States Code, Sections 1451–1546.

41. Explosives (obsolete). Title 50, United States Code, Sections 121 through 144.

42. Deserter; Deserter, Harboring. Title 10, United States Code, Sections 808 and 885.

43. Illegal Wearing of Uniforms; False Advertising or Misuse of Names, Words, Emblems or Insignia; Illegal Manufacturer, Use, Possession, or Sale of Emblems and Insignia; Illegal Manufacture, Possession, or Wearing of Civil Defense Insignia; Miscellaneous, Forging or Using Forged Certificate of Discharge from Military or Naval Service; Miscellaneous, Falsely Making or Forging Naval, Military, or Official Pass; Miscellaneous, Forging or Counterfeiting Seal of Department or Agency of the United States, Misuse of the Great Seal of the United States or of the Seals of the President or the Vice President of the United States; Unauthorized Use of "Johnny Horizon" Symbol; Unauthorized Use of Smokey Bear Symbol. Title 18, United States Code, Sections 702, 703, and 704; Title 18, United States Code, Sections 701, 705, 707, and 710; Title 36, United States Code, Section 182; Title 50, Appendix, United States Code, Section 2284; Title 46, United States Code, Section 249; Title 18, United States Code, Sections 498, 499, 506, 709, 711,

711a, 712, 713, and 714; Title 12, United States Code, Sections 1457 and 1723a; Title 22, United States Code, Section 2518.

44. Civil Rights; Civil Rights, Election Laws, Voting Rights Act, 1965, Title 18, United States Code, Sections 241, 242, and 245; Title 42, United States Code, Section 1973; Title 18, United States Code. Section 243; Title 18, United States Code, Section 244, Civil Rights Act—Federally Protected Activities; Civil Rights Act—Overseas Citizens Voting Rights Act of 1975.

45. Crime on the High Seas (Includes stowaways on boats and aircraft). Title 18, United States Code, Sections 7, 13, 1243, and 2199.

46. Fraud Against the Government: (Includes Department of Health, Education and Welfare; Department of Labor (CETA), and Miscellaneous Government Agencies) Anti-Kickback Statute; Department Assistance Act of 1950; False Claims, Civil; Federal-Aid Road Act; Lead and Zinc Act; Public Works and Economic Development Act of 1965; Renegotiation Act, Criminal; Renegotiation Act, Civil; Trade Expansion Act of 1962; Unemployment Compensation Statutes; Economic Opportunity Act. Title 50, United States Code, Section 1211 et seq.; Title 31, United States Code, Section 231; Title 41, United States Code, Section 119; Title 40, United States Code, Section 489.

47. Impersonation. Title 18, United States Code, Section 912, 913, 915, and 916.

48. Postal. Violation (Except Mail Fraud). This classification covers inquiries concerning the Postal Service and complaints pertaining to the theft of mail. Such complaints are either forwarded to the Postmaster General or the nearest Postal Inspector.

49. Bankruptcy Fraud. Title 18, United States Code, Sections 151–155.

50. Involuntary Servitude and Slavery. U.S. Constitution, 13th Amendment; Title 18, United States Code, sections 1581–1588, 241, and 242.

51. Jury Panel Investigations. This classification covers jury panel investigations which are requested by the appropriate Assistant Attorney General as authorized by 28 U.S.C. 533 AG memorandum 781, dated 11/9/72. These investigations can be conducted only up-on such a request and consist of an indices and arrest check, and only in limited important trials where defendant could have influence over a juror.

52. Theft, Robbery, Embezzlement, Illegal Possession or Destruction of Government Property. Title 18, United States Code, Sections 641, 1024, 1660, 2112, and 2114. Interference With Government Communications, Title 18, U.S.C., Section 1632.

53. Excess Profits On Wool. 1918 (obsolete). Subjects possible violator of Government Control of Wool Clip of 1918.

54. Customs Laws and Smuggling. This classification covers complaints received concerning smuggling and other matters involving importation and entry of merchandise into and the exportation of merchandise from the United States. Complaints are referred to the nearest district office of the U.S. Customs Service or the Commissioner of Customs, Washington, DC.

55. Counterfeiting. This classification covers complaints received concerning alleged violations of counterfeiting of U.S. coins, notes, and other obligations and securities of the Government. These complaints are referred to either the Director, U.S. Secret Service, or the nearest office of that Agency.

56. Election Laws. Title 18, United States Code, Sections 241, 242, 245, and 591–607; Title 42, United States Code, Section 1973; Title 26, United States Code, Sections 9012 and 9042; Title 2, United States Code, Sections 431–437, 439, and 441.

57. War Labor Dispute Act (obsolete). Pub. L. 89–77th Congress.

58. Corruption of Federal Public Officials. Title 18, United States Code, Sections 201–203, 205–211; Pub. L. 89–4 and 89–136.

59. World War Adjusted Compensation Act of 1924–44. (obsolete) Bureau of Investigation was charged with the duty of investigating alleged violations of all sections of the World War Adjusted Compensation Act (Pub. L. 472, 69th Congress (H.R. 10277)) with the exception of Section 704.

60. Anti-Trust, Title 15, United States Code, Sections 1–7, 12–27, and 13.

61. Treason or Misprision of Treason. Title 18, United Stats Code, Sections 2381, 2382, 2389, 2390, 756, and 757.

62. Administrative Inquiries. Misconduct Investigations of Officers and Employees of the Department of Justice and Federal Judiciary; Census Matters (Title 13, United States Code, Sections 211–214, 221–224, 304, and 305) Domestic Police Cooperation; Eight-Hour-Day Law (Title 40, United States, Code, Sections 321, 332, 325a, 326); Fair Credit Reporting Act (Title 15, United States Code, Sections 1681q and 1681r); Federal Cigarette Labeling and Advertising Act (Title 15, United States Code, Section 1333); Federal Judiciary Investigations; Kickback Racket Act (Title 18, United States Code, Section 874); Lands Division Matter, other Violations and/or Matters; Civil Suits—Miscellaneous; Soldiers' and Sailors' Civil Relief Act of 1940 (Title 50, Appendix, United States Code, Sections 510–590); Tariff Act of 1930 (Title 19, United States Code, Section 1304); Unreported Interstate Shipment of Cigarettes (Title 15, United States Code, Sections 375 and 376); Fair Labor Standards Act of 1938 (Wages and Hours Law) (Title 29, United States Code, Sections 201–219); Conspiracy (Title 18, United States Code, Section 371 (formerly Section 88, Title 18, United States Code); effective September 1, 1948).

63. Miscellaneous—Nonsubversive. This classification concerns correspondence from the public which does not relate to matters within FBI jurisdiction.

64. Foreign Miscellaneous. This classification is a control file utilized as a repository for intelligence information of value identified by country. More specific categories are placed in classification 108–113.

65. Espionage. Attorney General Guidelines on Foreign Counterintelligence; Internal Security Act of 1950; Executive Order 11905.

66. Administrative Matters. This classification covers such items as supplies, automobiles, salary matters and vouchers.

67. Personnel Matters. This classification concerns background investigations of applicants for employment with the FBI and folders for current and former employees.

68. Alaskan matters (obsolete). This classification concerns FBI investigations in the Territory of Alaska prior to its becoming a State.

69. Contempt of Court. Title 18, United States Code, Sections 401, 402, 3285, 3691, 3692; Title 10, United States Code. Section 847; and Rule 42, Federal Rules of Criminal Procedure.

70. Crime on Government Reservation. Title 18, United States Code, Sections 7 and 13.

71. Bills of Lading Act, Title 49, United States Code, Section 121.

72. Obstruction of Criminal Investigations: Obstruction of Justice, Obstruction of Court Orders. Title 18, United States Code. Sections 1503 through 1510.

73. Application for Pardon After Completion of Sentence and Application for Executive Clemency. This classification concerns the FBI's background investigation in connection with pardon applications and request for executive clemency.

74. Perjury. Title 18, United States Code, Sections 1621, 1622, and 1623.

75. Bondsmen and Sureties. Title 18, United States Code, Section 1506.

76. Escaped Federal Prisoner. Escape and Rescue; Probation Violator, Parole Violator, Mandatory, Release Violator. Title 18, United States Code, Sections 751–757, 1072; Title 18, United States Code. Sections 3651–3656; and Title 18, United States Code. Sections 4202–4207, 5037, and 4161–4166.

77. Applicants (Special Inquiry, Departmental and Other Government Agencies, except those having special classifications). This classification covers the background investigations conducted by the FBI in connection with the aforementioned positions.

78. Illegal Use of Government Transportation Requests. Title 18, United States Code, Section 287, 495, 508, 641, 1001 and 1002.

79. Missing Persons. This classification covers the FBI's Identification Division's assistance in the locating of missing persons.

80. Laboratory Research Matters. At FBI Headquarters this classification is used for Laboratory research matters. In field office files this classification covers the FBI's public affairs matters and involves contact by the FBI with the general public, Federal and State agencies, the Armed Forces, Corporations, the news media and other outside organizations.

81. Gold Hoarding. 1933–45. (obsolete) Gold Hoarding investigations conducted in accordance with an Act of March 9, 1933 and Executive Order issued August 28, 1933. Bureau instructed by Department to conduct no further investigations in 1935 under the Gold Reserve Act of 1934. Thereafter, all correspondence referred to Secret Service.

82. War Risk Insurance (National Life Insurance (obsolete)). This classification covers investigations conducted by the FBI in connection with civil suits filed under this statue.

83. Court of Claims. This classification covers requests for investigations of cases pending in the Court of Claims from the Assistant Attorney General in charge of the Civil Division of the Department of Justice.

84. Reconstruction Finance Corporation Act (obsolete). Title 15, United States Code, Chapter 14.

85. Home Owner Loan Corporation (obsolete). This classification concernod complaints received by the FBI about alleged violations of the Home Owners Loan Act, which were referred to the Home Owners Loan Corporation. Title 12, United States Code, Section 1464.

86. Fraud Against the Government—Small Business Administration. Title 15, United States Code, Section 645; Title 18, United States Code, Sections 212, 213, 215, 216, 217, 657, 658, 1006, 1011, 1013, 1014, 1906, 1907, and 1909.

87. Interstate Transportation of Stolen Property (Heavy Equipment—Commercialized Theft). Title 18, United States Code, Sections 2311, 2314, 2315 and 2318.

88. Unlawful Flight to Avoid Prosecution, Custody, or Confinement; Unlawful Flight to Avoid Giving Testimony. Title 18, United States Code, Sections 1073 and 1074.

89. Assaulting or Killing a Federal Officer, Crimes Against Family Members, Congressional Assassination Statute, Title 18, United States Code, Sections 1111, 1114, 2232.

90. Irregularities in Federal Penal Institutions. Title 18, United States Code, Sections 1791 and 1792.

91. Bank Burglary, Bank Larcency; Bank Robbery. Title 18, United States Code, Section 2113.

92. Racketeer Enterprise Investigations. Title 18, United States Code. Section 3237.

93. Ascertaining Financial Ability. This classification concerns requests by the Department of Justice for the FBI to ascertain a person's ability to pay a claim, fine or judgment obtained against him by the United States Government.

94. Research matters. This classification concerns all general correspondence of the FBI with private individuals which does not involve any substantive violation of Federal law.

95. Laboratory Cases (Examination of Evidence in Other Than Bureau's Cases). The classification concerns non-FBI cases where a duly constituted State, county or a municipal law enforcement agency in a criminal matter has requested an examination of evidence by the FBI Laboratory.

96. Alien Applicant (obsolete). Title 10, United States Code, Section 310.

97. Foreign Agents Registration Act. Title 18, United States Code, Section 951; Title 22, United States Code, Sections 611–621; Title 50, United States Code, Sections 851–857.

98. Sabotage. Title 18, United States Code, Sections 2151–2156; Title 50, United States Code, Section 797.

99. Plant Survey (obsolete). This classification covers a program wherein the FBI inspected industrial plants for the purpose of making suggestions to the operations of those plants to prevent espionage and sabotage.

100. Domestic Security. This classification covers investigations by the FBI in the domestic security field, e.g., Smith Act violations

101. Hatch Act (obsolete). Pub. L. 252, 76th Congress.

102. Voorhis Act, Title 18, United States Code, Section 1386

103. Interstate Transportation of Stolen Livestock, Title 18, United States Code, Sections 667, 2311, 2316 and 2317.

104. Servicemen's Dependents Allowance Act of 1942 (obsolete). Pub. L. 625, 77th Congress, Sections 115–119.

105. Foreign Counterintelligence Matters. Attorney General Guidelines on Foreign Counterintelligence. Executive Order 11905.

106. Alien Enemy Control; Escaped Prisoners of War and Internees, 1944–55 (obsolete). Suspects were generally suspected escaped prisoners of war, members of foreign organizations, fa to register under the Alien Registration Act. Cases ordered closed by Attorney General after alien enemies returned to their respective countries upon termination of hostilities.

107. Denaturalization Proceedings (obsolete). This classification covers investigation concerning allegations that an individual fraudulently swore allegiance to the United States or in some other manner illegally obtained citizenship to the U.S. Title 8, United States Code, Section 738.

108. Foreign Travel Control (obsolete). This classification concerns security-type investigations wherein the subject is involved in foreign travel.

109. Foreign Political Matters. This classification is a control file utilized as a repository for intelligence information concerning foreign political matters broken down by country.

110. Foreign Economic Matters. This classification is a control file utilized as a repository for intelligence information concerning foreign economic matters broken down by country.

111. Foreign Social Conditions. This classification is a control file utilized as a repository for intelligence information concerning foreign social conditions broken down by county.

112. Foreign Funds. This classification is a control file utilized as a repository for intelligence information concerning foreign funds broken down by country.

113. Foreign Military and Naval Matters. This classification is a control file utilized as a repository for intelligence information concerning foreign military and naval matters broken down by country.

114. Alien Property Custodian Matter (obsolete). Title 50, United States Code, Sections 1 through 38. This classification covers investigations concerning ownership and control of property subject to claims and litigation under this statute.

115. Bond Default; Bail Jumper. Title 18, United States Code, Sections 3146–3152.

116. Department of Energy Applicant; Department of Energy, Employee. This classification concerns background investigations conducted in connection with employment with the Department of Energy.

117. Department of Energy, Criminal. Title 42, United States Code, Sections 2011–2281; Pub. L. 93–438.

118. Applicant, Intelligence Agency (obsolete). This classification covers applicant background investigations conducted of persons under consideration for employment by the Central Intelligence Group.

119. Federal Regulation of Lobbying Act. Title 2, United States Code, Sections 261–270.

120. Federal Tort Claims Act, Title 28, United States Code, Sections 2671 to 2680. Investigations are conducted pursuant to specific request from the Department of Justice in connection with cases in which the Department of Justice represents agencies sued under the Act.

121. Loyalty of Government Employees (obsolete). Executive Order 9835.

122. Labor Management Relations Act, 1947. Title 29, United States Code, Sections 161, 162, 176–178 and 186.

123. Section Inquiry, State Department, Voice of America (U.S. Information Center) (Pub. L. 402, 80th Congress) (obsolete). This classification covers loyalty and security investigations on personnel employed by or under consideration for employment for Voice of America.

124. European Recovery Program Administration), formerly Foreign Operations Administration, Economic Cooperation Administration or E.R.P., European Recovery Programs; A.I.D. Agency for International Development (obsolete). This classification covers security and loyalty investigation of personnel employed by or under consideration for employment with the European Recovery Program, Pub. L. 472, 80th Congress.

125. Railway Labor Act; Railway Labor Act—Employer's Liability Act Title 45, United States Code, Sections 151–163 and 181–188.

126. National Security Resources Board, Special Inquiry (obsolete). This classification covers loyalty investigations on employees and applicants of the National Security Resources Board.

127. Sensitive Positions in the United States Government, Pub. L. 266 (obsolete). Pub. L. 81st Congress.

128. International Development Program (Foreign Operations Administration) (obsolete). This classification covers background investigations conducted on individuals who are to be assigned to duties under the International Development Program.

129. Evacuation Claims (obsolete). Pub. L. 886, 80th Congress.

130. Special Inquiry. Armed Forces Security Act (obsolete). This classification covers applicant-type investigations conducted for the Armed Forces security agencies.

131. Admiralty Matter. Title 46, United States Code, Sections 741–752 and 781–799.

132. Special Inquiry, Office of Defense Mobilization (obsolete). This classification covers applicant-type investigations of individuals associated with the Office of Defense Mobilization.

133. National Science Foundation Act, Applicant (obsolete). Pub. L. 507, 81st Congress.

134. Foreign Counterintelligence Assets. This classification concerns individuals who provide information to the FBI concerning Foreign Counterintelligence matters.

135. PROSAB (Protection of Strategic Air Command Bases of the U.S. Air Force (obsolete). This classification covered contacts with individuals with the aim to develop information useful to protect bases of the Strategic Air Command.

136. American Legion Contact (obsolete). This classification covered liaison contracts with American Legion offices.

137. Informants. Other than Foreign Counterintelligence Assets. This classification concerns individuals who furnish information to the FBI concerning criminal violations on a continuing and confidential basis.

138. Loyalty of Employees of the United Nations and Other Public International Organizations. This classification concerns FBI investigations based on referrals from the Office of Personnel Management wherein a question or allegation has been received regarding the applicant's loyalty to the U.S. Government as described in Executive Order 10422.

139. Interception of Communications (Formerly, Unauthorized Publication or Use of Communications). Title 47, United States Code, Section 605; Title 47, United States Code, Section 501; Title 18, United States Code, Sections 2510–2513.

140. Security of Government Employees; Fraud Against the Government, Executive Order 10450.

141. False Entries in Records of Interstate Carriers. Title 47, United States Code, Section 220; Title 49, United States Code, Section 20.

142. Illegal Use of Railroad Pass. Title 49, United States Code, Section 1.

143. Interstate Transport of Gambling Devices. Title 15, United States Code, Sections 1171 through 1180.

144. Interstate Transportation of Lottery Tickets. Title 18, United States Code, Section 1301.

145. Interstate Transportation of Obscene Materials. Title 18, United States Code, Sections 1462, 1464, and 1465.

146. Interstate Transportation of Prison-Made Goods. Title 18, United States Code, Sections 1761 and 1762.

147. Fraud Against the Government—Department of Housing and Urban Development, Matters. Title 18, United States Code, Sections 657, 709, 1006, and 1010; Title 12, United States Code, Sections 1709 and 1715.

148. Interstate Transportation of Fireworks. Title 18, United States Code, Section 836.

149. Destruction of Aircraft or Motor Vehicles. Title 18, United States Code, Section 31–35.

150. Harboring of Federal Fugitives, Statistics (obsolete).

151. (Referral cases received from the Office of Personnel Management under Pub. L. 298). Agency for International Development; Department of Energy; National Aeronautics and Space Administration; National Science Foundation; Peace Corps; Action; U.S. Arms Control and Disarmament Agency; World Health Organization; International Labor Organization; International Communications Agency. This classification covers referrals from the Office of Personnel Management where an allegation has been received regarding an applicant's loyalty to the U.S. Government. These referrals refer to applicants from Peace Corps; Department of Energy, National Aeronautics and Space Administration, Nuclear Regulatory Commission, United States Arms Control and Disarmament Agency and the International Communications Agency.

152. Switchblade Knife Act. Title 15, United States Code, Sections 1241–1244.

153. Automobile Information Disclosure Act. Title 15, United States Code. Sections 1231–1233.

154. Interstate Transportation of Unsafe Refrigerators. Title 15, United States Code, Sections 1211–1214.

155. National Aeronautics and Space Act of 1958. Title 18, United States Code, Section 799.

156. Employee Retirement Income Security Act. Title 29, United States Code, Sections 1021–1029, 1111, 1131,

and 1141; Title 18, United States Code, Sections 644, 1027, and 1954.

157. Civil Unrest. This classification concerns FBI responsibility for reporting information on civil disturbances or demonstrations. The FBI's investigative responsibility is based on the Attorney General's Guidelines for Reporting on Civil Disorders and Demonstrations Involving a Federal Interest which became effective April 5, 1976.

158. Labor-Management Reporting and Disclosure Act of 1959 (Security Matter) (obsolete). Pub. L. 86–257, Section 504.

159. Labor-Management Reporting and Disclosure Act of 1959 (Investigative Matter). Title 29, United States Code, Sections 501, 504, 522, and 530.

160. Federal Train Wreck Statute. Title 18, United States Code, Section 1992.

161. Special Inquiries for White House, Congressional Committee and Other Government Agencies. This classification covers investigations requested by the White House. Congressional committees or other Government agencies.

162. Interstate Gambling Activities. This classification covers information acquired concerning the nature and scope of illegal gambling activities in each field office.

163. Foreign Police Cooperation. This classification covers requests by foreign police for the FBI to render investigative assistance to such agencies.

164. Crime Aboard Aircraft. Title 49, United States Code, Sections 1472 and 1473.

165. Interstate Transmission of Wagering Information. Title 18, United States Code, Section 1065.

166. Interstate Transportation in Aid of Racketeering. Title 18, United States Code, Section 1952.

167. Destruction of Interstate Property. Title 15, United States Code, Sections 1281 and 1282.

168. Interstate Transportation of Wagering Paraphernalia. Title 18, United States Code, Section 1953.

169. Hydraulic Brake Fluid Act (obsolete); 76 Stat. 437, Pub. L. 87–637.

170. Extremist Informants (obsolete). This classification concerns individuals who provided information on a continuing basis on various extremist elements.

171. Motor Vehicle Seat Belt Act (obsolete). Pub. L. 88–201, 80th Congress.

172. Sports Bribery. Title 18, United States Code, Section 244.

173. Public Accommodations. Civil Rights Act of 1964 Public Facilities; Civil Rights Act of 1964 Public Education; Civil Rights Act of 1964 Employment; Civil Rights Act of 1964. Title 42, United States Code, Section 2000; Title 18, United States Code, Section 245.

174. Explosives and Incendiary Devices; Bomb Threats (Formerly Bombing Matters; Bombing Matters, Threats). Title 18, United States Code, Section 844.

175. Assaulting, Kidnapping or Killing the President (or Vice President) of the United States. Title 18, United States Code, Section 1751.

176. Anti-riot Laws. Title 18, United States Code, Section 245.

177. Discrimination in Housing. Title 42, United States Code, Sections 3601–3619 and 3631.

178. Interstate Obscene or Harassing Telephone Calls. Title 47, United States Code, Section 223.

179. Extortionate Credit Transactions. Title 18, United States Code, Sections 891–896.

180. Desecration of the Flag. Title 18, United States Code, Section 700.

181. Consumer Credit Protection Act. Title 15, United States Code, Section 1611.

182. Illegal Gambling Business: Illegal Gambling Business, Obstruction; Illegal Gambling Business Forfeiture. Title 18, United States Code, Section 1955; Title 18, United States Code, Section 1511.

183. Racketeer, Influence and Corrupt Organizations. Title 18, United States Code, Sections 1961–1968.

184. Police Killings. This classification concerns investigations conducted by the FBI upon written request from local Chief of Police or duty constituted head of the local agency to actively participate in the investigation of the killing of a police officer. These investigations are based on a Presidential Directive dated June 3, 1971.

185. Protection of Foreign Officials and Officials Guests of the United States. Title 18, United States Code, Sections 112, 970, 1116, 1117, and 1201.

186. Real Estate Settlement Procedures Act of 1974. Title 12, United States Code, Section 2602; Title 12, United States Code, Section 2606, and Title 12, United States Code, Section 2607.

187. Privacy Act of 1974; Criminal. Title 5, United States Code, Section 552a.

188. Crime Resistance. This classification covers FBI efforts to develop new or improved approaches, techniques, systems, equipment and devices to improve and strengthen law enforcement as mandated by the Omnibus Crime Control and Safe Streets Action of 1968.

189. Equal Credit Opportunity Act. Title 15, United States Code, Section 1691.

190. Freedom of Information/Privacy Acts. This classification covers the creation of a correspondence file to preserve and maintain accurate records concerning the handling of requests for records submitted pursuant to the Freedom of Information—Privacy Acts.

191. False Identity Matters. (obsolete) This classification covers the FBI's study and examination of criminal elements' efforts to create false identities.

192. Hobbs Act—Financial Institutions; Commercial Institutions Armored Carrier. Title 18, United States Code, Section 1951.

193. Hobbs Act—Commercial Institutions (obsolete). Title 18, United States Code, Section 1951; Title 47, United States Code, Section 506.

194. Hobbs Act—Corruption of Public Officials. Title 18, United States Code, Section 1951.

195. Hobbs Act—Labor Related. Title 18, United States Code, Section 1951.

196. Fraud by Wire. Title 18, United States Code, Section 1343.

197. Civil Actions or Claims Against the Government. This classification covers all civil suits involving FBI matters and most administrative claims filed under the Federal Tort Claims Act arising from FBI activities.

198. Crime on Indian Reservations. Title 18, United States Code, Sections 1151, 1152, and 1153.

199. Foreign Counterintelligence—Terrorism. Attorney General Guidelines on Foreign Counterintelligence. Executive Order 11905.

200. Foreign Counterintelligence Matters. Attorney General Guidelines on Foreign Counterintelligence. Executive Order 11905.

201. Foreign Counterintelligence Matters. Attorney General Guidelines Foreign Counterintelligence. Executive Order 11905.

202. Foreign Counterintelligence Matters. Attorney General Guidelines Foreign Counterintelligence. Executive Order 11905.

203. Foreign Counterintelligence Matters. Attorney General Guidelines on Foreign Counterintelligence. Executive Order 11905.

204. Federal Revenue Sharing. This classification covers FBI investigations conducted where the Attorney General has been authorized to bring civil action whenever he has reason to believe that a pattern or practice of discrimination in disbursement of funds under the Federal Revenue Sharing status exists.

205. Foreign Corrupt Practices Act of 1977. Title 15, United States Code, Section 78.

206. Fraud Against the Government—Department of Defense, Department of Agriculture, Department of Commerce, Community Services Organization, Department of Transportation. (See classification 46 (supra) for a statutory authority for this and the four following classifications.)

207. Fraud Against the Government—Environmental Protection Agency, National Aeronautics and Space Administration, Department of Energy, Department of Transportation.

208. Fraud Against the Government—General Services Administration.

209. Fraud Against the Government—Department of Health and Human Services (Formerly Department of Health, Education, and Welfare).

210. Fraud Against the Government—Department of Labor.

211. Ethics in Government Act of 1978, Title VI (Title 28, Sections 591–596).

212. Foreign Counterintelligence—Intelligence Community Support. This is an administrative classification for the FBI's operational and technical support to other Intelligence Community agencies.

213. Fraud Against the Government—Department of Education.

214. Civil Rights of Institutionalized Persons Act (Title 42, United States Code, Section 1997).

215. Foreign Counterintelligence Matters. Attorney General Guidelines on Foreign Counterintelligence. Executive Order 11905.

216. thru 229. Foreign Counterintelligence Matters. (Same authority as 215)

230. thru 240. FBI Training Matters.

241. DEA Applicant Investigations.

242. Automation Matters.

243. Intelligence Identities Protection Act of 1982.

244. Hostage Rescue Team.

245. Drug Investigative Task Force.

246 thru 248. Foreign Counterintelligence Matters. (Same authority as 215.)

249. Environmental Crimes—Investigations involving toxic or hazardous waste violations.

250. Tampering With Consumer Products (Title 18, U.S. Code, Section 1395)

251. Controlled Substance—Robbery;—Burglary (Title 18, U.S. Code, Section 2118).

252. Violent Crime Apprehension Program (VICAP). Case folders containing records relevant to the VICAP Program, in conjunction with the National Center for the Analysis of Violent Crime Record System at the FBI Academy; Quantico, Virginia.

253. False Identification Crime Control Act of 1982 (Title 18, U.S. Code, Section 1028—Fraud and Related Activity in Connection With Identification Documents, and Section 1738—Mailing Private Identification Documents Without a Disclaimer).

254. Destruction of Energy Facilities (Title 18, U.S. Code, Section 1365) relates to the destruction of property of nonnuclear energy facilities.

255. Counterfeiting of State and Corporate Securities (Title 18, U.S. Code, Section 511) covers counterfeiting and forgery of all forms of what is loosely interpreted as securities.

256. Hostage Taking—Terrorism (Title 18, U.S. Code, Section 1203) prohibits taking of hostage(s) to compel third party to do or refrain from doing any act.

257. Trademark Counterfeiting Act (Title 18, United States Code, Section 2320) covers the international trafficking in goods which bear a counterfeited trademark.

258. Credit Card Fraud Act of 1984 (Title 18, United States Code, Section 1029) covers fraud and related activities in connection with access devices (credit and debit cards).

259. Security Clearance Investigations Program. (Same authority as 215).

260. Industrial Security Program. (Same authority as 215.)

261. Security Officer Matters. (Same authority as 215.)

262. Overseas Homicide (Attempted Homicide—International Terrorism). Title 18, United States Code, Section 2331.

263. Office of Professional Responsibility Matters.

264. Computer Fraud and Abuse Act of 1986. Electronic Communications Privacy Act of 1986. Title 18, United States Code, Section 1030; Title 18, United States Code, Section 2701.

265. Acts of Terrorism in the United States—International Terrorist. (Followed by predicate offense from other classification.)

266. Acts of Terrorism in the United States—Domestic Terrorist. (Followed by predicate offense from other classification.)

267. Drug-Related Homicide. Title 21, U.S. Code, Section 848(e).

268. Engineering Technical Matters—FCI.

269. Engineering Technical Matters—Non-FCI.

270. Cooperative Witnesses.

271. Foreign Counterintelligence Matters. Attorney General Guidelines on Foreign Counterintelligence. Executive Order 11905.

272. Money Laundering. Title 18, U.S. Code, Sections 1956 and 1957.

273. Adoptive Forfeiture Matter—Drug. Forfeiture based on seizure of property by state, local or other Federal authority.

274. Adoptive Forfeiture Matter—Organized Crime. (Same explanation as 273.)

275. Adoptive Forfeiture Matter—White Collar Crime. (Same explanation as 273.)

276. Adoptive Forfeiture Matter—Violent Crime/Major Offenders Program. (Same explanation as 273.)

277. Adoptive Forfeiture Matter—Counterterrorism Program. (Same explanation as 273.)

278. Presidents Intelligence Oversight Board. Executive Order 12334.

279. Biological Weapons Anti-Terrorism Act of 1989. (Title 18, U.S. Code, Sections 175–179).

280. Equal Employment Opportunity Investigations.

281. Organized Crime Drug Investigations.

Records Maintained in FBI Field Divisions—FBI field divisions maintain for limited periods of time investigative, administrative and correspondence records, including files, index cards and related material, some of which are duplicated copies of reports and similar documents forwarded to FBI Headquarters. Most investigative activities conducted by FBI field divisions are reported to FBI Headquarters at one or more stages of the investigation. There are, however, investigative activities wherein no reporting was made to FBI Headquarters, e.g., pending cases not as yet reported and cases which were closed in the field division for any of a number of reasons without reporting to FBI Headquarters.

Duplicate records and records which extract information reported in the main files are also kept in the various divisions of the FBI to assist them in their day-to-day operation. These records are lists of individuals which contain certain biographic data, including physical description and photograph. They may also contain information concerning activities of the individual as reported to FBIHQ by the various field offices. The establishment of these lists is necessitated by the needs of the Division to have immediate access to pertinent information duplicative of data found in the central records without the delay caused by a time-consuming manual search of central indices. The manner of segregating these individuals varies depending on the particular needs of the FBI Division. The information pertaining to individuals who are a part of the list is derivative of information contained in the Central Records

System. These duplicative records fall into the following categories:

(1) Listings of individuals used to assist in the location and apprehension of individuals for whom legal process is outstanding (fugitives):

(2) Listings of individuals used in the identification of particular offenders in cases where the FBI has jurisdiction. These listings include various photograph albums and background data concerning persons who have been formerly charged with a particular crime and who may be suspect in similar criminal activities; and photographs of individuals who are unknown but suspected of involvement in a particular criminal activity, for example, bank surveillance photographs:

(3) Listings of individuals as part of an overall criminal intelligence effort by the FBI. This would include photograph albums, lists of individuals known to be involved in criminal activity, including theft from interstate shipment, interstate transportation of stolen property, and individuals in the upper echelon of organized crime:

(4) Listings of individuals in connection with the FBI's mandate to carry out Presidential directives on January 8, 1943, July 24, 1950, December 15, 1953, and February 18, 1976, which designated the FBI to carry out investigative work in matters relating to espionage, sabotage, and foreign counterintelligence. These listings may include photograph albums and other listings containing biographic data regarding individuals. This would include lists of identified and suspected foreign intelligence agents and informants:

(5) Special indices duplicative of the central indices used to access the Central Records System have been created from time to time in conjunction with the administration and investigation of major cases. This duplication and segregation facilitates access to documents prepared in connection with major cases.

In recent years, as the emphasis on the investigation of white collar crime, organized crime, and hostile foreign intelligence operations has increased, the FBI has been confronted with increasingly complicated cases, which require more intricate information processing capabilities. Since these complicated investigations frequently involve massive volumes of evidence and other investigative information, the FBI uses its computers, when necessary to collate, analyze, and retrieve investigative information in the most accurate and expeditious manner possible. It should be noted that this computerized investigative information, which is extracted from the main files or other commercial or governmental sources, is only maintained as necessary to support the FBI's investigative activities. Information from these internal computerized subsystems of the "Central Records System" is not accessed by any other agency. All disclosures of computerized information are made in printed form *or other appropriate format, in accordance with the routine uses which are set forth below and in compliance with applicable security requirements.*

Records also are maintained on a temporary basis relevant to the FBI's domestic police cooperating program, where assistance in obtaining information is provided to state and local police agencies.

Also, personnel type information, dealing with such matters as attendance and production and accuracy requirements is maintained by some divisions.

(The following chart identifies various listings or indexes maintained by the FBI which have been or are being used by various divisions of the FBI in their day-to-day operations. The chart identifies the list by name, description and use, and where maintained, i.e. FBI Headquarters and/or Field Office. The number in parentheses in the field office column indicates the number of field offices which maintain these indices. The chart indicates, under "status of index," those indexes which are in current use (designated by the word "active") and those which are no longer being used, although maintained (designated by the word "inactive"). There are 27 separate indices which are classified in accordance with existing regulations and are not included in this chart. The following indices are no longer being used by the FBI and are being maintained at FBIHQ pending receipt of authority to destroy: Black Panther Party Photo Index; Black United Front Index; Security Index; and Wounded Knee Album.)

Title of index	Description and use	Status of index	Maintained at—	
			Headquarters	Field office
Administrative Index (ADEX).	Consists of cards with descriptive data on individuals who were subject to investigation in a national emergency because they were believed to constitute a potential or active threat to the internal security of the United States. When ADEX was started in 1971, it was made up of people who were formerly on the Security Index, Reserve Index, and Agitator Index. This index is maintained in two separate locations in FBI Headquarters. ADEX was discontinued in January 1978.	Inactive	Yes	Yes (29).
Anonymous Letter File	Consists of photographs of anonymous communications and extortionate credit transactions, kidnapping, extortion and threatening letters.	Active	Yes	No.
Associates of DEA Class I Narcotics Violators Listing.	Consists of a computer listing of individuals whom DEA has identified as associates of Class I Narcotics Violators.	Active	Yes	Yes (56).
Background Investigation Index—Department of Justice.	Consists of cards on persons who have been the subject of a full field investigation in connection with their consideration of employment in sensitive positions with Department of Justice, such as U.S. Attorney, Federal judges, or a high level Department position.	Active	Yes	No.
Background Investigation Index—White House, Other Executive Agencies, and Congress.	Consists of cards on persons who have been the subject of a full field investigation in connection with their consideration for employment in sensitive positions with the White House, Executive agencies (other than the Department of Justice) and the Congress.	Active	Yes	No.
Bank Fraud and Embezzlement Index.	Consists of individuals who have been the subject of "Bank Fraud and Embezzlement" investigation. This file is used as an investigative aid.	Active	No	Yes (1).

Title of index	Description and use	Status of index	Maintained at— Head-quarters	Field office
Bank Robbery Album	Consists of photos of bank robbers, burglars, and larceny subjects. In some field offices at will also contain pictures obtained from local police departments of known armed robbers and thus potential bank robbers. The index is used to develop investigative leads in bank robbery cases and may also be used to show to witnesses of bank robberies. It is usually filed by race, height, and age. This index is also maintained in one resident agency (a suboffice of a field office).	Active	No	Yes (47).
Bank Robbery Nickname Index.	Consists of nicknames used by known bank robbers. The index card on each would contain the real name and method of operation and are filed in alphabetical order.	Active	No	Yes (1).
Bank Robbery Note File	Consists of photographs of notes used in bank robberies in which the suspect has been identified. This index is used to help solve robberies in which the subject has not been identified but a note was left. The role is compared with the index to try to match the sentence structure and handwriting for the purpose of identifying possible suspects.	Active	Yes	No.
Bank Robbery Suspect Index.	Consists of a control file or index cards with photos, if available, of bank robbers or burglars. In some field offices these people may be part of a bank robbery album. This index is generally maintained and used in the same manner as the bank robbery album.	Active	No	Yes (33).
Car Ring Case Photo Album.	Consists of photos of subjects and suspects involved in a large car theft ring investigation. It is used as an investigative aid.	Active	No	Yes (3).
Car Ring Case Photo Album and Index.	Consists of photos of subjects and suspects involved in a large car theft ring investigation. The card index maintained in addition to the photo album contains the names and addresses appearing on fraudulent title histories for stolen vehicles. Most of these names appearing on these titles are fictitious. But the photo album and card indexes are used as an investigative aid.	Active	No	Yes (1).
Car Ring Case Toll Call Index.	Consists of cards with information on persons who subscribe to telephone numbers to which toll calls have been placed by the major subjects of a large car theft ring investigation. It is maintained numerically by telephone number. It is used to facilitate the development of probably cause for a court-approved wiretap.	Active	No	Yes (2).
Car Ring Theft Working Index.	Contains cards on individuals involved in car ring theft cases on which the FBI Laboratory is doing examination work.	Active	Yes	No.
Cartage Album	Consists of photos with descriptive data of individuals who have been convicted of theft from interstate shipment or interstate transportation of stolen property where there is a reason to believe they may request the offense. It is used in investigating the above violations.	Active	No	Yes (3).
Channelizing Index	Consists of cards with the names and case file numbers of people who are frequently mentioned in information reports. The index is used to facilitate the distributing or channeling of information reports to appropriate files.	Active	No	Yes (9).
Check Circular File	Consists of fliers numerically in a control file on fugitives who are notorious fraudulent check passers and who are engaged in a continuing operation of passing checks. The fliers which include the subject's name, photo, a summary of the subject's method of operation and other identifying data is used to alert other FBI field offices and business establishments which may be the victims of bad checks.	Active	Yes	Yes (43).
Computerized Telephone Number File (CTNF) Intelligence.	Consists of a computer listing of telephone numbers (and subscribers' names and addresses) utilized by subjects and/or certain individuals which come to the FBI's attention during major investigations. During subsequent investigations, telephone numbers, obtained through subpoena, are matched with the telephone numbers on file to determine connections or associations.	Active	Yes	No.
Con Man Index	Consists of computerized names of individuals, along with company affiliation, who travel nationally and internationally while participating in large-dollar-value financial swindles.	Active	Yes	No.
Confidence Game (Flim Flam) Album.	Consists of photos with descriptive information on individuals who have been arrested for confidence games and related activities. It is used as an investigative aid.	Active	No	Yes (4).
Copyright Matters Index	Consists of cards of individuals who are film collectors and film titles. It is used as a reference in the investigation of copyright matters.	Active	No	Yes (1).
Criminal Intelligence Index	Consists of cards with name and file number of individuals who have become the subject of an antiracketeering investigation. The index is used as a quick way to ascertain file numbers and the correct spelling of names. This index is also maintained in one resident agency.	Active	No	Yes (2).
Criminal Informant Index	Consists of cards containing identity and brief background information on all active and inactive informants furnishing information in the criminal area.	Active	Yes	No.

