PRESIDENTIAL RECORDS ACT OF 1978

HEARINGS

BEFORE A

SUBCOMMITTEE OF THE COMMITTEE ON GOVERNMENT OPERATIONS HOUSE OF REPRESENTATIVES

NINETY-FIFTH CONGRESS

SECOND SESSION

ON

H.R. 10998 and Related Bills

TO AMEND THE FREEDOM OF INFORMATION ACT TO INSURE PUBLIC ACCESS TO THE OFFICIAL PAPERS OF THE PRESIDENT, AND FOR OTHER PURPOSES

FEBRUARY 23, 28; MARCH 2 AND 7, 1978

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PRESIDENTIAL RECORDS ACT OF 1978

THURSDAY, FEBRUARY 23, 1978

HOUSE OF REPRESENTATIVES,
GOVERNMENT INFORMATION
AND INDIVIDUAL RIGHTS SUBCOMMITTEE
OF THE COMMITTEE ON GOVERNMENT OPERATIONS,
Washington, D.C.

The subcommittee met, pursuant to notice, at 9:35 a.m., in room 2203, Rayburn House Office Building, Hon. Richardson Preyer (chairman of the subcommittee) presiding.

Present: Representatives Richardson Preyer, Peter H. Kostmayer, Ted Weiss, Paul N. McCloskey, Jr., Dan Quayle, and John N. Erlenborn.

Also present: Timothy H. Ingram, staff director; Edward J. Gleiman, counsel; Euphon Metzger, secretary; Catherine Sands, minority professional staff, Committee on Government Operations; and Harold C. Relyea, Congressional Research Service, Library of Congress.

Mr. PREYER. The subcommittee will come to order.

We are beginning consideration today of questions that have not been adequately answered for nearly 200 years: When a President leaves office, who owns his papers? And under what conditions should they be made available to the public?

When George Washington left office, he took his papers with him. Presidents since then have generally continued this tradition and removed the papers of their administrations, though the records were produced at public cost and for public purpose.

The Presidential Libraries Act of 1955 authorized the Administrator of the General Services Administration to accept Presidential papers for deposit, but subject to restrictions imposed by the donor.

The issue of Presidential papers is one of many that rose to public consciousness as a result of Watergate. The agreement between then General Services Administrator Arthur Sampson and former President Nixon provided for the destruction of the White House tapes and placed severe limitations on public access to the documents of the Nixon administration.

Congress reacted and passed legislation to preserve the materials and to increase their availability.

That legislation, which was upheld last year by the Supreme Court after a challenge from President Nixon, applies only to the papers of his administration, however.

I believe the time has come for Congress to establish a general policy which would apply to the official papers of all Presidents, assuring that they will be properly preserved and made readily available to the American public.

The purpose of today's hearing and three others to follow during the next 2 weeks is to receive testimony on the Presidential Papers Act of 1978, H.R. 10998, which I have introduced, and H.R. 11001, introduced by Representatives Allen Ertel and John Brademas. Without objection, we will include the text of these bills in the record.

[The bills, H.R. 10998 and H.R. 11001, follow:]

PRESIDENTIAL RECORDS ACT OF 1978

TUESDAY, FEBRUARY 28, 1978

HOUSE OF REPRESENTATIVES,
GOVERNMENT INFORMATION
AND INDIVIDUAL RIGHTS SUBCOMMITTEE
OF THE COMMITTEE ON GOVERNMENT OPERATIONS,
Washington, D.C.

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Present: Representatives Richardson Preyer, Peter H. Kostmayer, Paul N. McCloskey, and Dan Quayle.

Also present: Timothy H. Ingram, staff director; Edward J. Gleiman, counsel; Maura J. Flaherty, clerk; Catherine Sands, minority professional staff. Committee on Government Operations; and Harold C. Relyea, Congressional Research Service, Library of Congress.

Mr. KOSTMAYER [presiding]. The subcommittee will come to order.

I have a short opening statement which I will read.

Chairman Preyer has been detained by an executive session of the Ethics Committee but he will join us shortly after 10 o'clock this morning.

We continue today our hearings on the ownership and disposition of Presidential papers.

Last Thursday we heard from former White House counsel, Philip Buchen, Representatives Allen Ertel, of Pennsylvania, and John Brademas, of Indiana.

We have before us two bills, the Presidential Papers Act of 1978, which Congressman Preyer has introduced, and H.R. 11001 introduced by Representatives Ertel and Brademas.

Our questions are: When a President leaves office, who owns his papers and under what conditions should they be made available to the American people?

Our first witness this morning is Deputy Assistant Attorney General Lawrence A. Hammond, of the Department of Justice.

Welcome, Mr. Hammond, do you have a prepared statement?

STATEMENT OF LAWRENCE A. HAMMOND, DEPUTY ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGAL COUNSEL, U.S. DEPARTMENT OF JUSTICE; ACCOMPANIED BY JUDITH W. WEGNER, STAFF ATTORNEY

Mr. HAMMOND. I have with me this morning one of our attorney advisers from the Office of Legal Counsel, Ms. Judy Wegner.

I'm sorry that our statement was not available earlier. Counsel has asked me that in light of the fact that it did just come up early this morning that I go ahead and read the entire text. I have agreed to do that.

I appreciate this opportunity to present for your consideration the views of the Department of Justice on the constitutional questions raised by H.R. 10998, the "Presidential Papers Act of 1978." I would like to preface my remarks in much the same way that Judge Carl McGowan did in his opinion for the three-judge district court in *Nixon* v. *Administrator*. He acknowledged that there must necessarily be an important difference between the role of a court in reviewing a statutory enactment which has not yet been implemented and in reviewing the application of that law to the precise facts of individual cases. He quoted, as I would like to, from the Supreme Court's opinion in *Watson* v. *Buck*, 313 U.S. 387, 1944, where the Court warned against making judgments about statutory enactments in advance of their application:

> Passing upon the possible significance of the manifold provisions of a broad statute in advance of efforts to apply the separate provisions is analogous to rendering an advisory opinion upon a statute or a declaratory judgment upon hypothetical case.

That admonition of restraint should apply with even greater force when one is asked to comment on the constitutionality of a bill that has no accompanying legislative history to guide the reader through the several quite serious and important constitutional interests affected by the proposed legislation.

With these considerations in mind, we have approached the review of H.R. 10998 with an eye toward identifying those matters that deserve clarification in order to avoid what might be serious constitutional problems in the ultimate application of the statute, and to identify those few problems which, in the Department's view, would call into question the constitutionality of this legislation prior to its application to particular cases.

Although, as the following analysis of the bill will indicate, we believe that the congressional intent with regard to certain aspects of the bill should be clarified and certain modifications adopted, it is our conclusion that the subject matter of this bill is well within the province of Congress, that it deals with matters appropriate for congressional concern, and that its underlying purposes may constitutionally be achieved.

The bill has two principal aspects: First, it would reserve to the United States ownership and control of defined Presidential records; and, second, it would allow public access to such records, under procedures modeled on those contained in the Freedom of Information Act, immediately upon a President's departure from office and the completion of necessary archival processing. I will discuss each of these aspects in turn.

First, I turn to the Government ownership question. The reservation and retention of complete ownership, possession, and control of Presidential records in the United States marks a significant departure from past practice. Traditionally, Presidents have been regarded as possessing a property right in their papers, although a governmental interest in the regulation and disposition of such materials has also been recognized. The Supreme Court has expressly reserved judgment

on the question whether, under existing law, legal title to such materials lies in the President. Since H.R. 10998 would have only prospective effect, however, that question would be avoided. Instead the issue becomes whether Congress may properly declare the records of future Presidents to be Government property.

It is well established that the work product of Government employees prepared at the direction of their employer or in the course of their duties is Government property. Should Congress choose to extend this principle to cover records prepared or received by the President in the course of his duties, no substantial separation of powers problems would, in our view, be raised.

The Supreme Court's opinion in *Nixon* v. *Administrator* makes clear that it is within the appropriate ambit of Congress power to legislate with respect to the preservation of the historically valuable papers of the Chief Executive. Mr. Justice Powell's separate concurrence in that case makes the same point at somewhat greater length and concludes that Congress power in this area is "unquestionable."

We think it follows that, at least insofar as declaring the President's official papers to be public property is concerned, Congress action is not subject to serious challenge.

Mr. KOSTMAYER. Mr. Hammond, let me interrupt for one second. It is a lengthy statement. If it would be easier for you to summarize the remainder of it, please feel free to do that. That will give us the opportunity to ask more questions.

Mr. HAMMOND. I can do that.

Mr. KOSTMAYER. Without objection, your entire written testimony will be inserted in the record.

[See pp. 108–133.]

Mr. HAMMOND. I think that with respect to the ownership question, the additional questions that I think have to be addressed are: Have you written the bill broadly enough to exclude those papers that are private in nature and those papers that would be protectable under the first amendment privilege?

We think on its face that the private papers provision presents no problem. The way that the bill is drafted takes care of that appropriately.

We do see a problem with respect to materials having to do with the President's participation in political affairs. The bill is drafted to allow the President to exclude only those matters that deal with his personal participation. We think it is reasonable to assume that a good deal of material may well come to the President, as the leader of his national political party, that may only in the attenuated sense involve his personal participation. He may be asked or advised, for instance, about the status of Democratic congressional campaigns across the country. He may participate personally in none or only a few of them. We think that kind of material is still protected by the first amendment.

I would like to turn now to the access portions of the bill and, first, to the procedural provisions that deal with record maintenance, and recordkeeping.

The bill as we read it requires the President to implement a system of records managment and control. It requires him to make sure that things are adequately recorded and appropriately maintained.

It should be plain that whenever the legislative branch imposes any kind of requirement of this sort on the executive branch that someone

is going to raise or could raise a separation of powers question. The Supreme Court has fairly clearly now given us the framework for analyzing those types of issues. The Court has embraced Justice Jackson's concurrence in *Youngstown Sheet and Tube* v. *Sawyer*. It has done so both in the *United States* v. *Nixon*, and in the more recent case involving the Administrator of GSA.

It seems to me that it is clear that Congress can legislate with respect to the way papers are maintained so long as it does so in a way that does not lead to disruption of the functioning of the executive branch.

I cannot tell you—no one in the Justice Department can tell you—if these provisions would disrupt the functioning of the executive branch. My personal view, frankly, is that it is very doubtful that they would. I think that the way that the provisions are drafted is sensible. It leaves a great deal of discretion to the Executive to determine what is adequate and what is appropriate. Drawn in that way, it seems to us unlikely that a serious constitutional question could be raised with respect to that matter.

There is another procedural aspect of the bill that does raise in our minds a greater question. That is the provision with respect to the incumbent President gaining access to the papers of a former President. As the bill is now drafted, it would require the Counselor to the President to state in writing in advance that the documents he seeks from the files of a former President are, first, not otherwise available; and, second, specifically defined. He has to say, apparently with some precision, what document he needs.

In the main I don't think there would be a constitutional problem with that but I can certainly conceive of cases in which a President would need a set of files, would need them very quickly, and would not be able to say with specificity which particular documents he wants. He knows that the former President had a file on the matter and, furthermore, he may not be able to say that it is definitely not otherwise available. He may just need that particular file at that particular time.

I doubt that there was any intent here to prohibit the President from having access under those circumstances. We simply suggested that conceivably the language could be broadened somewhat to say that the President would state in writing these things where reasonably possible, or words to that effect.

The remaining access provisions of the bill establish a mechanism for making Presidential papers available for public scrutiny. The bill sets forth five categories of reasons why materials might not be disclosed.

We think there are two sorts of problems raised by the access provision and both of them are serious. The first one is with respect to who controls the access. We presume that because the Archivist is an employee of the executive branch, he serves under the Administrator of GSA who is an executive branch employee: We assume that for those reasons that the sitting President would necessarily have control over the activities of the Archivist.

There is a greater problem, however, with respect to the role to be played by the former President. If we read the bill correctly, the Archivist may consult the former President but he is not in any circumstances required to do so. There is no mechanism established under

the bill whereby the former President would have knowledge in advance and would have an opportunity, in particular cases, to say anything about disclosure. The view of the Supreme Court on this point is, I suppose, controlling.