Title of index	Description and use	Status of index	Maintained at—	
			Head-quarters	Field office
DEA Class 1 Narcotics Violators Listing.	Consists of a computer listing of narcotic violators—persons known to manufacture, supply, or distribute large quantities of illicit drugs—with background data. It is used by the FBI in their role of assisting DEA in disseminating intelligence data concerning illicit drug trafficking. This index is also maintained in two resident agencies.	Active	Yes	Yes (56).
Deserter Index	Contains cards with the names of individuals who are known military deserters. It is used as an investigative aid.	Active	No	Yes (4).
False Identities Index	Contains cards with the names of deceased individuals whose birth certificates have been obtained by other persons for possible false identification uses and in connection with which the FBI laboratory has been requested to perform examinations.	Inactive	Yes	No.
False Identities List	Consists of a listing of names of deceased individuals whose birth certificates have been obtained after the person's death, and thus whose names are possibly being used for false identification purposes. The listing is maintained as part of the FBI's program to find persons using false identities for illegal purposes.	Inactive	No	Yes (31).
False Identity Photo Album	Consists of names and photos of people who have been positively identified as using a false identification. This is used as an investigative aid in the FBI's investigation of false identities.	Inactive	No	Yes (2).
FBI/Inspector General (IG) Case Pointer System (FICPS).	Consists of computerized listing of individual names of organizations which are the subject of active and inactive fraud investigations, along with the name of the agency conducting the investigation. Data is available to IG offices throughout the federal government to prevent duplication of investigative activity.	Active	Yes	No.
FBI Wanted Persons Index	Consists of cards on persons being sought on the basis of Federal warrants covering violations which fall under the jurisdiction of the FBI. It is used as a ready reference to identify those fugitives.	Active	Yes	No.
Foreign Counterintelligence (FCI).	Consists of cards with identity background data on all active and inactive operational and informational assets in the foreign counterintelligence field. It is used as a reference aid on the FCI Asset program.	Active	Yes	No.
Fraud Against the Government Index.	Consists of individuals who have been the subject of a "fraud against the Government" investigation. It is used as investigative aid.	Active	No	Yes (1).
Fugitive Bank Robbers File	Consists of fliers on bank robbery fugitives filed sequentially in a control file. FBI Headquarters distributes to the field offices fliers on bank robbers in a fugitive status for 15 or more days to facilitate their location.	Active	Yes	Yes (43).
General Security Index	Contains cards on all persons that have been the subject of a security classification investigation by the FBI field office. These cards are used for general reference purposes.	Active	No	Yes (1).
Hoodlum License Plate Index.	Consists of cards with the license plates numbers and descriptive data on known hoodlums and cars observed in the vicinity of hoodlum homes. It is used for quick identification of such person in the course of investigation. The one index which is not fully retrievable in maintained by a resident agency.	Active	No	Yes (3).
Identification Order Fugitive Flier File.	Consists of fliers numerically in a control file. When immediate leads have been exhausted in fugitive investigations and a crime of considerable public interest has been committed, the fliers are given wide circulation among law enforcement agencies throughout the United States and are posted in post offices. The fliers contain the fugitive's photograph, fingerprints, and description.	Active	Yes	Yes (49).
Informant Index	Consists of cards with the name, symbol numbers, and brief background information on the following categories of active and inactive informants, top echelon criminal informants, security informants, criminal information, operational and informational assets, extremist informants (discontinued), plant informant—informants on and about certain military basis (discontinued), and potential criminal informants.	Active	No	Yes (56).
Informants in Other Field Offices, Index of.	Consist of cards with names and/or symbol numbers of informants in other FBI field offices that are in a position to furnish information that would also be included on the index card.	Active	No	Yes (15).
Interstate Transportation of Stolen Aircraft Photo Album.	Consists of photos and descriptive data on individuals who are suspects known to have been involve in interstate transportation of stolen aircraft. It is used as an investigative aid.	Active	No	Yes (1).
IRS Wanted List	Consists of one-page fliers from IRS on individuals with background information who are wanted by IRS for tax purposes. It is used in the identification of persons wanted by IRS.	Active	No	Yes (11).
Kidnapping Book	Consists of data, filed chronologically, on kidnappings that have occurred since the early fifties. The victims' names and the suspects, if known, would be listed with a brief description of the circumstances surrounding the kidnapping. The file is used as a reference aid in matching up prior methods of operation in unsolved kidnapping cases.	Active	Yes	No (4).
Known Check Passers Album.	Consists of photos with descriptive data of persons known to pass stolen, forged, or counterfeit checks. It is used as an investigative aid.	Active	No	Yes (4).

Title of index	Description and use	Status of index	Maintained at— Head-quarters	Field office
Known Gambler Index	Consists of cards with names, descriptive data, and sometimes photos of individuals who are known bookmakers and gamblers. The index is used in organized crime and gambling investigations. Subsequent to GAO's review, and at the recommendation of the inspection team at one of the two field offices where the index was destroyed and thus is not included in the total.	Active	No	Yes (5).
La Cosa Nostra (LCN) Membership Index.	Contains cards on individuals having been identified as members of the LCN index. The cards contain personal data and pictures. The index is used solely by FBI agents for assistance in investigating organized crime matters.	Active	Yes	Yes (55).
Leased Line Letter Request Index.	Contains cards on individuals and organizations who are or have been the subject of a national security electronic surveillance where a leased line letter was necessary. It is used as an administrative and statistical aid.	Active	Yes	No.
Mail Cover Index	Consists of cards containing a record of all mail covers conducted on individuals and groups since about January 1973. It is used for reference in preparing mail cover requests.	Active	Yes	No.
Military Deserter Index	Consists of cards containing the names of all military deserters where the various military branches have requested FBI assistance in locating. It is used as an administrative aid.	Active	Yes	No.
National Bank Robbery Album.	Consists of fliers on bank robbery suspects held sequentially in a control file. When an identifiable bank camera photograph is available and the case has been under investigation for 30 days without identifying the subject, FBIHQ sends a flier to the field offices to help identify the subject.	Active	Yes	Yes (42).
National Fraudulent Check File.	Contains photographs of the signature on stolen and counterfeit checks. It is filed alphabetically but there is no way of knowing the names are real or fictitious. The index is used to help solve stolen check cases by matching checks obtained in such cases against the index to identify a possible suspect.	Active	Yes	No.
National Security Electronic Surveillance Card File.	Contains cards recording electronic surveillances previously authorized by the Attorney General and previously and currently authorized by the FISC; current and previous assets in the foreign counterintelligence field; and a historical, inactive section which contains cards believed to record nonconserted physical entries in national security cases, previously toll billings, mail covers and leased lines. The inactive section also contains cards reflecting previous Attorney General approvals and denials for warrantless electronic surveillance in the national security cases.	Inactive	Yes	No.
Night Depository Trap Index	Contains cards with the names of persons who have been involved in the theft of deposits made in bank night depository boxes. Since these thefts have involved various methods, the FBI uses the index to solve such cases by matching up similar methods to identify possible suspects.	Active	Yes	No.
Organized Crime Photo Album.	Consists of photos and background information on individuals involved in organized crime activities. The index is used as a ready reference in identifying organized crime figures within the field offices' jurisdiction.	Active	No	Yes (13).
Photospread Identification Elimination File.	Consists of photos of individuals who have been subjects and suspects in FBI investigations. It also includes photos received from other law enforcement agencies. These pictures can be used to show witnesses of certain crimes.	Active	No	Yes (14).
Prostitute Photo Album	Consists of photos with background data on prostitutes who have prior local or Federal arrests for prostitution. It is used to identify prostitutes in connection with investigations under the White Slave Traffic Act.	Active	No	Yes (4).
Royal Canadian Mounted Policy (RCMP) Wanted Circular File.	Consists of a control file of individuals with background information of persons wanted by the RCMP. It is used to notify the RCMP if an individual is located.	Active	No	Yes (17).
Security Informant Index	Consists of cards containing identity and brief background information on all active and inactive informants furnishing information in the criminal area.	Active	Yes	No.
Security Subjects Control Index.	Consists of cards containing the names and case file numbers of individuals who have been subject to security investigations check. It is used as a reference source.	Active	No	Yes (1).
Security Telephone Number Index.	Contains cards with telephone subscriber information subpoenaed from the telephone company in any security investigation. It is maintained numerically by the last three digits in the telephone number. It is used for general reference purposes in security investigations.	Active	No	Yes (1).
Selective Service Violators Index.	Contains cards on individuals being sought on the basis of Federal warrants for violation of the Selective Service Act.	Active	Yes	No.

Title of index	Description and use	Status of index	Maintained at—	
			Headquarters	Field office
Sources of Information Index.	Consist of cards on individuals and organizations such as banks, motels, local government that are willing to furnish information to the FBI with sufficient frequency to justify listing for the benefit of all agents. It is maintained to facilitate the use of such sources.	Active	No	Yes (10).
Special Services Index	Contains cards of prominent individuals who are in a position to furnish assistance in connection with FBI investigative responsibility.	Active	No	Yes (28).
Stolen Checks and Fraud by Wire Index.	Consists of cards on individuals involved in check and fraud by wire violations. It is used as an investigative aid.	Active	No	Yes (1).
Stop Notices Index	Consists of cards on names of subjects or property where the field office has placed a stop at another law enforcement agency or private business such as pawn shops in the event information comes to the attention of that agency concerning the subject or property. This is filed numerically by investigative classification. It is used to insure that the agency where the stop is placed is notified when the subject is apprehended or the property is located or recovered.	Active	No	Yes (43).
Surveillance Locator Index	Consists of cards with basic data on individuals and businesses which have come under physical surveillance in the city in which the field office is located. It is used for general reference purposes in antiracketeering investigations.	Active	No	Yes (2).
Telephone Number Index—Gamblers.	Contains information on persons identified usually as a result of a subpoena for the names of subscribers to particular telephone numbers or toll records for a particular phone number of area gamblers and bookmakers. The index cards are filed by the last three digits of the telephone number. The index is used in gambling investigations.	Active	No	Yes (2).
Telephone Subscriber and Toll Records Check Index.	Contains cards with information on persons identified as the result of a formal request or subpoena to the phone company for the identity of subscribers to particular telephone numbers. The index cards are filed by telephone number and would also include identity of the subscriber, billing party's identity, subscriber's address, date of request from the telephone company, and file number.	Active	No	Yes (1).
Thieves, Couriers and Fences Photo Index.	Consists of photos and background information on individuals who are or are suspected of being thieves, couriers, or fences based on their past activity in the area of interstate transportation of stolen property. It is used as an investigative aid.	Active	No	Yes (4).
Toll Record Request Index	Contains cards on individuals and organizations on whom toll records have been obtained in national security related cases and with respect to which FBIHQ had to prepare a request letter. It is used primarily to facilitate the handling of repeat requests on individuals listed.	Active	Yes	No.
Top Burglar Album	Consists of photos and background data of known and suspect top burglars involved in the area of interstate transportation of stolen property. It is used as an investigative aid.	Active	No	Yes (4).
Top Echelon Criminal Informer Program (TECIP) Index.	Consists of cards containing identity and brief background information on individuals who are either furnishing high level information in the organized crime area or are under development to furnish such information. The index is used primarily to evaluate, corroborate, and coordinate informant information and to develop prosecutive data against racket figures under Federal, State, and local statutes.	Active	Yes	No.
Top Ten Program File	Consists of fliers, filed numerically in a control file, on fugitives considered by the FBI to be 1 of the 10 most wanted. Including a fugitive of the top 10 usually assures a greater national news coverage as well as nation-wide circulation of the flier.	Active	Yes	Yes (44).
Top Thief Program Index	Consists of cards of individuals who are professional burglars, robbers, or fences dealing in items likely to be passed in interstate commerce or who travel interstate to commit the crime. Usually photographs and background information would also be obtained on the index card. The index is used as an investigative aid.	Active	No	Yes (27).
Truck Hijack Photo Album	Contains photos and descriptive data of individuals who are suspected truck hijackers. It is used as an investigative aid and for displaying photos to witnesses and/or victims to identify unknown subjects in hijacking cases.	Active	No	Yes (4).
Truck Thief Suspect Photo Album.	Consists of photos and background data on individuals previously arrested or are currently suspects regarding vehicle theft. The index is used as an investigative aid.	Active	No	Yes (1).
Traveling Criminal Photo Album.	Consists of photos with identifying data of individuals convicted of various criminal offenses and may be suspects in other offenses. It is used as an investigative aid.	Active	No	Yes (1).
Veterans Administrative (VA)/Federal Housing Administration Matters (FHA) Index.	Consists of cards of individuals who have been subject of an investigation relative to VA and FHA matters. It is used as an investigative aid.	Active	No	Yes (1).

Title of index	Description and use	Status of index	Maintained at— Head-quarters	Field office
Wanted Fliers File	Consists of fliers, filed numerically in a control file, on badly wanted fugitives whose apprehension may be facilitated by a flier. The flier contains the names, photographs, aliases, previous convictions, and a caution notice.	Active	Yes	Yes (46).
Wheeldex	Contains the nicknames and the case file numbers of organized crime members. It is used in organized crime investigations.	Active	No	Yes (1).
White House Special Index	Contains cards on all potential White House appointees, staff members, guests, and visitors that have been referred to the FBI by the White House security office for a records check to identify any adverse or derogatory information. This index is used to expedite such check in view of the tight timeframe usually required.	Active	Yes	No.
Witness Protection Program Index.	Contains cards on individuals who have been furnished a new identity by the U.S. Justice Department because of their testimony in organized crime trials. It is used primarily to notify the U.S. Marshals Service when information related to the safety of a protected witness comes to the FBI's attention.	Active	Yes	No.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

Federal Records Act of 1950, Title 44, United States Code, chapter 31, section 3101; and title 36, Code of Federal Regulations, chapter XII, require Federal agencies to insure that adequate and proper records are made and preserved to document the organization, functions, policies, decisions, procedures and transactions and to protect the legal and financial rights of the Federal Government, title 28, United States Code, section 534, delegates authority to the Attorney General to acquire, collect, classify, and preserve identification, criminal identification, crime and other records.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

Records, both investigative and administrative, are maintained in this system in order to permit the FBI to function efficiently as an authorized, responsive component of the Department of Justice. Therefore, information in this system is disclosed to officials and employees of the Department of Justice, and/or all components thereof, who have need of the information in the performance of their official duties.

Personal information from this system may be disclosed as a routine use to any Federal agency where the purpose in making the disclosure is compatible with the law enforcement purpose for which it was collected, e.g., to assist the recipient agency in conducting a lawful criminal or intelligence investigation, to assist the recipient agency in making a determination concerning an individual's suitability for employment and/or trustworthiness for employment and/or trustworthiness for access clearance purposes, or to assist the recipient agency in the performance of any authorized function where access to records in this system is declared by the recipient agency to be relevant to that function.

In addition, personal information may be disclosed from this system to members of the Judicial Branch of the Federal Government in response to a specific request, or at the initiation of the FBI, where disclosure appears relevant to the authorized function of the recipient judicial office or court system. An example would be where an individual is being considered for employment by a Federal judge.

Information in this system may be disclosed as a routine use to any state or local government agency directly engaged in the criminal justice process, e.g., police, prosecution, penal, probation and parole, and the judiciary, where access is directly related to a law enforcement function of the recipient agency e.g. in connection with a lawful criminal or intelligence investigation, or making a determination concerning an individual's suitability for employment as a state or local law enforcement employee or concerning a victim's compensation under a state statute. Disclosure to a state or local government agency, (a) not directly engaged in the criminal justice process or (b) for a licensing or regulatory function, is considered on an individual basis only under exceptional circumstances, as determined by the FBI.

Information in this system pertaining to the use, abuse or traffic of controlled substances may be disclosed as a routine use to federal, state or local law enforcement agencies and to licensing or regulatory agencies empowered to engage in the institution and prosecution of cases before courts and licensing boards in matters relating to controlled substances, including courts and licensing boards responsible for the licensing or certification of individuals in the fields of pharmacy and medicine.

Information in this system may be disclosed as a routine use in a proceeding before a court of adjudicative body, e.g., the Equal Employment Opportunity Commission and the Merit Systems Protection Board, before which the FBI is authorized to appear, when (a) the FBI or any employee thereof in his or her official capacity, or (b) any employee in his or her individual capacity where the Department of Justice has agreed to represent the employee, or (c) the United States, where the FBI determines it is likely to be affected by the litigation, is a party to litigation or has an interest in litigation and such records are determined by the FBI to be relevant to the litigation.

Information in this system may be disclosed as a routine use to an organization or individual in both the public or private sector if deemed necessary to elicit information or cooperation from the recipient for use by the FBI in the performance of an authorized activity. An example would be where the activities of an individual are disclosed to a member of the public in order to elicit his/her assistance in our apprehension or detection efforts.

Information in this system may be disclosed as a routine use to an organization or individual in both the public or private sector where there is reason to believe the recipient is or could become the target of a particular criminal activity or conspiracy, to the extent the information is relevant to the protection of life or property.

Information in this system may be disclosed to legitimate agency of a foreign government where the FBI determines that the information is relevant to that agency's responsibilities, and dissemination serves the best interests of the U.S. Government, and where the purpose in making the disclosure is compatible with the purpose for which the information was collected.

Relevant information may be disclosed from this system to the news media and general public where there exists a legitimate public interest, e.g., to assist in the location of Federal fugitives, to provide notification of arrests, and where necessary for protection from imminent threat of life or property. This would include releases of information in accordance with 28 CFR 50.2.

A record relating to an actual or potential civil or criminal violation of the copyright statute, Title 17, United States Code, or the trademark statutes, Titles 15 and 17, U.S. Code, may be disseminated to a person injured by such violation to assist him/her in the institution or maintenance of a suit brought under such titles.

The FBI has received inquiries from private citizens and Congressional offices on behalf of constituents seeking assistance in locating individuals such as missing children and heirs to estates. Where the need is acute, and where it appears FBI files may be the only lead in locating the individual, consideration will be given to furnishing relevant information to the requester. Information will be provided only in those instances where there are reasonable grounds to conclude from available information the individual being sought would want the information to be furnished, e.g., an heir to a large estate. Information with regard to missing children will not be provided where they have reached their majority.

Information contained in this system, may be made available to a Member of Congress or staff acting upon the member's behalf when the member of staff requests the information in behalf of and at the request of the individual who is the subject of the record.

A record from this system of records may be disclosed as a routine use to the National Archives and Records Administration and General Services Administration in records management inspections conducted under the authority of 44 U.S.C. 2904 and 2906, to the extent that legislation governing the records permits.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

The active main files are maintained in hard copy form and some inactive records are maintained on microfilm. Investigative information which is maintained in computerized form may be stored in memory, on disk storage, on computer tape, or on a computer printed listing.

RETRIEVABILITY:

The FBI General Index must be searched to determine what information, if any, the FBI may have in its files. Index records, or pointers to specific FBI files, are created on all manner of subject matters, but the predominant type record is the name index record. It should be noted the FBI does not index all individuals who furnish information or all names developed during the course of an investigation. Only that information considered pertinent, relevant, or essential for future retrieval, is indexed. In certain major cases, individuals interviewed may be indexed to facilitate the administration of the investigation. The FBI has automated that portion of its index containing the most recent information—15 years for criminal related matters and 30 years for intelligence and other type matters. Automation will not change the "Central Records System"; it will only facilitate more economic and expeditious access to the main files. Searches against the automated records are accomplished on a "batch off-line" basis for certain submitting agencies where the name search requests conform to FBI specified formats and also in an "on-line" mode with the use of video display terminals for other requests. The FBI will not permit any organization, public or private, outside the FBI to have direct access to the FBI indices system. All searches against the indices data base will be performed on site within FBI space by FBI personnel with the assistance of the automated procedures, where feasible. Automation of the various FBI field office indices was completed in 1989. This automation initiative has been on a "day-one" basis. This indices system points to specific files within a given field office. Additionally, certain complicated investigative matters may be supported by specialized computer systems or by individual microcomputers. Indices created in these environments are maintained as part of the particular computer system and accessible only through the system or through printed listings of the indices. Full text retrieval is used in a limited number of cases as an investigative technique. It is not part of the normal search process and is not used as a substitute for the General Index or computer indices mentioned above.

The FBI will transfer historical records to the National Archives consistent with 44 U.S.C. 2103. No record of individuals or subject matter will be retained for transfered files; however, a record of the file numbers will be retained to provide full accountability of FBI files and thus preserve the integrity of the filing system.

SAFEGUARDS:

Records are maintained in a restric area and are accessed only by agency personnel. All FBI employees receives a complete background investigation prior to being hired. All employees are cautioned about divulging confidential information or any information contained in FBI files. Failure to abide by this provision violates Department of Justice regulations and may violate certain statutes providing maximum severe penalties of a ten thousand dollar fine or 10 years imprisonment or both. Employees who resign or retire are also cautioned about divulging information acquired in the jobs. Registered mail is used to transmit routine hard copy records between field offices. Highly classified records are hand carried by Special Agents or personnel of the Armed Forces Courier Service. Highly classified or sensitive privacy information, which is electronically transmitted between field offices, is transmitted in encrypted form to prevent interception and interpretation. Information transmitted in teletype form is placed in the main files of both the receiving and transmitting field offi Field offices involved in certain complicated investigative matters may be provided with on-line access to the duplicative computerized information which is maintained for them on disk storage in the FBI Computer Center in Washington, D.C., and this computerized data is also transmitted in encrypted form.

RETENTION AND DISPOSAL:

As the result of an extensive review of FBI records conducted by NARA, records evaluated as historical and permanent will be transferred to the National Archives after established retention periods and administrative needs of the FBI have elapsed. As deemed necessary, certain records be subject to restricted examination and usage, as provided by 44 U.S.C. section 2104.

FBI record disposition programs relevant to this System are conducted in accordance with the FBI Records Retention Plan and Disposition

Schedule which was approved by the Archivist of the United States and the U.S. District Court, District of Columbia. Investigative, applicant and administrative records which meet the destruction criteria will be destroyed after 20 or 30 years at FBI Headquarters and after 1, 5, 10 or 20 years in FBI Field Offices. Historical records will be transferred to the National Archives after 30 or 50 years, contingent upon investigative and administrative needs. The administrative indices and listings described within this System were appraised separately and disposition authority established. (Job No. NC1-65-82-4 and amendments).

SYSTEM MANAGER(S) AND ADDRESS:

Director, Federal Bureau of Investigation; Washington, DC 20535.

NOTIFICATION PROCEDURE:

Same as above.

RECORD ACCESS PROCEDURES:

A request for access to a record from the system shall be made in writing with the envelope and the letter clearly marked "Privacy Access Request". Include in the request your full name, complete address, date of birth, place of birth, notarized signature, and other identifying data you may wish to furnish to assist in making a proper search of our records. Also include the general subject matter of the document of its file number. The requester will also provide a return address for transmitting the information. Requests for access to information maintained at FBI Headquarters must be addressed to the Director, Federal Bureau of Investigation, Washington, DC 20535. Requests for information maintained at FBI field divisions or Legal Attaches must be made separately and addressed to the specific field division or Legal Attache listed in the appendix to this system notice.

CONTESTING RECORD PROCEDURES:

Individuals desiring to contest or amend information maintained in the system should also direct their request to the Director, Federal Bureau of Investigation, Washington, DC 20535, stating clearly and concisely what information is being contested, the reasons for contesting it, and the proposed amendment to the information sought.

RECORD SOURCE CATEGORIES:

The FBI, by the very nature and requirement to investigate violations of law within its investigative jurisdiction and its responsibility for the internal security of the United States, collects information from a wide variety of sources. Basically, it is the result of investigative efforts and information furnished by other Government agencies, law enforcement agencies, and the general public, informants, witnesses, and public source material.

SYSTEMS EXEMPTED FROM CERTAIN PROVISIONS OF THE ACT:

The Attorney General has exempted this system from subsections (c)(3), (d), (e) (1) (2) and (3), (e)(4) (G) and (H), (e)(8) (f), (g), of the Privacy Act pursuant to 5 U.S.C. 552a (j) and (k). Rules have been promulgated in accordance with the requirements of 5 U.S.C. 553 (b), (c) and (e).

Appendix of Field Divisions and Legal Attaches for the Federal Bureau of Investigation Field Divisions; Justice/FBI-999

5th Floor, 445 Broadway, Albany, NY 12201.
POB 25186, Albuquerque, NM 87125.
POB 100560, Anchorage, AK 99510.
POB 1683, Atlanta, GA 30370.
7142 Ambassador Road, Baltimore, MD 21207.
2122 Building, Birmingham, AL 35203.
One Center Plaza, Suite 600 Boston, MA 02108
111 West Huron Street, Buffalo, NY 14202.
6010 Kenley Lane, Charlotte, NC 28217.
219 S. Dearborn St., Chicago, IL 60604.
POB 1277, Cincinnati, OH 45201.
1240 E. 9th St., Cleveland, OH 44199.
POB 137, Columbia, SC 29202.
1801 W. Lamar, Dallas, TX 75202.
POB 1229, Denver, CO 80201.
POB 2118, Detroit, MI 48231.
700 E. San Antonio Ave., El Paso, TX 79901.
POB 50164, Honolula, HI 96850.
POB 61369, Houston, TX 77208.
POB 1186, Indianapolis, IN 45206.
100 W. Capitol St., Jackson, MS 39269.
POB 8928, Jacksonville, FL 32239.
POB 2449, Kansas City, MO 64142.
POB 10368, Knoxville, TN 37919.
POB 16032, Las Vegas, NV 89101.
POB 21470, Little Rock, AR 72221-1470.
11000 Wilshire Blvd., Los Angeles, CA 90024.
POB 2467, Louisville, KY 40201.
167 N. Main St., Memphis, TN 38103.
POB 592418, Miami, FL 33159.
POB 2058, Milwaukee, WI 53201.
111 Washington Ave. South S-1100 Minneapolis, MN 55401
POB 2128, Mobile, AL 36652.
POB 1158, Newark, NJ 07101.
POB 2058, New Haven, CT 06521.
POB 51930, New Orleans, LA 70151.
POB 1425, New York, NY 10008.
POB 3828, Norfolk, VA 23514.
POB 54511, Oklahoma City, OK 73154.
POB 548, Omaha, NE 68101.
600 Arch St., Philadelphia, PA 19106.
201 E. Indianola, Phoenix, AZ 85012.
POB 1315, Pittsburgh, PA 15230.
POB 709, Portland, OR 97207.
POB 12325, Richmond, VA 23241.
POB 13130, Sacramento, CA 95813.
POB 7251, St. Louis, MO 63177.
125 S. State St., Salt Lake City, UT 84138.
POB 1630, San Antonio, TX 78296.
880 Front St., San Diego, CA 92188.
POB 36015, San Francisco, CA 94102.
POB BT, San Juan, PR 00936.
915 2nd Ave., Seattle, WA 98174.
POB 3646, Springfield, IL 62708.
POB 172177, Tampa, FL 33602.
Washington Field Office, Washington, DC 20535.
Federal Bureau of Investigation Academy, Quantico, VA 22135.
Legal Attaches: (Send c/o the American Embassy for the Cities indicated).
Athens, Greece (PSC 108, Box 45, APO AE 09842) Bangkok, Thailand (Box 67, APO AP 96546)
Bern, Switzerland.
Bogota, Columbia (APO, Miami 34038).
Bonn, Germany (Box 310, APO, New York 09080).
Bridgetown, Barbados (Box B, FPO, Miami 34054).
Brussels, Belgium (APO, New York 09667).
Canberra, Australia (APO, San Francisco 96404-0001).
Caracas, Venezuela (Unit 4966, APO AA 34037)
Hong Kong, B.C.C. (FPO, San Francisco 96659-0002).
London, England (Box 2, FPO, New York 09509).
Madrid, Spain (PSC 61, Box 0001, APO AE 09642)
Manila, Philippines (APO, San Francisco 96528).
Mexico City, Mexico (POB 3087, Laredo, TX 78044-3087).
Montevideo, Uruguay (APO, Miami 34035).
Ottawa, Canada.
Panama City, Panama (Box E, APO, Miami 34002).
Paris, France (APO, New York 09777).
Rome, Italy (APO, New York 09794).
Tokyo, Japan (APO, San Francisco 96503).
Vienna, Austria (Unit 27937, Box 37, APO AE 09222)

JUSTICE/FBI-003

SYSTEM NAME:

Bureau Mailing Lists.

SYSTEM LOCATION:

Federal Bureau of Investigation, J. Edgar Hoover Bldg., 10th and Pennsylvania Ave., NW., Washington, shall be approved by the Secretary of Defense. The regulations prescribed by the Secretary of the Treasury pursuant to paragraph 1 hereof shall, so far as practicable, be uniform with the regulations prescribed for the other armed forces.

3. No person shall be entitled to more than one award of the National Defense Service Medal.

4. The National Defense Service Medal may be awarded posthumously.

DWIGHT D. EISENHOWER

THE WHITE HOUSE,
April 22, 1953.

EXECUTIVE ORDER 10449

CREATING AN EMERGENCY BOARD TO INVESTIGATE A DISPUTE BETWEEN THE NEW YORK, CHICAGO & ST. LOUIS RAILROAD COMPANY AND CERTAIN OF ITS EMPLOYEES

WHEREAS a dispute exists between the New York, Chicago & St. Louis Railroad Company, a carrier, and certain of its employees represented by the Brotherhood of Railroad Trainmen, a labor organization; and

WHEREAS this dispute has not heretofore been adjusted under the provisions of the Railway Labor Act, as amended; and

WHEREAS this dispute, in the judgment of the National Mediation Board, threatens substantially to interrupt interstate commerce to a degree such as to deprive a section of the country of essential transportation service:

NOW, THEREFORE, by virtue of the authority vested in me by section 10 of the Railway Labor Act, as amended (45 U. S. C. 160), I hereby create a board of three members, to be appointed by me, to investigate the said dispute. No member of the said board shall be pecuniarily or otherwise interested in any organization of employees or any carrier.

The board shall report its findings to the President with respect to the said dispute within thirty days from the date of this order.

As provided by section 10 of the Railway Labor Act, as amended, from this date and for thirty days after the board has made its report to the President, no change, except by agreement, shall be made by the New York, Chicago & St. Louis Railroad Company or its employees in the conditions out of which the said dispute arose.

DWIGHT D. EISENHOWER

THE WHITE HOUSE,
April 24, 1953.

EXECUTIVE ORDER 10450

amended; 10491 10531 10548 10550 (check aug 4/ 8/15/ 70)

SECURITY REQUIREMENTS FOR GOVERNMENT EMPLOYMENT

WHEREAS the interests of the national security require that all persons privileged to be employed in the departments and agencies of the Government, shall be reliable, trustworthy, of good conduct and character, and of complete and unswerving loyalty to the United States; and

WHEREAS the American tradition that all persons should receive fair, impartial, and equitable treatment at the hands of the Government requires that all persons seeking the privilege of employment or privileged to be employed in the departments and agencies of the Government be adjudged by mutually consistent and no less than minimum standards and procedures among the departments and agencies governing the employment and retention in employment of persons in the Federal service:

NOW, THEREFORE, by virtue of the authority vested in me by the Constitution and statutes of the United States, including section 1753 of the Revised Statutes of the United States (5 U. S. C. 631); the Civil Service Act of 1883 (22 Stat. 403; 5 U. S. C. 632, *et seq.*); section 9A of the act of August 2, 1939, 53 Stat. 1148 (5 U. S. C. 118 j); and the act of August 26, 1950, 64 Stat. 476 (5 U. S. C. 22-1, *et seq.*), and as President of the United States, and deeming such action necessary in the best interests of the national security, it is hereby ordered as follows:

SECTION 1. In addition to the departments and agencies specified in the said act of August 26, 1950, and Executive Order No. 10237[1] of April 26, 1951, the provisions of that act shall apply to all other departments and agencies of the Government.

SEC. 2. The head of each department and agency of the Government shall be responsible for establishing and maintaining within his department or agency an effective program to insure that the

[1] 3 CFR, 1951 Supp., p. 430.

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employment and retention in employment of any civilian officer or employee within the department or agency is clearly consistent with the interests of the national security.

SEC. 3. (a) The appointment of each civilian officer or employee in any department or agency of the Government shall be made subject to investigation. The scope of the investigation shall be determined in the first instance according to the degree of adverse effect the occupant of the position sought to be filled could bring about, by virtue of the nature of the position, on the national security, but in no event shall the investigation include less than a national agency check (including a check of the fingerprint files of the Federal Bureau of Investigation), and written inquiries to appropriate local law-enforcement agencies, former employers and supervisors, references, and schools attended by the person under investigation: *Provided*, that upon request of the head of the department or agency concerned, the Civil Service Commission may, in its discretion, authorize such less investigation as may meet the requirements of the national security with respect to per-diem, intermittent, temporary, or seasonal employees, or aliens employed outside the United States. Should there develop at any stage of investigation information indicating that the employment of any such person may not be clearly consistent with the interests of the national security, there shall be conducted with respect to such person a full field investigation, or such less investigation as shall be sufficient to enable the head of the department or agency concerned to determine whether retention of such person is clearly consistent with the interests of the national security.

(b) The head of any department or agency shall designate, or cause to be designated, any position within his department or agency the occupant of which could bring about, by virtue of the nature of the position, a material adverse effect on the national security as a sensitive position. Any position so designated shall be filled or occupied only by a person with respect to whom a full field investigation has been conducted: *Provided*, that a person occupying a sensitive position at the time it is designated as such may continue to occupy such position pending the completion of a full field investigation, subject to the other provisions of this order: *And provided further*, that in case of emergency a sensitive position may be filled for a limited period by a person with respect to whom a full field preappointment investigation has not been completed if the head of the department or agency concerned finds that such action is necessary in the national interest, which finding shall be made a part of the records of such department or agency.

SEC. 4. The head of each department and agency shall review, or cause to be reviewed, the cases of all civilian officers and employees with respect to whom there has been conducted a full field investigation under Executive Order No. 9835[2] of March 21, 1947, and, after such further investigation as may be appropriate, shall re-adjudicate, or cause to be re-adjudicated, in accordance with the said act of August 26, 1950, such of those cases as have not been adjudicated under a security standard commensurate with that established under this order.

SEC. 5. Whenever there is developed or received by any department or agency information indicating that the retention in employment of any officer or employee of the Government may not be clearly consistent with the interests of the national security, such information shall be forwarded to the head of the employing department or agency or his representative, who, after such investigation as may be appropriate, shall review, or cause to be reviewed, and, where necessary, re-adjudicate, or cause to be re-adjudicated, in accordance with the said act of August 26, 1950, the case of such officer or employee.

SEC. 6. Should there develop at any stage of investigation information indicating that the employment of any officer or employee of the Government may not be clearly consistent with the interests of the national security, the head of the department or agency concerned or his representative shall immediately suspend the employment of the person involved if he deems such suspension necessary in the interests of the national security and, following such investigation and review as he deems necessary, the head of the department or agency concerned shall terminate the employment of such suspended officer or employee whenever he shall determine such termination necessary or

[2] 3 CFR, 1947 Supp.

advisable in the interests of the national security, in accordance with the said act of August 26, 1950.

SEC. 7. Any person whose employment is suspended or terminated under the authority granted to heads of departments and agencies by or in accordance with the said act of August 26, 1950, or pursuant to the said Executive Order No. 9835 or any other security or loyalty program relating to officers or employees of the Government, shall not be reinstated or restored to duty or reemployed in the same department or agency and shall not be reemployed in any other department or agency, unless the head of the department or agency concerned finds that such reinstatement, restoration, or reemployment is clearly consistent with the interests of the national security, which finding shall be made a part of the records of such department or agency: *Provided*, that no person whose employment has been terminated under such authority thereafter may be employed by any other department or agency except after a determination by the Civil Service Commission that such person is eligible for such employment.

SEC. 8. (a) The investigations conducted pursuant to this order shall be designed to develop information as to whether the employment or retention in employment in the Federal service of the person being investigated is clearly consistent with the interests of the national security. Such information shall relate, but shall not be limited, to the following:

(1) Depending on the relation of the Government employment to the national security:

(i) Any behavior, activities, or associations which tend to show that the individual is not reliable or trustworthy.

(ii) Any deliberate misrepresentations, falsifications, or omissions of material facts.

(iii) Any criminal, infamous, dishonest, immoral, or notoriously disgraceful conduct, habitual use of intoxicants to excess, drug addiction, sexual perversion, or financial irresponsibility.

(iv) An adjudication of insanity, or treatment for serious mental or neurological disorder without satisfactory evidence of cure.

(v) Any facts which furnish reason to believe that the individual may be subjected to coercion, influence, or pressure which may cause him to act contrary to the best interests of the national security.

(2) Commission of any act of sabotage, espionage, treason, or sedition, or attempts thereat or preparation therefor, or conspiring with, or aiding or abetting, another to commit or attempt to commit any act of sabotage, espionage, treason, or sedition.

(3) Establishing or continuing a sympathetic association with a saboteur, spy, traitor, seditionist, anarchist, or revolutionist, or with an espionage or other secret agent or representative of a foreign nation, or any representative of a foreign nation whose interests may be inimical to the interests of the United States, or with any person who advocates the use of force or violence to overthrow the government of the United States or the alteration of the form of government of the United States by unconstitutional means.

(4) Advocacy of use of force or violence to overthrow the government of the United States, or of the alteration of the form of government of the United States by unconstitutional means.

(5) Membership in, or affiliation or sympathetic association with, any foreign or domestic organization, association, movement, group, or combination of persons which is totalitarian, Fascist, Communist, or subversive, or which has adopted, or shows, a policy of advocating or approving the commission of acts of force or violence to deny other persons their rights under the Constitution of the United States, or which seeks to alter the form of government of the United States by unconstitutional means.

(6) Intentional, unauthorized disclosure to any person of security information, or of other information disclosure of which is prohibited by law, or willful violation or disregard of security regulations.

(7) Performing or attempting to perform his duties, or otherwise acting, so as to serve the interests of another government in preference to the interests of the United States.

(8) added by EO 10491

(b) The investigation of persons entering or employed in the competitive service shall primarily be the responsibility of the Civil Service Commission, except in cases in which the head of a department or agency assumes that responsibility pursuant to law or by agreement with the Commission. The Commission shall furnish a full investigative report to the department or agency concerned.

(c) The investigation of persons (including consultants, however employed), entering employment of, or employed by, the Government other than in the competitive service shall primarily be the responsibility of the employing department or agency. Departments and agencies without investigative facilities may use the investigative facilities of the Civil Service Commission, and other departments and agencies may use such facilities under agreement with the Commission.

(d) There shall be referred promptly to the Federal Bureau of Investigation all investigations being conducted by any other agencies which develop information indicating that an individual may have been subjected to coercion, influence, or pressure to act contrary to the interests of the national security, or information relating to any of the matters described in subdivisions (2) through ~~(7)~~ (8) of subsection (a) of this section. In cases so referred to it, the Federal Bureau of Investigation shall make a full field investigation.

SEC. 9. (a) There shall be established and maintained in the Civil Service Commission a security-investigations index covering all persons as to whom security investigations have been conducted by any department or agency of the Government under this order. The central index established and maintained by the Commission under Executive Order No. 9835 of March 21, 1947, shall be made a part of the security-investigations index. The security-investigations index shall contain the name of each person investigated, adequate identifying information concerning each such person, and a reference to each department and agency which has conducted an investigation concerning the person involved or has suspended or terminated the employment of such person under the authority granted to heads of departments and agencies by or in accordance with the said act of August 26, 1950.

(b) The heads of all departments and agencies shall furnish promptly to the Civil Service Commission information appropriate for the establishment and maintenance of the security-investigations index.

(c) The reports and other investigative material and information developed by investigations conducted pursuant to any statute, order, or program described in section 7 of this order shall remain the property of the investigative agencies conducting the investigations, but may, subject to considerations of the national security, be retained by the department or agency concerned. Such reports and other investigative material and information shall be maintained in confidence, and no access shall be given thereto except, with the consent of the investigative agency concerned, to other departments and agencies conducting security programs under the authority granted by or in accordance with the said act of August 26, 1950, as may be required for the efficient conduct of Government business.

SEC. 10. Nothing in this order shall be construed as eliminating or modifying in any way the requirement for any investigation or any determination as to security which may be required by law.

SEC. 11. On and after the effective date of this order the Loyalty Review Board established by Executive Order No. 9835 of March 21, 1947, shall not accept agency findings for review, upon appeal or otherwise. Appeals pending before the Loyalty Review Board on such date shall be heard to final determination in accordance with the provisions of the said Executive Order No. 9835, as amended. Agency determinations favorable to the officer or employee concerned pending before the Loyalty Review Board on such date shall be acted upon by such Board, and whenever the Board is not in agreement with such favorable determination the case shall be remanded to the department or agency concerned for determination in accordance with the standards and procedures established pursuant to this order. Cases pending before the regional loyalty boards of the Civil Service Commission on which hearings have not been initiated on such date shall be referred to the department or agency concerned. Cases being heard by regional loyalty boards on such date shall be heard to conclusion, and the determination of the board shall be forwarded to the head of the department or agency concerned: *Provided*, that if no specific department or agency is involved, the case shall be dismissed without prejudice to the applicant. Investigations pending in the Federal Bureau of Investigation or the Civil Service

Commission on such date shall be completed, and the reports thereon shall be made to the appropriate department or agency.

SEC. 12. Executive Order No. 9835 of March 21, 1947, as amended, is hereby revoked. For the purposes described in section 11 hereof the Loyalty Review Board and the regional loyalty boards of the Civil Service Commission shall continue to exist and function for a period of one hundred and twenty days from the effective date of this order, and the Department of Justice shall continue to furnish the information described in paragraph 3 of Part III of the said Executive Order No. 9835, but directly to the head of each department and agency.

SEC. 13. The Attorney General is requested to render to the heads of departments and agencies such advice as may be requisite to enable them to establish and maintain an appropriate employee-security program.

amended by E.O 10550

SEC. 14. (a) The Civil Service Commission, with the continuing advice and collaboration of representatives of such departments and agencies as the National Security Council may designate, shall make a continuing study of the manner in which this order is being implemented by the departments and agencies of the Government for the purpose of determining:

(1) Deficiencies in the department and agency security programs established under this order which are inconsistent with the interests of, or directly or indirectly weaken, the national security.

(2) Tendencies in such programs to deny to individual employees fair, impartial, and equitable treatment at the hands of the Government, or rights under the Constitution and laws of the United States or this order.

Information affecting any department or agency developed or received during the course of such continuing study shall be furnished immediately to the head of the department or agency concerned. The Civil Service Commission shall report to the National Security Council, at least semiannually, on the results of such study, and shall recommend means to correct any such deficiencies or tendencies.

(b) All departments and agencies of the Government are directed to cooperate with the Civil Service Commission to facilitate the accomplishment of the responsibilities assigned to it by subsection (a) of this section.

SEC. 15. This order shall become effective thirty days after the date hereof.

DWIGHT D. EISENHOWER

THE WHITE HOUSE,
April 27, 1953.

EXECUTIVE ORDER 10451

INSPECTION OF CERTAIN RETURNS BY THE COMMITTEE ON THE JUDICIARY, HOUSE OF REPRESENTATIVES

By virtue of the authority vested in me by sections 55 (a), 508, 603, 729 (a), and 1204 of the Internal Revenue Code (53 Stat. 29, 111, 171, 54 Stat. 989, 1008, 55 Stat. 722; 26 U. S. C. 55 (a), 508, 603, 729 (a), and 1204), it is hereby ordered that until June 30, 1953, any income, excess-profits, declared value excess-profits, capital stock, estate, or gift tax return for any period to and including 1952 shall be open to inspection by the Committee on the Judiciary, House of Representatives, or any duly authorized subcommittee thereof, in connection with the inquiry authorized by the resolution of the Committee adopted January 27, 1953, with reference to the administration of the Department of Justice and the Office of the Attorney General of the United States, subject to the conditions stated in the Treasury decision[1] relating to the inspection of such returns by that Committee, approved by me this date.

DWIGHT D. EISENHOWER

THE WHITE HOUSE,
April 28, 1953.

EXECUTIVE ORDER 10452

PROVIDING FOR THE PERFORMANCE BY THE CHAIRMAN OF THE CIVIL SERVICE COMMISSION OF CERTAIN FUNCTIONS RELATING TO PERSONNEL MANAGEMENT

By virtue of the authority vested in me by the laws of the United States, including section 1753 of the Revised Statutes (5 U. S. C. 631) and the Civil Service Act of January 16, 1883 (22 Stat. 403), and as President of the United States, it is hereby ordered as follows:

SECTION 1. The Chairman of the United States Civil Service Commission shall, in addition to the functions conferred upon him by statute and by

[1] 26 CFR, Part 458.

Ordered that defendants, their officers, agents, servants and employees be, and they hereby are, enjoined

(1) from demolishing the building located at 1016 Wahler Place, S.E., and demolishing or seeking permit to demolish the buildings located at 1022, 1029, 1034, 1040, 1064, 1070, 1051, 1057 and 1075 Wahler Place, S.E., in the District of Columbia;

(2) from removing or permitting the removal of any appliances, fixtures or other items from any of the buildings above designated; and

(3) from evicting, removing or otherwise interfering with the tenancy of any tenant at Sky Tower, except in accordance with law for grounds arising subsequent to the date of this Order, and except that they shall, not later than February 28, 1975, arrange, permit and enable, at defendants' expense, the removal of the three families occupying 1070 Wahler Place, S.E., to comparable apartments in one of the rehabilitated buildings, and such apartments shall first have been put into decent, safe and sanitary condition; and it is further

Ordered that defendants are directed

(4) promptly to erect fences around the demolition site, to complete the demolition now in progress on 1063 and 1060 Wahler Place, S.E., in a prompt and safe manner, and promptly to remove at all demolished buildings all foundations and footings, old materials, debris, rubble and demolition equipment, grade the site to fill in holes and effectuate a safe condition and normally presentable appearance;

(5) to restore with reasonable diligence each of the units and common areas in the eight rehabilitated buildings to a condition at least as decent, safe and sanitary as that existing as of September 17, 1974, such work to begin immediately and proceed expeditiously with priority given apartments presently occupied and to include, though not be limited to, immediately replacing into the rehabilitated units the refrigerators, bathtubs and other appliances, and assuring a constant and reliable source of heat to all occupied buildings;

(6) to attempt immediately to locate all former tenants who left Sky Tower subsequent to September 17, 1974, and to permit any such tenant family to return to Sky Tower, such return to be arranged as promptly as the repair work and the schedules of the returning families may permit, and to pay all moving and lease termination penalties incurred by such tenants who decide to return (all previous tenants are to return under the terms of their previous tenancy, including rent supplements); provided, however, that this Order shall in no way limit the right of the defendants to rent space to persons other than such former tenants if space is available after the needs of former tenants have been met, giving priority to other members of the class; and

(7) promptly to arrange security services on a continuous basis in a manner reasonably adequate to prevent vandalism to the buildings; provided, however, that when the buildings are reoccupied to an extent the defendants deem adequate to make provision of security unnecessary, they may move the Court to be relieved from this obligation; and it is further

Ordered that defendants shall file with the Court and serve upon plaintiffs' counsel at the end of each week commencing February 17, 1975, a progress report stating with particularity the steps taken to carry out and implement this Order, and that counsel for the parties shall appear in open court at 9:30 a. m. on March 3, 1975, to determine a schedule for further proceedings in this cause.

Richard M. NIXON, Plaintiff,
v.
Arthur F. SAMPSON et al., Defendants,
Henry S. Ruth, Special Prosecutor, Intervenor,
Jack Anderson, Intervenor.

The REPORTERS COMMITTEE FOR FREEDOM OF the PRESS et al., Plaintiffs,
v.
Arthur F. SAMPSON et al., Defendants,
Richard M. Nixon, Intervenor.

Lillian HELLMAN et al., Plaintiffs,
v.
Arthur F. SAMPSON et al., Defendants,
Sen. Sam J. Ervin, Jr., et al., Amici Curiae;
Congresswoman Elizabeth Holtzman, Amicus Curiae.
Civ. A. Nos. 74–1518, 74–1533, and 74–1551.

United States District Court, District of Columbia.

Jan. 31, 1975.

Suit, which was brought by former president against the administrator of general services, the counsel to the president, the director of the Secret Service and the special prosecutor for declaratory relief, was consolidated with a suit by news reporters for declaratory and injunctive relief, suit by an individual and others for declaratory and injunctive relief against the former president and the other defendants in the former president's suit and a suit by an investigative reporter for declaratory and injunctive relief against the former president and the other defendants. On motions for preliminary injunction, to dismiss and for summary judgment, the District Court, Charles R. Richey, J., held that the newspaper reporters had standing to challenge validity of agreement between former president and General Services Administration for the temporary custody of presidential material; that a justiciable controversy existed; that the agreement between the former president and the General Services Administration was invalidated by the Presidential Recordings and Materials Preservation Act; that placing ownership of presidential materials in a former president would violate the emoluments clause; that ownership of materials and tape recordings of conversations relating to the conduct of the office of the president was in the United States and not the former president; that a former president could not assert or waive the privilege which attaches to the confidential communications relating to the conduct of the office of the president and such privilege may only be asserted or waived by the incumbent president. The court established a procedure for the protection of the privacy of the former president.

Order in accordance with opinion.*

1. Federal Civil Procedure ⇐103

The judicial doctrine of "standing" is a correlative of the constitutional requirement that there be a "case or controversy." U.S.C.A.Const. art. 3, § 1 et seq.

2. Courts ⇐231

The essence of the "case or controversy" requirement is that a federal court will not serve as a forum in which to air generalized grievances about the conduct of the government. U.S.C.A. Const. art. 3, § 1 et seq.

3. Federal Civil Procedure ⇐103

In order for a party to have standing it is necessary that the case have an impact on the party which is not common to all members of the public.

4. Records ⇐14

The primary purpose of the Freedom of Information Act is to increase public access to government records by providing a right of access to "any person" without consideration of the interests of the party seeking relief. 5 U.S.C.A. § 552.

* Entry of order stayed by Court of Appeals 513 F.2d 430.

5. Declaratory Judgment ⚷203

Newspaper reporters who requested de novo determination of their right to access under Freedom of Information Act to certain materials and tape-recorded conversations of former president were entitled to a declaratory judgment on issues of ownership of the materials and tape-recorded conversations, whether the materials were "records" within meaning of the Act and whether an agreement between the former president and the administrator of the General Services Administration concerning custody of the materials was invalid. 5 U.S.C.A. § 552; 28 U.S.C.A. §§ 2201, 2202; U.S.C.A.Const. art. 3, § 1 et seq.; Amend. 1.

6. Records ⚷14

Where newspaper reporters had been denied access under Freedom of Information Act to papers and tape-recorded conversations of former president, burden was on the General Services Administration to sustain its denial of access rather than on the reporters to prove the right to access. 5 U.S.C.A. § 552; 28 U.S.C.A. §§ 2201, 2202; U.S.C.A.Const. art. 3, § 1 et seq.; Amend. 1.

7. Declaratory Judgment ⚷300

Newspaper reporters who had been denied access by the General Services Administration and other government officials to access to papers and tape-recorded conversations of former president, had standing under the Freedom of Information Act to sue in the federal courts in order to obtain a determination whether the materials were "records" within the meaning of the Act, whether claimed exemptions were valid and whether the reporters were entitled to access. 5 U.S.C.A. § 552; 28 U.S.C.A. §§ 2201, 2202; U.S.C.A.Const. art. 3, § 1 et seq.; Amend. 1.

8. Declaratory Judgment ⚷300

Newspaper reporters who sought, under the Freedom of Information Act, access to papers and tape-recorded conversations of former president had standing to contest validity of agreement between former president and the General Services Administration pertaining to custody of the papers. 5 U.S.C.A. § 552(a)(3), (b)(1).

9. Records ⚷14

Exceptions of the Freedom of Information Act are to be read narrowly and disclosure is the rule, not the exception. 5 U.S.C.A. § 552(a)(3), (b)(1).

10. Records ⚷14

When it is asserted that materials are exempt from disclosure under the Freedom of Information Act on ground they are specifically exempted from disclosure by statute, the court must not only examine and interpret the statute relied upon as specifically exempting disclosure but must also resolve any dispute as to whether the exemption has been properly invoked. 5 U.S.C.A. § 552(b)(3).

11. Records ⚷14

News reporters who sought to examine papers and tape recordings of former president under the Freedom of Information Act were not barred by the Presidential Libraries Act from challenging validity of agreement between former president and General Services Administration relating to custody of the materials and the reporters had standing to challenge the validity of the agreement. 5 U.S.C.A. § 552(b)(3); 44 U.S.C.A. § 2101 et seq.

12. Records ⚷14

Fact that news reporters did not personally own the records which they sought to examine under the Freedom of Information Act did not preclude their access to the material sought. 5 U.S.C.A. § 552.

13. Records ⚷13

The Presidential Recordings and Materials Preservation Act nullified agreement of September 7, 1974, between former president and General Services Administration providing for the temporary custody of certain records and tape recordings of the former president's administration. Presidential Recordings and Materials Preservation Act, § 101 et seq., 44 U.S.C.A. § 2107 note.

14. Action ⚷6

The Presidential Recordings and Materials Preservation Act did not moot the question of ownership of public papers and recordings of former president of the United States. Presidential Recordings and Materials Preservation Act, § 101 et seq., 44 U.S.C.A. § 2107 note.

15. United States ⚷26

The Presidential Recordings and Materials Preservation Act did not grant to former president the right to assert any privilege as to materials and tape recordings of his administration. Presidential Recordings and Materials Preservation Act, §§ 102(b), 103, 104(a), (a)(5), 44 U.S.C.A. § 2107 note.

16. Courts ⚷281

In order for court to ascertain whether an actual controversy exists which is justiciable, it must examine the nature of the proceedings. U.S.C.A. Const. art. 3, § 1 et seq.

17. Courts ⚷231

Question of ownership of papers and tape recordings of former president's administration was a justiciable issue. 5 U.S.C.A. § 552; 28 U.S.C.A. §§ 2201, 2202; U.S.C.A.Const. art. 3, § 1 et seq.; Amend. 1.

18. Declaratory Judgment ⚷366

Fact that former president had filed new suit contesting validity of Presidential Recordings and Materials Preservation Act would not prevent resolution of issues of validity of ownership of papers and tape recordings relating to former president's administration where if the former president was unsuccessful in the new suit, a ruling which substantially advanced the resolution of the ownership issue and if he was successful, the court could re-address the effect of an agreement between the former president and the General Services Administration on temporary custody of the materials which was nullified by the Act. Presidential Recordings and Materials Preservation Act, § 101 et seq., 44 U.S.C.A. § 2107 note.

19. Declaratory Judgment ⚷182

Provision of the Presidential Recordings and Materials Preservation Act for "public access" pursuant to regulations to be promulgated by the Administrator of General Services did not moot reporters' suit to determine ownership of papers and tape recordings of administration of former president. Presidential Recordings and Materials Preservation Act, § 104(a), 44 U.S.C.A. § 2107 note; U.S.C.A.Const. Amend. 4.

20. Action ⚷6

Where wrongful conduct has occurred, mere possibility that it will not reoccur, especially when it is only the statement of the defendant that it will not, is not sufficient to moot the claim for relief.

21. Declaratory Judgment ⚷182

Where news reporters, in addition to seeking access to materials and tape recordings of former president, also sought declaratory judgment on issue of ownership of the materials, it was within the discretion of the trial court, considering the public interest and the Presidential Recordings and Materials Preservation Act, to decide whether a declaration should issue. Presidential Recordings and Materials Preservation Act, § 104(d), 44 U.S.C.A. § 2107 note.

22. Declaratory Judgment ⚷203

Where the Presidential Recordings and Materials Preservation Act nullified agreement between the former president and the General Services Administration pertaining to temporary custody of presidential papers, no justiciable controversy existed as to whether the administrator of General Services owed a duty to the former president under the Presidential Libraries Act to effectuate the agreement. 5 U.S.C.A. § 552(a)(3); 28 U.S.C.A. § 1361; 44 U.S.C.A. § 2108(c).

23. United States ⚷125(28)

Former president's action for injunctive relief to compel the Administrator of General Services, the counsel to the president, the director of the Secret-

Service and the special prosecutor, in their official capacity, to comply with agreement between the former president and the General Services Administration pertaining to temporary custody of papers and tape recordings of the former president's administration was barred by sovereign immunity.

24. Injunction ⟹75

Former president was entitled to maintain suit against Administrator of General Services, counsel to the president, director of the Secret Service and special prosecutor for injunctive relief to prevent the defendants from infringing upon his alleged constitutional rights. U.S.C.A.Const. Amends. 1, 4.

25. Federal Civil Procedure ⟹2550

Ownership of papers and tape recordings relating to administration of former president was question of law which was determinable on motion for summary judgment. Fed.Rules Civ. Proc. rule 56, 28 U.S.C.A.; U.S.C.A. Const. Amend. 4.

26. United States ⟹55

Generally, that which is generated, created, produced or kept by a public official in the administration and performance of the powers and duties of public office belongs to the government and may not be considered the private property of the individual.

27. Records ⟹14
United States ⟹55

Records of a government officer executed in the discharge of his official duties are public documents and ownership is in the United States.

28. United States ⟹26

Former president's assertion of ownership of documents, tapes, papers and other materials generated or retained by himself or others on his behalf in the performance of his duties as president was contrary to the nature of the office of the president and the Constitution. U.S.C.A.Const. art. 2, § 1, cls. 1, 5.

29. United States ⟹26

The powers and duties of the executive inure to the office of the presidency and not to any individual officeholder; the president is but a transient holder of the public trust. U.S.C.A.Const. art. 2, § 1, cls. 1, 5.

30. United States ⟹26

Even though a president while in office may exercise specific and enumerated powers, he is nevertheless a servant of the people. U.S.C.A.Const. art. 2, § 1, cls. 1, 5.

31. United States ⟹28

Though the president is elected by a nationwide ballot, and is often said to represent all the people, he does not embody the nation's sovereignty and is not above the law's commands; sovereignty remains at all times with the people. U.S.C.A.Const. art. 2, § 1, cls. 1, 7; § 4.

32. United States ⟹26

Where papers and tape recordings of former president's administration were directly related to the performance of the office of the president and were of incalculable value, it would be contradictory to, and a violation of, the emoluments clause for a president to be given or to be permitted to assert a personal right to such materials. U.S.C.A.Const. art. 2, § 1, cl. 6.

33. United States ⟹26

The inherent continuity of the office of the president negated claim by former president that the independence of the office required that his assertion of ownership of papers and tape recordings generated by his administration be sustained. U.S.C.A.Const. art. 2, § 1, cls. 1, 5.

34. United States ⟹26

To allow any one president to remove the documents, papers, tapes and other materials which contained information vital to the ongoing affairs of the nation would be totally disruptive to the office of the presidency and would impair the ability of his successor in office to properly carry out the duties and powers of the office. U.S.C.A.Const. art. 2, § 1, cls. 1, 5.

35. United States ⟹26

The historical practice of past presidents did not evince clear and constant recognition of ownership of the materials generated and retained in the conduct of the office of the president. U.S.C.A.Const. art. 2, § 1, cls. 1, 5.

36. United States ⟹26

Congress has not sanctioned the personal ownership of presidential materials and tapes generated and retained in the conduct of the office of the president; the Presidential Libraries Act does not sanction the personal ownership of each president of the documents, papers, tapes and other materials generated and retained in the conduct of the office of the president. 44 U.S.C.A. §§ 2101, 2107, 2108.

37. Statutes ⟹205

A statute cannot be read piecemeal.

38. Records ⟹14

The Office of the President was a "federal agency" within meaning of 1950 Federal Records Act. Federal Property and Administrative Services Act of 1949, § 3, 40 U.S.C.A. § 472; 44 U.S.C.A. §§ 2103, 2107, 3301.

See publication Words and Phrases for other judicial constructions and definitions.

39. United States ⟹26, 55

Presidential materials and tape-recorded conversations which were generated, created, produced or kept in the administration and performance of the powers and duties of the office of the president belonged to the government and were not personal property of former president. 44 U.S.C.A. § 2101; Presidential Recordings and Materials Preservation Act, § 101(b)(2), 44 U.S.C.A. § 2107 note.

40. Records ⟹14

To extent that presidential materials and tape-recorded conversations contained "records" within the meaning of Freedom of Information Act, newspaper reporters had right of access to those records. 5 U.S.C.A. § 552.

41. Records ⟹14

The Office of the President is not an "agency" within meaning of the Freedom of Information Act. 5 U.S.C.A. § 552.

See publication Words and Phrases for other judicial constructions and definitions.

42. Records ⟹14

Records of congressionally created executive "agencies" which assist the president in the formulation of policy and programs may be accessible under the Freedom of Information Act even though they have been sent to and are in the possession of the White House Office. 5 U.S.C.A. § 552.

43. Records ⟹14

The term "agency," within meaning of the Freedom of Information Act does not include the White House Office but does include the Executive Office of the President. 5 U.S.C.A. § 552(a)(3), (e).

44. United States ⟹26

Former president was not entitled to assert or waive the privilege which attaches to the confidential communications relating to the conduct of the Office of the President for communications contained in presidential materials and tape recordings as the privilege belonged to the government and could only be asserted or waived by the incumbent president. U.S.C.A.Const. art. 2, § 1, cls. 1, 5.

45. United States ⟹28

Executive privilege is founded upon the public interest in the effective performance of the constitutional powers and duties assigned to the executive branch and the privilege belongs to the government.

46. United States ⟹26

The privilege for presidential communications inures to the Office of the President, not to any particular officeholder and is not separate and distinct from concept of "executive privilege." U.S.C.A.Const. art. 2, § 1, cl. 1.

See publication Words and Phrases for other judicial constructions and definitions.

47. United States ⟹26

The true function of the privilege which protects the president's confidential communications is to assure that future presidents and their assistants will not be inhibited in expressing their candid, objective, and even blunt or harsh opinions. U.S.C.A.Const. art. 2, § 1, cl. 1.

48. Witnesses ⇐217

Generally, in order to determine to whom a privilege belongs, the court must ascertain whom the privilege benefits.

49. United States ⇐26

The privilege which protects the president's confidential communications may be asserted or waived only by the incumbent president. U.S.C.A.Const. art. 2, § 1, cl. 1.

50. United States ⇐40

The assertion or waiver of the executive privilege is vested in the head of the department claiming or waiving the privilege.

51. United States ⇐26

The privilege attaching to confidential communications of a president may neither be claimed nor waived by a private party as it is identical to the privilege which protects all executive department documents reflecting advisory opinions, recommendations and deliberations, comprising part of process by which governmental decisions and policies are formulated. U.S.C.A.Const. art. 2, § 1, cl. 1.

52. United States ⇐26

The duty of the president to preserve, protect, and to defend the Constitution carries with it the responsibility that each president not disclose the confidential communications of his predecessor except on the same consideration that he is required to give to his own confidential communications with his assistants, i. e., when it is in the "public interest." U.S.C.A.Const. art. 2, § 1, cls. 1, 7; § 4.

53. United States ⇐26

Although there is no personal "presidential privilege," a president, once he has left office, cannot be compelled to reveal confidential communications which relate to conduct to the office of the president; the incumbent president may intercede in order to assert or waive the privilege if the former president is subpoenaed or summoned to testify concerning confidential communications relating to the conduct of the office of the president.

54. Witnesses ⇐219(3)

When an attorney is subpoenaed or summoned to testify about confidential communication protected by the attorney-client privilege, he may not do so without the informed consent of his client; the attorney-client privilege is personal to the client and can only be waived by the client.

55. Searches and Seizures ⇐7(1)

Agreement between president of the United States and special prosecutor relating to prosecutor's access to materials and tape recordings of previous administration was a waiver of the privilege to prevent disclosure of confidential communications between the president and his assistants relating to conduct of the office of the president and did not constitute a "general warrant" in violation of the Fourth Amendment. U.S.C.A. Const. Amend. 4.

See publication Words and Phrases for other judicial constructions and definitions.

56. Searches and Seizures ⇐7(10)

Where agreement between the president and special prosecutor for access to certain tapes and materials only pertained to presidential materials and tape-recorded conversations relating to the conduct of the office of the president, such materials were the property of the United States and were in the possession of the executive branch of the government, the prosecutor's access to such materials would not violate former president's Fourth Amendment right to be free from unlawful searches and seizures. U.S.C.A.Const. Amend. 4.

57. Searches and Seizures ⇐7(10)

There is no cognizable Fourth Amendment claim by a private citizen with respect to a search by the government of government property in the government's possession, even though the private citizen generated or retained the property as a public official. U.S.C.A. Const. Amend. 4.

58. Searches and Seizures ⇐7(10)

In the case of public records and official documents, made or kept in the administration of public office, the fact of actual possession or of lawful custody would not justify the officer in resisting inspection, even though the record was made by himself and would supply the evidence of his alleged criminal dereliction. U.S.C.A.Const. Amend. 4.

59. Searches and Seizures ⇐7(26)

Objection to evidence obtained in violation of the prohibition of the Fourth Amendment may be raised only by one who claims ownership in or right to possession of the property seized. U.S.C. A.Const. Amend. 4.

60. Searches and Seizures ⇐7(10)

The Fourth Amendment protects the individual from unlawful government seizure of private property in the individual's possession but it does not protect seizures of private property lawfully in the possession of the government. U.S.C.A.Const. Amend. 4.

61. Evidence ⇐23(1)

Court would take judicial notice of fact that President Gerald Ford has granted, and former President Nixon has accepted a full and unconditional pardon.

62. Pardon and Parole ⇐9

The acceptance of a pardon precludes the one pardoned from asserting privilege against self-incrimination with respect to materials pertaining to the offense for which pardon was granted. U.S.C.A.Const. Amend. 5.

63. Searches and Seizures ⇐7(26)

No Fourth Amendment claim is cognizable where one citizen seeks to prevent the seizure of another citizen's property. U.S.C.A.Const. Amend. 4.

64. Searches and Seizures ⇐7(1)

The essential purpose of the Fourth Amendment is to shield the citizen from unwarranted intrusions into his privacy. U.S.C.A.Const. Amend. 4.

65. Searches and Seizures ⇐7(10)

One who is not the object of the criminal process has the right to have the privacy of both his private papers and conversations protected if he has a reasonable expectation that they will remain free from governmental intrusion. U.S.C.A.Const. Amend. 4.

66. Searches and Seizures ⇐7(10)

The fact that personal property is in the possession of the government does not in and of itself eliminate an expectation of privacy. U.S.C.A.Const. Amend. 4.

67. Searches and Seizures ⇐7(10)

Former president had right of privacy with respect to personal materials and tape-recorded conversations in the possession of the United States. U.S.C. A.Const. Amend. 4.

68. Courts ⇐262.3(1)

District court has power to issue an injunction to prevent an injury to a constitutionally protected right such as the right of privacy. U.S.C.A.Const. Amend. 4.

69. Injunction ⇐22, 75

Where special prosecutor and United States had evinced no interest in former president's personal materials and tape-recorded conversations, injunction would not issue to prohibit their examination of such materials but the court would fashion a remedy with respect to unintended infraction of the former president's right of privacy. U. S.C.A.Const. Amend. 4.

70. Searches and Seizures ⇐7(10)

Procedure was established for the protection of the privacy of former president with respect to materials and tape-recorded conversations relating to the conduct of the office of the presidency in the possession of the United States during special prosecutor's examination of materials during ongoing investigation. U.S.C.A.Const. Amend. 4.

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Thaddeus Holt, Breed, Abbott & Morgan, and William Sudow, Counsel, Subcommittee on Printing of the House Administration Committee, Washington, D. C., for amici curiae Senator Sam J. Ervin, Jr., et al.

Larry P. Ellsworth, Alan B. Morrison, Washington, D. C., for amicus curiae Congresswoman Elizabeth Holtzman.

MEMORANDUM OPINION

CHARLES R. RICHEY, District Judge.

I. INTRODUCTION

These consolidated cases present a unique controversy, the heart of which concerns the ownership of and the right to assert or waive privilege with respect to the "Presidential materials and tape-recorded conversations" [1] of the Nixon Administration.

The suits comprise the following actions: a suit by former President Richard M. Nixon (C.A. No. 74–1518) for injunctive relief and a writ of mandamus against Arthur F. Sampson, the Administrator of General Services; Philip W. Buchen, counsel to President Gerald R. Ford; and H. Stuart Knight, Director of the Secret Service, as well as the Special Prosecutor, an intervenor-defendant, who has counterclaimed against Mr. Nixon for declaratory relief; a suit by The Reporters Committee for Freedom of the Press, et al. (C.A. No. 74–1533) for declaratory and injunctive relief against Messrs. Sampson, Buchen, and Knight; a suit by Lillian Hellman, et al. (C.A. No. 74–1551) for declaratory and injunctive relief against Mr. Richard M. Nixon and Messrs. Sampson, Buchen, and Knight; and a suit by Mr. Jack Anderson, an intervenor-plaintiff in C.A. No. 74–1518, for declaratory and injunctive relief against Mr. Nixon, by cross-claim, and against Messrs. Sampson, Buchen, and Knight for declaratory and injunctive relief.

These actions are before the Court on the following motions: [2] plaintiff Nixon's motion for a preliminary injunc-

1. The nature of the "Presidential materials and tape-recorded conversations" will be discussed *infra*. However, prior to that discussion, the term should be considered as including all of the materials, including docu- ts, papers, etc., and tape-recorded conversations of the Nixon Administration which have been boxed or set aside by personnel of the General Services Administration and the archivists assigned to the White House.

2. These consolidated cases were before the Court on motions for preliminary injunction by plaintiffs Nixon, Anderson, and The Reporters Committee for Freedom of the Press, et al., the joint motion of the Special Prosecutor and the government defendants for modification of the temporary restraining order, and plaintiff Nixon's motions to dismiss the Anderson and Hellman complaints for lack of standing. Subsequent to the hearings on these motions, the Congress passed and President Ford signed the Presidential Recordings and Materials Preservation Act, *see* footnote 36, *infra*, which changed the posture of this litigation, *see* Section V, *infra*. The parties therefore filed appropriate motions for a resolution of the questions extant. The Court will, therefore, of even date herewith, deny the motions for a preliminary injunction of plaintiffs Anderson and The Reporters Committee for Freedom of the Press, et al. However, the motions by plaintiff Nixon to dismiss are still viable and require resolution. Further, the joint motion of the Special Prosecutor for modification of the temporary restraining order will be considered, as requested by the Special Prosecutor, as being merged into his motion for summary judgment.

tion; plaintiff Nixon's motions to dismiss the Hellman, et al., and Anderson suits for lack of standing; the government defendant's motion to dismiss all the actions, except that by the Special Prosecutor, on the ground that they are moot; and on motions for summary judgment or partial summary judgment by plaintiffs Anderson, The Reporters Committee for Freedom of the Press, et al., Lillian Hellman, et al., and the Special Prosecutor, on his counterclaim for declaratory relief, and as the intervenor-defendant in C.A. 74–1518.

II. BACKGROUND [3]

On August 9, 1974, President Richard M. Nixon resigned from Office and was succeeded by Gerald R. Ford.[4] Shortly thereafter, on August 15, 1974, members of the Office of the Special Prosecutor [5] informed Philip W. Buchen,[6] counsel to President Ford, and J. Fred Buzhardt, counsel to former President Nixon, that the Special Prosecutor had a continuing interest in the Presidential materials and tape-recorded conversations of the Nixon Administration which are housed in the White House, the Executive Office Building, and elsewhere, that "might be relevant to investigations and prosecutions within the jurisdiction of the Special Prosecutor."[7] Assurances were given to the Special Prosecutor that the files of former President Nixon and his staff members would not be removed from the White House or the Executive Office Building without the Special Prosecutor's approval.[8] On August 22, 1974, Mr. Buchen requested an opinion from Attorney General William Saxbe on the issues of the ownership of the Presidential materials and tape-recorded conversations of the Nixon Administration and the responsibilities of the Ford Administration with respect to subpoenas or other court orders requiring the production of these materials and/or tape-recorded conversations.[9] On August 29, 1974, Mr. Buchen received a preliminary opinion from Deputy Attorney General Laurence Silberman

3. The facts contained in this section are not all-inclusive, but form the essential background of this litigation. They are not in dispute. Further facts will be included in the later appropriate sections.

4. President Richard M. Nixon resigned from office shortly after a unanimous recommendation by the House Committee on the Judiciary that he be impeached. Impeachment of Richard M. Nixon, President of the United States, H.R.Rep.No.93–1305, 93d Cong., 2d Sess. (1974). Gerald R. Ford became the 38th President on August 9, 1974.

5. On May 25, 1973, the Attorney General of the United States established the Office of the Special Prosecutor. Department of Justice Order No. 517–73, 38 Fed.Reg. 14,688, adding 28 C.F.R. §§ 0.37, 0.38 and appendix to subpart G–1 (June 4, 1973). The Special Prosecutor, Mr. Leon Jaworski, was the original named intervenor. Since he resigned the office and was replaced by Mr. Henry S. Ruth, Jr., Mr. Ruth has been substituted as the named intervenor pursuant to Rule 25(d)(1) of the Federal Rules of Civil Procedure.

6. Mr. Buchen is a named defendant in all the consolidated actions.

7. Affidavit of Peter M. Kreindler, counsel to the Special Prosecutor, at ¶ 3 (hereinafter, "Kreindler affidavit"); Deposition of Philip W. Buchen, November 11, 1974, pp. I–4, 5, II–10, 6 (hereinafter, "Buchen deposition").

8. Kreindler affidavit at ¶ 3. Buchen deposition at II–73.

9. Buchen deposition at I–7. *See* footnote 87, *infra*.

that the Presidential materials and tape-recorded conversations were to be regarded as belonging to the former President, but that the government had a right to use the materials for ongoing governmental purposes and would also have to respond to subpoenas or court orders relating to the materials and tape-recorded conversations.[10] Thereafter, Mr. Buchen met with Mr. William Casselman, counsel to President Ford, and Mr. Benton L. Becker, a private attorney, concerning the disposition of the Presidential materials of the Nixon Administration.[11] On or about August 30, 1974, Mr. Buchen contacted Mr. Herbert J. Miller, attorney for former President Nixon, and raised the subject of the disposition of the materials.[12] Further discussions were held on September 3 and September 5, 1974, between Mr. Buchen, Mr. Miller and Mr. Becker.[13] At the September 5 meeting, Mr. Miller presented a draft depository agreement for consideration.[14] After some changes, it was finalized and signed by the former President on September 6, 1974.[15] On the same day, a written opinion of Attorney General Saxbe was released.[16] At or about 6:15 or 6:30 p. m. on September 7, 1974, Mr. Arthur F. Sampson, Administrator of the General Services Administration, met with Messrs. Casselman and Becker, who presented him with the depository agreement signed by former President Nixon.[17] At approximately 7:10 p.m., Mr. Sampson signed the agreement,[18] (hereinafter, the "Nixon-Sampson Agreement").

On September 10, 1974, Jack Anderson, a well-known newspaper columnist, filed an application with the General Services Administration, pursuant to the Freedom of Information Act,[19] seeking access to the materials encompassed by the Nixon-Sampson Agreement. On October 2, 1974, Lillian Hellman and other members of the Committee for Public Justice filed a similar application, but restricted it to the tape recordings of conversations in the White House and Executive Office Building. Both applications were denied on the grounds that:

> . . . (1) this agency does not presently have the requested materials in its possession; (2) deposited papers and other historical materials are not "records" within the purview of the Freedom of Information Act and, therefore, are not subject to its provisions; and (3) assuming, for the sake of argument, that the deposited papers and other historical materials are subject to the provisions of the Act, they are exempt from disclosure under the third exception to the mandatory public disclosure; i.e. " . . . matters that are . . . . specifically exempted from disclosure by statute . . ." 5 U.S.C. 552(b)(3)). The pertinent statute is the Presidential Libraries Act of 1955, which provides that the Administrator of the General Services may accept for deposit on behalf of the United States papers and/or other historical materials which may be subject to restrictions upon access that have been accepted by the Administrator (44 U.S. 2107–2108).[20]

10. *Id.* at I–11, 12.

11. Deposition of Benton L. Becker at 12 (hereinafter, "Becker deposition").

12. Buchen deposition at I–14, 15, 16.

13. Becker deposition at 28–29; Buchen deposition, Exhibit 4.

14. Buchen deposition, Exhibits 4 & 5; Becker deposition at 35; Buchen deposition at II–46.

15. Deposition of Arthur F. Sampson at 13, 85 (hereinafter, "Sampson deposition"); Becker deposition at 51, 103.

16. Sampson deposition at 20, 22–23.

17. Kreindler affidavit at ¶ 5.

18. The Nixon-Sampson agreement is set forth in Appendix A.

19. 5 U.S.C. § 552 (1970).

20. Letter of Mr. Richard Q. Vawter, Director of Information, GSA, to Mr. Jack Anderson, dated October 3, 1974, at ¶ 3.

Thereafter, the applicants exhausted their administrative remedies.[21]

On October 17, 1974, former President Nixon brought suit against Arthur F. Sampson, Philip W. Buchen, and H. Stuart Knight,[22] seeking a temporary restraining order and a preliminary injunction to compel compliance with the Nixon-Sampson Agreement and preventing unauthorized access to the materials and tape-recorded conversation. On October 21, 1974, Jack Anderson, whose application for access to the materials had been denied on the basis, *inter alia*, of the Nixon-Sampson Agreement, moved to intervene, seeking temporary and preliminary injunctive relief to prevent its implementation. On the same day, the Special Prosecutor also moved to intervene in order to protect the interests of his office in the materials and tape-recorded conversations. Also on October 21, The Reporters Committee for Freedom of the Press, et al., filed suit against the government seeking relief similar to that sought by plaintiff-intervenor Anderson in C.A. 74–1518, as well as consolidation with the Nixon suit. After granting the Reporters' motion to consolidate, the Court held a hearing. On October 21, the Court, in order to preserve the status quo, issued a temporary restraining order which essentially prohibited the implementation of the Nixon-Sampson Agreement and set forth the access procedures to the materials until a full hearing on the motions for a preliminary injunction could be held.