In *Nixon* v. *Administrator* the Court embraced the Solicitor General's statement that the privileges of the executive branch survived the period in which a President sits in office, that he does retain the authority to assert a privilege after he has gone from office. An opportunity to do so, we think, has to be preserved. How that is done—I think there ought to be broad flexibility there. The important point is that there has to be some opportunity for a former President to come in and say, for a variety of reasons, that particular documents ought not to be made public. It is necessary for him to have that right in order, as the Court said in *Nixon* v. *Administrator*, to preserve the confidentiality of executive branch communications—essentially the "chilling effect" side of the President's privilege.

He also would need to have that opportunity so that he could raise any first amendment or other privacy issues that were still alive after the screening process.

Apart from the question of who controls access, we have several concerns about the standards set forth in the statutes themselves. The first one is with respect to the confidentiality provision which I think is subpart (b) of the listing. As presently drawn, the confidentiality requirement deals only with matters personally presented to or documents personally prepared by the President. It does not extend—at least on its face—to the confidential communications of those in the Executive Office and those on the President's staff.

We think that it is clear that the privileges of the executive branch extend beyond the person of the President and do extend to those who are his close personal advisers. A statute which did not provide an opportunity for a President to object to the disclosure of documents generated by or coming to or from his personal advisers would be constitutionally flawed.

We have a second problem with the confidentiality requirement and maybe it is a matter of interpretation. As we read the provision there is not a taking into account of the need for the President to decline to turn over material for, what I guess you would call, the generalized presumptive privilege. That is, in the draft it would appear that the President may decline to make documents available if he thinks it will in some way injure the national security or would do harm to foreign affairs. But he may not decline to turn over documents simply because he concludes that it would erode the essential confidentiality of executive communications.

If the bill is read and intended that way, we think it is simply not constitutionally broad enough.

There is a more generalized problem that we perceive in the drafting of your five-part list of reasons why material might not be disclosed, in a couple of respects we have been able to identify in the short time that we have had.

There are things that appear not to be included, for instance, investigatory files of law enforcement investigations, the identity of informants. Presumably the committee would want to have an opportunity for the nondisclosure of that kind of material in particular

cases. The conclusion I draw from that is that the approach of trying to identify with precision those reasons why documents might not be turned over is probably not going to prove the most efficacious way to proceed.

I think the approach of H.R. 11001 comes closer to protecting the essence of the privileges available to the executive branch by providing a period of time in which no disclosures or more limited disclosures would be appropriate.

This concludes my remarks.

Mr. KOSTMAYER. In regard to what you just said about the Brademas-Ertel bill, do you generally favor the 15-year limitation?

Mr. HAMMOND. We favor in a general way some time limitations. The reason for favoring a time limitation relates specifically to the presumptive privilege, the chilling effect problem. I'm not concerned about the national security secrets, the things that would injure our foreign affairs. Those would be taken care of under either bill as I read it.

We do favor the perceived need to protect that relationship—the confidentiality.

Mr. KOSTMAYER. Rather than employing a broad provision ruling out access for 15 years, could we not define specific categories such as were defined in the Ford agreement? We could limit it to those and disclose as much information as possible, as early as possible, and limit what we would not reveal to certain specific categories. Would that be an acceptable compromise to you?

Mr. HAMMOND. I think so. You could identify certain types of communications that are more likely to require the veil of confidentiality, for instance, communications about nominations to the Supreme Court is an example that comes to mind. That is the kind of material that I think most sitting Presidents would not want to make available at least for a respectable period of time.

Mr. KOSTMAYER. You mean an incumbent President would not want to make it available or a former President?

Mr. HAMMOND Both, I suppose.

Mr. KOSTMAYER. Why would President Carter not want to make available President Nixon's or President Ford's decisions?

Mr. HAMMOND. With respect to the nominations to the Supreme Court, for instance?

Mr. KOSTMAYER. Yes.

Mr. HAMMOND. I would suspect that if President Carter and President Carter's aides know that the information they give him on potential nominees is going to be made public by the next President, they may be much more reluctant to be as candid and as open and as complete in the advice that they give. That is the rationale.

Mr. KOSTMAYER. We might be more specific about that.

In the Ford agreement there are seven categories of materials which would be restricted. Some, I think, are too broad and too general. I spoke about this at the last hearing. One, for example, says "material that might be used to harass or injure any living person or interfere with the person's right of privacy or right of association." That seems to me to be rather broad and general and could end up excluding material which might embarrass an individual because it indicated that he was involved in some wrongdoing, information which should come to light not after 16 years but as soon as possible.

What about the chilling effect? Do you regard that as a serious problem?

Mr. HAMMOND. Certainly. It is certainly diminished by the passage of time. I think that there ought to be a point at which just about everything that a President ever received ought to be made public—anything that is not personal to him and is not protected by some other specific provision of the Constitution—but at least within a reasonable time after a President leaves office. I suspect that a good deal of the communications that come to him would be colored if people knew that they were going to be made available.

Mr. KOSTMAYER. Isn't the chilling effect always a factor whether or not the information is going to be made available sooner or later? Are not people in the White House always reluctant to write anything down even though it is going to come to light sooner or later anyway?

Mr. HAMMOND. Candidly, there are a lot of other considerations that go into any adviser's thought processes when he decides how and in what manner to communicate with the President and the President's advisers. I daresay that in many cases, if not in most cases, the chilling effect of eventual public disclosure is the most important. It is a factor and I think it is an important factor.

Realistically there are lots of other considerations. Most of them relate to how best to make the immediate decision at hand. If it is best to do it in writing—if it is the most effective way to get it done—then you can be pretty sure it is going to be in writing.

Mr. KOSTMAYER. I do not think too much of the chilling effect. It is all going to come out in the end anyway.

Mr. McCloskey?

Mr. MCCLOSKEY. Has OMB read your testimony?

Mr. HAMMOND. Yes.

Mr. MCCLOSKEY. I don't find any reference to whether OMB is in agreement with this testimony.

Mr. HAMMOND. I may be mistaken, but with respect to material that the Office of Legal Counsel prepares, especially materials relating to constitutional issues, we, as a matter of practice, submit our testimony to OMB. OMB shares it with whomever they wish and we receive comments. We don't really clear it as such in the sense that if they called and said, "Change an argument, we don't like the constitutional argument." If they ever did that we would tell them no.