On October 24, 1974, Lillian Hellman, and other members of the Committee for Public Justice, whose application for access had been denied, brought suit against the government and former President Nixon for declaratory and injunctive relief, seeking access to specified tape recordings.[23] The Hellman plaintiffs also moved to consolidate their action with the other suits.

During this time period, several members of Congress who had introduced and supported legislation concerning the Nixon-Sampson Agreement moved for leave to appear as amici curiae,[24] and the Court granted their motions.

On October 25, former President Nixon moved to amend the temporary restraining order, claiming that there was an immediate need for the original materials and tape-recorded conversations to enable him to testify in the Watergate criminal trial. The Court scheduled a hearing on the matter for October 30. In the interim, Mr. Nixon moved to consolidate the hearing on the preliminary injunction with the trial, to intervene in the Reporters' suit, and to amend his application for a preliminary injunction, in order to request immediate transfer to his possession of all the materials and tape-recorded conversations. The Reporters Committee for Freedom of the Press, et al., also moved to extend the temporary restraining or-

21. Plaintiff Anderson filed an administrative appeal on October 8, 1974. While no action has been taken, counsel for the government defendants have stipulated that Anderson's request, as well as those of Lillian Hellman, et al., and The Reporters Committee for Freedom of the Press, et al., would be denied on the same grounds set forth in the accompanying text of this footnote, and that their administrative remedies should be deemed exhausted. Transcript of the Hearing of November 18, 1974, pp. 405–407.

22. The suit names the defendants in their official capacity as officers of the United States government, as well as individually. Therefore, the suit must be considered, insofar as it concerns the action of the defendants in their official capacity, as one against the United States. *See* Dugan v. Rank, 372 U.S. 609, 620, 83 S.Ct. 999, 10 L.Ed.2d 15 (1963).

23. Plaintiffs Hellman, et al., made application for access to the 147 tape-recorded conversations subpoenaed by the House Committee on the Judiciary during the hearings on the question of the impeachment of the President. *See* footnote 21, *supra*.

24. Congresswoman Elizabeth Holtzman filed a motion to appear as amicus curiae which was granted on November 11, 1974. On November 11, five other members petitioned to appear as amici curiae; specifically, Sam J. Ervin, Jr., John Brademas, Jacob Javits, Gaylord Nelson, and Wayne Hays. This motion was also granted on November 11, 1974.

der. After the hearing, during which Mr. Nixon's counsel withdrew his motion to modify the temporary restraining order because the former President was too ill to testify, the Court, on October 31, granted the Special Prosecutor's and Anderson's motions to intervene in the Nixon suit, granted Nixon's motion to intervene in the Reporters' suit, consolidated the Hellman suit with the Nixon and Reporters Committee suits, extended the temporary restraining order, and denied the motion to consolidate the trial with the hearing on the motions for preliminary injunctions, which was set for November 15, 1974.

On November 4, the Anderson, Hellman and Reporters plaintiffs (hereinafter, the "FOIA plaintiffs"), moved to take depositions and to inspect the areas where the materials were being kept. In order to provide the parties with the opportunity to make an adequate record at the subsequent hearing, the Court allowed limited depositions and also ordered the government to provide the Court and the parties with a descriptive categorization of the materials. On the same day, Mr. Nixon again moved to amend the temporary restraining order, which motion in essence sought a clarification of the access procedures.

On November 11, the Special Prosecutor and the government filed a joint motion to amend the temporary restraining order to allow implementation of an agreement dated November 9, 1974,[25] between President Ford and the Special Prosecutor which provided, *inter alia*, that the President had determined that in the interest of justice the Special Prosecutor would have immediate access to the Presidential materials and tape-recorded conversations of the Nixon Administration for purposes of investigation and prosecution of persons involved in the "Watergate" matter. Shortly thereafter, on November 13, former President Nixon filed a new motion for a temporary restraining order requesting that the Ford-Ruth Agreement be enjoined.[26]

After two days of hearings on all motions extant, on November 15 and 18, the Court requested that the parties file proposed findings of fact and conclusions of law by November 29, 1974. At the request of the parties, this was extended to December 6. A few days later, on December 9, the Congress passed a bill relating to the materials covered by the Nixon-Sampson Agreement.[27] The Court promptly ordered that the parties brief the impact of this legislation. Those briefs were filed on December 16, 1974. On December 19, 1974, President Gerald R. Ford signed into law the Presidential Recordings and Materials Preservation Act.[28] In response thereto, considering the posture of the cases to have been altered by the new legislation, the parties filed the following motions: the government defendants moved to dismiss all actions, except the Special Prosecutor's counterclaim, on the ground that they have become moot; the Special Prosecutor filed a motion for summary judgment; and plaintiffs Anderson, Reporters Committee for Freedom of the Press, et al., and Lillian Hellman, et al., have filed motions for summary judgment or, in the alternative, for partial summary judgment.

III. THE CLAIMS OF THE PARTIES

Former President Nixon, who claims ownership to the Presidential materials and tape recordings generated or retained during his tenure in office, seeks a writ of mandamus or an injunction in the nature of specific performance to compel the defendants, officers of the United States, to comply with the terms and conditions of the Nixon-Sampson Agreement, including but not limited to immediately transferring the materials to California, except (a) such materials and tapes as were subject to subpoena or other legal process at the time the action was filed and, (b) such of the materials and tapes which the Special Prosecutor may designate which are needed for on-going criminal investigations and prosecutions, provided that such excepted materials and tapes, or portions thereof, shall be transferred in accordance with the agreement at such time as such subpoenas or court orders are quashed, vacated or satisfied, and the Special Prosecutor no longer has such interest in them. Further, he requests that the defendants be enjoined from interfering with the performance of the agreement and that they be enjoined from having access to the materials and tapes without his authorization. The gravamen of the former President's claim is that he has a constitutional right and duty to protect and assert the privilege of confidentiality which allegedly attaches to the Presidential materials and tapes, and that ownership and control of the materials and tapes is an essential incident of this right and duty. It is also his contention that compliance by the defendants with demands for production of the materials and tapes will necessitate a search of the materials and tapes which, without his authorization, will be in derrogation of rights and privileges afforded the former President by the Constitution. Thus, he maintains that the November 9th Agreement between President Ford and the Special Prosecutor is unlawful as it abridges his rights and duty to protect the privilege of confidentiality as well as other of his constitutional rights, particularly the right to be free from unreasonable searches and seizures. And, lastly, the former President claims that the defendants, having entered into the Nixon-Sampson Agreement, owe him a duty to comply with the terms and conditions of the agreement, which he asserts is valid, binding and non-discretionary. It is on the basis of all of the above that he seeks equitable relief, stating that he has no adequate remedy at law and that he will suffer irreparable injury without preliminary and permanent relief.

It is the contention of the Special Prosecutor, an intervenor-defendant in the Nixon suit, and in which contention the government concurs, that the government of the United States and the Special Prosecutor, by virtue of its authorization and responsibilities, have an "overriding interest" in the Presidential materials and tapes of the Nixon Administration which supervenes any personal or contractual rights that the former President may or may not have. The Special Prosecutor also claims that this interest was recognized by the government prior to the Nixon-Sampson Agreement and that the government, by entering into the agreement, did not intend to negate this "overriding interest", nor does the agreement itself. Furthermore, the Special Prosecutor maintains that the former President does not have the constitutional right to assert a claim of privilege against his successor in office who, it is claimed, has determined by the November 9, 1974 Agreement, that the interests of justice require that the Special Prosecutor have access to the materials and tapes.

While concurring with the Special Prosecutor in his contentions, the government does not contest the validity of the agreement, nor the right of ownership asserted by the former President in the materials and tapes. Nevertheless, it is the position of the defendants that the relief requested by the former President is barred by the doctrine of sovereign immunity, in that specific performance will not lie against the government for failure to comply with a contract. They also argue that since the Nixon-Sampson Agreement is silent as to when and how the agreement is to be effectuated, it is discretionary and not ministerial and, therefore, a writ of mandamus may not issue. Finally, the defendants contend that any search of the materials or tapes will not violate Mr. Nixon's fourth amendment rights.

25. Hereinafter, the "November 9th Agreement". The full text of the agreement is set forth in Appendix B.

26. This motion was subsequently withdrawn.

27. 120 Cong.Rec. H. 11442, S. 20806 (daily ed., Dec. 9, 1974).

28. *See* footnote 36, *infra*.

The contentions of Jack Anderson, The Reporters Committee for Freedom of the Press, et al., and Lillian Hellman, et al., the "FOIA plaintiffs", are essentially identical. Having been denied access to the Presidential materials and tapes on the basis of the Nixon-Sampson Agreement, they seek an injunction restraining the effectuation of the agreement and a declaration that the Presidential materials and tapes belong to the United States, and not to the former President. They claim that the Presidential materials and tapes are government records, that since the former President was a private citizen at the time he entered into the Nixon-Sampson Agreement, he could not impose restrictions on access to the materials, and that it was beyond the statutory authority of the Administrator to allow any such restrictions to be imposed. In support of this proposition, they argue that any historical practice of claims of ownership by prior Presidents was terminated by the Presidential Libraries Act, 44 U.S.C. § 2101 et seq., and that a former President does not have the right to claim Presidential privilege. Furthermore, they maintain that Arthur F. Sampson, the Administrator of General Services, failed to comply with statutory requirements when he signed the agreement and, therefore, it is null and void. Specifically, they allege that Mr. Sampson failed to perform his statutory duty to negotiate an agreement,[29] and also failed to confer with the National Records Council prior to signing the agreement, which they contend is also statutorily required. Furthermore, they argue that the Nixon-Sampson Agreement is invalid because it allegedly confers title to the materials and tapes upon the former President, in contravention of the exclusive power of Congress to dispose of property under Article 4 of the Constitution. They also contend that these materials and records, etc., are an emolument within the meaning of and in violation of Article II of the Constitution. In addition, they allege that the agreement is merely temporary and that there is no assurance that the former President will permanently donate the materials or even some of the materials to the United States; therefore, if an injunction does not issue, the possibility of their attaining their right of access to the materials will be forever lost. Lastly, they maintain that access to the materials and tape-recorded conversations cannot be barred by a claim of privilege by the former President; it is their position that the privilege belongs to the government and may only be asserted by the incumbent President.

IV. JURISDICTION

The jurisdiction of the Court in Civil Action No. 74-1518 is founded upon Title 28 U.S.C. §§ 1331, 1332, 1361 and in Civil Action Nos. 74-1533 and 74-1551 upon Title 5 U.S.C. §§ 552, 702-704 and Title 28 U.S.C. §§ 1331, 1361.

V. STANDING

Former President Nixon and the United States have, by motion[30] and in all their papers[31] and oral argument, vigorously contested the standing to sue of intervenor-plaintiff Anderson, The Reporters Committee for Freedom of the Press, et al., and Lillian Hellman, et al. The argument is basically threefold. First, it is claimed that these parties have only a speculative interest in the materials and have not sustained an "injury in fact". Second, it is argued that the Freedom of Information Act does not provide a basis for challenging the validity of the Nixon-Sampson Agreement. Encompassed within this contention are the assertions that: the

29. *See* 44 U.S.C. § 2108(c).

30. Plaintiff Nixon has moved to dismiss Plaintiff Anderson's crossclaim in C.A. 74-1518 and, as a named defendant in C.A. 74-1551, moved to dismiss the complaint of Lillian Hellman, et al.

31. The government defendants have contested the standing of the FOIA plaintiffs in their opposition to the motions for a preliminary injunction.

materials are not agency "records"; the White House is not an "agency"; the materials are "exempted" from disclosure under the FOIA; and the Congress does not have the constitutional power to require disclosure of Presidential materials and tape-recorded conversations.[32]

In support of these contentions, former President Nixon and the United States have placed great reliance upon the Tenth Circuit opinion in Nichols v. United States, 460 F.2d 671 (10th Cir. 1972), aff'g 325 F.Supp. 130 (D.Kan. 1971), for the proposition that since those persons who here seek access to the materials and tape-recorded conversations were not parties to the Nixon-Sampson Agreement nor have a claim of ownership in the materials and tape-recorded conversations, they therefore do not have standing to contest the validity or terms of the agreement.

In *Nichols*, a pathologist had been denied access to certain materials relating to the assassination of President John F. Kennedy. He claimed in federal court that the donation agreement between the Kennedy estate and the government was a nullity since the government had possession of the materials prior to the donation and, therefore, they were government property. The trial court held that a donor need not "own" the materials to deposit them pursuant to 44 U.S.C. §§ 2107, 2108(c), and to place restrictions on their access, as long as the materials "fall within the description of those things which may be deposited." 325 F.Supp. at 136. The Tenth Circuit upheld the ruling of the trial court and added that since Nichols was not a party to the agreement, he did not have standing to contest its validity or terms. 460 F.2d at 674-675.

[1-3] The arguments of former President Nixon and the government, however, do not really address the question of standing but, rather, go to the merits of the FOIA plaintiffs' claims. And, the opinions in *Nichols, supra*, are likewise infirm and should not be followed. It must be recognized that the judicial doctrine of standing is simply a correlative of the Article III requirement of the Constitution that there be a "case or controversy". *See* Flast v. Cohen, 392 U.S. 83, 101, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1953). The essence of this requirement is that a federal court will not serve as a "forum in which to air . . . generalized grievances about the conduct of government." *Id.* at 106, 88 S.Ct. at 1956. Thus, it is necessary that there be an impact on the party which is not common to all members of the public. Laird v. Tatum, 408 U.S. 1, 13, 92 S.Ct. 2318, 33 L.Ed.2d 154 (1972). The courts, therefore, have established certain criteria which must be met in order for there to be "a personal stake in the outcome of the controversy as to assure that concrete adverseness . . . upon which the court so largely depends for the illumination of difficult constitutional questions." Baker v. Carr, 369 U.S. 186, 204, 82 S.Ct. 691, 703, 7 L.Ed.2d 663 (1969). Congress, however, has determined that these criteria need not be demonstrated in certain cases. These actions, under the Freedom of Information Act, present such a case.

[4-6] The primary purpose of the Freedom of Information Act,[33] passed in 1966, is to increase public access to government records, Soucie v. David, 145 U.S.App.D.C. 144, 448 F.2d 1067, 1076 (1971), by providing a right of access to "any person" without "consideration of the interests of the party seeking relief." *Id.* at 1077. The FOIA, therefore, clearly effectuates important first amendment interests. *See* Tennessean Newspapers, Inc. v. Federal Housing Administration, 464 F.2d 657, 660 (6th Cir. 1972). Upon a denial of access, the applicant may bring a suit in the United States District Court and there obtain a *de novo* determination of the matter.[34]

32. *See* footnote 20, *supra*.

33. 5 U.S.C. § 552 (1970).

34. The FOIA plaintiffs have not only sought a *de novo* determination of the matter, but have also requested a declaratory judgment

5 U.S.C. § 552(a)(3). Thus, when access is denied, a controversy exists and injury must be presumed. To then require that the person meet the criteria for standing would be in contravention of the Act. Moreover, the "burden is on the agency to sustain its action." 5 U.S.C. § 552(a)(3). Thus, it is impermissible to require the person who has been denied access to prove his case at the outset, as the government and the former President seek to require the FOIA plaintiffs to do.

[7] Simply stated, when a party, such as the parties in the instant matter, has made an application under the FOIA and that application has been denied, (s)he has standing to sue in the federal courts. And, questions as to whether that which is sought is a "record" within the meaning of the FOIA; whether a claimed exemption is valid, and other such questions go to the merits of the action, for which the plaintiff is entitled to a *de novo* determination. Thus, the opinions in *Nichols, supra,* to the extent that they held that the plaintiff therein, an FOIA applicant, did not have standing, appear to be in error.

Notably, in *Nichols,* the trial court rejected the plaintiff's claim that the material requested belonged to the government, or was a government "record" within the FOIA, and granted the government's motion for summary judgment. 325 F.Supp. at 137, 138. The Tenth Circuit upheld the district court, but added, as dictum, that it believed that the plaintiff had no standing. 460 F.2d at 674–675. It is apparent to this Court, however, that an FOIA plaintiff, such as Nichols, has standing, even though (s)he may not prevail on the merits.

[8, 9] For similar reasons, the contention that the FOIA plaintiffs do not have standing to contest the validity of the Nixon-Sampson Agreement is also untenable. It is well settled that the exceptions of the Freedom of Information Act are to be read narrowly and that disclosure is the rule, not the exception. And, Section 552(a)(3) of the Act places the burden on the government to sustain its action. Thus, the courts have been loathe to accept mere assertions that a record is covered by an exception. The former President and the government, however, point to the *Nichols* case, *supra,* and the recent Supreme Court decision in Environmental Protection Agency v. Mink, 410 U.S. 73, 93 S.Ct. 827, 35 L.Ed.2d 119 (1973), for the proposition that the parties herein, who have been denied access to records because of the Nixon-Sampson Agreement, may not challenge the validity of the agreement.

The *Mink* case does not stand for such a proposition. The Supreme Court in *Mink* delineated the parameters of judicial review of a denial of access under the national defense and foreign policy exemption, 5 U.S.C. § 552(b)(1). The court held that once a record had in fact been classified, the district court, after the government has shown that the President has determined to keep a record secret, should not inquire into the "soundness of executive classifications. . . ." 410 U.S. at 84, 93 S.Ct. 827. The *Mink* decision, however, cannot be read to hold that the soundness of the assertions under all of the exemptions should not be scrutinized. And, notably, this Circuit has opined that the *Mink* decision does not preclude an inquiry into whether a document has *in fact* been classified. *See* Schaffer v. Kissinger, 505 F.2d 389 (D.C.Cir., 1974).

The government in these cases has denied access to the materials under the

pursuant to 28 U.S.C. §§ 2201, 2202, that the "Presidential materials and tape-recorded conversations" do not belong to former President Nixon but, rather, to the United States and are "records" within the meaning of the FOIA, and that the Nixon-Sampson Agreement is invalid. Such a remedy is clearly available in connection with a FOIA suit, even though some of the applications did not request *all* of the materials and tape-recorded conversations. *See* Renegotiation Board v. Bannercraft Clothing Co., 415 U.S. 1, 94 S.Ct. 1028, 39 L.Ed.2d 123 (1974).

third exemption of the Freedom of Information Act, 5 U.S.C. § 552(b)(3), which provides that this section does not apply to matters that are "specifically exempted from disclosure by statute." The statute that is asserted is the Presidential Libraries Act, 44 U.S.C. § 2101 et seq. The government claims that the parties do not have standing to challenge the Nixon-Sampson Agreement, as there is a statute which specifically exempts from access the materials encompassed by the agreement. It is the government's contention, in which the former President concurs, that this is dispositive of the matter. This, however, is not the law.

[10] The exemptions under the Freedom of Information Act are to be narrowly construed. This general construction of the FOIA has been made particularly applicable to the third exemption. Robertson v. Butterfield, 498 F.2d 1031 (D.C.Cir. 1974). A court must not only examine and interpret the statute relied upon as specifically exempting disclosure. *See* Schechter v. Weinberger, 506 F.2d 1275 (D.C.Cir. 1974). It must also resolve any dispute as to whether the exemption has been properly invoked. *See* Stretch v. Weinberger, 3 Cir., 495 F.2d 639 (1974).

[11, 12] Thus, it is the conclusion of this Court that the Nixon-Sampson Agreement, having been invoked to bar access to the FOIA plaintiffs, can be scrutinized by this Court. For, if the FOIA plaintiffs are correct in their allegations that these are government "records" within the meaning of the FOIA and do not belong to the former President, and that the Nixon-Sampson Agreement is invalid, it would do great violence to the letter and spirit of the FOIA to hold that the government, by merely asserting the third exemption, could preclude a determination of these issues and thus access which would otherwise be appropriate. And, to the extent that *Nichols, supra,* is contrary, it is rejected.[35]

VI. JUSTICIABILITY

A threshold issue in these consolidated cases is whether they remain justiciable. Subsequent to the commencement of these proceedings, Congress passed and President Ford signed into law the Presidential Recordings and Materials Preservation Act.[36] The Act, which is unique both as to its nature and because it is specifically directed at these pending proceedings, has raised a dispute as to whether, on the basis of the allegations extant and the possible relief that may be afforded, there still exists a "live dispute between the parties" which requires resolution. Golden v. Zwickler, 394 U.S. 103, 109, 89 S.Ct. 956, 22 L.Ed.2d 113 (1969). In this regard, the Court must ascertain whether the effect of the Act is to moot any or all of the questions presented,[37] and whether the non-mooted questions, if any, are present in an actual controversy requiring immediate resolution and for which the Court can fashion an appropriate

35. The Tenth Circuit's statement was not only dictum, but was based upon a finding that the material did not belong to the government. In the instant matter, the FOIA plaintiffs claim that these are government records, and there has been no contrary finding. Furthermore, it is obvious that FOIA applicants do not personally own the records that they seek. This cannot preclude access, or else all applications would be denied. The true question here, as a *Nichols,* is whether restrictions can be placed on "records" beyond those contained in the exemptions to the FOIA, 5 U.S.C. § 552(b)(1–9). In Nichols, it was found that the materials were not even records. Therefore, the court in *Nichols* did not even have to reach this question.

36. Pub.Law 93–526, "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," to be cited as the "Presidential Recordings and Materials Act." The Act, formerly S. 4016, was passed by the Congress on December 9, 1974, *see* Cong. Rec. 93rd Cong., 2d Sess., S. 20806, H. 11442 (daily ed., Dec. 9, 1974), and was signed by President Ford on December 19, 1974.

37. *See* Golden v. Zwickler, *supra,* 394 U.S. at 108–109, 89 S.Ct. 956.

remedy.[38] In conjunction with the latter inquiry, the Court must also determine whether the legislation makes an adjudication of any or all of the questions premature.[39]

[13] It is clear to the Court that the Presidential Recordings and Materials Preservation Act nullifies the Nixon-Sampson Agreement of September 7, 1974.[40] The Nixon-Sampson Agreement provided essentially that the Presidential materials and tape recordings of the Nixon Administration would be "deposited temporarily" in an existing government facility.[41] Access to the Presidential materials was to be by a two-key system, one held by the government and the other held by Mr. Nixon, as "custodian of the materials", the latter key being "essential for access."[42] Access to both the Presidential materials and tape recordings was to be limited to Mr. Nixon or any person whom he designated.[43] As to the Presidential materials, Mr. Nixon could, after three years, "withdraw from deposit without formality any or all of the materials . . . for any purpose or use . . . ."[44] And, as to the tape recordings, they were to be donated to the United States as of September 1, 1979, under specific instructions, but would be destroyed at the time of Mr. Nixon's death or on September 1, 1984, whichever event occurred first.[45] The agreement further provided that upon any subpoena or court order which demanded that the government produce either the Presidential materials or tape recordings, the government would notify Mr. Nixon who, as "owner and custodian" with the "sole right and power of access thereto," could then raise "any privileges or defenses" he might have.[46] Mr. Nixon was to then allow the government to inspect the materials in order that "national security or any other privilege" could be interposed.[47]

Upon a careful examination of the terms and conditions of the Nixon-Sampson Agreement, it is apparent that its salient aspects are: that Mr. Nixon would be the custodian of the Presidential materials and tapes, of the latter until 1979, and of the former until such time as he donated such materials as he designated; that Mr. Nixon would have the sole right of access to both the Presidential materials and tape recordings; and that Mr. Nixon would have the sole right to use the information contained in the Presidential materials and tape recordings. Thus, it is unquestionable that the Presidential Recordings and Materials Preservation Act, which provides in Title I, Sections 101(a), (b) and 102(a)[48] that the Administrator of

38. *Id.* *See also* Powell v. McCormack, 395 U.S. 486, 517, 89 S.Ct. 1944, 23 L.Ed.2d 491 (1969).

39. *See* Abbott Laboratories v. Gardner, 387 U.S. 136, 148–149, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967).

40. The clear intent of Congress can be ascertained by the succinct statement in the House Committee Report that "This legislation would nullify the Nixon-Sampson Agreement of September 7, 1974, and would provide that the Federal Government retain custody of the Nixon tapes and Presidential materials." Report of the Committee on House Administration No. 93–1507, 93rd Cong., 2d Sess. at 4 (Description of the Bill) (November 27, 1974) (Hereinafter, "House Committee Report").

41. *See* Appendix A, Intro. ¶ 12, ¶ No. 4.

42. *See* Appendix A, ¶ 6.

43. *See* Appendix A, ¶ 7(A) and ¶ 9(A).

44. *See* Appendix A, ¶ 7(A). Prior to expiration of the three-year period Mr. Nixon could only remove reproductions of the Presidential materials, although still for "any use". *Id.*

45. *See* Appendix A, ¶ 8. Prior to their destruction, no reproductions could be made of the tapes and no person could listen to the tapes without Mr. Nixon's prior approval. He further reserved to himself "literary use of the information on the tapes." *Id.* at ¶ 9(A).

46. *See* Appendix A, ¶ 6(B) and ¶ 9(B).

47. *Id.*

48. Title I, Sections 101(a), (b) and 102(a) provide that:

"Sec. 101.(a) Notwithstanding any other law or any agreement or understanding made pursuant to section 2107 of title 44,

General Services shall, "Notwithstanding any other law or agreement or understanding . . . retain . . . complete possession and control . . ." of the tape recordings and Presidential materials of the Nixon Administration, and that they shall not be destroyed except as provided by law, abrogates the Nixon-Sampson Agreement.[49]

[14] Although the Presidential Recordings and Materials Preservation Act moots the question of the validity of the Nixon-Sampson Agreement, the Act does not resolve the questions of ownership of the Presidential materials and tape recordings, nor whether the former President may assert any privilege in regard thereto. First, with respect to the question of ownership, the Act requires that the Administrator of General Services take custody and control, but makes no statement as to who has title to the Presidential materials and tape recordings. It is apparent that Congress deliberately chose not to resolve this question. The section of the House Committee Report on private ownership unequivocally states that: "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."[50] The avoidance by Congress of the question of ownership is also evidenced by title I, section 105(a) of the Act.[51] That section, while under the

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—

(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.

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."

49. There are two further reasons which make it clear that the Act nullifies the agreement. First, the Act provides for the possession and control of the Presidential materials and tape recordings, "[not]withstanding any other law or any agreement or understanding made pursuant to Section 2107 of Title 44, United States Code." Thus, it need not even be inferred that the Nixon-Sampson Agreement is abrogated by the Act. This is particularly true as Congress utilized the word "notwithstanding", which it often uses to negate a prior act or law.
Secondly, the Act covers the same subject matter as the agreement and, with respect to the Presidential materials, is identical. Both the Act and the Agreement refer to 44 U.S.C. § 2101 for the definition of Presidential materials. And, like the Agreement, the Act differentiates between Presidential materials and tape recordings. *See* Appendix A, second introductory paragraph. Section 101(b)(2) of the Act provides that, "For purposes of this subsection, the term 'historical materials' has the meaning given it by section 2101 of title 44, United States Code."

50. House Committee Report, at 7.

51. "Sec. 105(a). The United States District Court for the District of Columbia shall have the 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 ques-*

category of "Judicial Review", provides for the possibility that "just compensation" *may* be necessary. However, this would have to be predicated upon a determination by a court that there existed personal property rights in the Presidential materials and tape recordings.[52] Otherwise, in the opinion of Congress, "If the materials are already public property, the bill is simply an exercise of the congressional power under Article IV of the Constitution to dispose of the property of the United States . . .", and no compensation would be required.[53]

[15] Second, with respect to the question of whether former President Nixon may rightfully assert any privilege as to the Presidential materials and tape recordings, the Act is also noncommital. None of the sections of the Act which provide for access to Presidential materials and tape recordings include any determination of this question. Subsection 102(b) of title I, which provides for access in "any judicial proceeding" or pursuant to "court subpoena or other legal process," recognizes that the Presidential materials and tape recordings may be subject to the "rights, defenses or privileges" which either the federal government or "any person" may assert. Clearly, the "either-or" language of this subsection demonstrates that Congress did not resolve this question. Further, subsection 104(a) of title I, which requires the Administrator to establish regulations for public access, similarly takes no position on this question, for section 104(a)(5) provides that the Administrator must consider "the need to protect *any* party's opportunity to assert any legally or constitutionally based rights or privileges which would prevent or otherwise limit access to such recordings and materials." (Emphasis added.) Those sections providing for access for both Mr. Nixon and the federal government likewise do not provide any indication whether or not Mr. Nixon has the right to assert any privilege to the Presidential materials and tape recordings.[54]

tion 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." (Emphasis added.)

52. Section 103 provided that "if any court of the United States determines that any provision of title I of this legislation deprives an individual of his property without just compensation, then compensation shall be made to such individual from the Treasury of the United States." House Committee Report at 11 (Analysis of Section 103) Section 103 of S. 4016, which provided for compensation, was incorporated in Section 105 of the final version of the Public Law 93–526. And, as stated by Congressman John Brademas, a sponsor of the Act:

"The amendment also deletes the express language in the House-passed bill which provides that the bill takes no position on ownership of the material prior to enactment.

The legislation still takes no position on ownership. However, the Senate felt that this language was unnecessary because the legislative history in the Senate and House is clear on this point."

120 Cong.Rec., 93rd Cong., 2d Sess. at H. 11444 (daily ed., Dec. 9, 1974).

53. House Committee Report, at 7. It is also notable that in analyzing section 103(a) of title I of the Act, the committee stated that:

"Section 103 also provides that the provisions of title I of this legislation shall not be construed as making any determination with respect to any private property right of title to the recordings or materials, if any such right existed before the date of enactment of title I of this legislation. The committee does not intend this legislation to make any decision, determination, or other rule with respect to the existence or extent of any such private property rights. It is the opinion of the committee that the question of private property rights with respect to the recordings or materials should be left for determination by an appropriate court." *Id.* at 11.

See footnote 52, *supra*.

54. Subsection 102:

"(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."

Subsection 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."

Although it might be argued that since section 103 only prevents "unauthorized access", thereby allowing the government access, pursuant to subsection 102(d), [illegible]ite any privilege that may attach to the materials, this Court does not read this section in that manner. However, such a determination is not necessary in these cases.

Thus, it is the opinion of this Court that while the Presidential Recordings and Materials Preservation Act nullifies the Nixon-Sampson Agreement, the Act does not resolve the basic questions of ownership and privilege. It is therefore necessary that the Court determine whether these questions are present in an "actual controversy" which requires resolution.

[16, 17] In order to ascertain whether there exists an actual controversy, it is necessary to examine the nature of the proceedings. *See* United States v. Nixon, 418 U.S. 683, 94 S.Ct. 3090, 3101, 41 L.Ed.2d 1039 (1974). The FOIA plaintiffs, whose applications for access to the Presidential materials and tape recordings were administratively denied, have brought suit under the Freedom of Information Act and the Administrative Procedure Act, seeking an injunction to restrain the enforcement of the Nixon-Sampson Agreement and a declaration that the Agreement is invalid and that the Presidential materials and tape recordings are government records and not the personal property of former President Nixon. Clearly, even if there never had been an agreement, this Court would have to determine the questions of ownership and privilege since Mr. Nixon, who is a defendant and intervenor in these actions, claims without reliance upon the Nixon-Sampson Agreement, that the Presidential materials and tape recordings are his personal property and not government records, a position shared by the government, and that they are protected by his assertion of his alleged right of "Presidential privilege". The Nixon-Sampson Agreement, therefore, is merely an additional ground asserted by both Mr. Nixon, a party in all these proceedings, and the government, for preventing access by the FOIA plaintiffs. Thus, the fact that the legislation nullifies the Nixon-Sampson Agreement does not resolve what is otherwise a live controversy.

The question thus presented is whether this Court should at this time decide the dispute as to ownership and privilege. The government defendants and Mr. Nixon argue that any adjudication would be premature. They argue that since Mr. Nixon has filed a new suit attacking the validity of the Presidential Recordings and Materials Preservation Act, this Court should delay decision on all issues. There are, however, compelling reasons for rejecting this argument.

[18] There are essentially three contentions asserted by Mr. Nixon and the government as to why the FOIA plaintiffs cannot have access to the Presidential materials and tape recordings: ownership, privilege, and the Nixon-Sampson Agreement. The third ground has been eliminated by statute and, since Mr. Nixon has not contested this in this suit, the Court must presume that the Act is valid. Thus, a resolution of the first and second grounds would end these disputes. However, it is apparent that if Mr. Nixon were to be successful in his new suit, the third ground may be reasserted. While this is possible, there is no reason for both the pending and the new suit not to go forward at the same time. *See* Weinstein v. Williams—McWilliams Industries, Inc., 313 F.Supp.

876 (D.Del.1970).[55] Clearly, if Mr. Nixon is unsuccessful in the new suit, then a ruling in these pending proceedings would substantially advance the resolution of these disputes. If he is successful, then the Court can re-address the issues concerning the Nixon-Sampson Agreement, which have already been briefed and argued.[56]

Furthermore, the issues of ownership and privilege are basic questions extant in the controversy between Mr. Nixon, the government defendants and the Special Prosecutor.

As discussed below, those disputes require resolution at this time.[57] Therefore, it is obviously judicious to resolve these issues in all the pending cases.

[19–21] The defendants argue, however, by way of a motion to dismiss, that since the Presidential Recordings and Materials Preservation Act provides for "public access" pursuant to regulations to be promulgated by the Administrator of General Services,[58] an adjudication of these questions may be unnecessary or at least premature. This contention is unacceptable for several reasons. First, Title I, Section 104(d) of the Act provides that: "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. (sic)" Further, in explaining this provision of the Act, the House Committee Report states that: "It is the intent of the committee that this section not apply to litigation now pending in which access to the material relating to the Nixon Presidency under the Freedom of Information Act and title to the materials is in issue. But, rather, it is intended to apply to actions filed subsequent to enactment of this title." [59] Thus, it is impossible for this Court to conclude that an adjudication of the FOIA actions is unnecessary or premature. Secondly, as previously stated, these regulations do not resolve the basic questions of ownership and privilege and they are drawn in such a

55. There, the district court states that:
"If it is unclear whether the pending suit involves identical issues and the Court is unable to say that one suit is superior to the other in comparative utility, then the Court might properly allow both suits to go forward and defer action in the declaratory judgment action to see if the coercive suit will settle the controversy between the parties. If all the issues are not settled, the remaining issues could be dealt with by declaratory relief. For a full discussion of this subject, see 6A Moore Federal Practice ¶ 57.08 [6]."
313 F.Supp. at 879 (footnote omitted).

56. Judicial time and economy should not be abused by tactical fencing.

57. The question of ownership is particularly significant with respect to Mr. Nixon's fourth amendment claims. *See* Section X(c), *infra*.

58. Title I, 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. 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;
(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."

59. House Committee Report, at 7.

way that these same questions will probably arise.[60] This Court will not require the FOIA plaintiffs to abandon their present actions on the mere possibility that they may be able to obtain access under the new regulations. It is a general principle that where wrongful conduct has occurred, the mere possibility that it will not re-occur, especially when it is only the statement of the defendant that it will not, is not sufficient to moot the claim for relief. *See* United States v. Concentrated Phosphate Export Ass'n, 393 U.S. 199, 89 S.Ct. 361, 21 L.Ed.2d 344 (1968). This principle is particularly applicable in the instant proceedings, where the FOIA plaintiffs, having been denied access, seek a statutory injunction to "enjoin the agency from withholding agency records and to order the production of agency records improperly withheld".[61] The mere allegation by the defendants that access may be possible under the regulations yet to be promulgated is not enough, particularly when the criteria upon which the regulations are to be drawn negates the assertion that the wrongful conduct will not re-occur.[62] Third, it must be recognized that while the FOIA plaintiffs have sought access to the materials, they also seek a declaratory judgment. It is, therefore, within the discretion of this Court, considering the public interest and the purpose of the statute, to decide whether a declaration should issue at this time. *See* Public Affairs Ass'n v. Rickover, 369 U.S. 111, 82 S.Ct. 580, 7 L.Ed.2d 604 (1962). It is the opinion of this Court that, given the express intention of Congress that the Presidential Recordings and Materials Preservation Act, insofar as it provides for a new avenue of access, shall not interfere with these pending cases, it is appropriate to consider the claims of the FOIA plaintiffs and, if they prevail, issue a declaratory judgment.

[22] A similar examination of Nixon v. Sampson et al., reveals that while the Presidential Recordings and Materials Preservation Act has an obvious impact upon the justiciability of those claims for relief which rely upon the Nixon-Sampson Agreement, there does remain a dispute that is presently cognizable. Mr. Nixon, as plaintiff in C.A. 74–1518, seeks not only a writ of mandamus, under 28 U.S.C. § 1361, to compel defendant Arthur F. Sampson to comply with the provisions of the Presidential Libraries Act, 44 U.S.C. § 2108(c), and thereby effectuate the Nixon-Sampson Agreement, but also seeks an injunction in the nature of specific performance to compel the defendants to comply with the terms and conditions of the agreement so as to protect his alleged constitutional rights, particularly his alleged right of "Presidential privilege". Since this Court has determined that the Presidential Recordings and Materials Preservation Act nullifies the Nixon-Sampson Agreement, there can be no justiciable controversy which would permit a decision on the issue of whether, under the Presidential Libraries Act, defendant Sampson owes a specific statutory duty to Mr. Nixon to effectuate the Nixon-Sampson Agreement which would not necessitate the exercise of official discretion. Such a determination would, of course, have required this Court to ascertain the validity of the agreement for it is axiomatic that a writ of mandamus will not issue to compel a government official to do an illegal act.[63] Plaintiff Nixon's request for injunctive relief, however, remains partially justiciable.

[23, 24] To the extent that Mr. Nixon seeks injunctive relief to compel the defendants, in their official capacity, to comply with the Nixon-Sampson Agreement, the action is barred by sovereign immunity. *See* Larson v. Domestic and Foreign Commerce Corp., 337 U.S. 682,

60. *See* footnote 58, *supra*.

61. 5 U.S.C. § 552(a)(3).

62. *See* footnote 58, *supra*.

63. This is the standard issue raised upon a request for a writ of mandamus. *See, e. g.* Feliciano v. Laird, 426 F.2d 424 (2d Cir. 1970).