Mr. MCCLOSKEY. Mr. Hammond, in running through your testimony I find no real approval of this legislation. However, you point out a lot of problems with it.

Are you in favor of the concept represented by this legislation?

Mr. HAMMOND. I'm sorry, Mr. Congressman, we certainly are.

Mr. MCCLOSKEY. You are? Do you speak for the White House in that respect?

Mr. HAMMOND. I am not authorized to speak for them but I think if you have somebody up here, they will tell you that they are as well. I have been informally advised that they are in favor of it.

Mr. MCCLOSKEY. You have listed a number of problems with it. Let me just pose one question.

Under this legislation would the President have the right to make copies of his records and take them with him when he leaves office? I think not. I cannot imagine a President not wanting to take copies of his records with him when he leaves the White House.

The bill says that all Presidential records will be turned over to the Archivist. Will the President be guilty of a crime if he makes copies and takes them with him?

Mr. HAMMOND. That is an interesting question and one that I had not considered.

Mr. MCCLOSKEY. Can you imagine a President of the United States leaving the White House without the right to take with him copies of the records?

Mr. HAMMOND. I would be very surprised—and maybe you can advise me, Mr. Kostmayer—but I would be surprised if it was the intent of the staff to prohibit the President from having access to and having a property right in his own papers.

Mr. KOSTMAYER. There is a question of ownership here. I do not know whether the staff can answer the question.

Certainly the President would have access to those papers.

Mr. HAMMOND. It would seem to me that the intent of the statute is to increase public access, not to decrease Presidential access.

Mr. MCCLOSKEY. The problem that I have with this legislation is that you divide records into three parts: personal records, Presidential records, and documents that support one of the others.

The legislation says very clearly that "at the conclusion of his term of office, the Presidential records"—that means all Presidential records—"shall be turned over to the Archivist." Where does that leave the President if he should want to make copies? Are not those copies also records?

Mr. GLEIMAN. It was the intent of the legislation that the President should continue to have access to the records.

Mr. MCCLOSKEY. I am putting ourselves in this situation as Members of Congress. I assume that when we leave office we would like to take at least one copy of every paper we have ever signed and that has been submitted to us so we have duplicate sets of the record.

Now what is going to apply to the set of records that the President takes with him?

Mr. GLEIMAN. The objectives of the bill are to preserve and make available to the public the records of the President and the past Presidents. So on the assumption that the records were left behind and turned over to the National Archives, there would be no problem with achieving the first objective.

The second objective appears to be to make those records available to the public with respect to a duplicate set of papers and documents that the President may wish to take with him when he left office.

Since Mr. Hammond's testimony and other testimony that we have heard tends to indicate that the President's interest is protecting confidential communications with his advisers, he would be on his own with respect to whether he wanted to waive the protection that he apparently is supposed to be giving his advisers.

I assume that the President would not be able to make available to the public a set of documents, or for that matter take from the White House, documents that would affect foreign relations.

Mr. MCCLOSKEY. Mr. Hammond, what, in your judgment, are reasons for this legislation.

Mr. HAMMOND. It seems to me that the primary reason that favors this kind of legislation is that the papers of the President, whatever else you say about them, are matters in which the public has an interest.

I know there has been a lot of talk in a number of court cases and even an opinion authorized by the Department of Justice several years ago that talk about who owns the papers and who has the property rights in the papers.

As I read it—and I think as most Presidents have read it—the simple fact of the matter is that whoever owns them, they are very much impressed with the public interest. The public ought to be able to see how its President makes decisions. It ought to have available to it the history of how important decisions were made.

Mr. McCLOSKEY. Let's look at that question, let's say, in the selection of Supreme Court Justices. Let's assume that in the selection consideration of a particular nominee—if derogatory information is received or solicited, should that information be available to public inspection and, if so, in your opinion after what period of time?

Mr. HAMMOND. I think that when you talk about information of a personal nature——

Mr. McCLOSKEY. Let's take the Carswell case. Let's say information is received indicating a potential nominee for the Supreme Court has had homosexual contacts. Would that be privileged information?

Mr. HAMMOND. My personal view is that it should be, it should be protected.

Mr. McCLOSKEY. At what stage should it be made available to the public in your opinion?

Mr. HAMMOND. It may well be that that particular portion of the file on any Supreme Court nominee ought never to be made public.

Mr. McCLOSKEY. Under these two statutes which we are now considering, what would be the law in your judgment if either one of them were adopted?

Mr. HAMMOND. We think that both statutes as drafted are unconstitutional.

Mr. McCLOSKEY. How can you be in favor of a statute that is unconstitutional? I don't understand your testimony.

Mr. HAMMOND. We are in favor—and I am sorry if I was not clear—we are in favor of the concept, we are in favor of what the committee and what both bills try to do.

Mr. McCLOSKEY. But you are saying that both bills as presently written are unconstitutional?

Mr. HAMMOND. Yes, sir.

Mr. McCLOSKEY. I do not find anywhere in your testimony the suggestions as to how they should be amended to make them constitutional.

Mr. HAMMOND. There are a number of specific suggestions——

Mr. McCLOSKEY. I find at least five points in your testimony where you have indicated there is either a constitutional difficulty or, in your opinion, the language is flatly unconstitutional: is that right?

Mr. HAMMOND. That is right.

Mr. McCLOSKEY. In no case do I find your suggestions as to the language that would make the bill constitutional in your judgment.

Mr. HAMMOND. If you would like I can cite you to the specific pages.

Mr. McCLOSKEY. What I would like to ask you to do is to give us the language, in your judgment, which would remove the constitutional difficulties in this bill.

Mr. HAMMOND. I think I have on almost every issue that we talked about. If it would help you we can go through it.

Mr. KOSTMAYER. Would the gentleman yield?

Mr. MCCLOSKEY. I will be glad to yield.

Mr. KOSTMAYER. One question of constitutionality relates to revealing information about an individual even if it is at the end of a long period of time, such as Mr. McCloskey suggested; is that not a question of constitutionality?

Mr. HAMMOND. Yes; I think that there is. We said that there has to be some mechanism whereby a former President and a sitting President can prevent there from being that kind of disclosure.

Mr. KOSTMAYER. There is not presently that provision in the bill?

Mr. HAMMOND. No; there is not in either bill as I read them.