69 S.Ct. 1457, 93 L.Ed. 1628 (1949). And to the extent that Mr. Nixon seeks injunctive relief to prevent certain of the defendants from interfering with the agreement, the action is, for the same reasons as those applicable to the action for a writ of mandamus, not justiciable. To the extent, however, that Mr. Nixon seeks injunctive relief to prevent the defendants from infringing upon his alleged constitutional rights, the action is maintainable and this Court has jurisdiction to make that determination. *See* Bell v. Hood, 327 U.S. 678, 682, 66 S.Ct. 773, 90 L.Ed. 939 (1946). But, the conduct sought to be enjoined must be beyond that which is sanctioned by the Presidential Recordings and Materials Preservation Act. For, otherwise, the claim would not be that the defendants were acting unlawfully, but that the Act is unconstitutional. Notably, Mr. Nixon has not amended his pleadings in this proceeding to include such a challenge; rather, he has filed a new suit for declaratory and injunctive relief.[64] While it would appear that the Courts should therefore grant the defendants' motion to dismiss the complaint, the Court will not do so since it is apparent that if Mr. Nixon is successful in that suit, his present claims for relief would be cognizable. *See* Weinstein v. Williams-McWilliams Industries, Inc., *supra*. The Court will instead stay the proceedings with respect to those claims which are based upon the Nixon-Sampson Agreement pending a decision in the new suit.[65] However, the Court will decide the issue of infringement with respect to the FOIA plaintiffs' requests under the FOIA, and with respect to the November 9th Agreement, which remain justiciable.

The controversy concerning the alleged infringement of Mr. Nixon's rights exists apart from both the Nixon-Sampson Agreement and the Presidential Recordings and Materials Preservation Act. Mr. Nixon seeks to enjoin the defendants, particularly Mr. Philip W. Buchen, counsel to President Ford, from permitting the Special Prosecutor to have access to the materials. He claims that this is not only a violation of his alleged "right and duty to protect the constitutionally-based privilege of confidentiality" of the Presidential materials and tape recordings, but also his fourth amendment rights to be free from unreasonable searches and seizures and privacy.

Furthermore, President Ford, on November 9, 1974, entered into an agreement with the Office of the Special Prosecutor whereby the Special Prosecutor would be permitted to have access for the purpose of accommodating the needs of the Special Prosecutor with respect to "ongoing criminal investigations and prosecutions within the Special Prosecutor's jurisdiction." Appendix B, Intro. ¶. And, the Special Prosecutor, who is an intervenor-defendant in C.A. 74–1518, has counterclaimed for a declaration of the validity and enforceability of the November 9th Agreement, as well as having moved for summary judgment in C.A. 74–1518. This controversy does not depend upon the enforceability of the Nixon-Sampson Agreement,[66] but rather upon the basic questions of ownership and privilege raised by the FOIA plaintiffs' cases. Moreover, as previously noted, Mr. Nixon does not rely upon the Nixon-Sampson Agreement to establish his claim of ownership or his right to assert a privilege, which are necessary if he is to prevail in this controversy. Thus, these questions are squarely before the Court.

64. C.A.No. 74–1582.

65. The Court will issue an order of even date of this opinion.

66. Mr. Nixon argues, however, that the Nixon-Sampson Agreement, if enforceable, would serve as a bar to access by the Special Prosecutor. Thus he contends that, like the FOIA cases, this controversy should not be resolved until the new action in which he contests the Presidential Recordings and Materials Preservation Act is resolved. This is not persuasive, however, since the question here is not whether the Nixon-Sampson Agreement is valid, but whether it was within the discretion of the Administrator to delay the enforcement of the agreement in the interests of the Special Prosecutor. The Court finds that it was, as the time of enforcement of the agreement was discretionary.

Moreover, the Presidential Recordings and Materials Preservation Act does not resolve this controversy. Although Section 102(b) of the Act provides that: "Any request by the Office of Watergate Special Prosecution Force, whether by Court subpoena or other lawful process, for access to such recordings or materials shall at all times have priority over any other request for such recordings or materials," this section can only be construed to afford the Special Prosecutor "priority" of access, not the right of access. Nor can section 102(d) which provides for access for "lawful government use" be construed as a limitation or expansion of these rights. Thus, the questions of ownership and privilege under the Nixon suit and the Special Prosecutor's counterclaim are justiciable. Furthermore, they require immediate resolution.

Having determined that the questions of ownership and privilege are raised in a live controversy, the Court will resolve these questions. Prior to reaching the merits, however, it is necessary to determine whether the motions for summary judgment and partial summary judgment meet the requirements of Rule 56 of the Federal Rules of Civil Procedure.

VII. RULE 56

Having determined that the questions relating to the Nixon-Sampson Agreement are not at this time justiciable, it is left to determine whether there are genuine issues of material fact with respect to the claims relating to ownership, privilege and the fourth amendment. Rule 56, Federal Rules of Civil Procedure. As to the issues of privilege and the fourth amendment, the moving parties are clearly entitled to a judgment as a matter of law. With respect to the question of ownership, however, Mr. Nixon contends that there are genuine issues of material fact which cannot be resolved on a motion for summary judgment.

The former President claims that the evidence is not conclusive as to the practices of other former Presidents. However, the practices of former Presidents are not adjudicative facts.[67] Neither are they material to a resolution of the legal issues involved in this case.

Nevertheless, the parties have submitted voluminous briefs and appendices in which the practices of many, if not all, of the past Presidents are set forth. What Mr. Nixon really contests, then, are the assumptions drawn by the other parties based upon the information therein. The Court, however, will not rely upon any of these disputed "assumptions", and will make its determination of the issues on motions for summary judgment and partial summary judgment based solely upon facts which are not in dispute.

[25] There is no dispute as to the nature of the "Presidential materials and tape-recorded conversations." Mr. Nixon has admitted that these materials and tape-recorded conversations were generated or retained by himself and others on his behalf during his tenure in office, and that they contain documents, papers, tapes and other materials, all of which relate to the official business of the government of the United States, and many of which relate directly to the conduct of the Office of the President. Thus, the question presented is purely a question of law. The FOIA plaintiffs seek a declaration that these materials and tapes belong to the government and may not be barred from public access under the FOIA. Mr. Nixon and the government contest this claim, arguing that since Mr. Nixon owns the "Presidential materials and tape recordings", they cannot be considered "records" within the meaning of the FOIA. In this position the government concurs,

67. *See* Schick v. Reed, 419 U.S. 256, 95 S.Ct. 379, 42 L.Ed.2d 430 (1974).

and adds that the materials cannot be obtained under the FOIA because the White House is not an "agency" within the meaning of the FOIA and, therefore, these materials are not "records" within the meaning of the Act.

Before turning to the merits, it is necessary to set forth with more particularity the nature of the "Presidential materials and tape-recorded conversations", which are estimated to comprise 42 million items. Based upon the pleadings,[68] the hearings,[69] and the submission by the government,[70] the Court finds that the "Presidential materials and tape recordings" are comprised of the following categories:

1) *Materials and tape-recorded conversations of the Office of the President, generated or retained by the former President or by others on his behalf, relating to the performance of the constitutional powers and duties of the Office of the President.* These communications include all the White House Central Files and all the White House Special Files, as well as many materials and tape-recorded conversations which were never in these files. These communications include memoranda, documents, and papers of the former President, the White House Staff and aides, and they include classified papers and documents relating to the national defense, and other ongoing interests of the government.[71]

2) *Materials of the Executive agencies and departments relating to the business of government.* These materials include documents, papers and communications of the Executive agencies and departments, as well as documents, papers, and communications sent from and between the various Executive agencies and departments.[72]

68. *See e. g.*, Answer of intervenor-defendant Richard M. Nixon, C.A. 74–1533; Plaintiff Nixon's Motion for Preliminary Injunction and Amended Motion for Preliminary Injunction of October 29, 1974 in C.A. No. 74–1518.

It is admitted by all parties that the materials and tape-recorded conversations also contained purely private matters. The FOIA plaintiffs have stated on the record that they do not seek access to these materials or conversations.

69. At the hearings on the motions for preliminary injunctions evidence was introduced by way of testimony and depositions as to the nature of the "Presidential materials and tapes", (hereinafter, TR. or by reference to a particular deposition, *see* footnotes 7–15, *supra*.).

70. In order to ascertain with more specificity the nature of the 42 million items in question, the Court ordered the government to submit indices and descriptions of the materials and tapes, in accordance with established procedures in such cases. *See*, Vaughn v. Rosen, 157 U.S.App.D.C. 340, 484 F.2d 820 (1973). This submission was filed on November 14, 1974 (hereinafter, "Government Submission".)

71. Examples of materials and tape-recorded conversations falling into this first category are: 888 original tape recordings and approximately 60–75 copies of conversations in the White House Oval Office and in the Executive Office Building (Government's Submission, document entitled "Materials Held in Safe Zone 128 and Room 429 EOB"); "memoranda to the President for his information, review, and decision including proposed Presidential decisions and instructions" (Government Submission, document entitled "Categories of Nixon Administration Materials Held by National Security Council"); "memoranda of conversations between the former President and foreign Heads of Government/State and other foreign dignitaries including, but not limited to, Foreign Ministers and other Cabinet Officers, Ambassadors, and Special Emissaries" (*id.*); "records of appointments and meetings with U. S. Cabinet officers and other officials pertaining to national security matters" (*id.*); "defense-related papers associated with deployment of forces, budget, research and development, and organization/command structure" (*id.*); "telegrams originating in the White House dispatched to foreign governments, U. S. ambassadors and force commanders relating to foreign policy and national security decisions" (*id.*); "sensitive incoming cable traffic associated with negotiations, plans, evaluations and the impact of decisions taken on national security" (*id.*); and records embodying "thousands of communications between the former president and his aides and [relating] to topics covering the enormous range of responsibilities which fall within the function of the Presidency" (plaintiff Nixon's Amended Motion for Preliminary Injunction, No. 74–1515, p. 4., filed on October 29, 1974).

3) *Materials and Communications in and out of the White House files relating solely to the private lives and activities of the former President, his family, and all other persons taking part or described in said materials and communications.*[73]

Because none of the above facts are disputed by any of the parties, and because the above facts are the only facts necessary to a thorough consideration of the legal issues relevant herein, this Court holds that a summary judgment under Rule 56, Fed.Rules of Civ.Proc. is appropriate under the circumstances. With this issue, and all procedural issues, now decided, the Court turns to the merits of this case and the first substantive question, that of "ownership".

VIII. OWNERSHIP

POINT ONE: THE CLAIM OF OWNERSHIP OF FORMER PRESIDENT NIXON TO THE "PRESIDENTIAL MATERIALS AND TAPE-RECORDED CONVERSATIONS" OF THE NIXON ADMINISTRATION IS CONTRARY TO THE GENERAL PRINCIPLE OF LAW THAT THAT WHICH IS GENERATED OR KEPT IN THE ADMINISTRATION AND PERFORMANCE OF THE POWERS AND DUTIES OF A PUBLIC OFFICE BELONG TO THE GOVERNMENT.

[26, 27] It is a general principle of law that that which is generated, created, produced or kept by a public official in the administration and performance of the powers and duties of a public office belongs to the government and may not be considered the private property of the official. United States v. First Trust Co. of St. Paul, 251 F.2d 686, 688 (8th Cir. 1958), aff'g First Trust Co. of St. Paul v. Minnesota Historical Soc., 146 F.Supp. 652 (D.Minn.1956), wherein the Court of Appeals set forth the well-settled principle that:

> "[R]ecords of a government officer executed in the discharge of his official duties . . . are public documents and ownership is in the United States."

72. Examples of materials falling into this second category are: logs, diaries, and calendars of members of the Executive Branch which illustrate the organization, functions, procedures, operations, and other activities of the Executive Branch (Anderson Ex. 2 at 736, 778; Ex. 4 at 515, 521, 560); the files of the Chairman and of the members of the Council of Economic Advisors (Government's Submission, document entitled "Description of Presidential Materials of the Nixon Administration Sent to the National Archives Building by the Office of Presidential Papers"); various documents relating to task force studies on such matters as rural development, the mentally handicapped, prisoner rehabilitation, air pollution, science policy, low income housing, urban renewal, higher education, business taxation, oceanography, and economic growth (Governments' Submission, memorandum dated March 7, 1973, from William F. Matthews, White House Chief of Files); memoranda to Dr. Henry Kissinger from the State Department (Government's Submission, memorandum dated January 12, 1972, from William F. Matthews; Nesbitt Testimony at 76–77); virtually all of the files of at least the three agencies with responsibility for vast areas of government policy and action—the Domestic Council, the Council of Economic Advisors; the Council of International Economic Policy (Nesbitt Dep. Tr. at 15, 20–21; Government's Submission, document entitled "Description of Presidential Materials of the Nixon Administration Sent to the National Archives Building by the Office of Presidential Papers").

73. Examples of materials and communications falling into this third category are: personal gifts to the former First Family (Government's Submission, document entitled "Description of Presidential Materials of the Nixon Administration Sent to the National Archives Building by the Office of Presidential Papers"); birthday cards, anniversary cards, wedding invitations, Christmas cards, Easter cards, Thanksgiving cards, Valentines, mail from children and adults, get-well cards and letters of sympathy and encouragement with regard to Watergate, and documents labelled as Mrs. Nixon's "Social Files" (Government's Submission, Memoranda For the Record from William T. Matthews, dated July 23, 1970 through November 14, 1973).

251 F.2d at 688.[74] *Cf.* White v. United States, 164 U.S. 100, 103, 17 S.Ct. 38, 41 L.Ed. 365 (1896); Wilson v. United States, 221 U.S. 361, 380, 31 S.Ct. 538, 55 L.Ed. 771 (1912). *See also* United States v. Chadwick, 76 F.Supp. 919 (N.D.Ala.1948):

> "[t]he notes, memoranda, statements and other material made and taken by [a public official] in the course of said employment, were and are, the property of the Government."

76 F.Supp. at 923. In *Chadwick*, the district court in fact ordered the return of the "notes, memoranda, statements and other material" which were taken by the public officer when he left office.

This principle has also been followed by the states. In Coleman v. Commonwealth, 25 Grattan (66 Va.) 865 (1874), the Virginia Supreme Court of Appeals held that:

> "whenever a written record of the transactions of a public officer in his office, is a convenient and appropriate mode of discharging the duties of his office, it is not only his right but his duty to keep that memorial, whether expressly required so to do or not; *and when kept it becomes a public document—a public record belonging to the office and not the officer; it is the property of the state and not of the citizen; and is no sense a private memorandum.*"

25 Grattan (66 Va.) at 881 (emphasis added). *See also* Robison v. Fishback, 175 Ind. 132, 93 N.E. 666 (1911); People v. Peck, 138 N.Y. 386, 34 N.E. 347 (1893). In *Peck*, the court held that information given to a public official and related to the administration of that office gave rise to an implied duty to preserve the information for the office and then the public. 138 N.Y. at 395, 34 N.E. at 355. Moreover, the court in *Peck* opined that the fact that the official was not required to keep the information was not determinative. *Id.*, *See also, Sandy White, supra*, 164 U.S. at 103, 17 S.Ct. 38.

This principle has also found expression in cases involving the question of whether a document or other material generated by a public official is outside the scope of his duties and therefore susceptible to copyright. The most well-recognized case in this area is that of Public Affairs Associates, Inc. v. Rickover, 109 U.S.App.D.C. 128, 284 F.2d 262 (1960), rev'd and rem'd 369 U.S. 111, 82 S.Ct. 580, 7 L.Ed.2d 604 (1962), on remand, 268 F.Supp. 444 (D.D.C. 1967). The case concerned an action by a publisher for a declaratory judgment as to its right to publish certain uncopyrighted speeches given by Vice Admiral Hyman G. Rickover, who had refused to allow the speeches to be published, claiming that he owned the speeches and that they were protected by a secured copyright. 284 F.2d at 264–265. The publisher argued that the speeches "resulted from [Rickover's] official responsibilities" and, therefore, were the property of the government. Thus, a copyright would be contrary to 17 U.S.C. § 8, which provides, "No copyright shall subsist in * * * any publication of the United States Government." 284 F.2d at 267–268 (footnote omitted). The Supreme Court, reversing and remanding

74. The United States argued in its brief to the Eighth Circuit Court of Appeals that:
"The right of a government (state or Federal) to written records of its employees produced in the performance of their official duties has been uniformly recognized by the decided cases. The doctrine adopted by the decisions is one that is, in large part, so self-evident that there has been relatively little litigation in this area . . . This rule is not merely an extension of normal principles governing a master-servant relationship. The peculiar status of public employment and the need for records bearing on the carrying out of governmentally directed and financed tasks . . . intensifies the need for applicability where governmental employees and governmental records are involved . . . In fact, we have been unable to find any case, nor has one been cited, in which the records of a public employee produced in the discharge of his public duties have been held to be private property." Brief for the United States at 37–39 (footnotes omitted).

due to insufficiency of the record, set forth the test for determining whether the speeches belonged to the government. 369 U.S. at 113–114, 82 S.Ct. 580. The determination was to be made by ascertaining whether the speeches were prepared "in relation to the Vice Admiral's official duties," after careful examination of the "nature and scope" of the duties of the office. *Id.* at 113, 82 S.Ct. at 582.[75] On remand, the district court, finding that the use of government duplicating machinery, government paper, and the services of a government secretary not determinative, held that the speeches were not "written and delivered as a part of Admiral Rickover's official duties" and, therefore, were susceptible to copyright. 268 F.Supp. at 456.

In the instant matter, former President Nixon contends that this principle is inapplicable to "Presidential materials and tapes" of the Nixon administration, although he admits that these materials and tape-recorded conversations relate to the conduct of the Office of the President. He argues that the nature of the Office of the President permits an assertion of private ownership, and therefore enables him to prevent access to these materials and tapes by any person without his authorization. In support of this contention, he points to the fact that the President is a "constitutionally-elected" officer, and therefore he cannot be held to the principle that that which is generated or kept in the administration and performance of a public office belongs to the government.

POINT TWO: FORMER PRESIDENT NIXON'S ASSERTION OF OWNERSHIP OF THE DOCUMENTS, PAPERS, TAPES AND OTHER MATERIALS GENERATED OR RETAINED BY HIMSELF OR OTHERS ON HIS BEHALF IN THE PERFORMANCE OF HIS DUTIES AS THE PRESIDENT OF THE UNITED STATES IS CONTRARY TO THE NATURE OF THE OFFICE OF THE PRESIDENT AND THE CONSTITUTION.

[28] In order to sustain the assertion that former President Nixon personally owns the documents, papers, tapes and other materials generated or retained by himself or others in the performance of his duties as the President of the United States, it must be found that an individual President is distinguishable from other public servants.[76] Such a conclusion, however, is untenable as it is refuted by the Constitution and the very concept of the Office of the President.

[29–31] Art. II, Sec. I, cl. 1 of the Constitution provides that: "The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and, together with the Vice President, chosen for the same Term, be elected, as follows . . . ." And, Sec. I, cl. 5 further provides that:

> "In Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the same shall devolve on the Vice President, and the Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President or Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected."

75. *See* Scherr v. Universal Match Corp., 417 F.2d 497 (2d Cir. 1969); aff'g 297 F.Supp. 107 (S.D.N.Y. 1967); note, Piracy in High Places—Government Publications and Copyright Law, 24 Geo.Wash.L.Rev. 423 (1956).

76. The principle that that which is done for the public by a public official belongs to the government in essence expresses the notion that that which is done on behalf of the sovereign belongs to the sovereign, which in our system of government is the public. Thus, the assertion of former President Nixon may well be said to be a claim that while in office he was in fact the sovereign, or at least the embodiment thereof.

These sections of Article II compel only one conclusion: the powers and duties of the executive inure to the Office and not to any individual office-holder; for the President, although elected to the highest office in the Nation, is but a transient holder of the public trust. Even though a President while in office may exercise specific and enumerated powers, Youngstown Sheet & Tube Co. et al., v. Sawyer, 343 U.S. 579, 72 S.Ct. 863, 96 L.Ed. 1153 (1952), he is nevertheless a servant of the people. The President is elected by the people (Art. II, Sec 1, cl. 1), to execute the laws made by the people (Art. II, Sec. 1, cl. 7), and may be removed by the people (Art. II, Sec. IV); and, as recently articulated by the United States Court of Appeals for the District of Columbia:

> "Though the President is elected by a nationwide ballot, and is often said to represent all the people, he does not embody the nation's sovereignty. *He is not above the law's commands* . . . . Sovereignty remains at all times with the people . . . ."[77]

Former President Nixon's claim of ownership is therefore repugnant to the very nature of the Office of the President.

It is important to remember that the original Articles of Confederation did not include a chief executive, and that there was a great reluctancy in formulating the Constitution to include such an Office because of the fear that it would lead to a monarchial rather than a republican form of government. The framers of the Constitution, however, were successful in establishing such an Office by convincing the people that a President was necessary for the proper administration of the government and that he would be in the nature of a chief magistrate and not a monarch.[78] James Madison argued in The Federalist No. 69 that:

> "The President of the United States would be an Officer elected by the people for *four* years, the King of Great Britain is a perpetual and hereditary prince. . . . What answer shall we give to those who would persuade us that things so unlike resemble each other? The same that ought to be given to those who tell us that a government, the whole power of which would be in the hands of the elective and periodical servants of the people, is an aristocracy, a monarchy, and a despotism."[79]

Thus, as the Supreme Court has cautioned, "it would be altogether unsafe to reason from any supposed resemblance between [the President and a monarch] where the rights and powers of the executive are brought into question." Fleming v. Page, 50 U.S. (9 How.) 603, 618, 13 L.Ed. 276 (1850). Rather, the President is a "creature of the Law." *See* United States v. Lee, 106 U.S. 196, 220, 1 S.Ct. 240, 27 L.Ed. 171 (1882). And, in order to preserve the freedom of the people, the President is bound by the law. *See* Youngstown Sheet & Tube Co., *supra* 343 U.S. at 655, 72 S.Ct. 863. Therefore, to uphold former President Nixon's claim of ownership would be to place him above the law as well as recognize that he may assert a right to the products of the office, which would be to compare him to a monarch. This the Court cannot do.

[32] Further, not only must former President Nixon's claim of ownership be rejected as contrary to the nature of the office, but also because it is expressly negated by the Constitution itself. Art. II, Sec. I, cl. 6, generally known as the Emoluments Clause, provides that: "The President shall, at stated Times, receive for his Services, a Compensation,

77. Nixon v. Sirica, 159 U.S.App.D.C. 58, 487 F.2d 700, 711 (1973) (footnotes omitted) (emphasis added).

78. *See* The Federalist (Ford ed. 1898) Nos. 69, 70 (hereinafter, The Federalist).

79. The Federalist. No. 69 at 465.

which shall neither be increased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them." Since the materials in question are directly related to the performance of the Office of the President and are of incalculable value, it would be contradictory to and a violation of the Emoluments clause for a President to be given or to be permitted to assert a personal right to such materials.

Moreover, it was the intent of the framers of the Constitution to prevent the Office of the President from being a position of both power and profit. While they recognized that they could not divest the office of power, they sought to prevent the corruption of the office by removing profit. They feared that if the office offered both power and profit, the persons who sought the office would "not be the wise and moderate, the lovers of peace and good order, the men fittest for trust." 1 Farrand, The Records of the Federal Convention of 1787, at 82 (as recorded by Madison) (rev. ed. 1937).[80]

Mr. Nixon, however, argues that this Court must sustain his claim of ownership in order to preserve the "constitutional independence" of the Office of the President.

POINT THREE: THE INHERENT CONTINUITY OF THE OFFICE OF THE PRESIDENT NEGATES A CLAIM BY FORMER PRESIDENT NIXON THAT THE INDEPENDENCE OF THE OFFICE REQUIRES THAT HIS ASSERTION OF OWNERSHIP BE SUSTAINED.

[33] Former President Nixon contends that in order to preserve the independence of the Office of the President, the Court must uphold his claim of ownership to the documents, papers, tapes and other materials generated or retained by himself and others on his behalf in the performance of his duties as President of the United States. While this assertion is actually an outgrowth of his argument that he has a personal "Presidential privilege" which attaches to the documents, papers, tapes and other materials which contain confidential communications between himself and his aides, his broad assertion of ownership to approximately 42 million items of materials must be rejected because it would undermine the continuity of the Office of the President.

As previously set forth, Art. II, Sec. I, cl. 1 of the Constitution provides that there be regular changes in the individuals who hold the Office of the President, and Sec. I, cl. 5, which provides for the procedure of who shall hold the Office upon the death, resignation, or other inability of the incumbent, recognizes that there may be unforeseen and irregular changes in the individual who holds the Office of the President.[81] These changes may be from year to year, or even from day to day. And, since the

80. Former President Nixon argues, however, that this is not an emolument because his right of ownership does not come into existence until he leaves office and, therefore, there could be no emolument as the Emoluments Clause by its terms applies only to a President's term of office. Even if this were true, then his claim of ownership would be a direct violation of Art. IV, Sec. III, cl. 2 of the Constitution, which provides that only the Congress can dispose of property belonging to the United States. For if his claim of ownership does not come into existence until he leaves office, then it can only be concluded that while he is in office the documents, papers, tapes and other materials were government property.

81. Clearly, the various sections of Article II make it irrefutable that no individual President has a "right" to hold the Office in perpetuity; furthermore, the 22nd amendment limits each individual to two terms in Office. Even if this were not the law, the fact that a President may not be reelected would mandate such a conclusion.

This proposition is supported by the rejection of any analogy between the Office of the President and a monarchy. See footnotes and accompanying text. In this century alone there have been several changes in the individual presidents other than by election. Calvin Coolidge became the 30th President upon the death of Warren G. Harding on August 2, 1923. Harry S. Truman be-successor is charged with exercising the executive power, it is essential that he have for this purpose the documents, papers, tapes and other materials generated and retained by his predecessor in the exercise of the Article II powers and duties of the Presidency. To sanction the contrary result would undermine the notion of continuity of the Office of the President, and the government as a whole.[82]

The President of the United States is charged with significant powers and duties in the formulation and effectuation of the nation's foreign and domestic policies.[83] He is also charged by the Oath of Office with executing the Office of the President and preserving, protecting and defending the Constitution of the United States, U.S.Const. Art. II, Sec. I, cl. 7, and by Sec. II, cl. 3, with the duty to "take care that the laws be faithfully executed." In order to carry out these responsibilities, the Office of the President must seek and obtain information and advice from the "offices", "counsels", and "departments" of the Executive Branch.

[34] Although the Office of the President consisted originally of only a few aides, it has continuously grown over the years;[84] today there are over five thousand persons who work within the Office of the Executive.[85] Moreover, in order to formulate, effectuate, and discharge the powers and duties of the Office of the President, numerous executive departments and agencies have been created,[86] all of which report to the Office of the President, and which are utilized in the formation and effectuation of the Nation's foreign and domestic policy. To allow any one President to remove the documents, papers, tapes and other materials which contain information vital to the ongoing affairs of the nation would be totally disruptive to the Office of the Presidency and would impair the ability of his successor in office to properly carry out the duties and powers of the office:

> "To recognize the constitutional independence of the Presidency is not to establish a sound premise for the conclusion that presidential records are the private property of the incumbent, whether in or out of office. On the contrary, it would seem that if any proposition collides with constitutional principles it is that the President should be exempted from the legal obligation that rests upon other officials in government to protect and refrain from appropriating to personal use records produced or received into custody by virtue of the exercise of a public office. To assume otherwise would be to vest in the highest office of the land, or in his heirs or descendants, the right to sell, to destroy, to disclose, to refuse to disclose, or otherwise to dispose of documents of the highest official nature involving information that, if improperly, prematurely, or irresponsibly revealed, could not only wreck private lives, but also endanger the security of the nation."

H. G. Jones, The Records of a Nation, 161–62 (1969).

Mr. Nixon, however, contends that his personal ownership of the "Presidential materials and tapes" has been sanctioned by precedent.

POINT FOUR: THERE IS NO PRECEDENT WHICH COMPELS A FINDING THAT THE "PRESIDENTIAL MATERIALS AND TAPES" ARE THE PERSONAL PROPERTY OF FORMER PRESIDENT NIXON.

There is no precedent which compels a finding that the "Presidential materials and tapes" of the Nixon administration are the personal property of former President Nixon. There are, in fact, only two cases in our jurisprudence which have involved documents, papers and other materials generated and/or retained in the conduct of the Office of the President.

In the most recent case, In Re Roosevelt's Will, 190 Misc. 341, 73 N.Y.S.2d 821 (1947), the executors of the estate of President Franklin D. Roosevelt sought a determination by surrogate's court that the instrument purporting to be a "gift *inter vivos*" of all his private and official papers to the government was valid. Thus, the question before the court was limited to whether the instrument contained the essential elements of a valid *inter vivos* gift. *Id.* at 821. The court, finding that it did, went no further. The question of whether President Roosevelt personally owned the documents and papers was not raised nor considered. The court, however, noted that during his lifetime, President Roosevelt had continuously placed official documents and papers in a depository and had stated that, "'the ownership and title of all the papers, books, et cetera, should be in the Federal Government itself'." *Id.* at 823. The court also noted that whereas upon the death of President Roosevelt, the "White House Central Files" were removed to the library, the "Map Room Papers", "relating to the prosecution of the war," were "still in Washington, D.C., under the custody of the President of the United States." *Id.* at 825.

In Re Roosevelt's Will, therefore, provides no express precedent that the "Presidential materials and tapes" belong to former President Nixon. While it may be construed to assume such ownership, the example of the "Map Room Papers" evinces the repugnance of personal ownership to the continuity of the Office of the President. Had the heirs of former President Roosevelt been less cooperative, a possibility beyond the imagination of this Court, the case may well have been of a different nature.

The second and earlier case, Folsom v. Marsh, 9 Fed.Cas. p. 342 (No. 4, 901)

came the 33rd President upon the death of Franklin D. Roosevelt on April 12, 1945. Lyndon B. Johnson became the 36th President upon the death of John F. Kennedy on November 22, 1963. And, Richard M. Nixon (plaintiff, defendant and intervenor in these consolidated cases), who resigned from office on August 9, 1974, has been succeeded by Gerald R. Ford, now the 38th President of the United States. Congressional Directory 93rd Cong., 2d Sess. 412 (1974).

82. *See* H. L. A. Hart, The Concept of Law (Oxford U.Press 1972). The notion of continuity is a primary premise of our legal system and it is this notion which differentiates the constitutional system from the monarchial system of government.

83. Art. II, Sec. II of the Constitution provides that the Chief Executive shall be the Commander in Chief and shall conduct the war powers of the Nation; shall have the power to make treaties, with the advice and consent of Congress, and to conduct the nation's foreign affairs; and shall have the power and duty to formulate and recommend to Congress domestic policies and programs.

84. *See* E. Hargrove, Power of the Modern Presidency, 80–81 (1974).

85. By several Congressional Reorganization Acts, the Office of the Executive has continually expanded. In 1939, various agencies were incorporated within the Office of the Executive (5 U.S.C. § 133 et seq.); and today there are 14 "offices" with staffs in the Executive Office of the President which deal with matters formerly handled by the Departments of Defense, State, and Health, Education and Welfare. United States Government Manual for 1973/74 at 78 (1973). *See* also Lester G. Seligman, "Presidential Leadership: the Inner Circle and Institutionalization in the Presidency", (Wildavsky ed. 1969). These include, for example, the Office of Management and Budget, the Domestic Council, the Council on Environmental Quality, the Office of Telecommunications Policy, the Council on International Economic Policy, and the Council of Economic Policy Advisors.

86. Although the immediate Executive Office of the President has expanded only in recent years, the numerous executive "departments", all of which have reported and continued to report to the Office of the President, have a long history. These include: Department of State, established in 1789, the Department of the Treasury, established in 1789; the Department of Justice, established in 1870; the Post Office Department, established in 1872 (as part of the Executive); the Department of the Interior, established in 1849; the Department of Agriculture, established in 1889 (as part of the Executive); the Department of Commerce, established in 1913; the Department of Labor, established in 1913; the Department of Health, Education and Welfare, established in 1953; the Department of Housing and Urban Development, established in 1965; and the Department of Transportation, established in 1966. *See* R. Morris, Encyclopedia of American History (1973); Gov't Manual at 474–641.

(C.C.D.Mass.1841) concerned a dispute between two private parties in an action for infringement of copyright. Folsom and Company, publishers of a multi-volume work entitled. "The Writings of George Washington", by Jarod Sparks, brought suit in equity to enjoin Marsh and Company, publishers of a two-volume work entitled "The Life of Washington in the Form of an Autobiography," written by Rev. Charles W. Upham, from continuing to publish the two-volume work, claiming that the defendant had copied verbatim a portion of the multi-volume treatise. *Id.* at 343. The defendants claimed that there could be no infringement since the material extracted was the papers of George Washington himself and, therefore, public in nature and not susceptible to copyright. *Id.* at 344. Circuit Justice Story, recognizing the copyright, held that there had been infringement and that an injunction should issue. *Id.* at 349.

While on first impression the holding in *Folsom* would lend support to former President Nixon's claim of ownership, Justice Story's opinion was carefully interwoven with indications of its limited *stare decisis* value, as well as an inference that a contrary conclusion may well have been reached had the equities not dictated the result.

First, Justice Story noted that President Washington had "deemed them his own private property," and that Mr. Sparks together with Mr. Chief Justice Marshall had procured the papers from his nephew, the late Mr. Justice Washington. 9 Fed.Cas. at 345. Thus, he was sensitive to the fact that publication by the defendants "must be injurious to the rights of property of the representatives and assignees of President Washington." *Id.* at 345. Secondly, he noted that the pirated work only included a fraction of the papers of the multi-volume treatise, and that copies of these papers were generally available. *Id.* at 347. However, Justice Story emphasized that the copyright law had encouraged publication of the papers of such presidents as "Jefferson and Madison, and other distinguished statesmen of our own country." *Id.* Thus, he was fearful that not to recognize the copyright would have an inhibiting effect on such publications. Third, he noted that the multi-volume treatise was a work of considerable labor, and that the equities were, therefore, against the pirate, despite the limited degree of the infringement. *Id.* Thus, it is understandable that Justice Story prefaced his opinion with the following caveat:

> "This is one of those intricate and embarrassing questions, arising in the administration of civil justice, in which it is not, from the peculiar nature of the controversy, easy to arrive at any satisfactory conclusion, or to lay down any principles applicable to all cases."

9 Fed.Cas. at 344. It therefore is apparent that decision in Folsom v. Marsh was not intended to be, and cannot be, considered an establishment of the right of personal ownership of a President in the documents, papers and materials generated or retained in the conduct of the Office of the President. Rather, Justice Story was careful to comment that had the government sought an interest in the matter, the result may have been different:

> "In respect to official letters, addressed to the government, or any of its departments, by public officers, so far as the right of the government extends, from principles of public policy, to withhold them from publication, or to give them publicity, there may be a just ground of distinction. It may be doubtful, whether any public officer is at liberty to publish them, at least, in the same age, when secrecy may be required by the public exigencies, without the sanction of the government. On the other hand, from the nature of the public service, or the character of the documents, embracing historical, military, or diplomatic information, it may be right, and even the duty, of the government, to give them publicity, even against the will of the writers.
>
> . . . . . .
>
> But assuming the right of the government to publish such official letters and papers, under its own sanction, and for public purposes, *I am not prepared to admit, that any private persons have a right to publish the same letters and papers, without the sanction of the government, for their own private profit and advantage.*"

9 Fed.Cas. at 347 (emphasis added).[87]

Former President Nixon, however, contends that the historical practice of past Presidents does sanction his private right of ownership.

POINT FIVE: THE HISTORICAL PRACTICE OF PAST PRESIDENTS DOES NOT EVINCE A CLEAR AND CONSTANT RECOGNITION OF OWNERSHIP OF THE MATERIALS GENERATED AND RETAINED IN THE CONDUCT OF THE OFFICE OF THE PRESIDENT.

[35] Former President Nixon contends that his personal ownership of the "Presidential materials and tapes" is supported by the practice of past Presidents. In response, the statement of Judge Pine in Youngstown Sheet & Tube Co. v. Sawyer, 103 F.Supp. 569, 575 (D.D.C.1952), is particularly applicable and this Court adopts it: "Apparently, according to his theory, several repetitive, unchallenged, illegal acts sanctify those committed thereafter. I disagree."

An examination of the practices of past Presidents reveals that while some Presidents claimed that the materials in the White House were their personal property and, therefore, took them when they left office, this was not the opinion or the practice of all previous Presidents. For example, President Thomas Jefferson:

> "deposit[ed] in the various departmental offices—State, Treasury, War, Justice, and Post Office—every document having any relation to the conduct of public business or being in any sense official in nature." [88]

More recently, Presidents Franklin D. Roosevelt and Harry S. Truman publicly stated that these materials were the property of the government.[89] But even if there existed an expectation and practice by past Presidents to the contrary, it would not necessarily dictate the constitutional standard. The Court must examine the purpose and function of such practice, for to merely rely on historical precedent would be "blind formalism". Williams v. Florida, 399 U.S. 78, 103, 90 S.Ct. 1893, 26 L.Ed.2d 446 (1970).[90]

A review of the literature concerning Presidential practice with regard to the disposition of Presidential papers and materials reveals that there were compelling reasons for Presidents to take their materials with them when they left office. H. R. Jones, in his learned work, The Records of a Nation: Their Management, Preservation and Use,[91] indicates that the most important factor which prompted Presidents to take Presidential papers and materials with them when they left office was the lack of assurance that they would not be indiscriminately thrown open to public

87. It was based upon this language that Attorney General Saxbe stated in his opinion that while the former President had an apparent right of ownership, it was subject to the "interests" of the government. Opinion of the Attorney General of the United States, September 6, 1974 (unpublished).

88. Statement of Julian P. Boyd, Editor, "The Papers of Thomas Jefferson," (Princeton Univ.Lib.), Brief of The Reporters Committee for Freedom of the Press, et al., in Support of Motion for Preliminary Injunction, Exhibit A.

89. Records of a Nation, at 157, 162 n. 25; Christian Science Monitor, January 29, 1947.

90. In *Williams*, the Supreme Court held that the 12-man jury, although historically adhered to, was not necessary to "effect the purposes of the jury system." 399 U.S. at 102, 90 S.Ct. at 1907.

91. Hereinafter, Records of a Nation.

scrutiny.[92] As another scholar has stated Presidents feared that the end of the President's term would be a "signal for disclosure." [93] This is understandable since there was no provision or facility to house and protect these papers and materials. In fact, the National Archives did not even come into existence until 1934.[94] Even after its creation, there was no provision whereby these papers and materials could be deposited and access controlled. Thus, when President Franklin D. Roosevelt decided to deposit the Presidential papers and materials of his administrations with the government, the problem, as stated by Jones, was that "nowhere in past experience would there be found a logical pattern or practical solution to the complex problem of what disposition to make of the papers of an outgoing President." [95] Thus, in 1943, the archivists had to make up their own rules for access.[96]

Therefore, considering the problem that there was no place to deposit Presidential papers and materials, and the fear of disclosure, it is understandable that Presidents such as William H. Taft stated: "I do not think that I ought to burden the White House with these things and, therefore, want them sent to me." Index to the William Howard Taft Papers V. (1972).