Mr. KOSTMAYER. Surely that is a serious flaw in both bills.

Mr. HAMMOND. But there is a provision that says "would intrude upon the personal privacy" of some individual. There is no power for the former President to assert that under H.R. 10998 as I read it.

Mr. KOSTMAYER. The provision says that anything regarding personal privacy shall never be revealed?

Mr. HAMMOND. It is discretionary as I read it. It says, "information which if disclosed would constitute a clearly unwarranted invasion of the privacy of the President and his family or any other person."

I believe it is discretionary. It says, "requests may be denied" if this consequence would flow. It is not mandatory.

Mr. KOSTMAYER. That is not for a limited period of time? Those requests could be denied by the Archivist?

Mr. HAMMOND. That is right. It is our view that in passing on those requests, the Archivist essentially acts as the alter ego of the President.

Mr. KOSTMAYER. But that does not set aside the constitutional request?

Mr. HAMMOND. It does not insofar as it does not give the former President an opportunity to state his views.

Mr. MCCLOSKEY. You think this power should be delegated to the Archivist? It makes the Archivist the repository of a new discretion I don't think was ever intended.

Mr. HAMMOND. Not in our view. It is not delegated in the sense that the Archivist independently of the President can do all these things. He does them as the agent and alter ego of the President.

Mr. MCCLOSKEY. Let me go back to this Carswell question.

Do you think after 15 years—assuming Carswell is still alive—that this information should be subject to public release?

Mr. HAMMOND. I think that some of the information ought to be available to the public, not in terms of things that would affect his personal privacy directly but in terms of the decisionmaking process, who was contacted, what kinds of information were solicited, how thorough an investigation was done. I think that the public is entitled to know what happened in that decisionmaking process. If that can be done without further injuring Mr. Carswell's privacy, I think it ought to be available.

Mr. MCCLOSKEY. But does not that make any potential nominee for public office subject to having disclosed the most embarrassing aspects of his or her background? Is that the price you have to pay for being nominated to public office; whatever derogatory comments have been made about you from any source may someday then be available to public information? Is that, in essence, what you are saying?

Mr. HAMMOND. No; it is not. Let me state it more clearly.

The things that are of a purely personal nature.

Mr. MCCLOSKEY. But there is nothing of a personal nature with respect to the qualifications of a person for public office in the court decision, is there? Is everything relevant under the libel laws? Have not we said a public figure is practically naked as far as any right of privacy?

Mr. HAMMOND. I think the answer to that is "no," we have not gone that far.

Mr. KOSTMAYER. What if it involves national security?

Mr. MCCLOSKEY. Or the Vice President, let's say he has had psychiatric treatment as in the case of Senator Eagleton. I would have thought that that was the greatest privilege we had in this country, the right to the privacy of medical records.

Counsel, can you tell me is there any right to invade the personal medical records in the national interest?

Mr. HAMMOND. A right to invade personal medical records?

Mr. MCCLOSKEY. Let's use that as a test. Should the Government have the right to obtain the personal medical records, such as those covering the relationship between Senator Eagleton and his doctor, in the public's interest?

Mr. HAMMOND. I think you are going to have to be more specific. Which branch of the Government? I think that the executive branch surely had the right to obtain that information.

Mr. MCCLOSKEY. The attorney-client privilege and the doctor-patient privilege does not apply to the protection of an individual if he is a nominee for public office; is that your testimony?

Mr. HAMMOND. No; it is not. It is not close to my testimony.

Mr. MCCLOSKEY. That is what I am trying to ascertain.

Take the Eagleton case. Does the Government of the United States have the right to penetrate the doctor-patient privilege in order to ascertain information about a nominee for public office? If so, under this statute, would the public then have the right to know about what a man had said to his doctor or to his attorney if this information became disclosed as part of the nominating process?

Mr. HAMMOND. As I understand it there are two aspects to your question. The first one is: Does the Government have a right or a power to invade a doctor-patient privilege or an attorney-client privilege in gathering information about the suitability of a nominee?

I would say that in some cases the answer is yes. In some cases you cannot assess the abilities and the qualifications of a person for high public office unless you know some of those very personal, sensitive, and privileged things. I think it is a fact of life. I think that the President does have to know if there is a serious psychiatric problem in someone who has a delicate national security position. There are times when that information is unquestionably essential.

Mr. MCCLOSKEY. Even without the consent of the individual?

Mr. HAMMOND. No; he always has the authority and the power, I think, to say that he will not take the office. It is a tradeoff. It is something you give up.

Mr. MCCLOSKEY. I do not want to lose this point. Without the consent of the individual, does the executive branch have the right to inquire about information which was a result of the doctor-patient or attorney-client privilege?

Mr. HAMMOND. To inquire into it?

If I was being considered for a position on the National Security Council, it would surely be appropriate for someone in the executive branch—the FBI or whoever is doing the investigtion—to ask me questions that may have to do with personal matters or matters that are protected by a personal privilege. I have the authority and the power to say, "I am sorry, that is a matter that I cannot share with you." Then it is up to the President to decide. If he wants that information and deems it essential, then I withdraw if I am not willing to share it.

That happens with some regularity.

Mr. MCCLOSKEY. In other words, you think that a President of the United States when nominating someone for office has the right to ask the FBI to inquire of an individual what that individual said to his lawyer or to his doctor?

Mr. HAMMOND. In some cases.

Mr. KOSTMAYER. With the individual's consent first?

In other words, so-and-so has been nominated for a high position; the FBI goes to him and says, "We are going to have to talk to your lawyer and your psychiatrist and your doctor. Do we have permission to do that? Do you grant it or deny it?"

Mr. HAMMOND. Yes.

It is ordinarily specifically stated in advance of the FBI investigation.

Mr. KOSTMAYER. They ask if he has ever had psychiatric treatment?

Mr. HAMMOND. Yes.

Mr. KOSTMAYER. If he lies, then he is absolutely not qualified for the position to begin with.

Mr. HAMMOND. I would think so.

I think though that that is only half of your question.

The second half is: When should the public have access to that kind of information if it is purely personal in nature?

Mr. MCCLOSKEY. I want to get to that question but I am not sure I am absolutely clear on your first answer.

I assume that a potential nominee can give his consent or deny his consent to reveal what he has said to his lawyer or to his psychiatrist. If he refuses to give consent then it is my understanding that it is common practice to ask the potential nominee, "Is there anything you feel would be embarrassing to this administration if we appoint you?"

I do not know that this question is put as a matter of custom: Would you give us free access to what you have said to your attorney or your doctor? But assuming that an individual does not give his consent, the administration then has the choice of either nominating him or her or not nominating him or her.

Do you feel that the executive authority does have the right to ask for a waiver of the attorney-client or the doctor-patient privilege? Do you feel it is not an invasion of privacy?

Mr. HAMMOND. I would think they have not only the right, but in some cases they have the duty. For a Chief Executive to fail to inquire into some matters that might be protected by a lawyer-client privilege or matters that might be protected by a doctor-patient privilege would be——

Mr. KOSTMAYER. With the consent of the individual first?

Mr. HAMMOND. Yes.

I am sure you understand that the doctor and the lawyer carry that privilege on behalf of their respective patients and clients. They cannot answer an FBI request or a request from the President without that person's consent. If you go to somebody's doctor and say, "Give me the patient's file," it would be a gross breach of medical ethics for the doctor to turn over the file without first going to the patient and saying, "Do you consent?"

Mr. KOSTMAYER. It is always possible—and God forbid that this should happen—that a President might even order someone to break into a psychiatrist's office.

Mr. HAMMOND. It is hard to imagine that that would happen.

Mr. MCCLOSKEY. A friend of mine is now in jail for doing that.

Let's go to the second question. Assuming that a nominee for office has been prevailed upon to waive his attorney-client or his doctor-patient privilege and the Justice Department is in possession of the sensitive information which in turn is passed on to the President. What protection would the individual have under either of these laws against an unwarranted invasion of his privacy in the interest of the public's right to know why the President did not select Mr. Carswell or someone like him?

Mr. HAMMOND. You are on a very good point. There is no protection as I read either bill for the individual himself to come in and insist that material that would affect his privacy——

Mr. MCCLOSKEY. What about the Privacy Act of 1974? Would the Privacy Act apply in this case?

Mr. HAMMOND. I am not an expert on the Privacy Act but I think the answer is no.

Mr. GLEIMAN. Mr. McCloskey, the Privacy Act would not apply unless we specifically applied it to the White House offi e. However, if I can clarify a point on the availability to the public of the information, the bill that Mr. Preyer introduced does apply to the standing tradition of the Freedom of Information Act. There would be some exceptions to personal privacy.

The question that I might pose to the witness is this. Since the Freedom of Information Act does not—for the executive branch—provide notice to the individual that his interests might be harmed by disclosure of information, would you suggest that the Freedom of Information Act is unconstitutional?

Mr. HAMMOND. No; and I was not suggesting that for this particular reason the statute is unconstitutional. That is one of the harms.

It is a balance. There are some personal privacy downsides.

Mr. GLEIMAN. You are not saying that the lack of notice to the individual to whom the material pertains, that the lack of notice to these individuals would not render the proposal that Mr. Preyer is making unconstitutional?

Mr. HAMMOND. I do not believe so. I do not think that the constitutional right of privacy has been extended by the courts to provide individuals with a right to prohibit the Government from disclosing material that they had gathered about them.

Mr. MCCLOSKEY. The problem I have with this legislation is that by extending the Freedom of Information Act to the Presidential papers but not the Privacy Act, we are treating Presidential papers with less respect than any other governmental papers, are we not?

Mr. HAMMOND. Again, I am on soft ground here because I am not schooled in the details of the Privacy Act. If you apply the Freedom of Information Act principle there certainly are cases now in which it is at least possible—and it is happening all the time—that information about individuals in the files of the Government is being made public. I do not believe that anything in the Privacy Act prevents that from occurring.

Look at the recent FOI releases of the FBI Cointelpro materials, the FOI releases on the Warren Commission, the releases now of the investigative conclusions drawn by the Watergate special prosecution force.

Mr. MCCLOSKEY. The problem that I have with this legislation in your testimony, Mr. Hammond, is this. You point out, for example, the common law privilege not recognized in the legislation: the right to decline the identity of an informant. Do you feel that the legislation should include this particular protection?

Mr. HAMMOND. Yes, sir.

Mr. MCCLOSKEY. Here you say, "Stated simply, we doubt that it is reasonably possible to set forth and preserve in a legislative catalog all of the privileges necessary to the function of the President." I agree. Then you cite two examples: "disclosure of investigatory materials; the privilege against the disclosure of the identity of informants."

You say it is not possible to list in the law all of the privileges that we do extend to the President. How do we draft a law then?

Mr. HAMMOND. I suggested that the way around that is to make sure that you provide a screening mechanism that gives the President—both sitting and former—an opportunity to raise the privilege in a particular case when disclosure is in question.

Mr. MCCLOSKEY. You subject that to court decision then, don't you?

Mr. HAMMOND. Inevitably.

If anyone thinks that there are not going to be court decisions on this statute, he is deluding himself.

Mr. MCCLOSKEY. I have begun to wonder; I agreed with the purposes of this legislation initially but I begin to wonder if we should draft legislation to accomplish this or if this may be one of those areas where the best intentions to draft a law fail the practical test when we then have to apply the law.

I think I would like to defer this because you have pointed out five instances where these bills are perhaps unconstitutional. We have no real language to overcome those parts of it. I wonder if perhaps we should not sit down and try to draft the law to meet the constitutional objections first and then proceed with the testimony.

Mr. HAMMOND. I have suggested, I think in every case, language—either specific words or an approach.

Mr. KOSTMAYER. How can you ever remedy the problem of someone's privacy being disclosed against his will eventually? What if the Archivist chooses to disclose it?

Mr. HAMMOND. As a constitutional matter, I do not think that the statute necessarily has to provide every individual with a right to make that objection. The constitutional problem is taking away from the former President the opportunity to make it on their behalf.

Mr. MCCLOSKEY. That is what we did in the Privacy Act. We set up the law so that the individual would have the right to protest if he

felt his rights of privacy were being infringed upon. We don't do that here.

Mr. HAMMOND. We don't do it under the Freedom of Information Act either, Congressman.