This situation was altered, however, with the passage of the Federal Records Act in 1950, which was amended in 1955 to become the Presidential Libraries Act.[97] Under this Act, Presidential papers and materials could be deposited and access controlled.[98] Subsequently, every President has deposited the Presidential papers and materials under the Act.[99]

The practices of past Presidents must be viewed in light of these reasons for post-term retention of Presidential papers and materials. When so viewed, the practice may be considered not one of asserting a right of ownership, but of retention in trust for the public. *See*, First Trust Co. of St. Louis v. Minnesota Historical Society, 146 F.Supp. 652, aff'd, 251 F.2d 686 (8th Cir. 1958). And, even if a rule existed that a President, at the expiration of his term in office, could remove the Presidential papers and materials to hold them in trust and to protect their confidentiality, the passage of the Presidential Libraries Act eliminated the reason for such a rule, and it should not now be resurrected:

> *"It is revolting to have no better reason for a rule of law than that it was laid down so* [*long ago*]. *It is even more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past."* (Emphasis added.)

Holmes, The Path of the Law, 10 Harv. L.Rev. 457, 469 (1897).

A further reason for rejecting any such rule is that the scope of the office of the President has greatly expanded in this century, and has taken on many of the functions formerly assigned to the executive departments.[100] Thus, the papers and materials generated and retained in this office have become even more indispensible to the ongoing operations of the government.[101] That they

92. Records of a Nation at 159–160, 162.

93. David D. Lloyd, "The Harry S. Truman Library," American Archivist, XVIII (April 1955), 101–102.

94. National Archives Act of 1934, PL. 73–432, 48 Stat. 1122.

95. Records of a Nation at 147.

96. *Id.* at 153.

97. P.L. 84–373; 69 Stat. 695, codified at 44 U.S.C. § 2101 et seq., amending P.L. 81–754; 64 Stat. 583 (§ 507 of the Federal Records Act) [hereinafter, the "Presidential Libraries Act"].

98. *See* 44 U.S.C. §§ 2107, 2108, formerly § 507(a) & (e) of the 1950 Act.

99. *See* Government Brief in Opposition to Motions for a Preliminary Injunction, Appendix.

100. *See* footnote 86, *supra*.

101. *See* Section VII, "Point Three", *supra*.

should be removed and controlled by a former President further undermines the vitality of the rule.

Former President Nixon, however, argues that his right of ownership has been recognized by Congress and, therefore, must be accepted.

POINT SIX: CONGRESS HAS NOT SANCTIONED THE PERSONAL OWNERSHIP OF "PRESIDENTIAL MATERIALS AND TAPES" GENERATED AND RETAINED IN THE CONDUCT OF THE OFFICE OF THE PRESIDENT.

[36] An analysis of the relevant statutes and the legislative history reveal that Congress has never sanctioned the personal ownership of "Presidential Materials and tapes" generated and retained in the conduct of the Office of the President.

Former President Nixon argues that the Presidential Libraries Act of 1955, 44 U.S.C. §§ 2101, 2107, 2108, sanctioned the personal ownership of each President of the documents, papers, tapes and other materials generated and retained in the conduct of the Office of the President. Principally, he relies on section 2107 which provides in pertinent part that:

> "When the Administrator of General Services considers it to be in the public interest he may accept for deposit—
>
> "(1) the papers and other historical materials of a *President* or *former President* of the United States, *or other official or former official of the Government*, and other papers relating to and contemporary with a President or former President of the United States, subject to restrictions agreeable to the Administrator as to their use . . . ." (Emphasis added).

and which amended section 507(e) of the Federal Records Act of 1950, which provided in pertinent part that:

> "(e) The Administrator may accept for deposit—
>
> "(1) the *personal papers* and other *personal historical documentary materials* of the *present President* of the United States, his successors, heads of executive departments, and such other officials of the Government as the President may designate, offered for deposit under restrictions respecting their use specified in writing by the prospective depositors . . . ." (Emphasis added.)

Former President Nixon contends that since the word "personal" in section 507(e)(1) was not included in section 2107, Congress recognized the right of ownership of the President to all the documents, papers, tapes and other materials generated and retained in the conduct of the office of the President. The legislative history of the Act and the other sections of the 1955 Act require that this interpretation be rejected.

Preliminarily, it must be recognized that the impetus for the passage of the 1950 Federal Records Act was the desire to secure for the Nation the historical record contained in Presidential documents, papers and materials. Records of a Nation at 145–154. Congress sought to prevent the destruction of these valuable memorials of history which had so often been destroyed.[102] As Representative McCormack stated when presiding over the hearings concerning the 1955 amendments: "the matter should not be left to happenstance." [103] Thus, Congress established a statutory scheme to provide facilities for these materials.

Considering this general purpose, the omission of the word "personal" cannot be interpreted as recognizing a right of private ownership. In fact, the legislative history reveals that the word "personal" was omitted to expand the scope of materials relating to the life of a President that could be accepted and preserved, such as pre-Presidential materials and materials "outside the scope

102. *See* 1955 Hearings at 6–7 (Statement of Rep. McCormack).

103. *Id.*

of the personal collection of the President." 1955 Hearings at 24.

[37, 38] The language of the statute itself rejects the former President's interpretation. It is axiomatic that a statute cannot be read in piecemeal. A reading of the other subsections of section 507 of the 1950 Act demonstrate not only that Congress distinguished between "personal" and "official" materials of the President, but also that section 2107 is still limited to "personal" materials.

Section 507(a)(1) of the 1950 Act provided in pertinent part that:

> "Sec. 507. (a) The Administrator, whenever it appears to him to be in the public interest, is hereby authorized—
>
> "(1) to accept for deposit with the National Archives of the United States *the records of any Federal agency* or of the Congress of the United States that are determined by the Archivist to have sufficient historical or other value to warrant their continued preservation by the United States Government . . . ." (Emphasis added).

This section was not changed by the 1955 amendments, but was left intact in section 2103 of title 44. It provides for the deposit of "records" of "any Federal agency". These records are the "official" records of the government, defined in 44 U.S.C. § 3301 which defines government records as:

> "all books, papers, maps, photographs, or other documentary materials, regardless of physical form or characteristics, *made* or *received* by an agency of the United States government under Federal law or *in connection with the transaction of public business* and preserved or appropriate for preservation by that agency or its legitimate *successor* as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the Government or because of the informational value of data in them." (Emphasis added)

Further, "Federal agency" includes the Office of the President, by the definition set forth in 40 U.S.C. § 472, which provides in pertinent part that:

> "(a) The term 'executive agency' means any executive department or independent establishment in the executive branch of the Government . . . ."
>
> "(b) The term 'Federal agency means any executive agency' or any establishment in the legislative or judicial branch of the Government . . ."

Although this section does not expressly include the Office of the President, this is the clear interpretation. The Solicitor General has, in discussing section 507(a)(1) [sections 2103, 2104 as amended], opined that:

> "The Presidency seems to have been regarded by Congress as a Federal agency, the official records of which would be subject to deposit pursuant to sections [2103 and 2104 of 44 U.S.C.]. Section 3(b) of the Federal Property and Administrative Services Act of 1949 . . . defines 'Federal agency' as including *inter alia*, 'any executive agency' and section 3(a) defines 'executive agency' as 'any executive department or independent establishment in the executive branch of the Government * * *' Other parts of that act appear to be applicable to the White House, among other agencies. See, e.g., sections 109, 201–206, 301–309."

Memorandum of Office of the Asst. Solicitor General (now Office of Legal Counsel) at 2 (July 24, 1951).

Thus, section 2107, when construed with section 2103, reveals not only that Congress distinguished between "official" and "personal" Presidential documents, papers and materials, but also that section 2107 must still be interpreted as only including "personal" documents, papers and materials. Therefore, the contention of the former President must be rejected.[104]

This Court, however, recognizes that without reference to 44 U.S.C. § 3301 (definition of government records), the distinction between official and personal Presidential documents, papers and materials would be vague. Even without referring to section 3301, however, the general principle that documents, papers and materials generated and retained in the conduct of a public office which this Court has held to apply to the Office of the President, would cause the same result: that former President Nixon's contention be rejected.[105]

[39] The Court, having tested former President Nixon's claim of ownership against the common-law, the Constitution, the history and practice of former Presidents, precedent, and the Acts of Congress, concludes that the "Presidential materials and tape-recorded conversations" which were generated, created, produced or kept in the administration and performance of the powers and duties of the Office of the President belong to the government, and are not personal property of the former President.

POINT SEVEN: TO THE EXTENT THAT THE PRESIDENTIAL MATERIALS AND TAPE-RECORDED CONVERSATIONS CONTAIN "RECORDS" WITHIN THE MEANING OF THE FOIA, THE FOIA PLAINTIFFS HAVE A RIGHT OF ACCESS TO THOSE RECORDS.

[40] The government and former President Nixon contend that even if Mr. Nixon does not own the "Presidential materials and tape-recorded conversations" generated and retained in the conduct of the Office of the President, they nevertheless are not "records" within the meaning of the Freedom of Information Act.

The Freedom of Information Act, 5 U.S.C. § 552, provides in pertinent part that:

> "(a)(3) . . . each agency, on request for identifiable records . . . shall make the records promptly available to any person. . . ."

The FOIA applies to the records of executive *departments* of the government. *See e.g.* Rose v. Department of Air Force, 495 F.2d 261 (2d Cir. 1974) (Defense); Stern v. Richardson, 367 F. Supp. 1316 (D.D.C.1973) (Justice); Tax Analysts & Advocates v. Internal Revenue Service, 362 F.Supp. 1298 (D. D.C.1973) (Treasury); National Parks & Conservation Ass'n v. Morton, 498 F. 2d 765 (D.C.Cir. 1974) (Interior). Moreover, these records would be available to "any person" even if they are sent to the Office of the President for his

104. This is further compelled by the fact that only officials of the government can, under the Act, deposit "official" records. *See* S.Rep.No.2140, 81st Cong., 2d Sess. at 16–17, quoted in 1950 U.S.Code Cong.Serv. at p. 3564. *See also* 44 U.S.C. §§ 3101, 3106.

105. Former President Nixon's argument that Congress recognized the right of personal ownership of "Presidential materials and tapes" by permitting former Presidents to take a tax deduction for them when they were donated to the government is likewise erroneous. Congress eliminated this deduction in the Tax Reform Act of 1969, P.L. 91–172, 83 Stat. 685 (December 30, 1969). And, although Congress took no express position in the language of the statute on the question of ownership, some members of Congress openly rejected any notion of private ownership. For example, Senator John J. Willians of Delaware stated during the debate that:

> "One of the things that bothers me about getting special tax benefits through the gift of official papers is that the parties doing this are making a profit from the 'charitable' giving of what are really official papers which, in my opinion, properly belong to the Government and not to them as individuals. I am sure that in many cases many of the papers are just plain junk, but to the extent that they do have value, they were developed by Government officials on Government time with the aid of Government staff personnel, were typed by Government secretaries on Government paper, and were even stored in Government files."

115 Cong.Rec.S. 20461 (daily ed. July 23, 1969).

consideration. *See* Environmental Protection Agency v. Mink, 410 U.S. 73, 93 S.Ct. 827, 35 L.Ed.2d 119 (1973). Thus, these records of the executive departments even though now in the Office of the President must still be considered as records under the FOIA and, therefore, accessible to applicants under the Act. Notably, although this Court has held that the Presidential materials and tape-recorded conversations are not the private property of former President Nixon, this fact would be an additional ground for rejecting his claim. For it is inconceivable that these "records" which would have been accessible when Mr. Nixon was in office, would be inaccessible when Mr. Nixon left office.

[41, 42] It is the opinion of the Court that the essence of the government's and former President Nixon's claim is that the Office of the President is not an "agency" under the FOIA, and therefore the "Presidential materials and tape-recorded conversations" pertaining thereto are not "records" within the Act. This broad contention must be considered in light of the fact that the Office of the President is really two entities: the White House Office and the Executive Office of the President. *See* Soucie v. David, 145 U.S.App.D.C. 144, 448 F.2d 1067, 1074 (1971). The former includes the President and his immediate aides, and the latter includes congressionally-created executive "agencies" which assist the President in the formulation of policy and programs. *Id.* at 1074–1079. The executive agencies have been held to be within the meaning of the term "agency" of the FOIA, and "records" of such agencies may be accessible under the FOIA even though they have been sent to and are in the possession of the White House Office. *Id.* 1075–1076. Thus, the "records" of the executive "agencies" like the executive departments, even though now in the White House Office, must be considered "records" under the FOIA and accessible to applicants under the Act.

The remaining question then is whether the Office of the President (the White House Office) is an "agency" under the FOIA, making its "records" accessible under the Act. The language of the definition of the term "agency" does not distinguish between the White House Office and the Executive Office of the President. In fact, the definition of the term "agency" "specifically excludes Congress and the courts of the United States, but does not specifically exclude the President." Soucie v. David, *supra*, 145 U.S.App.D.C. 144, 448 F.2d at 1073 n. 17. Further,

> "the leading students of the APA, whose analyses are often cited by the Supreme Court, and who on some matters are in conflict with each other, seem to be in agreement that the term 'agency' in the APA includes the President—a conclusion fortified by the care taken to make express exclusion of 'Congress' and 'the courts.'"

Amalgamated Meat Cutters & Butchers Work v. Connaly, 337 F.Supp. 737, 761 (D.D.C.1971) (three-judge court) (citing R. Berger, Administrative Arbitrariness—A Synthesis, 78 Yale L.J. 965, 997 (1969); K. Davis, Administrative Arbitrariness—A Postscript, 114 U. of Pa.L. Rev. 823, 832 (1966); L. Jaffee, The Right to Judicial Review, 71 Harv.L. Rev. 401, 769, 778, 781 (1958)).

[43] This, however, is not conclusive. This question cannot be answered without consideration of the doctrine of the separation of powers. Congressional intrusions into the powers and duties of the Office of the President have been few, and they should not be assumed. It is the opinion of this Court that when Congress excluded the "executive" from the definition of "agency" within the FOIA, it did not go so far as to place the "records" of the President and his immediate aides, known as the White House Office, within the purview of the Act. This conclusion is supported by the recent amendments to the FOIA.[106]

106. P.L. 93–502, 120 Cong.Rec. —; U.S.Code Cong. and Admin.News, (December 15, 1974) at p. 1798.

5 U.S.C. § 552(a)(3) has been amended to include subsection (e), which provides:

> "(e) For purposes of this section, the term 'agency' as defined in section 551(1) of this title includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (*including the Executive Office of the President*), or any independent regulatory agency." (emphasis added)

In explaining the expanded definition of the term "agency", the Conference Report[107] states that:

> With respect to the meaning of the term 'Executive Office of the President' the conferees intend the result reached in Soucie v. David, 145 U.S. App.D.C. 144, 448 F.2d 1067 (1971). The term is not to be interpreted as including the President's immediate personal staff or units in the Executive Office whose sole function is to advise and assist the President.

Thus, Congress has excluded those White House materials and tape-recorded conversations between the President and his aides from the purview of the Act by the new amendments. It is the opinion of this Court that in view of these new amendments and Congress's intention, and considering the doctrine of separation of powers, the present definition of the term "agency" should not include the White House Office but should only be extended to the Executive Office of the President, as previously differentiated. This, however, does not mean that "records" of the executive agencies and departments which were kept in the White House Office are immune from access under the FOIA, *See* Environmental Protection Agency v. Mink, *supra*; Soucie v. David, *supra*. Therefore, the FOIA plaintiffs are entitled to a declaration as to such, as well as a declaration that they are "records" within the meaning of the FOIA.[108]

This, however, does not dispose of the matter, as former President Nixon contends that even if the "Presidential materials and tapes" do contain such "records", access may not be given to any FOIA applicant since it would violate his alleged constitutional right of "Presidential privilege". The FOIA plaintiffs seek a declaration to the contrary. Further, the question of privilege is also raised with respect to the November 9th Agreement between President Ford and the Special Prosecutor, as well as with respect to the government defendants responding to subpoenas and other Court orders. These, in turn, raise questions under the fourth amendment.

IX. PRIVILEG

A FORMER PRESIDEN ASSERT OR WAIVE LEGE WHICH ATTACH CONFIDENTIAL C TIONS RELATING TO DUCT OF THE OFFICE OF THE PRESIDENT CONTAINED IN PRESIDENTIAL MATERIALS AND TAPE RECORDINGS AS THE PRIVILEGE BELONGS TO THE GOVERNMENT AND MAY ONLY BE ASSERTED OR WAIVED BY THE INCUMBENT PRESIDENT.

[44] Former President Nixon contends that he must have personal and exclusive control of access to and disclosure of Presidential materials and tape recordings which contain confidential communications relating to the conduct of the Office of the President in order to protect and preserve what he denominates as his constitutional right of

107. Conf.Rep. No. 93-1200, 12 U.S.Code Cong. and Admin.News, (December 15, 1974) at p. 6285.

108. Since the FOIA plaintiffs have also sought access, the government will be afforded the opportunity to raise any "exception" applicable, 5 U.S.C. § 552(b)(1–9), or executive privilege. *See* Soucie v. David, *supra*, 145 U.S.App.D.C. 144, 448 F.2d at 1079. This litigation, however, has not reached that stage.

"Presidential privilege." He argues that this privilege has been recognized by the Supreme Court in the recent case of United States v. Nixon, 418 U.S. 683, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974). Based upon this premise, he claims that the defendants, officers of the United States government, may not have access to or disclose the Presidential materials and tape recordings, either to respond to a subpoena or other court order, or pursuant to the November 9th Agreement between President Ford and the Special Prosecutor, or in response to requests by private parties under the Freedom of Information Act.

It is extremely important to articulate the precise parameters of the question presented to the Court. Former President Nixon claims a personal "Presidential privilege" to confidential communications which took place in the Office of the President during his tenure, and which relate to the conduct of the office. He argues that this "Presidential privilege" is distinguishable from "executive privilege", the latter being applicable to state and national security secrets, the former apparently encompassing all communications to and from the former President concerning the conduct of the Office of the President. This presents a difficult definitional problem. On the one hand, the former President defines "Presidential privilege" by the fact of a confidential communication to or from the President, and "executive privilege", on the other hand, by the substance of the information contained therein. Thus, he asserts that even though he has left office, it is he who has the right to assert or waive the "Presidential privilege", but it is the government who has the right to assert or waive the "executive privilege". This dichotomy, however, is unacceptable for numerous reasons.

A. *The Function of the Privilege*

[45] Executive privilege is founded upon the public interest in the effective performance of the constitutional powers and duties assigned to the Executive Branch. *See* Carl Zeiss Stiftung v. E. B. Carl Zeiss, Jena, 40 F.R.D. 318, 325 (D.C.1966) ("executive privilege" is essential to the quality of its functioning). And, based upon the function of executive privilege, it is well-settled that the privilege belongs to the government. United States v. Reynolds, 345 U.S. 1, 8, 73 S.Ct. 528, 97 L.Ed. 727 (1953).

Mr. Nixon, however, relying on the recent Supreme Court case of United States v. Nixon, 418 U.S. 683, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974), contends that unlike executive privilege, the privilege which protects confidential communications of the President relating to the conduct of the Office of the President is a "Presidential privilege" which inures to the President during whose term in office the communications occurred. United States v. Nixon, *supra*, however, does not lend support to Mr. Nixon's reasoning. Rather, the Supreme Court's analysis of the function of the privilege which protects confidential communications relating to the conduct of the Office of the President overwhelmingly supports the contrary conclusion.

In United States v. Nixon, *supra*, the Supreme Court, holding that an assertion of privilege based "only on the generalized interest in confidentiality" could not "prevail over the fundamental demands of due process of law in the fair administration of criminal justice," 418 U.S. at 713, 94 S.Ct. at 3110, recognized that the protection of the confidentiality of presidential communications is constitutionally based, 418 U.S. at 711, 94 S.Ct. at 3109. Significantly, the Court, while noting that the privilege has "all the values to which we accord deference for the privacy of all citizens," determined that the privilege should be recognized because it is in the "public interest" that the "Chief Executive", in the performance of Article II powers, must be free, with his assistants, "to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately." 418 U.S. at 708, 94 S.Ct. at 3107. The privilege accepted by the Supreme Court is not personal, but rather, "the privilege can be said to derive from the supremacy of each branch within its own assigned area of constitutional duties." 418 U.S. at 705, 94 S.Ct. at 3106. The Court opined that the privilege only exists insofar as it "relates to the effective discharge of a President's powers." 418 U.S. at 711, 94 S.Ct. at 3109.

[46–48] The Supreme Court's analysis of the function of the privilege therefore compels only one conclusion, that it inures to the Office of the President, not to any particular office-holder. Thus, the privilege which protects the President's confidential communications must be considered but "one species of executive privilege." Senate Select Committee on Pres. Camp. Act. v. Nixon, 498 F.2d 725, 729 (D.C.Cir., 1974). For, like that which protects military and state secrets, *it is also founded upon the public interest in the effective performance of the constitutional powers and duties assigned to the Executive Branch* and, therefore, also belongs to the government.[109] This is so even if a limited view of the privilege is taken, for it is apparent that the crux of the Supreme Court's decision in United States v. Nixon, *supra*, is that while the privilege protects conversations that have occurred, its true function is to assure that *future* presidents and their assistants will not be inhibited in expressing their "candid, objective, and even blunt or harsh opinions." 418 U.S. at 706, 712, 94 S.Ct. at 3107, 3109, n. 20.

B. *The Exercise of the Privilege*

[49] The assertion or waiver of the privilege is an exercise of the executive power, and since this power is vested in the incumbent President, U.S.Const., Art. II, Sec. I, cl. 1, it follows that the former President may not assert or waive the privilege.[110] Nevertheless, Mr. Nixon contends that since these confidential communications occurred during his tenure in office, he has the right to assert or waive the privilege. The reasons for the above-stated principle, however, require that Mr. Nixon's contention be rejected.

[50] This principle, that the assertion or waiver of the privilege is an exercise of executive power, has been expressed in the "head of the department" concept. In the area of military and state secrets, it is well-settled that "[the privilege] is not to be lightly invoked. There must be a formal claim of privilege, lodged by the *head of the department* which has control over the matter, after actual personal consideration by that officer." United States v. Reynolds, 345 U.S. at 7, 73 S.Ct. at 532 (emphasis added). The reason that the "head of the department" must raise the privilege is apparent.

Only a government official, and particularly the "head of the department", has sufficient knowledge to determine, after "actual personal consideration of the matter," whether the disclosure of certain information would affect, adversely or not, the ongoing interests of the government. For, only (s)he knows what those ongoing interests are. This will depend upon a myriad of information, both current and past, to which only the head of the Department will have access, and which will be necessary to make a decision involving "considerations of policy . . . of extreme magnitude". Ware v. Hylton, 3 Dall (3 U.S. 199, 260 (1796). Clear-

109. It is the general rule that to determine to whom a privilege belongs, the Court must ascertain whom the privilege benefits. *Cf.* Turner v. Black, 19 Ill.2d 296, 166 N.E.2d 588, 595, (1960).

Thus, since the executive privilege exists for the benefit of the people, it is perhaps technically proper to state that the privilege belongs to the people. However, since the government is equatable with the people, U. S.Const., Preamble, it is not misleading to state that the privilege belongs to the government.

110. This was long ago articulated by President John Quincy Adams, who stated: "the right of withholding information pertains to the office and not to the man." Records of a Nation at 162.

ly, a private individual does not have this capacity. For example, in the case of In re Grove, 180 F. 62 (3rd Cir. 1910), a private individual, Grove, had been held in contempt for refusing to produce copies of plans and specifications for the construction of certain torpedo boat destroyers for the United States, for which his company had submitted a bid. The Third Circuit Court of Appeals held that Grove's refusal was proper and not contemptuous since only the Secretary of the Navy, who had informed the Court that, after consideration of the matter, disclosure "[would not cause] the discovery of military or other secrets detrimental to the public interest," was in a position to make such a determination. 180 F. at 67.[111] It was upon consideration of the matter as revealed in *Grove* that the Supreme Court in *Reynolds* held that "the privilege belongs to the Government and must be asserted by it; it can neither be claimed nor waived by a private party." 345 U.S. at 7, 73 S.Ct. at 532 (citing In re Grove).

[51] The rule announced in *Reynolds, supra,* is also applicable to confidential communications of a President pertaining to the conduct of the Office of the President. This privilege is identical[112] to the privilege which protects all executive department "documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated." *Carl Zeiss, supra,* 40 F.R.D. at 324. *See also,* Black v. Sheraton Corp. of America, et al., 371 F.Supp. 97, 100 (D.D.C.1974); United States v. Article of Drug, etc., 43 F.R.D. 181, 190 (D.Del.1967); Rosee v. Board of Trade of City of Chicago, 36 F.R.D. 684, 689 (N.D.Ill.1965); United States v. Procter & Gamble Co., 25 F.R.D. 485, 489 (D.N.J.1960); Kaiser Aluminum & Chemical Corp. v. United States, 157 F.Supp. 939, 944, 141 Ct.Cl. 38 (1958); Gardner v. Anderson, 9 Fed.Cas. p. 1158, No. 5220 (C.C.D.Md. 1876). In these cases, while the fact of the communication is privileged, as with all privileges,[113] the substance of the communication has not been separated from the fact thereof; "While it is agreed that the privilege extends to all military and diplomatic secrets, its recognition is not confined to data qualifying as such." *Carl Zeiss, supra,* 40 F. R.D. at 324. Therefore, the courts in such cases have uniformly adopted the "head of the department" principle, requiring the head of the department to assess the impact of disclosure, not only on the free flow of information, but the impact of the substance of the disclosure upon ongoing governmental interests. *See, e. g., Carl Zeiss, supra,* 324 n. 15 (citing numerous cases where the courts have noted the impact of the substance

111. Notably, the Department of the Navy originally had broadly asserted a privilege in the trial court but that court postponed the matter "to learn further from the Navy Department what its position in the matter really was", after which the Secretary of the Navy gave the court a different reply, "qualifying in a very material respect the answer [the Department] had previously given to the court's request for copies of the papers." 180 F. at 70.

112. It is arguable that the Supreme Court in United States v. Nixon, *supra,* did not bifurcate the privilege which protects confidential communications to the Chief Executive and that which is afforded to the executive departments and agencies, since the court cited in support of the privilege such cases as *Carl Zeiss, supra,* which involved only executive departments and not the Office of the President. This conclusion is further supported when it is considered that the executive departments and agencies are merely extensions of the Office of the Chief Executive, which aid in the performance of Article II powers, U.S.Const., Art. II, Sec. 2. And, therefore, the Supreme Court's decision in United States v. Nixon may be considered nothing more than a determination that the heretofore common law privilege which has protected confidential communications in the Executive Branch is constitutionally based. 418 U.S. at 704–710, 94 S.Ct. at 3106–3109.

113. The fact of the communication and the substance thereof may not be so easily separated. *See* Branzburg v. Hayes, 408 U.S. 665, 92 S.Ct. 2646, 33 L.Ed.2d 626 (1972).

of the communication as well as the fact of the communication). Thus, since the fact of the communication can similarly not be separated from the substance thereof with respect to the communications of the President pertaining to the conduct of the Office of the President,[114] the head of the department rule of *Reynolds* must be applied.[115]

That the rule in *Reynolds, supra,* must be applied with respect to confidential communications of the President relating to the conduct of the Office of the President is even more compelling than with respect to the executive departments, since the former relate to decisions and policies at the highest level of the government. Thus, the disclosure of even the most innocuous statement about a foreign power, for example, may have the gravest repercussions. *See* United States v. Nixon, *supra,* 418 U.S. at 714–716, 94 S.Ct. at 3111.

Thus, the assertion or waiver of the privilege which protects confidential communications relating to the conduct of the Office of the President, even though they are those of a former President, must be exercised by the incumbent President. It may not be asserted or waived by a private party, even a former President; it is apparent that Mr. Nixon, although a former President, is no longer privy to the myriad of information concerning ongoing governmental interests which would be essential to the exercise of the privilege. Therefore, he lacks the capacity to assert or waive the privilege.[116] Thus, the preservation or disclosure of confidential communications pertaining to the conduct of the Office of the President must devolve upon the incumbent President.

This conclusion would also obtain even if the substance of the communication were not considered. For, the privilege of confidentiality of presidential communications is not only based upon the public interest, but also, it is to be exercised in the public interest.[117] "If a President concludes that compliance with a subpoena would be injurious to the public interest he may . . . invoke a claim of privilege." United States v. Nixon, 418 U.S. at 713, 94 S.Ct. at 3110. Thus, even where the disclosure of the substance of the communication would not be detrimental to ongoing governmental interests, an assessment must be made of whether the public interest in disclosure outweighs the affect upon the free flow of information within the Office of the President. And, only the incumbent President is in a position to assess the public interest, and balance these interests. Clearly, even in such

114. Although the Supreme Court in United States v. Nixon stated that case did not involve "the President's interest in preserving state secrets," 418 U.S. at 712, 94 S.Ct. at 3109, n. 19, the Court did not divorce the substance of the communication from the fact of the communication. The Court in fact found that since the President could not give any reason for withholding the information contained in the conversation, the general claim of confidentiality was insufficient to overcome the specific needs of another significant public interest, that of the "fair administration of criminal justice." 418 U.S. at 711–712, 94 S.Ct. at 3109–3110.

115. This rule has in fact been applied to confidential White House communications. Center for Corporate Responsibility v. Shultz, 368 F.Supp. 863 (D.D.C.1973). There, the district court had ordered the production of a tape recorded conversation between President Richard M. Nixon, White House counsel John W. Dean, III, and Chief of Staff H. R. Haldeman, concerning political influence of the Internal Revenue Service relating to the denial of an application for tax exemption of the Center for Corporate Responsibility. Subsequent to the court's order, White House counsel, noting his general authority in such matters, filed a claim of executive privilege. The court, finding the rule in *Reynolds* applicable, held that since only the President was in a position to assert the privilege, the claim was improperly asserted. 368 F.Supp. at 872–873.

116. This is even more apparent with respect to the heirs of the former President who have never held the office.

117. "[The] application of Executive privilege depends on a weighing of the public interest protected by the privilege against the public interests that would be served by disclosure in a particular case." Nixon v. Sirica, *supra,* 159 U.S.App.D.C. 58, 487 F.2d at 716.

instances, "[the privilege] is not to be lightly invoked." *Reynolds, supra,* 345 U.S. at 7, 73 S.Ct. at 532.

Moreover, it is the incumbent President, not the former President, who bears the legal and political responsibility for either asserting or waiving the privilege. It is the incumbent President who is held legally responsible for his conduct, U.S.Const. Art. II, Sec. IV, and it is the incumbent President who is held politically responsible; he, not the former President, must stand for reelection, U.S.Const., Art. II, Sec. I, cl. 1. And, even though there are statutes which would prohibit the former President from disclosing certain information,[118] these statutes are not all-inclusive.

The court concludes that the privilege which protects confidential communications relating to the conduct of the Office of the President belongs to the government, and must be asserted or waived by the incumbent President, and not by the former President or any other private citizen.

C. *The Scope of Protection of the Privilege*

Former President Nixon contends that if he is unable to control the assertion or waiver of the privilege, he will lose the protection that the privilege would afford him if he were still in office.

Preliminarily, as this Court has earlier set forth, the privilege does not exist for the protection of the officeholder, but rather for the office and, therefore, the public. Yet, the effect of the privilege is to shield public officials to a limited extent. They are protected from public disclosure of "errors or bad judgment," *Kaiser Aluminum, supra,* 157 F. Supp. at 946, except where the privilege must yield to other interests. *See* United States v. Nixon, *supra.* However, this protection is limited:

> "It is true, of course, that the Executive cannot, any more than the other branches of government, invoke a general confidentiality privilege to shield its officials and employees from investigations by the proper governmental institutions into possible criminal wrongdoing."

Senate Select Comm. on Pres. Cam. Act. v. Nixon, *supra,* D.C.Cir., 498 F.2d at 731 (footnote omitted).

See also, Nixon v. Sirica, *supra,* 159 U.S.App.D.C. 58, 487 F.2d at 713.

[52] It is against this background that former President Nixon strongly asserts that if the court rules that only an incumbent President may assert or waive the privilege which protects the confidential communication of the President, including those of a former President, relating to the conduct of the Office of the President, it would subject each President to the intolerable possibility that his successor would lay bare, either out of spite or for political gain, those confidential communications of his predecessor which reveal "errors or bad judgment." But such an assertion is untenable as the privilege is part of the Constitution, United States v. Nixon, *supra,* which each President has a constitutional duty to "preserve, protect and defend." U.S.Const., Art. II, Sec. I, cl. 7. This duty carries with it the responsibility that each President not disclose the confidential communications of his predecessor except upon the same consideration that he is required to give to his own confidential communications with his assistants, i. e., when it is in the "public interest". United States v. Nixon, *supra,* 418 U.S. at 713, 94 S.Ct. at 3110 (Section D). And, it matters not that a former President has no remedy at law or equity to prohibit disclosures by his successors, or to recover damages therefrom for his successors, having taken the "oath of office" may, upon a violation of the duty to protect such communications, be held responsible. U.S.Const., Art. II, Sec. I, cl. 1; Sec. IV.

Former President Nixon, however, claims that a "Presidential privilege" is essential to a former President; otherwise, he could be compelled to reveal confidential communications once he had left office.[119] This Court has rejected any notion of a *personal* "Presidential privilege". However, this does not mean that a President, once he has left office, can be compelled to reveal confidential communications which relate to the conduct of the Office of the President. For, a President, in this sense, is analogous to an attorney.

[53, 54] When an attorney is subpoenaed or summoned to testify about confidential communications protected by the attorney-client privilege, he may not do so without the informed consent of his client. For, the attorney-client privilege is personal to the client, and can only be waived by the client. *See* Magida v. Continental Can Co., 12 F.R.D. 74, 78 (S.D.N.Y.1951). Similarly, the former President, when called upon to testify about confidential communications concerning the conduct of the Office of the President, could not do so without the informed consent of the client—in this case, the public. However, unlike the attorney-client privilege, the public expresses its consent through its designated representative,[120] the incumbent President. Thus, it would appear that when the former President is subpoenaed or summoned to testify concerning confidential communications relating to the conduct of the Office of the President, the incumbent President would have to intercede in order to assert or waive the privilege. This conclusion has found expression in not wholly dissimilar cases. *See e. g.,* Heine v. Raus, 399 F.2d 785 (4th Cir. 1968). However, a final and conclusive determination of this question is not essential for a resolution of the questions herein.

The Court concludes, as a matter of law, that the privilege which attaches to confidential communications relating to the conduct of the Office of the President contained in Presidential materials and tape recordings belongs to the government and may only be asserted or waived by the incumbent President, and not by former President Nixon.

X. FOURTH AMENDMENT

POINT ONE: MR. NIXON'S FOURTH AMENDMENT RIGHTS HAVE NOT BEEN VIOLATED BECAUSE THE NOVEMBER 9TH AGREEMENT IS NOT A GENERAL WARRANT: NOR DOES IT SUBJECT HIM TO AN UNREASONABLE SEARCH AND SEIZURE. HOWEVER, UNDER THE CIRCUMSTANCES, MR. NIXON'S RIGHT OF PRIVACY MUST BE AFFORDED PROTECTION.

This Court, having held that only the incumbent President can assert or waive the privilege which attaches to the confidential communications relating to the conduct of the Office of the President contained in the Presidential materials and taped conversations of the Nixon Administration, cannot enjoin the actions of the defendants or the November 9th Agreement on the basis of a claim of infringement of "Presidential privilege". Mr. Nixon, however, also seeks to enjoin the defendants, who are now acting pursuant to the November 9th Agreement, from infringing upon his alleged fourth amendment rights. In a three-fold allegation, he claims that the November 9th Agreement is a "general warrant", that the defendants' access to the Presidential materials and tape recordings is a violation of his right to be free from unreasonable searches and sei-

118. *See e. g.,* title 18 U.S.C. § 793(d)-(e).

119. In support of this contention, he points to the fact that Harry S. Truman, after he had left office, when summoned to testify before Congress, refused on the ground that he could not do so as it would result in his revealing confidential communications relating to the conduct of the office of the President and, the communications were, therefore, privileged. Brief of Richard M. Nixon in Support of Motion for Preliminary Injunction at 26.

120. *Cf.* In re Investigation of World Arrangements with Relation to . . . Petroleum, 13 F.R.D. 280, 285-286 (D.D.C. 1952).

zures, and that the defendants will also violate his constitutional right of privacy. The Court will deal with each of these arguments in turn, as they are in large part dependent upon each other.

A. *"General Warrant"*

[55] Mr. Nixon contends that the November 9th Agreement is a "general warrant" which is abhorrent to the Constitution, specifically the fourth amendment which was adopted to safeguard against such pernicious practices. *See* Weeks v. United States, 232 U.S. 383, 390, 34 S.Ct. 341, 58 L.Ed. 652 (1914). The November 9th Agreement, set forth in its entirety in Appendix B, however, bears no resemblance to a "general warrant". It does not give the Special Prosecutor the general authority to invade the home and privacy of a citizen and seize his private papers in support of charges against him. *Id.* It is evident from the first paragraph of the agreement that it is a waiver by the incumbent President of the privilege to prevent disclosure of confidential communications between the President, albeit the former President, and his assistants relating to the conduct of the Office of the President:

> "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 . . ." [121]

The agreement does not give the Special Prosecutor the power to indiscriminately search the Presidential materials and tape-recorded conversations. Rather, it specifically limits both the scope and procedures for access. The Special Prosecutor not only must specify "those materials that he has reason to believe are relevant to specified criminal investigations and prosecutions" but also must explain "why access to such materials is important to a full and fair resolution of these investigations and prosecutions." [122]

More importantly, the agreement does not sanction an unlawful intrusion into the privacy of a citizen. Although the agreement does not define the "Presidential materials" referred to in the first paragraph, the United States government and the Special Prosecutor have stated on the record that it only encompasses Presidential materials and tape recordings relating to the conduct of the office of the President. They argue that such access is lawful and is based upon the government's right to access to materials and tape-recorded conversations in which they have an "overriding interest". This theory is extracted from dicta in the case of Folsom v. Marsh, 9 Fed.Cas. 342, 347 (D.Mass.1841) and a recent opinion of the Attorney General.[123] Although this Court has rejected this theory, the access is nevertheless lawful, since this Court has held that these "Presidential material and tapes" do in fact belong to the government, giving it an unfettered right of access.

Thus, there being no grounds for concluding that the November 9th Agreement is a "general warrant", its effectuation can not be enjoined on that basis.

B. *Search and Seizure*

[56] Mr. Nixon's second contention is that any search by the defendants pursuant to the November 9th Agreement would nevertheless violate his fourth amendment right to be free from unlawful searches and seizures. This claim must be considered in light of the following: first, the defendants and the Special Prosecutor have averred that the November 9th Agreement only pertains to Presidential materials and tape-recorded conversations relating to the conduct of the Office of the President; second, this Court has held that these are the property of the United States Government; and, third, they are in the possession of the Executive Branch of the government.

[57–63] There is no cognizable fourth amendment claim by a private citizen with respect to a search by the government of government property in the government's possession, even though the private citizen generated or retained the property as a public official.[124] This is true even though the fourth amendment applies to private materials, Boyd v. United States, 116 U.S. 616, 6 S.Ct. 524, 29 L.Ed. 746 (1886), and private conversations, United States v. United States Dist. Ct., E. D. of Mich., S. D., 407 U.S. 297, 313, 92 S.Ct. 2125, 32 L.Ed.2d 752 (1972), and not to government-owned materials and tape-recorded conversations. *Cf.* Davis v. United States, 328 U.S. 582, 589–591, 66 S.Ct. 1256, 1259, 90 L.Ed. 1453 (1945). And, even where the individual is still in public office, it is well-settled that, "in the case of public records and official documents, made or kept in the administration of public office, the fact of actual possession or of lawful custody would not justify the officer in resisting inspection, even though the record was made by himself and would supply the evidence of his alleged criminal dereliction." Wilson v. United States, 221 U.S. 361, 380, 31 S.Ct. 538, 55 L.Ed. 771 (1912). *See also* Taylor v. United States, 111 U.S.App.D.C. 324, 296 F.2d 446 (1961). This principle has even greater force when the official has left office and no longer is in custody of the materials, for "the settled doctrine is that objection to evidence obtained in violation of the prohibition of [the fourth amendment] may be raised only by one who claims ownership in or right to possession of . . . the property seized . . . ." Gibson v. United States, 80 U.S.App.D.C. 81, 149 F.2d 381, 384 (1945).[125]

It is the conclusion of this Court that there can be no violation of Mr. Nixon's fourth amendment right to be free from unlawful searches and seizures with respect to the Presidential materials and tape-recorded conversations relating to

121. The striking similarity of this language with that of the Supreme Court, in United States v. Nixon, 418 U.S. at 712, 94 S.Ct. at 3110, is quite evident. And, it must also be pointed out that President Ford, although waiving the general privilege as to confidentiality, did not waive the privilege as to national security matters. *See* Appendix B, ¶ 2.

122. Appendix B, ¶ 1 and 1(a) & (b).

123. *See* footnote 88, *supra*.

124. The fourth amendment protects an individual from unlawful government seizures of private property in the individual's possession; it does not protect seizures of private property lawfully in the possession of the government. *See* Burdeau v. McDowell, 256 U.S. 465, 476, 41 S.Ct. 574, 65 L.Ed. 1048 (1921). Thus, it is difficult to comprehend how there could be any unlawful search and seizure of government property in government possession. The applicable constitutional provision would appear to be the fifth amendment, which protects an individual from compulsory production of evidence to be used against him. *See* United States v. Davis, *supra*, 328 U.S. at 587, 66 S.Ct. 1256. There is no indication, however, that the Special Prosecutor intends to use the Presidential materials and tape-recorded conversations in a criminal proceeding against the former President. And, the Court takes judicial notice of the fact that President Ford has granted, and Mr. Nixon has accepted, a full and unconditional pardon. Such a pardon dispels any possibility that a fifth amendment claim could be cognizable. Brown v. Walker, 161 U.S. 591, 598–599, 16 S.Ct. 644, 40 L.Ed. 819 (1896). However, since Mr. Nixon has not contested the November 9th Agreement on fifth amendment grounds, it is unnecessary for the Court to embark upon consideration of such issues.

125. Although the Supreme Court has held that property rights and the right to possession are not controlling fourth amendment considerations, Warden v. Hayden, 387 U.S. 294, 302–306, 87 S.Ct. 1642, 18 L.Ed.2d 782 (1967), they become significant in the instant matter which is analogous to the situation where one citizen seeks to prevent the search of another citizen's property. *See* Gibson, *supra*, 149 F.2d at 384. In such situations, there is no cognizable fourth amendment claim. *Id.*

the conduct of the Office of the President, which are owned by and are in the possession of the United States Government.

C. *Right of Privacy*

Having rejected Mr. Nixon's general warrant and search and seizure allegations, the Court will now address the merits of his allegation of infringement of his right of privacy.

[64, 65] The essential purpose of the fourth amendment is to shield the citizen from unwarranted intrusions into his privacy. Cardwell v. Lewis, 417 U.S. 583, 94 S.Ct. 2464, 2469, 41 L.Ed.2d 325 (1974) (and cases cited therein). "This protection reaches all alike, whether accused of a crime or not, and the duty of giving to it force and effect is obligatory upon all entrusted under our Federal system with the enforcement of the laws." Weeks v. United States, 232 U.S. 383, 392, 34 S.Ct. 341, 344, 58 L.Ed. 652 (1914). Thus, even though Mr. Nixon is not the object of the criminal process, he has a right to have the privacy of both his private papers and conversations protected. But, such protection is not afforded unless it can be found that he has a reasonable expectation that they will remain free from governmental intrusion. *See* Mancusi v. DeForte, 392 U.S. 364, 88 S.Ct. 2120, 20 L.Ed.2d 1154 (1968); Katz v. United States, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967).[126]

[66, 67] The fact that personal property is in the possession of the government does not in and of itself eliminate an expectation of privacy. *See* United States v. Blok, 88 U.S.App.D.C. 326, 188 F.2d 1019, 1021 (1951). Here, former President Nixon left office under unique circumstances, making it difficult for him to remove with him his personal materials and tape-recorded conversations. The evidence indicates that at the time of his departure, they were being prepared for transfer to his home in California. Certainly, the fact of his unusual departure from office did not diminish his nor the government's expectation that these materials would remain free from intrusion. Thus, his right of privacy deserves protection.

However, the need to protect Mr. Nixon's right of privacy with respect to personal materials and tape-recorded conversations springs not from an intended governmental intrusion, but from the circumstances and the very nature of the tapes. The Special Prosecutor and the government defendants have emphatically stated that they have no interest in Mr. Nixon's personal materials and tape-recorded conversations. They admit, however, that in locating certain government-owned materials and tape-recorded conversations, specified by the Special Prosecutor pursuant to the November 9th Agreement, there may be inadvertent examination of the private materials and tape-recorded conversations. This is due to the fact, recognized by all the parties, that official and personal materials and conversations are intermingled. This is supported by the evidence adduced at the hearings which revealed that in the haste to compile and prepare the materials for transfer, no system for separating personal from official materials was employed.[127] And, although some of the boxes in which the material was placed are marked, there is no assurance as to the nature of all of the materials in a particular box or file.[128] With respect to the tape-recorded conversations, it is obvious and uncontested that they are interspersed with official and personal matters.

The Court, therefore, finds that Mr. Nixon does have a cognizable right of privacy claim to the personal materials and tape-recorded conversations which right is threatened not by an intended governmental intrusion, but by the possibility of inadvertent examination in the course of the defendants' lawful examination of Presidential materials and tape-recorded conversations relating to the conduct of the Office of the President. Having so found, the Court turns to the question of the nature of the remedy to be applied under the circumstances.

POINT TWO: MR. NIXON'S RIGHT TO PRIVACY DOES NOT ENTITLE HIM TO AN INJUNCTION, BUT THE COURT HAS THE POWER TO PROTECT HIS RIGHTS AND THOSE OF THE GOVERNMENT BY FASHIONING A REMEDY.

[68, 69] This Court has the power to issue an injunction to prevent an injury to a constitutionally-protected right, in this case, the right of privacy. *See,* Bell v. Hood, 327 U.S. 678, 66 S.Ct. 773, 90 L.Ed. 939 (1946)[129] *see also* Bivens v. Six Unknown Named Agents of the Fed. Bur. Narc., 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971) (especially Harlan, Jr., concurring, 398–412). Such a remedy, however, is in this instance clearly inappropriate. The Special Prosecutor and the government defendants have, as previously noted, evinced no interest in Mr. Nixon's personal materials and tape-recorded conversations. This Court will not enjoin them from doing an act which they do not themselves wish to do. Nevertheless, the Special Prosecutor and the government, having candidly conceded that as a result of intermingling the possibility of unintended infraction exists, have recommended that the Court fashion a remedy suited to the circumstances. It is clear that this Court has the power, and indeed the duty, to fashion such a remedy. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163, 2 L.Ed. 60 (1803):

> "the government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right."

See also, Bivens, supra; J. I. Case Co. v. Borak, 377 U.S. 426, 84 S.Ct. 1555, 12 L.Ed.2d 423 (1964); Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 77 S.Ct. 912, 1 L.Ed.2d 972 (1957); Bell v. Hood, *supra;* Dellinger, Of Rights and Remedies: The Constitution as a Sword, 85 Harv.L.Rev. 1532, 1540–43 (1971–72).

In light of the circumstances, the problem facing the Court is formulating a procedure which will both effecuate the interests and protect the rights of the parties. This is not a novel problem, even with respect to these very same tape-recorded conversations. *See* Nixon v. Sirica, *supra,* 159 U.S.App.D.C. 58, 487 F.2d at 718–721.

Although the overall controversy concerns approximately 42 million materials, including documents, papers, tapes, etc., the Special Prosecutor, the government, and Mr. Nixon agree that their dispute involves a significantly smaller number of items. These include approximately 138 boxes of papers and 900 tape-recorded conversations. Further, the Special Prosecutor, pursuant to the November 9th Agreement, seeks only a relatively small portion of these materials to be used for investigations, for ongoing grand injuries, and for prosecutions. And, in an effort to aid the Court, the Special Prosecutor has sug-

126. Although it is arguable that the Presidential Recordings and Materials Preservation Act, *supra,* may have taken by eminent domain these private materials and tape-recorded conversations, this is still in dispute and is the subject matter of Mr. Nixon's newly-filed suit. *See* footnote 64, *supra.* Thus, the Court will not reject Mr. Nixon's privacy claim on that basis. Further, a strong argument may be made that the Act in fact protects his right of privacy. *See* section 104(a).

127. Testimony of Mr. Jack Nesbitt, TR–S2–S3, S6–94, 104–105; *See* also, Deposition of Mr. Nesbitt at 10–11, 27, 38–40, 65, 38–42.

128. *Id.*

129. The Court, articulating the rule, stated ". . . it is established practice for this Court to sustain the jurisdiction of federal courts to issue injunctions to protect rights safeguarded by the Constitution . . . ". 327 U.S. at 684, 66 S.Ct. at 777 (footnote omitted).

gested several alternative procedures for resolving the question of access.[130]

[70] Initially, it must be recognized that Mr. Nixon, not the government or Special Prosecutor, must make the preliminary determination of what is private. For if the government or Special Prosecutor were to examine the materials and tape-recorded conversations for this purpose, they would be doing that which any procedure must be designed to prevent—the intrusion into Mr. Nixon's privacy. Allowing Mr. Nixon to make this initial determination, however, must not result in the frustration of the interests of the government in immediate and unfettered access to materials and tape-recorded conversations relating to the conduct of the Office of the President. Therefore, the Court, based upon the recommendations of the Special Prosecutor, will require the following procedure:[131]

1. *Documents:* In effectuating the terms and conditions of the November 9th Agreement, the government defendants, or their agents, prior to any governmental examination of the materials, shall permit Mr. Nixon or his counsel, (a) to segregate from any box or file, any document which is deemed personal, as defined by this Court, (b) to mark those portions of any document which are deemed private, as defined by this Court, without destroying or impairing the integrity of that portion or any other portion of the document;

2. *Tapes:* In effectuating the terms and conditions of the November 9th Agreement, the government defendants, or their agents, prior to any governmental examination of the tape-recorded conversations, shall permit Mr. Nixon or his counsel to listen to those tape-recorded conversations and, if any such tape-recorded conversation contains matters which are deemed private, as defined by this Court, then Mr. Nixon or his counsel shall so designate.

This procedure is to be effectuated as follows:

(a) The defendants shall specify one individual official of the government having expertise in the use of tape recording mechanisms (hereinafter, "operator"), who at all times shall operate the mechanisms chosen by the operator for use in this procedure; and

(b) The operator shall employ two tape recorders, one (hereinafter, "recorder A") of which shall include the following features: (1) a single-listening device, commonly known as headphones, and (2) a digital "counter"; the other (hereinafter, "recorder B") shall include the capacity to duplicate the recording from recorder A; and

(c) When Mr. Nixon, or his counsel, are in the process of listening to the tapes, he shall utilize the single-listener device; and

(d) The operator shall play the tape on recorder A and duplicate the tape onto recorder B, and when Mr. Nixon or his counsel deem any conversation or portion thereof as private, as defined by this Court, the operator shall stop recorder B at the commencement of that conversation or portion thereof so as not to record that conversation or portion thereof on the tape on recorder B, and shall commence the tape on recorder B at the termination of the conversation or portion thereof designated as private, and the operator shall also, utilizing the "counter", mark in a log the digital number of the commencement and termination of the conversation or portion thereof designated as private.

Thus, there will be produced one duplicate for use without any private conversations or portions thereof. And, if the original tape or tapes are to be used, the private conversations or portions thereof can be avoided by reference to the log and the digital numbers therein.

The Court is of the belief that the above procedure will be accomplished with the full cooperation of the parties and with all deliberate speed.

It is recognized by all parties that disputes will arise with respect to the validity of the claim that a particular material or tape-recorded conversation, or portion thereof, is private. When such a dispute arises, upon notice of counsel, the Court shall examine the material or tape-recorded conversation, or portion thereof, *in camera*. This shall be followed by a hearing in chambers under the procedure set forth below.

The burden of proof as to whether a particular paper or tape-recorded conversation, or portion thereof, is personal shall be borne by Mr. Nixon. The primary reason for placing the burden of proof on Mr. Nixon is that he alone will have "access to knowledge about the fact in question." James, Civil Procedure, 257 (1965) (citing Maguire, Evidence, Common Sense and Common Law 179 (1947)). The government and the Special Prosecutor are at an obvious disadvantage since they will not have examined the materials or tape-recorded conversations, and, therefore, will not be able to say with sufficient accuracy why a particular paper or tape-recorded conversation, or portion thereof, is or is not private or official. Thus, the burden must fall to the party having the superior knowledge of the facts in question.

Placing the burden on Mr. Nixon also comports with the traditional reason for allocating the burden of proof. The government and the Special Prosecutor do not seek access to these private materials and tape-recorded conversations. Rather, it is Mr. Nixon as plaintiff who seeks to protect his privacy therein. Thus, the burden of proof must be placed upon Mr. Nixon, who relies upon the essential fact that a particular paper or tape-recorded conversation or portion thereof is private to establish his claim for relief. *See* 9 Wigmore, Evidence § 2486 (3d ed. 1940).

Furthermore, the Court will not require that the government or Special Prosecutor demonstrate a particular need for a particular paper or tape-recorded conversation prior to the *in camera* inspection. Although this is contrary to the procedure set forth in Nixon v. Sirica, supra, 159 U.S.App.D.C. 58, 487 F.2d at 716–718, and approved in United States v. Nixon, 418 U.S. at 712–716, 94 S.Ct. at 3110–3111, there are obvious reasons for not adopting that requirement in the instant matter. There the taped conversations were cloaked in a "presumptive privilege", since their production was opposed on the basis of executive privilege. 487 F.2d at 716; 418 U.S. at 708, 94 S.Ct. at 3108. The presumption was based upon a deference to a determination of a co-equal branch of the government and upon the great public interest in nondisclosure. 487 F.2d at 717; 418 U.S. at 706–707, 94 S.Ct. at 3107, 3111. These considerations are not extant where the sole reason for opposing mere inadvertent examination is the personal right of privacy.

Thus, the Court will require that when a dispute arises, Mr. Nixon shall submit to the Court, the government, and the Special Prosecutor, a specific statement designating with particularity those materials or tape-recorded conversations, or portions thereof, which he believes should not be examined. This shall be accompanied by a detailed statement of the reasons why the particular materials or tape-recorded conversations are to be considered private. Such statement shall be drawn in such a manner so as not to compromise the substance of the materials or conversations

130. Response of the Special Prosecutor to Mr. Nixon's Report to the Court, January 2, 1975.

131. This procedure is delineated in terms of the effectuation of the November 9th Agreement. However, the same procedure is intended to apply with equal force to requests for Presidential materials or tape-recorded conversations when such requests are made pursuant to a subpoena or court order, or by way of application under the Freedom of Information Act. As discussed in Section VIII, *supra,* requests under the FOIA are proper when the materials or conversations being sought were generated by executive departments or by the Executive Office of the President; requests are not within the scope of the FOIA when the materials or conversations being sought were generated by the White House Office.

for which protection is sought. Whereupon the government and the Special Prosecutor shall file with the Court and Mr. Nixon a response thereto, with that degree of specificity as is possible using available materials.[132] Those materials and/or tape-recorded conversations shall be submitted to the Court for an *in camera* inspection, to be followed by a hearing in chambers.

Following the *in camera* inspection and the hearing in chambers, the Court will either (a) uphold or deny the claim, or (b) uphold or deny the claim in part, and thereupon designate that which is private. These findings shall be considered final for purposes of appeal.

XI. CONCLUSION

In accordance with this Opinion, and the findings of fact and conclusions of law contained herein, the Court will issue an Order of even date herewith rendering judgment which grants or denies total or partial relief to the parties based upon their claims.

APPENDIX A

September 6, 1974

Honorable Arthur F. Sampson
Administrator
General Services Administration
Washington, D.C.

Dear Mr. Sampson:

In keeping with the tradition established by other former Presidents, it is my desire to donate to the United States, at a future date, a substantial portion of my Presidential materials which are of historical value to our Country. In donating these Presidential materials to the United States, it will be my desire that they be made available, with appropriate restrictions for research and study.

In the interim, so that my materials may be preserved, I offer to transfer to the Administrator of General Services (the "Administrator"), for deposit, pursuant to 44 U.S.C. Section 2101, et seq., all of my Presidential historical materials as defined in 44 U.S.C. Section 2101 (hereinafter "Materials"), which are located within the metropolitan area of the District of Columbia subject to the following:

1. The Administrator agrees to accept solely for the purpose of deposit the transfer of the Materials, and in so accepting the Materials agrees to abide by each of the terms and conditions contained herein.

2. In the event of my death prior to the expiration of the three-year time period established in paragraph 7A hereof, the terms and conditions contained herein shall be binding upon and inure to the benefit of the executor of my estate for the duration of said period.

3. I retain all legal and equitable title to the Materials, including all literary property rights.

4. The Materials shall, upon acceptance of this offer by the Administrator, be deposited temporarily in an existing facility belonging to the United States, located within the State of California near my present residence. The Materials shall remain deposited in the temporary California facility until such time as there may be established, with my approval, a permanent Presidential archival depository as provided for in 44 U.S.C. Section 2108.

5. The Administrator shall provide in such temporary depository and in any permanent Presidential archival depository reasonable office space for my personal use in accordance with 44 U.S.C. Section 2108(f). The Materials in their entirety shall be deposited within such office space in the manner described in paragraph 6 hereof.

132. These include materials such as White House diaries, logs, indices, etc., that the Special Prosecutor has said are available for this use.

6. Within both the temporary and any permanent Presidential archival depository, all of the Materials shall be placed within secure storage areas to which access can be gained only by use of two keys. One key, essential for access, shall be given to me alone as custodian of the Materials. The other key may be duplicated and entrusted by you to the Archivist of the United States or to members of his staff.

7. Access to the Materials within the secure areas, with the exception of recordings of conversations in the White House and the Executive Office Building which are governed by paragraphs 8 and 9 hereof, shall be as follows:

   A. For a period of three years from the date of this instrument, I agree not to withdraw from deposit any originals of the Materials, except as provided in subparagraph B below and paragraph 10 herein. During said three-year period, I may make reproductions of any of the originals of the Materials and withdraw from deposit such reproductions for any use I may deem appropriate. Except as provided in subparagraph B below, access to the Materials shall be limited to myself, and to such persons as I may authorize from time to time in writing, the scope of such access to be set forth by me in each said written authorization. Any request for access to the Materials made to the Administrator, the Archivist of the United States or any member of their staffs shall be referred to me. After three years I shall have the right to withdraw from deposit without formality any or all of the Materials to which this paragraph applies and to retain such withdrawn Materials for any purpose or use I may deem appropriate, including but not limited to reproduction, examination, publication or display by myself or by anyone else I may approve.

   B. In the event that production of the Materials or any portion thereof is demanded by a subpoena or other order directed to any official or employee of the United States, the recipient of the subpoena or order shall immediately notify me so that I may respond thereto, as the owner and custodian of the Materials, with sole right and power of access thereto and, if appropriate, assert any privilege or defense I may have. Prior to any such production, I shall inform the United States so it may inspect the subpoenaed materials and determine whether to object to its production on grounds of national security or any other privilege.

8. The tape recordings of conversations in the White House and Executive Office Building which will be deposited pursuant to this instrument shall remain on deposit until September 1, 1979. I intend to and do hereby donate to the United States, such gift to be effective September 1, 1979, all of the tape recordings of conversations in the White House and Executive Office Building conditioned however on my continuing right or access as specified in paragraph 9 hereof and on the further condition that such tapes shall be destroyed at the time of my death or on September 1, 1984, whichever event shall first occur. Subsequent to September 1, 1979 the Administrator shall destroy such tapes as I may direct. I impose this restriction as other Presidents have before me to guard against the possibility of the tapes being used to injure, embarrass, or harass any person and properly to safeguard the interests of the United States.

9. Access to recordings of conversations in the White House and Executive Office Building within the secure areas shall be restricted as follows:

A. I agree not to withdraw from deposit any originals of the Materials, except as provided in subparagraph B and paragraph 10 below, and no reproductions shall be made unless there is mutual agreement. Access to the tapes shall be limited to myself, and to such persons as I may authorize from time to time in writing, the scope of such access to be set forth by me in each said written authorization. No person may listen to such tapes without my written prior approval. I reserve to myself such literary use of the Information on the tapes.

B. In the event that production of the Materials or any portion thereof is demanded by a subpoena or other order directed to any official or employee of the United States, the recipient of the subpoena or order shall immediately notify me so that I may respond thereto, as the owner and custodian of the Materials, with sole right and power of access thereto and, if appropriate, assert any privilege or defense I may have. Prior to any such production, I shall inform the United States so it may inspect the subpoenaed materials and determine whether to object to its production on grounds of national security or any other privilege.

10. The Administrator shall arrange and be responsible for the reasonable protection of the Materials from loss, destruction or access by unauthorized persons, and may upon receipt of any appropriate written authorization from the Counsel to the President provide for a temporary re-deposit of certain of the Materials to a location other than the existing facility described in paragraph 4 herein, provided however that no dimunition of the Administrator's responsibility to protect and secure the Materials from loss, destruction, unauthorized copying or access by unauthorized persons is affected by said temporary re-deposit.

11. From time to time as I deem appropriate, I intend to donate to the United States certain portions of the Materials deposited with the Administrator pursuant to this agreement, such donations to be accompanied by appropri restrictions as authorized by 44 U.S.C. Section 2107. However, prior to such donation, it will be necessary to review the Materials to determine which of them should be subject to restriction, and the nature of the restrictions to be imposed. This review will require a meticulous, thorough, time-consuming analysis. If necessary to fulfill this task, I will request that you designate certain members of the Archivist's staff to assist in this review under my direction.

If you determine that the terms and conditions set forth above are acceptable for the purpose of governing the establishment and maintenance of a depository of the Materials pursuant to 44 U.S.C. Section 2101 and for accepting the irrevocable gift of recordings of conversations after the specified five year period for purposes as contained in paragraph 8 herein, please indicate your acceptance by signing the enclosed copy of this letter and returning it to me. Upon your acceptance we both shall be bound by the terms of this agreement.

Sincerely,

/s/ Richard Nixon

Accepted by: Arthur F. Sampson
Administrator General Services Administration
/s/ Arthur F. Sampson
9/7/74

APPENDIX B

NOVEMBER 9, 1974 AGREEMENT

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

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

NOW, THEREFORE, the undersigned have agreed as follows:

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

a. *Documents*

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

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

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

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

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

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

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

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

5. The parties to this Agreement shall move jointly to modify, if necessary, the temporary restraining order as now outstanding in Civil Action number 74-1518 and in consolidated cases in the

United States District Court for the District of Columbia to permit implementation of this Agreement.

/s/ Philip W. Buchen Nov. 8, 1974
Philip W. Buchen
Counsel to the President

/s/ Arthur F. Sampson 11/9/74
Arthur F. Sampson
Administrator of General Services

/s/ H. Stuart Knight 11/9/74
H. Stuart Knight
Director, United States Secret Service

/s/ Henry S. Ruth, Jr. Nov. 8, 1974
Henry S. Ruth, Jr.
Special Prosecutor
Watergate Special Prosecution Force

KEYSTONE COLLECTION SERVICE INC., Plaintiff,

v.

The Honorable Luis Silva RECIO, Secretary of the Department of Labor of the Commonwealth of Puerto Rico, et al., Defendant.

Civ. No. 74-716.

United States District Court,
D. Puerto Rico.
Jan. 23, 1975.

Plaintiff filed complaint for injunctive relief on ground that the "Christmas Bonus Law" of the Commonwealth of Puerto Rico was unconstitutional. The District Court, Juan R. Torruella, J., held that a substantial federal question warranting convening of a three-judge court was not presented in that the "Christmas Bonus Law" fits perfectly within the group of laws created with a social redeeming value and purpose and is not unconstitutional as depriving an individual of his property without due process.

Dismissed.

1. Courts ⟹101.5(1)

Test for convening of a three-judge court is whether a substantial constitutional question is presented. 28 U.S.C.A. § 2281 et seq.

2. Constitutional Law ⟹81

The police power of the state generally extends to all public needs. U.S.C.A.Const. Amend. 14.

3. Eminent Domain ⟹13

An ulterior public advantage may justify a comparatively insignificant taking of private property for what in its immediate purpose is a private use. U.S.C.A.Const. Amend. 14.

4. Constitutional Law ⟹81

It is within the power of the government to regulate activities permeated with an aura of public welfare. U.S.C.A.Const. Amend. 14.

5. Constitutional Law ⟹81

Laws regulating areas such as labor relations, minimum wages, commercial and business affairs, securities and antitrust, and the physical environment are within the purview of the Constitution and part of the regulatory powers of the state or federal government. U.S.C.A.Const. Amend. 14.

6. Constitutional Law ⟹278(1)
Labor Relations ⟹1321

The "Christmas Bonus Law" of Puerto Rico fits perfectly within the group of laws created with a social redeeming value and purpose and is not unconstitutional as depriving any one individual of his property without due process in that it answers to local usage and, in opinion of legislature, is necessary to the public welfare of the Commonwealth. 29 L.P.R.A. § 501 et seq.; U.S.C.A.Const. Amend. 14.

7. Courts ⟹101.5(4)

Claim that "Christmas Bonus Law" of Puerto Rico operated to deprive plaintiff of his property without due process of law did not present a substantial federal question warranting convening of a three-judge court. 29 L.P.R.A. § 501 et seq.; 28 U.S.C.A. § 2281 et seq.; U.S.C.A.Const. Amend. 14.

Frank Carbó, San Juan, P. R., and Victor J. Pagan, Rio Piedras, P. R., for plaintiff.

Rolando Silva and Alfredo Raffucci Carrion, Commonwealth of P. R. Dept. of Justice, for defendant.

OPINION AND ORDER

TORRUELLA, District Judge.

On June 21, 1974 plaintiff, Keystone Collection Service, Inc., filed a complaint for injunctive relief pursuant to the provisions of 28 U.S.C.A. Secs. 2281 and 2284, and 42 U.S.C.A., Sec. 1983. In accordance with these provisions, plaintiff further requested that this Court convene a three judge court to consider the constitutionality of Commonwealth Law # 148 of June 30, 1969, appearing at 29 L.P.R.A., Section 501[1] et seq., commonly known as the "Christmas Bonus Law." [2]

Thereafter, on September 12, 1974, Plaintiff filed a motion amending the above complaint to include Hon. Luis Silva Recio, Secretary of the Department of Labor of the Commonwealth of Puerto Rico, as a defendant. Said amendment was allowed by this Court.

In essence, Plaintiff is alleging that the payment of the bonus provided for by said Law # 148 deprives him of his property without due process of law under the Fourteenth Amendment of the United States Constitution.

[1] The issues presently before the Court have been narrowed down to determining whether the constitutional question presented is "substantial", as it is well settled that only if a "substantial" question is raised must a three judge court be convened. Swift & Co., v. Wickham, 382 U.S. 111, 115, 86 S.Ct. 258, 15 L.Ed.2d 194 (1965). The parties agreed, and the Court concurs, that plaintiff has complied with all other necessary requirements to convening a three judge court. 28 U.S.C.A. § 2281 et seq. (See Gilhool v. Chairman, 306 F.Supp. 1202, C.D.C.Pa., 1969; Marín v. U. P. R., 346 F.Supp. 470 (C.D.C.P.R., 1972)).

The doctrine of "substantial federal question" has been defined by the Supreme Court on several occasions. Substantiality has been described as that which is not obviously frivolous, (Hannis Distilling v. Baltimore, 216 U.S. 285, 30 S.Ct. 326, 54 L.Ed. 482 (1910)), not wholly unsubstantial, (Bailey v. Patterson, 369 U.S. 31, 82 S.Ct. 549, 7 L.Ed.2d 512 (1962)), is no longer open to discussion, (McGilvra v. Ross, 215 U.S. 70, 30 S.Ct. 27, 54 L.Ed. 95 (1909)), or is not so attenuated and unsubstantial as to be devoid of merit. (Newburyport v. Newburyport, 193 U.S. 561, 24 S.Ct. 553, 48 L.Ed. 795 (1904)).

In the case of Ex Parte Piresky, 290 U.S. 30, 54 S.Ct. 3, 78 L.Ed. 152 (1933), the Supreme Court expounded the theory which more clearly defined the above doctrine. The Court set forth that an issue is unsubstantial if:

> ". . . 'its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and *leave no room for the inference that the question sought to be raised can be the subject of controversy.*'" (Emphasis added).

See also Goosby v. Osser, 409 U.S. 512, 93 S.Ct. 854, 35 L.Ed.2d 36 (1973).

The above doctrine was affirmed very recently by the Supreme Court in Ha-

1. This statute, supra, broadly provides that any employer who employs one or more employees during the period of twelve months comprised from October 1st to September 30, of any subsequent calendar year, shall pay said employee a bonus equivalent to 2% of the total wages, computed up to a maximum of ten thousand dollars, if said employee works 700 hours or more within the above period. The total amount paid by reason of said bonus is not to exceed 15% of the net annual profits of the employer.

2. There is in fact no reference in this statute to the bonus as being a "Christmas Bonus", which might raise other constitutional issues not presently pertinent.

1ST STORY of Level 1 printed in FULL format.

The Washington Post

July 14, 1996, Sunday, Final Edition

SECTION: A SECTION; Pg. A21

LENGTH: 569 words

HEADLINE: FBI Sharing Files Illegally, Expert Says; Law May Not Allow White House Access

BYLINE: George Lardner Jr., Washington Post Staff Writer

BODY:

The FBI has been violating the law, at least technically, for more than 20 years in providing the White House with sensitive background reports on the people who work there, according to an expert on the Privacy Act.

The FBI is entitled to share the information only with a bona fide federal "agency" and under the law, said Washington lawyer Robert Gellman, the White House counsel's office, which routinely gets the reports, is not an "agency."

FBI officials insist they are on solid legal ground. They say the kind of "agency" they can share their confidential reports with, under regulations published in the Federal Register, does not have the same meaning as the word "agency" does under federal laws such as the Freedom of Information Act or the Privacy Act. In short, the word "agency" means what the FBI says it means, not what the law says it means.

"There is no question that [Gellman] is right in that the definition of 'agency' in the Privacy Act has been interpreted by the courts not to apply to units of the White House that are involved in just advising the president and, specifically, the White House counsel's office," FBI General Counsel Howard M. Shapiro said in an interview.

But all that, he argued, is "beside the point." The 1974 Privacy Act, he said, has a "routine use" provision allowing the FBI to disseminate information for purposes compatible with the reasons for gathering the information. FBI background investigations of White House employees are conducted to determine their suitability for security clearances and access to the White House complex.

As Shapiro pointed out in his report last month on the wrongful disclosure of FBI reports to the Clinton White House, the Privacy Act sets down two requirements for proper "routine use" disclosures: provision of adequate public notice of the "routine uses" that can be expected of the agency collecting the information, and "compatibility" with the purpose for which it was collected.

The FBI published its most recent notice in October 1993, saying that information from its Central Records system may be disclosed to "any federal agency" that needs it, say, for determining suitability or trustworthiness for employment.

However, Shapiro asserted, "our use of the word 'agency' in that Register notice is the common, everyday, colloquial use of the word 'agency.' It does not refer back to, nor does it intend to be limited by" the Privacy Act.

Gellman, who spent 17 years dealing with the Privacy Act as a lawyer and staff director for the House government information subcommittee, and now is a consultant on information and privacy issues, said the FBI reasoning was ridiculous but not surprising.

"What the bureau is saying is that the use of the word 'agency' in a Privacy Act notice doesn't mean what the word 'agency' means in the Privacy Act," Gellman said. "This is a little bit of Alice in Wonderland: Words mean what I want them to mean. But it's the only argument they can make to justify what they've done."

He suggested the bureau consider rewriting its regulations to make them more precise. "There's nothing to stop them from using different words," Gellman said.

Shapiro acknowledged that "clearer language" might be appropriate. But meanwhile, he said, court precedents state that "an agency's construction of its own routine use is entitled to considerable deference."

LANGUAGE: ENGLISH

LOAD-DATE: July 14, 1996

PL93-579 **PRIVACY ACT OF 1974.**
Dec. 31, 1974. 93-2. 15 p. • •Item 575.
88 STAT. 1896.

"To amend title 5, United States Code, by adding a section 552a to safeguard individual privacy from the misuse of Federal records, to provide that individuals be granted access to records concerning them which are maintained by Federal agencies, to establish a Privacy Protection Study Commission, and for other purposes."

Legislative history: (S. 3418 and related bills):

1970 CIS/Annual:
House Hearings: H621-15.

1972 CIS/Annual:
House Document: H920-1.
Senate Hearings: S521-13; S521-14.

1973 CIS/Annual:
House Hearings: H401-7; H401-9; H401-33.
House Report: H403-11 (No. 93-598).

1974 CIS/Annual:
House Hearings: H401-20; H401-40. 103pgs
Senate Committee Prints: S402-29; ~~S522-10~~; ~~S522-12~~; ~~S522-13~~; ~~S522-17~~; ~~S522-18~~; ~~S522-19~~; ~~S522-21~~.
House Report: H403-27 (No. 93-1416, accompanying H.R. 16373). 42pgs
Senate Report: S403-18 (No. 93-1183). 95pgs

Congressional Record Vol. 120 (1974):
Nov. 21, considered and passed Senate.
Dec. 11, considered and passed House, amended, in lieu of H.R. 16373.
Dec. 17, Senate concurred in House amendment with amendments.
Dec. 18, House concurred in Senate amendments.

Weekly Compilation of Presidential Documents Vol. 11, No. 1:
Jan. 1, Presidential statement.

PL93-580 **AMERICAN INDIAN POLICY REVIEW COMMISSION, establishment.**
Jan. 2, 1975. 93-2. 5 p. • •Item 575.
88 STAT. 1910.

"To provide for the establishment of the American Indian Policy Review Commission."

Legislative history: (S.J. Res. 133 and related bill):

1973 CIS/Annual:
Senate Hearings: S441-67.
Senate Report: S443-43 (No. 93-594).

1974 CIS/Annual:
House Hearings: H441-31.
House Report: H443-39 (No. 93-1420, accompanying H.J. Res. 1117).

Congressional Record Vol. 119 (1973):
Dec. 5, considered and passed Senate.

Congressional Record Vol. 120 (1974):
Nov. 19, considered and passed House, amended, in lieu of H.J. Res. 1117.
Dec. 16, Senate concurred in House amendment with an amendment.
Dec. 18, House concurred in Senate amendments to House amendments.

PL93-581 **U.S. CAPITOL GROUNDS, temporary and permanent construction authorization.**
Jan. 2, 1975. 93-2. 2 p. • •Item 575.
88 STAT. 1914.

"Authorizing the Architect of the Capitol to permit certain temporary and permanent construction work on the Capitol Grounds in connection with the erection of an addition to a building on privately owned property adjacent to the Capitol Grounds."

Concerns use of grounds for construction of International Brotherhood of Teamsters headquarters building.

Legislative history: (S.J. Res. 262):

1974 CIS/Annual:
House Report: H643-16 (No. 93-1604).
Senate Report: S643-16 (No. 93-1307).

Congressional Record Vol. 120 (1974):
Dec. 9, considered and passed Senate.
Dec. 19, considered and passed House.

PL93-582 **CHEYENNE-ARAPAHO TRIBES, OKLA., lands in trust.**
Jan. 2, 1975. 93-2. 1 p. • •Item 575.
88 STAT. 1915.

"To declare that certain land of the United States is held by the United States in trust for the Cheyenne-Arapaho Tribes of Oklahoma."

Legislative history: (S. 521 and related bill):

1974 CIS/Annual:
House Report: H443-52 (No. 93-1583, accompanying H.R. 3605).
Senate Report: S443-20 (No. 93-862).

Congressional Record Vol. 120 (1974):
May 28, considered and passed Senate.
Dec. 17, considered and passed House, amended, in lieu of H.R. 3605.
Dec. 18, Senate concurred in House amendment.

PL93-583 **STATE LOTTERIES.**
Jan. 2, 1975. 93-2. 2 p. • •Item 575.
88 STAT. 1916.

"To amend title 18 of the United States Code to permit the transportation, mailing, and broadcasting of advertising, information, and materials concerning lotteries authorized by law and conducted by a State, and for other purposes."

Legislative history: (S. 544 and related bill):

1974 CIS/Annual:
House Report: H523-25 (No. 93-1517, accompanying H.R. 6668).
Senate Report: S523-48 (No. 93-1404).

Congressional Record Vol. 120 (1974):
Dec. 19, considered and passed Senate.
Dec. 20, considered and passed House, amended, in lieu of H.R. 6668; Senate concurred in House amendment.

PL93-584 **JUDICIAL REVIEW OF DECISIONS OF ICC.**
Jan. 2, 1975. 93-2. 2 p. • •Item 575.
88 STAT. 1917.

"To improve judicial machinery by amending title 28, United States Code, with respect to judicial review of decisions of the Interstate Commerce Commission and for other purposes."

Transfers judicial review to courts of appeals.

Legislative history: (S. 663):

1973 CIS/Annual:
Senate Hearings: S521-47.
Senate Report: S523-32 (No. 93-500).

1974 CIS/Annual:
House Report: H523-29 (No. 93-1569).

Congressional Record Vol. 119 (1973):
Nov. 16, considered and passed Senate.

Congressional Record Vol. 120 (1974):
Dec. 17, considered and passed House, amended.
Dec. 19, Senate concurred in House amendments.

PL93-585 **HOOVER INSTITUTION ON WAR, REVOLUTION, AND PEACE, Stanford University, Calif., grants.**
Jan. 2, 1975. 93-2. 2 p. • •Item 575.
88 STAT. 1918.

"To recognize the fifty years of extraordinary and selfless public service of Herbert Hoover, including his many great humanitarian endeavors, his chairmanship of two Commissions of the Organization of the Executive Branch, and his service as thirty-first President of the United States, and in commemoration of the one hundredth anniversary of his birth on August 10, 1974, by providing grants to the Hoover Institution on War, Revolution, and Peace."

Legislative history: (S. 1418 and related bill):

1973 CIS/Annual:
Senate Report: S543-39 (No. 93-503).

1974 CIS/Annual:
House Hearings: H341-26.

Congressional Record Vol. 119 (1973):
Nov. 15, considered and passed Senate.

Congressional Record Vol. 120 (1974):
Dec. 19, considered and passed House, amended, in lieu of H.R. 17580.
Dec. 19, Senate concurred in House amendment.