I can give you a very specific example. There was very recently a release of a good deal of documentation from the Watergate special prosecution force in response to a lawsuit that was filed. It was a settlement or a partial settlement that resulted in a release of a good deal of material. A lot of that material talked about people who were investigated, some of whom were prosecuted and some of whom were not.

No attempt was made and no law that I know of required an attempt to be made to notify each of those people who were subjects of or who were involved in those investigations and to tell them "We are about to make a release." Nobody did that.

In the Privacy Act—again I want to qualify this because I am not an expert of it—I don't think that the Privacy Act requires that.

Mr. MCCLOSKEY. Let me test something that you said. You said you had language in your testimony to remedy the constitutional problems you raised. On page 23 of your testimony you say:

> We doubt it is reasonably possible to set forth and preserve in a legislative catalog all of the privileges necessary to the functioning of the President.

Those privileges would—

> have their origins as common law "evidentiary" privileges and enjoy an existence apart from what we usually regard as a "Presidential" privilege—are rooted in the notion that the public interest in furthering effective, and fair, law enforcement requires their preservation.
>
> Our point here is that we doubt that any very specific and restrictive listing of this sort will prove sufficient * * * .

What do you recommend?

Mr. HAMMOND. If you read on down on page 24, toward the bottom of the page. I will quote:

> In passing the Presidential Recordings and Materials Preservation Act, we think Congress recognized these facts.

The ones you just referred to.

> The approach adopted there is one that recommends itself: the statute simply instructed the Administrator of GSA to draft appropriate regulations.

Mr. MCCLOSKEY. When we cannot reach a legal definition and then we instruct somebody to pass regulations to meet our own inadequacies——

Mr. HAMMOND. The point is not simply the drafting of regulations. The point is that the regulations would have to provide an opportunity for any party to assert any legally or constitutionally based right or privilege.

Mr. MCCLOSKEY. You recommend a similar provision, that if we cannot define it in law, then we instruct an Administrator to amass regulations to cover this.

Mr. HAMMOND. Even if you could come up with the most complete catalog that our collective minds can conceive of, you would still, in my view, have to have a provision of this sort.

Mr. MCCLOSKEY. I just want to respectfully suggest that one of the most admirable things the President has said is that he does not want to beleaguer the law with voluminous regulations.

If we cannot reach a legal definition here, to ask that it be set forth in voluminous regulations is wrong.

Mr. HAMMOND. I think it need not be set forth in voluminous regulations. I note that the Administrator has recently announced—and maybe Mr. Rhoads can testify about this in more detail—the regulations under the Nixon papers statute have just been made public in the Federal Register several weeks ago. They are maybe 6 pages long.

Mr. MCCLOSKEY. Suppose we went a little further in this statute and declared that Presidential records—and define those—be kept and they not be destroyed. Would not that meet the purpose of this legislation?

Mr. HAMMOND. I would have to defer to the people who drafted it but I would suspect that the answer is "No." It is not merely the preservation that is important, it is the public access.

Mr. MCCLOSKEY. Why would the public access to these papers not be governed properly by the Privacy Act and the Freedom of Information Act? Why would those two laws not be adequate to protect the public's right to know and the individual's right to privacy with respect to those Presidential papers?

Mr. HAMMOND. Simply extending the Freedom of Information Act to apply to the President; is that what you are suggesting?

Mr. MCCLOSKEY. I am asking why is anything necessary more than the provision that these are public records and they should not be destroyed, leaving in place the Freedom of Information Act and the Privacy Act.

Mr. HAMMOND. The Freedom of Information Act does not apply.

Mr. GLEIMAN. The Freedom of Information Act and the Privacy Act do not apply to the records that are created within the White House office which would, in effect, constitute the official records of the President.

We would have to change the definition in order to have the FOI and Privacy Acts apply.

[See appendix 23 regarding the applicability of the Freedom of Information Act to the Executive Office of the President.]

Mr. MCCLOSKEY. The purpose of the legislation—if I understand counsel correctly—is to provide that the papers be preserved, to distinguish between Presidential papers and personal papers, and to make them subject to the Freedom of Information Act. Why do we not make them subject to the Privacy Act as well? The Privacy Act was an attempt to balance the Freedom of Information Act against the rights of individuals to prohibit the unwarranted invasion of privacy.

Why do you not recommend both?

Mr. HAMMOND. If the Privacy Act did what you suggested that it does, that would be a good idea. I do not think that the Privacy Act as it exists right now would deal with any of the kinds of problems that you are concerned about. It would not prevent the disclosure of information. It does not work that way.

Mr. PREYER. [presiding]. Thank you, Mr. McCloskey.

Mr. KOSTMAYER. So there is really no solution to at least one of the problems that Congressman McCloskey raises, that is, that under the legislation the chairman is introducing and also the Brademas-Ertel bill, someone's privacy is eventually going to be disclosed against his will. Papers will be released and there is nothing we can do to control that.

Even if we attempt to notify that individual at the end of 15 years that some information is going to come to light that he may find derogatory, he still would not have the right to deny public access to that information.

That is not a constitutional issue.

Mr. HAMMOND. You could draft a statute that would provide that.

Mr. KOSTMAYER. That would give that individual the opportunity?

Mr. HAMMOND. Yes; I think it would be terribly cumbersome but there is a lot to recommend it.

Mr. KOSTMAYER. I also wanted to address the point Congressman McCloskey raised earlier about the need for the legislation. Simply, the need for the legislation is to decide public ownership of the papers.

Under current law a President has the right to take his papers with him and never reveal them to anyone at all. Once the law is passed could this practice continue?

Mr. HAMMOND. I think that is almost true. I think the fact of the matter is that if a President did try to take his papers something would be done about it. Congress has done that in the past.

I need to qualify the statement I made before. It seems to me that you probably could not give to an individual the right in every case to prevent the Chief Executives from disclosing information about him that came to the Chief Executive in the course of or in relation to this constitutional function.

You could not give the individual an override.

Mr. KOSTMAYER. You could not give that individual the right to prohibit the Chief Executive from disclosing it?

Mr. HAMMOND. That is right. There may well be cases in which the Chief Executive would find it necessary to perform his functions.

Mr. KOSTMAYER. By disclosing such information to the general public?