Weekly Compilation of Presidential Documents Vol. 11, No. 2:
Jan. 4, Presidential statement.

PL93-586 **COAST GUARD RESERVE, benefits.**
Jan. 2, 1975. 93-2. 1 p. • •Item 575.
88 STAT. 1920.

"To amend title 10, United States Code, to provide certain benefits to members of the Coast Guard Reserve, and for other purposes."

Equalizes benefits with those of other armed forces reserve personnel.

prepare and execute without consideration such instruments as may be appropriate to carry out the purposes of this Act.

Approved December 31, 1974.

Public Law 93-579

December 31, 1974
[S. 3418]

AN ACT

To amend title 5, United States Code, by adding a section 552a to safeguard individual privacy from the misuse of Federal records, to provide that individuals be granted access to records concerning them which are maintained by Federal agencies, to establish a Privacy Protection Study Commission, and for other purposes.

Privacy Act of 1974.
5 USC 552a note.

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 "Privacy Act of 1974".

Congressional findings.
5 USC 552a note.

SEC. 2. (a) The Congress finds that—

(1) the privacy of an individual is directly affected by the collection, maintenance, use, and dissemination of personal information by Federal agencies;

(2) the increasing use of computers and sophisticated information technology, while essential to the efficient operations of the Government, has greatly magnified the harm to individual privacy that can occur from any collection, maintenance, use, or dissemination of personal information;

(3) the opportunities for an individual to secure employment, insurance, and credit, and his right to due process, and other legal protections are endangered by the misuse of certain information systems;

(4) the right to privacy is a personal and fundamental right protected by the Constitution of the United States; and

(5) in order to protect the privacy of individuals identified in information systems maintained by Federal agencies, it is necessary and proper for the Congress to regulate the collection, maintenance, use, and dissemination of information by such agencies.

Statement of purpose.

(b) The purpose of this Act is to provide certain safeguards for an individual against an invasion of personal privacy by requiring Federal agencies, except as otherwise provided by law, to—

(1) permit an individual to determine what records pertaining to him are collected, maintained, used, or disseminated by such agencies;

(2) permit an individual to prevent records pertaining to him obtained by such agencies for a particular purpose from being used or made available for another purpose without his consent;

(3) permit an individual to gain access to information pertaining to him in Federal agency records, to have a copy made of all or any portion thereof, and to correct or amend such records;

(4) collect, maintain, use, or disseminate any record of identifiable personal information in a manner that assures that such action is for a necessary and lawful purpose, that the information is current and accurate for its intended use, and that adequate safeguards are provided to prevent misuse of such information;

(5) permit exemptions from the requirements with respect to records provided in this Act only in those cases where there is an important public policy need for such exemption as has been determined by specific statutory authority; and

(6) be subject to civil suit for any damages which occur as a result of willful or intentional action which violates any individual's rights under this Act.

SEC. 3. Title 5, United States Code, is amended by adding after section 552 the following new section:

"§ 552a. Records maintained on individuals

5 USC 552a.

"(a) DEFINITIONS.—For purposes of this section—

"(1) the term 'agency' means agency as defined in section 552(e) of this title;

Ante, p. 1564.

"(2) the term 'individual' means a citizen of the United States or an alien lawfully admitted for permanent residence;

"(3) the term 'maintain' includes maintain, collect, use, or disseminate;

"(4) the term 'record' means any item, collection, or grouping of information about an individual that is maintained by an agency, including, but not limited to, his education, financial transactions, medical history, and criminal or employment history and that contains his name, or the identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or a photograph;

"(5) the term 'system of records' means a group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual;

"(6) the term 'statistical record' means a record in a system of records maintained for statistical research or reporting purposes only and not used in whole or in part in making any determination about an identifiable individual, except as provided by section 8 of title 13; and

"(7) the term 'routine use' means, with respect to the disclosure of a record, the use of such record for a purpose which is compatible with the purpose for which it was collected.

"(b) CONDITIONS OF DISCLOSURE.—No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains, unless disclosure of the record would be—

"(1) to those officers and employees of the agency which maintains the record who have a need for the record in the performance of their duties;

"(2) required under section 552 of this title;

"(3) for a routine use as defined in subsection (a)(7) of this section and described under subsection (e)(4)(D) of this section;

"(4) to the Bureau of the Census for purposes of planning or carrying out a census or survey or related activity pursuant to the provisions of title 13;

"(5) to a recipient who has provided the agency with advance adequate written assurance that the record will be used solely as a statistical research or reporting record, and the record is to be transferred in a form that is not individually identifiable;

"(6) to the National Archives of the United States as a record which has sufficient historical or other value to warrant its continued preservation by the United States Government, or for evaluation by the Administrator of General Services or his designee to determine whether the record has such value;

"(7) to another agency or to an instrumentality of any governmental jurisdiction within or under the control of the United States for a civil or criminal law enforcement activity if the activity is authorized by law, and if the head of the agency or instrumentality has made a written request to the agency which maintains the record specifying the particular portion desired and the law enforcement activity for which the record is sought;

"(8) to a person pursuant to a showing of compelling circumstances affecting the health or safety of an individual if upon such disclosure notification is transmitted to the last known address of such individual;

"(9) to either House of Congress, or, to the extent of matter within its jurisdiction, any committee or subcommittee thereof, any joint committee of Congress or subcommittee of any such joint committee;

"(10) to the Comptroller General, or any of his authorized representatives, in the course of the performance of the duties of the General Accounting Office; or

"(11) pursuant to the order of a court of competent jurisdiction.

"(c) ACCOUNTING OF CERTAIN DISCLOSURES.—Each agency, with respect to each system of records under its control, shall—

"(1) except for disclosures made under subsections (b)(1) or (b)(2) of this section, keep an accurate accounting of—

"(A) the date, nature, and purpose of each disclosure of a record to any person or to another agency made under subsection (b) of this section; and

"(B) the name and address of the person or agency to whom the disclosure is made;

"(2) retain the accounting made under paragraph (1) of this subsection for at least five years or the life of the record, whichever is longer, after the disclosure for which the accounting is made;

"(3) except for disclosures made under subsection (b)(7) of this section, make the accounting made under paragraph (1) of this subsection available to the individual named in the record at his request; and

"(4) inform any person or other agency about any correction or notation of dispute made by the agency in accordance with subsection (d) of this section of any record that has been disclosed to the person or agency if an accounting of the disclosure was made.

"(d) ACCESS TO RECORDS.—Each agency that maintains a system of records shall—

Personal review.

"(1) upon request by any individual to gain access to his record or to any information pertaining to him which is contained in the system, permit him and upon his request, a person of his own choosing to accompany him, to review the record and have a copy made of all or any portion thereof in a form comprehensible to him, except that the agency may require the individual to furnish a written statement authorizing discussion of that individual's record in the accompanying person's presence;

Amendment request.

"(2) permit the individual to request amendment of a record pertaining to him and—

"(A) not later than 10 days (excluding Saturdays, Sundays, and legal public holidays) after the date of receipt of such request, acknowledge in writing such receipt; and

"(B) promptly, either—

"(i) make any correction of any portion thereof which the individual believes is not accurate, relevant, timely, or complete; or

"(ii) inform the individual of its refusal to amend the record in accordance with his request, the reason for the refusal, the procedures established by the agency for the individual to request a review of that refusal by the head of the agency or an officer designated by the head of the agency, and the name and business address of that official;

Review.

"(3) permit the individual who disagrees with the refusal of the agency to amend his record to request a review of such refusal, and not later than 30 days (excluding Saturdays, Sundays, and legal public holidays) from the date on which the individual requests such review, complete such review and make a final determination unless, for good cause shown, the head of the agency extends such 30-day period; and if, after his review, the reviewing official also refuses to amend the record in accordance with the request, permit the individual to file with the agency a concise statement setting forth the reasons for his disagreement with the refusal of the agency, and notify the individual of the provisions for judicial review of the reviewing official's determination under subsection (g)(1)(A) of this section;

Notation of dispute.

"(4) in any disclosure, containing information about which the individual has filed a statement of disagreement, occurring after the filing of the statement under paragraph (3) of this subsection, clearly note any portion of the record which is disputed and provide copies of the statement and, if the agency deems it appropriate, copies of a concise statement of the reasons of the agency for not making the amendments requested, to persons or other agencies to whom the disputed record has been disclosed; and

"(5) nothing in this section shall allow an individual access to any information compiled in reasonable anticipation of a civil action or proceeding.

"(e) AGENCY REQUIREMENTS.—Each agency that maintains a system of records shall—

"(1) maintain in its records only such information about an individual as is relevant and necessary to accomplish a purpose of the agency required to be accomplished by statute or by executive order of the President;

"(2) collect information to the greatest extent practicable directly from the subject individual when the information may result in adverse determinations about an individual's rights, benefits, and privileges under Federal programs;

"(3) inform each individual whom it asks to supply information, on the form which it uses to collect the information or on a separate form that can be retained by the individual—

"(A) the authority (whether granted by statute, or by executive order of the President) which authorizes the solicitation of the information and whether disclosure of such information is mandatory or voluntary;

"(B) the principal purpose or purposes for which the information is intended to be used;

"(C) the routine uses which may be made of the information, as published pursuant to paragraph (4)(D) of this subsection; and

"(D) the effects on him, if any, of not providing all or any part of the requested information;

Publication in Federal Register.

"(4) subject to the provisions of paragraph (11) of this subsection, publish in the Federal Register at least annually a notice of the existence and character of the system of records, which notice shall include—

"(A) the name and location of the system;

"(B) the categories of individuals on whom records are maintained in the system;

"(C) the categories of records maintained in the system;

"(D) each routine use of the records contained in the system, including the categories of users and the purpose of such use;

"(E) the policies and practices of the agency regarding storage, retrievability, access controls, retention, and disposal of the records;

"(F) the title and business address of the agency official who is responsible for the system of records;

"(G) the agency procedures whereby an individual can be notified at his request if the system of records contains a record pertaining to him;

"(H) the agency procedures whereby an individual can be notified at his request how he can gain access to any record pertaining to him contained in the system of records, and how he can contest its content; and

"(I) the categories of sources of records in the system;

"(5) maintain all records which are used by the agency in making any determination about any individual with such accuracy, relevance, timeliness, and completeness as is reasonably necessary to assure fairness to the individual in the determination;

"(6) prior to disseminating any record about an individual to any person other than an agency, unless the dissemination is made pursuant to subsection (b)(2) of this section, make reasonable efforts to assure that such records are accurate, complete, timely, and relevant for agency purposes;

"(7) maintain no record describing how any individual exercises rights guaranteed by the First Amendment unless expressly authorized by statute or by the individual about whom the record is maintained or unless pertinent to and within the scope of an authorized law enforcement activity;

"(8) make reasonable efforts to serve notice on an individual when any record on such individual is made available to any person under compulsory legal process when such process becomes a matter of public record;

Rules of conduct.

"(9) establish rules of conduct for persons involved in the design, development, operation, or maintenance of any system of records, or in maintaining any record, and instruct each such person with respect to such rules and the requirements of this section, including any other rules and procedures adopted pursuant to this section and the penalties for noncompliance;

Confidentiality of records.

"(10) establish appropriate administrative, technical, and physical safeguards to insure the security and confidentiality of records and to protect against any anticipated threats or hazards to their security or integrity which could result in substantial harm, embarrassment, inconvenience, or unfairness to any individual on whom information is maintained; and

Publication in Federal Register.

"(11) at least 30 days prior to publication of information under paragraph (4)(D) of this subsection, publish in the Federal Register notice of any new use or intended use of the information in the system, and provide an opportunity for interested persons to submit written data, views, or arguments to the agency.

"(f) AGENCY RULES.—In order to carry out the provisions of this section, each agency that maintains a system of records shall promulgate rules, in accordance with the requirements (including general

5 USC 553.

notice) of section 553 of this title, which shall—

"(1) establish procedures whereby an individual can be notified

in response to his request if any system of records named by the individual contains a record pertaining to him;

"(2) define reasonable times, places, and requirements for identifying an individual who requests his record or information pertaining to him before the agency shall make the record or information available to the individual;

"(3) establish procedures for the disclosure to an individual upon his request of his record or information pertaining to him, including special procedure, if deemed necessary, for the disclosure to an individual of medical records, including psychological records, pertaining to him;

"(4) establish procedures for reviewing a request from an individual concerning the amendment of any record or information pertaining to the individual, for making a determination on the request, for an appeal within the agency of an initial adverse agency determination, and for whatever additional means may be necessary for each individual to be able to exercise fully his rights under this section; and

Fees.

"(5) establish fees to be charged, if any, to any individual for making copies of his record, excluding the cost of any search for and review of the record.

Publication in Federal Register.

The Office of the Federal Register shall annually compile and publish the rules promulgated under this subsection and agency notices published under subsection (e)(4) of this section in a form available to the public at low cost.

"(g)(1) CIVIL REMEDIES.—Whenever any agency

"(A) makes a determination under subsection (d)(3) of this section not to amend an individual's record in accordance with his request, or fails to make such review in conformity with that subsection;

"(B) refuses to comply with an individual request under subsection (d)(1) of this section;

"(C) fails to maintain any record concerning any individual with such accuracy, relevance, timeliness, and completeness as is necessary to assure fairness in any determination relating to the qualifications, character, rights, or opportunities of, or benefits to the individual that may be made on the basis of such record, and consequently a determination is made which is adverse to the individual; or

"(D) fails to comply with any other provision of this section, or any rule promulgated thereunder, in such a way as to have an adverse effect on an individual,

Jurisdiction.

the individual may bring a civil action against the agency, and the district courts of the United States shall have jurisdiction in the matters under the provisions of this subsection.

Amendment of record.

"(2)(A) In any suit brought under the provisions of subsection (g)(1)(A) of this section, the court may order the agency to amend the individual's record in accordance with his request or in such other way as the court may direct. In such a case the court shall determine the matter de novo.

"(B) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this paragraph in which the complainant has substantially prevailed.

Injunction.

"(3)(A) In any suit brought under the provisions of subsection (g)(1)(B) of this section, the court may enjoin the agency from withholding the records and order the production to the complainant of any agency records improperly withheld from him. In such a case the court shall determine the matter de novo, and may examine the contents of any agency records in camera to determine whether the records or any portion thereof may be withheld under any of the exemptions set forth in subsection (k) of this section, and the burden is on the agency to sustain its action.

"(B) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this paragraph in which the complainant has substantially prevailed.

Damages.

"(4) In any suit brought under the provisions of subsection (g)(1)(C) or (D) of this section in which the court determines that the agency acted in a manner which was intentional or willful, the United States shall be liable to the individual in an amount equal to the sum of—

"(A) actual damages sustained by the individual as a result of the refusal or failure, but in no case shall a person entitled to recovery receive less than the sum of $1,000; and

"(B) the costs of the action together with reasonable attorney fees as determined by the court.

"(5) An action to enforce any liability created under this section may be brought in the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, without regard to the amount in controversy, within two years from the date on which the cause of action arises, except that where an agency has materially and willfully misrepresented any information required under this section to be disclosed to an individual and the information so misrepresented is material to establishment of the liability of the agency to the individual under this section, the action may be brought at any time within two years after discovery by the individual of the misrepresentation. Nothing in this section shall be construed to authorize any civil action by reason of any injury sustained as the result of a disclosure of a record prior to the effective date of this section.

"(h) RIGHTS OF LEGAL GUARDIANS.—For the purposes of this section, the parent of any minor, or the legal guardian of any individual who has been declared to be incompetent due to physical or mental incapacity or age by a court of competent jurisdiction, may act on behalf of the individual.

"(i)(1) CRIMINAL PENALTIES.—Any officer or employee of an agency, who by virtue of his employment or official position, has possession of, or access to, agency records which contain individually identifiable information the disclosure of which is prohibited by this section or by rules or regulations established thereunder, and who knowing that disclosure of the specific material is so prohibited, willfully discloses the material in any manner to any person or agency not entitled to receive it, shall be guilty of a misdemeanor and fined not more than $5,000.

"(2) Any officer or employee of any agency who willfully maintains a system of records without meeting the notice requirements of subsection (e)(4) of this section shall be guilty of a misdemeanor and fined not more than $5,000.

Unchanged by 1996 *

"(3) Any person who knowingly and willfully requests or obtains any record concerning an individual from an agency under false pretenses shall be guilty of a misdemeanor and fined not more than $5,000.

5 USC 553.

"(j) GENERAL EXEMPTIONS.—The head of any agency may promulgate rules, in accordance with the requirements (including general notice) of sections 553(b)(1), (2), and (3), (c), and (e) of this title, to exempt any system of records within the agency from any part of this section except subsections (b), (c)(1) and (2), (e)(4)(A) through

§552a(i)(3)

(F), (e)(6), (7), (9), (10), and (11), and (i) if the system of records is—

"(1) maintained by the Central Intelligence Agency; or

"(2) maintained by an agency or component thereof which performs as its principal function any activity pertaining to the enforcement of criminal laws, including police efforts to prevent, control, or reduce crime or to apprehend criminals, and the activities of prosecutors, courts, correctional, probation, pardon, or parole authorities, and which consists of (A) information compiled for the purpose of identifying individual criminal offenders and alleged offenders and consisting only of identifying data and notations of arrests, the nature and disposition of criminal charges, sentencing, confinement, release, and parole and probation status; (B) information compiled for the purpose of a criminal investigation, including reports of informants and investigators, and associated with an identifiable individual; or (C) reports identifiable to an individual compiled at any stage of the process of enforcement of the criminal laws from arrest or indictment through release from supervision.

At the time rules are adopted under this subsection, the agency shall include in the statement required under section 553(c) of this title, the reasons why the system of records is to be exempted from a provision of this section. 5 USC 553.

"(k) SPECIFIC EXEMPTIONS.—The head of any agency may promulgate rules, in accordance with the requirements (including general notice) of sections 553(b)(1), (2), and (3), (c), and (e) of this title, to exempt any system of records within the agency from subsections (c)(3), (d), (e)(1), (e)(4)(G), (H), and (I) and (f) of this section if the system of records is—

"(1) subject to the provisions of section 552(b)(1) of this title; 5 USC 552.

"(2) investigatory material compiled for law enforcement purposes, other than material within the scope of subsection (j)(2) of this section: *Provided, however*, That if any individual is denied any right, privilege, or benefit that he would otherwise be entitled by Federal law, or for which he would otherwise be eligible, as a result of the maintenance of such material, such material shall be provided to such individual, except to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, prior to the effective date of this section, under an implied promise that the identity of the source would be held in confidence;

"(3) maintained in connection with providing protective services to the President of the United States or other individuals pursuant to section 3056 of title 18;

"(4) required by statute to be maintained and used solely as statistical records;

"(5) investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for Federal civilian employment, military service, Federal contracts, or access to classified information, but only to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, prior to the effective date of this section, under an implied promise that the identity of the source would be held in confidence;

"(6) testing or examination material used solely to determine individual qualifications for appointment or promotion in the

(cont.)

NOTES OF DECISIONS

1. **Marriages within section**

U.S. v. Seay, C.A.4 (S.C.) 1983, 718 F.2d 1279, certiorari denied 104 S.Ct. 2677, [main volume] 467 U.S. 1226, 81 L.Ed.2d 873.

§ 1922. False or withheld report concerning Federal employees' compensation

Whoever, being an officer or employee of the United States charged with the responsibility for making the reports of the immediate superior specified by section 8120 of title 5, willfully fails, neglects, or refuses to make any of the reports, or knowingly files a false report, or induces, compels, or directs an injured employee to forego filing of any claim for compensation or other benefits provided under subchapter I of chapter 81 of title 5 or any extension or application thereof, or willfully retains any notice, report, claim, or paper which is required to be filed under that subchapter or any extension or application thereof, or regulations prescribed thereunder, shall be fined under this title or imprisoned not more than one year, or both.

(As amended Pub.L. 103–322, Title XXXIII, § 330016(1)(G), Sept. 13, 1994, 108 Stat. 2147.)

HISTORICAL AND STATUTORY NOTES

1994 Amendments

Pub.L. 103–322, § 330016(1)(G), substituted "under this title" for "not more than $500".

Legislative History

For legislative history and purpose of Pub.L. 103–322, see 1994 U.S. Code Cong. and Adm. News, p. 1801.

§ 1923. Fraudulent receipt of payments of missing persons

Whoever obtains or receives any money, check, or allotment under—

[See main volume for text of (1) and (2)]

without being entitled thereto, with intent to defraud, shall be fined under this title or imprisoned not more than one year, or both.

(As amended Pub.L. 103–322, Title XXXIII § 330016(1)(I), Sept. 13, 1994, 108 Stat. 2147.)

HISTORICAL AND STATUTORY NOTES

1994 Amendments

Pub.L. 103–322, § 330016(1)(I), substituted "under this title" for "not more than $2,000" wherever appearing.

Legislative History

For legislative history and purpose of Pub.L. 103–322, see 1994 U.S. Code Cong. and Adm. News, p. 1801.

§ 1924. Unauthorized removal and retention of classified documents or material

(a) Whoever, being an officer, employee, contractor, or consultant of the United States, and, by virtue of his office, employment, position, or contract, becomes possessed of documents or materials containing classified information of the United States, knowingly removes such documents or materials without authority and with the intent to retain such documents or materials at an unauthorized location shall be fined not more than $1,000, or imprisoned for not more than one year, or both.

(b) For purposes of this section, the provision of documents and materials to the Congress shall not constitute an offense under subsection (a).

(c) In this section, the term "classified information of the United States" means information originated, owned, or possessed by the United States Government concerning the national defense or foreign relations of the United States that has been determined pursuant to law or Executive order to require protection against unauthorized disclosure in the interests of national security.

3423,

(Added Pub.L. 103–359, Title VIII, § 808(a), Oct. 14, 1994, 108 Stat. 3453.)

HISTORICAL AND STATUTORY NOTES

Intelligence Authorization Act for FY 1995

Legislative History

For legislative history and purpose of Pub.L. 103–359, see 1994 U.S. Code Cong. and Adm. News, p. 2703.

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Chapter 5—Federal Civilian Personnel

Current as June 13, 1996

PART V—UNHEALTHFUL POSTS

[Part V revoked by EO 10903 of Jan. 9, 1961, 26 FR 217, 3 CFR, 1959-1963 Comp., p. 433]

PART VI—GENERAL PROVISIONS

SEC. 601. *Publication.* This order, and the places designated, the rates fixed, and the regulations prescribed by the Secretary of State and the Office of Personnel Management pursuant to Parts I and II of this order, shall be published in the FEDERAL REGISTER.

[Sec. 601 amended by EO 12107 of Dec. 28, 1978, 44 FR 1055, 3 CFR, 1978 Comp., p. 264]

Executive Order 10450—Security requirements for Government employment

SOURCE: The provisions of Executive Order 10450 of Apr. 27, 1953, appear at 18 FR 2489, 3 CFR, 1949-1953 Comp., p. 936, unless otherwise noted.

WHEREAS the interests of the national security require that all persons privileged to be employed in the departments and agencies of the Government, shall be reliable, trustworthy, of good conduct and character, and of complete and unswerving loyalty to the United States; and

WHEREAS the American tradition that all persons should receive fair, impartial, and equitable treatment at the hands of the Government requires that all persons seeking the privilege of employment or privileged to be employed in the departments and agencies of the Government be adjudged by mutually consistent and no less than minimum standards and procedures among the departments and agencies governing the employment and retention in employment of persons in the Federal service:

NOW, THEREFORE, by virtue of the authority vested in me by the Constitution and statutes of the United States, including section 1753 of the Revised Statutes of the United States (5 U.S.C. 631); the Civil Service Act of 1883 (22 Stat. 403; 5 U.S.C. 632, *et seq.*); section 9A of the act of August 2, 1939, 53 Stat. 1148 (5 U.S.C. 118j); and the act of August 26, 1950, 64 Stat. 476 (5 U.S.C. 22-1, *et seq.*), and as President of the United States, and deeming such action necessary in the best interests of the national security, it is hereby ordered as follows:

SECTION 1. In addition to the departments and agencies specified in the said act of August 26, 1950, and Executive Order No. 10237 of April 26, 1951, the provisions of that act shall apply to all other departments and agencies of the Government. [1]

SEC. 2. The head of each department and agency of the Government shall be responsible for establishing and maintaining within his department or agency an effective program to insure that the employment and retention in employment of any civilian officer or employee within the department or agency is clearly consistent with the interests of the national security.

[1] EDITORIAL NOTE: In *Cole* v. *Young*, 76 S.Ct. 861 (1955), section 1 of EO 10450 was held to be invalid if applied to every department and agency.

SEC. 3. (a) The appointment of each civilian officer or employee any department or agency of the Government shall be made subject investigation. The scope of the investigation shall be determined in first instance according to the degree of adverse effect the occupant the position sought to be filled could bring about, by virtue of nature of the position, on the national security, but in no event shall investigation include less than a national agency check (including check of the fingerprint files of the Federal Bureau of Investigatio and written inquiries to appropriate local law-enforcement agenc former employers and supervisors, references, and schools attended the person under investigation: *Provided,* that upon request of the h of the department or agency concerned, the Office of Personnel M agement may, in its discretion, authorize such less investigation as n meet the requirements of the national security with respect to per-di intermittent, temporary, or seasonal employees, or aliens employed o side the United States. Should there develop at any stage of investi tion information indicating that the employment of any such per may not be clearly consistent with the interests of the national secur there shall be conducted with respect to such person a full field inve gation, or such less investigation as shall be sufficient to enable the h of the department or agency concerned to determine whether retent of such person is clearly consistent with the interests of the national curity.

(b) The head of any department or agency shall designate, or ca to be designated, any position within his department or agency the cupant of which could bring about, by virtue of the nature of the po tion, a material adverse effect on the national security as a sensitive sition. Any position so designated shall be filled or occupied only b person with respect to whom a full field investigation has been co ducted: *Provided,* that a person occupying a sensitive position at time it is designated as such may continue to occupy such posit pending the completion of a full field investigation, subject to the ot provisions of this order: *And provided further,* that in case of emerger a sensitive position may be filled for a limited period by a person w respect to whom a full field pre-appointment investigation has not b completed if the head of the department or agency concerned finds t such action is necessary in the national interest, which finding shall made a part of the records of such department or agency.

[Sec. 3 amended by EO 12107 of Dec. 28, 1978, 44 FR 1055, 3 CFR, 1978 Comp., p.

SEC. 4. The head of each department and agency shall review, cause to be reviewed, the cases of all civilian officers and employ with respect to whom there has been conducted a full field investi tion under Executive Order No. 9835 of March 21, 1947, and, a such further investigation as may be appropriate, shall re-adjudicate, cause to be re-adjudicated, in accordance with the said act of Aug 26, 1950, such of those cases as have not been adjudicated under a se rity standard commensurate with that established under this order.

SEC. 5. Whenever there is developed or received by any departm or agency information indicating that the retention in employment any officer or employee of the Government may not be clearly cons ent with the interests of the national security, such information shall forwarded to the head of the employing department or agency or representative, who, after such investigation as may be appropriate, shall review, or cause to be reviewed, and, where necessary, re-adjudicate, or cause to be re-adjudicated, in accordance with the said act of August 26, 1950, the case of such officer or employee.

SEC. 6. Should there develop at any stage of investigation information indicating that the employment of any officer or employee of the Government may not be clearly consistent with the interests of the national security, the head of the department or agency concerned or his representative shall immediately suspend the employment of the person involved if he deems such suspension necessary in the interests of the national security and, following such investigation and review as he deems necessary, the head of the department or agency concerned shall terminate the employment of such suspended officer or employee whenever he shall determine such termination necessary or advisable in the interests of the national security, in accordance with the said act of August 26, 1950.

SEC. 7. Any person whose employment is suspended or terminated under the authority granted to heads of departments and agencies by or in accordance with the said act of August 26, 1950, or pursuant to the said Executive Order No. 9835 or any other security or loyalty program relating to officers or employees of the Government, shall not be reinstated or restored to duty or reemployed in the same department or agency and shall not be reemployed in any other department or agency, unless the head of the department or agency concerned finds that such reinstatement, restoration, or reemployment is clearly consistent with the interests of the national security, which finding shall be made a part of the records of such department or agency: *Provided,* that no person whose employment has been terminated under such authority thereafter may be employed by any other department or agency except after a determination by the Office of Personnel Management that such person is eligible for such employment.

[Sec. 7 amended by EO 12107 of Dec. 28, 1978, 44 FR 1055, 3 CFR, 1978 Comp., p. 264]

SEC. 8. (a) The investigations conducted pursuant to this order shall be designed to develop information as to whether the employment or retention in employment in the Federal service of the person being investigated is clearly consistent with the interests of the national security. Such information shall relate, but shall not be limited, to the following:

(1) Depending on the relation of the Government employment to the national security:

(i) Any behavior, activities, or associations which tend to show that the individual is not reliable or trustworthy.

(ii) Any deliberate misrepresentations, falsifications, or omissions of material facts.

(iii) Any criminal, infamous, dishonest, immoral, or notoriously disgraceful conduct, habitual use of intoxicants to excess, drug addiction, sexual perversion.

(iv) Any illness, including any mental condition, of a nature which in the opinion of competent medical authority may cause significant defect in the judgment or reliability of the employee, with due regard to the transient or continuing effect of the illness and the medical findings in such case.

(v) Any facts which furnish reason to believe that the individual be subjected to coercion, influence, or pressure which may cause to act contrary to the best interests of the national security.

(2) Commission of any act of sabotage, espionage, treason, or tion, or attempts thereat or preparation therefor, or conspiring wit aiding or abetting, another to commit or attempt to commit any a sabotage, espionage, treason, or sedition.

(3) Establishing or continuing a sympathetic association with a s teur, spy, traitor, seditionist, anarchist, or revolutionist, or with an onage or other secret agent or representative of a foreign nation, o representative of a foreign nation whose interests may be inimical t interests of the United States, or with any person who advocate use of force or violence to overthrow the government of the U States or the alteration of the form of government of the United S by unconstitutional means.

(4) Advocacy of use of force or violence to overthrow the go ment of the United States, or of the alteration of the form of go ment of the United States by unconstitutional means.

(5) Knowing membership with the specific intent of furtherin aims of, or adherence to and active participation in, any foreign o mestic organization, association, movement, group, or combinatic persons (hereinafter referred to as organizations) which unlawfull vocates or practices the commission of acts of force or violence to vent others from exercising their rights under the Constitution or of the United States or of any State, or which seeks to overthro Government of the United States or any State or subdivision there unlawful means.

(6) Intentional, unauthorized disclosure to any person of securit formation, or of other information disclosure of which is prohibite law, or willful violation or disregard of security regulations.

(7) Performing or attempting to perform his duties, or othe acting, so as to serve the interests of another government in prefer to the interests of the United States.

(8) Refusal by the individual, upon the ground of constitutional lege against self-incrimination, to testify before a congressional con tee regarding charges of his alleged disloyalty or other misconduct.

(b) The investigation of persons entering or employed in the com tive service shall primarily be the responsibility of the Office of Pe nel Management, except in cases in which the head of a departme agency assumes that responsibility pursuant to law or by agree with the Office. The Office shall furnish a full investigative repo the department or agency concerned.

(c) The investigation of persons (including consultants, however ployed), entering employment of, or employed by, the Govern other than in the competitive service shall primarily be the respon ity of the employing department or agency. Departments and age without investigative facilities may use the investigative facilities o Office of Personnel Management, and other departments and age may use such facilities under agreement with the Office.

(d) There shall be referred promptly to the Federal Bureau of In tigation all investigations being conducted by any other agencies w develop information indicating that an individual may have been jected to coercion, influence, or pressure to act contrary to the inte of the national security, or information relating to any of the matters described in subdivisions (2) through (8) of subsection (a) of this section. In cases so referred to it, the Federal Bureau of Investigation shall make a full field investigation.

[Sec. 8 amended by EO 10491 of Oct. 13, 1953, 18 FR 6583, 3 CFR, 1949–1953 Comp., p. 973; EO 10531 of May 27, 1954, 19 FR 3069, 3 CFR, 1954–1958 Comp., p. 193; EO 10548 of Aug. 2, 1954, 19 FR 4871, 3 CFR, 1954–1958 Comp., p. 200; EO 11785 of June 4, 1974, 39 FR 20053, 3 CFR, 1971–1975 Comp., p. 874; EO 12107 of Dec. 28, 1978, 44 FR 1055, 3 CFR, 1978 Comp., p. 264]

SEC. 9. (a) There shall be established and maintained in the Office of Personnel Management a security-investigations index covering all persons as to whom security investigations have been conducted by any department or agency of the Government under this order. The central index established and maintained by the Office under Executive Order No. 9835 of March 21, 1947, shall be made a part of the security-investigations index. The security-investigations index shall contain the name of each person investigated, adequate identifying information concerning each such person, and a reference to each department and agency which has conducted an investigation concerning the person involved or has suspended or terminated the employment of such person under the authority granted to heads of departments and agencies by or in accordance with the said act of August 26, 1950.

(b) The heads of all departments and agencies shall furnish promptly to the Office of Personnel Management information appropriate for the establishment and maintenance of the security-investigations index.

(c) The reports and other investigative material and information developed by investigations conducted pursuant to any statute, order, or program described in section 7 of this order shall remain the property of the investigative agencies conducting the investigations, but may, subject to considerations of the national security, be retained by the department or agency concerned. Such reports and other investigative material and information shall be maintained in confidence, and no access shall be given thereto except, with the consent of the investigative agency concerned, to other departments and agencies conducting security programs under the authority granted by or in accordance with the said act of August 26, 1950, as may be required for the efficient conduct of Government business.

[Sec. 9 amended by EO 12107 of Dec. 28, 1978, 44 FR 1055, 3 CFR, 1978 Comp., p. 264]

SEC. 10. Nothing in this order shall be construed as eliminating or modifying in any way the requirement for any investigation or any determination as to security which may be required by law.

SEC. 11. On and after the effective date of this order the Loyalty Review Board established by Executive Order No. 9835 of March 21, 1947, shall not accept agency findings for review, upon appeal or otherwise. Appeals pending before the Loyalty Review Board on such date shall be heard to final determination in accordance with the provisions of the said Executive Order No. 9835, as amended. Agency determinations favorable to the officer or employee concerned pending before the Loyalty Review Board on such date shall be acted upon by such Board, and whenever the Board is not in agreement with such favorable determination the case shall be remanded to the department or agency concerned for determination in accordance with the standards and procedures established pursuant to this order. Cases pending before the regional loyalty boards of the Office of Personnel Management on which hearings have not been initiated on such date shall be referred to the department or agency concerned. Cases being heard by regional loyalty boards on such date shall be heard to conclusion and the determination of the board shall be forwarded to the head of the department or agency concerned: *Provided,* that if no specific department or agency is involved, the case shall be dismissed without prejudice to the applicant. Investigations pending in the Federal Bureau of Investigation or the Office of Personnel Management on such date shall be completed, and the reports thereon shall be made to the appropriate department or agency.

[Sec. 11 amended by EO 12107 of Dec. 28, 1978, 44 FR 1055, 3 CFR, 1978 Comp., p. 264]

SEC. 12. Executive Order No. 9835 of March 21, 1947, as amended, is hereby revoked.

[Sec. 12 amended by EO 11785 of June 4, 1974, 39 FR 20053, 3 CFR, 1971-1975 Comp., p. 874]

SEC. 13. The Attorney General is requested to render to the heads of departments and agencies such advice as may be requisite to enable them to establish and maintain an appropriate employee-security program.

SEC. 14. (a) The Office of Personnel Management, with the continuing advice and collaboration of representatives of such departments and agencies as the National Security Council may designate, shall make a continuing study of the manner in which this order is being implemented by the departments and agencies of the Government for the purpose of determining:

(1) Deficiencies in the department and agency security programs established under this order which are inconsistent with the interests of, or directly or indirectly weaken, the national security.

(2) Tendencies in such programs to deny to individual employees fair, impartial, and equitable treatment at the hands of the Government, or rights under the Constitution and laws of the United States or this order.

Information affecting any department or agency developed or received during the course of such continuing study shall be furnished immediately to the head of the department or agency concerned. The Office of Personnel Management shall report to the National Security Council, at least semiannually, on the results of such study, shall recommend means to correct any such deficiencies or tendencies, and shall inform the National Security Council immediately of any deficiency which is deemed to be of major importance.

(b) All departments and agencies of the Government are directed to cooperate with the Office of Personnel Management to facilitate the accomplishment of the responsibilities assigned to it by subsection (a) of this section.

(c) To assist the Office of Personnel Management in discharging its responsibilities under this order, the head of each department and agency shall, as soon as possible and in no event later than ninety days after receipt of the final investigative report on a civilian officer or employee subject to a full field investigation under the provisions of this order, advise the Office as to the action taken with respect to such officer or employee. The information furnished by the heads of departments and agencies pursuant to this section shall be included in the reports which the Office of Personnel Management is required to submit to the National Security Council in accordance with subsection (a) of this section. Such reports shall set forth any deficiencies on the part of the heads of departments and agencies in taking timely action under this order, and shall mention specifically any instances of noncompliance with this subsection.

[Sec. 14 amended by EO 10550 of Aug. 5, 1954, 19 FR 4981, 3 CFR, 1954–1958 Comp., p. 200; EO 12107 of Dec. 28, 1978, 44 FR 1055, 3 CFR, 1978 Comp., p. 264]

SEC. 15. This order shall become effective thirty days after the date hereof.

Executive Order 10471—Authorizing the heads of departments and agencies to grant leaves of absence to certain persons

SOURCE: The provisions of Executive Order 10471 of July 17, 1953, appear at 18 FR 4231, 3 CFR, 1949–1953 Comp., p. 952, unless otherwise noted.

By virtue of the authority vested in me by section 301 of title 3 of the United States Code, and as President of the United States, if is ordered as follows:

1. The heads of the several departments and agencies of the Government are hereby authorized and empowered, without the approval, ratification, or other action of the President, to exercise, with respect to personnel in their respective department or agency, the authority conferred upon the President by section 6305(b) of title 5 of the United States Code, to authorize leaves of absence in accordance with the said section 6305(b) to persons who receive compensation in accordance with section 401 of the Foreign Service Act of 1980 (22 U.S.C. 3961).

[Sec. 1 amended by EO 12292 of Feb. 23, 1981, 46 FR 13967, 3 CFR, 1981 Comp., p. 134]

2. This order shall be effective as of July 5, 1953.

Executive Order 10552—Delegating to the Office of Personnel Management the authority of the President to promulgate regulations under which certain Government employees may be prevented or relieved from working by administrative order

SOURCE: The provisions of Executive Order 10552 of Aug. 10, 1954, appear at 19 FR 5079, 3 CFR, 1954–1958 Comp., p. 201, unless otherwise noted.

By virtue of the authority vested in me by section 301 of title 3 of the United States Code, 65 Stat. 713, it is declared that the Office of Personnel Management be, and it is hereby, designated and empowered to exercise, without the approval, ratification, or other action of the President, the authority vested in the President by the joint resolution of June 29, 1938, 52 Stat. 1246, as amended by the act of June 11, 1954, 68 Stat. 249 (5 U.S.C. 86a), to promulgate regulations under which certain employees of the Government may be prevented or relieved from working by administrative order.