Mr. HAMMOND. Conceivably the general public but maybe not. It seems to me that there might be cases in which the President would have to make a disclosure of that kind in order to carry out his constitutional functions. I cannot think of a specific example but I can conceive of that being a problem.

Mr. KOSTMAYER. I agree that it is a difficult area in which to legislate. I suppose these things just have to take their course. It is a difficult area. It disturbs me. I do not know what the answer is for protecting the privacy of individuals whose names may arise in Presidential papers and who may be embarrassed at the end of 15 years or immediately.

I do not know how they can be protected and at the same time protect the rights of the American people to have as much access to that information as possible.

Mr. PREYER. Thank you, Mr. Kostmayer.

I believe counsel has a few questions.

Mr. GLEIMAN. If I could clarify, under our bill the Freedom of Information Act would apply and individuals would be protected against the invasions of privacy.

On page 15 in your testimony you speak to the exemptions that we have withdrawn from Executive privilege over the years.

Mr. KOSTMAYER. I do not understand how the Freedom of Information Act protects the individuals that we were just talking about.

Mr. GLEIMAN. The Freedom of Information Act says that while there is a presumption of availability of records, one could withhold those records if disclosure would result in a clearly unwarranted invasion of an individual's privacy.

Mr. KOSTMAYER. But that is not a decision made by the individual whose privacy is being invaded.

Mr. GLEIMAN. No, sir. But that is no different than the treatment of any other records in Government.

Mr. KOSTMAYER. As I said, there is no solution to the problem including the one you suggested.

Mr. GLEIMAN. There is some question as to whether a problem really exists based on the case law as built up over the years.

Mr. KOSTMAYER. That is why the rights to privacy are not protected. I think clearly their rights are not protected. I am not saying that I know a way to protect them, I do not. Maybe we have to have a tradeoff. Maybe it is better not to have those rights protected. I think clearly they are not protected and I don't know how to protect them.

Mr. GLEIMAN. If I could recap your testimony, Mr. Hammond. You say you see no constitutional problems with declaring ownership of the Presidential papers and you are in favor of that; is that correct?

Mr. HAMMOND. Yes.

Mr. GLEIMAN. You see no problem basically with imposing record-keeping provisions on the White House from a constitutional standpoint.

Mr. HAMMOND. I think that as long as those practices do not constitute a disruption of the Office of the President.

Mr. GLEIMAN. For the most part, then, the problem with the bill that has been introduced by the chairman and also the other bill introduced by Representatives Ertel and Brademas, is the confidential advice exemption. You feel that we cannot define the sphere of confidential protection given by the incumbent President and by former Presidents.

You seem to imply that the disclosure of a former President's documents would have an effect on the incumbent President. It would have an effect on his ability to receive candid advice from his advisers; is that correct?

Mr. HAMMOND. That is right.

Mr. GLEIMAN. What right does a former President have, what is his real interest? Where is this duty that he owes to his assistants in case law or in the common law?

Mr. HAMMOND. His interest arises while he is President. It is his interest as President to be able to assure his advisers that if they tell him things in confidence, those things will be maintained in confidence. If his advisers know that his promise of confidentiality is only as long-lived as his ability to become reelected, and then only once, they may be—so the argument goes—less candid.

Mr. GLEIMAN. What would be the effect of a President leaving office and failing to impose any restrictions on the availability of those documents that he has received from his assistants and advice that he has received from his assistants? Would there be some cause of action in the assistants against the former President?

Mr. HAMMOND. No.

Mr. GLEIMAN. Again, I am not quite clear where the duty arises that the President owes to his assistants to keep these communications confidential.

Mr. HAMMOND. Not so much a duty he owes to the assistants. It is a duty he owes to the institution. It is a duty he owes to the Presidency. It is impossible, again so the argument goes, for the President faithfully to execute the laws and to faithfully perform his other functions if he cannot receive open and candid advice.

Mr. GLEIMAN. You said that you did not necessarily feel that the 15-year figure was a magic figure in terms of assuring that confidential advice would be received; is that correct?

Mr. HAMMOND. That is correct.

Mr. GLEIMAN. Presidents have tended to impose restrictions in certain areas. Would you agree that we might be able to come up with a listing of the areas where the privilege has to be protected?

Mr. HAMMOND. I think you can come up with a listing of areas in which the privilege has to be protected. I do not really doubt that. What I do doubt is that you can come up with an exclusive list or a sufficiently comprehensive list that no other protection need to be provided. That is my concern.

Mr. GLEIMAN. In other words, we are obligated to allow the President to have carte blanche authority as he sees fit based on the departing President's perception of what the needs are.

Mr. HAMMOND. Certainly not. The way your bill is drafted right now, if a private citizen requests access and the President says, "No; I am not going to give you access." What happens then? A lawsuit is filed and you go to court. The President says:

> I am not going to give you these materials because they violate one of the provisions of the statute or because they invade some constitutional prerogative.

It is not a carte blanche at all as President Nixon found out.

Mr. GLEIMAN. You started out by saying "your statute as drafted." You are referring to the bill that the chairman has introduced?

Mr. HAMMOND. Yes.

Mr. GLEIMAN. It does not provide notice to the President but to the former President.

Mr. HAMMOND. But it inferentially provides notice to the incumbent President.

Mr. GLEIMAN. Do you feel we have to provide notice to former and incumbent Presidents?

Mr. HAMMOND. No; you already do provide notice to the incumbent President.

Mr. GLEIMAN. Do you feel we have to provide notice to the former President?

Mr. HAMMOND. Yes; clearly.

It is not my idea. That is what Justice Brennan said for the Court in *Nixon* v. *Administrator*.

Mr. GLEIMAN. I was wondering if you could provide us with the particular authorities. I know that you cited and relied quite heavily with respect to the generalized harm doctrine, on the Senate select committee case. It seems to be somewhat of an anomaly. It seems to be the only case where the generalized harm concept of Presidential privilege was held to so firmly. As a matter of fact, it has received considerable criticism and commentary as I understand it.

Could you refer to the other case law that you feel would support the position and need for including a provision encompassing generalized harm?

Mr. HAMMOND. If you would like, I can provide a memorandum on that.

[The information follows:]

DEPARTMENT OF JUSTICE,
Washington D.C., March 13, 1978.

Hon. RICHARDSON PREYER,
Chairman, Subcommittee on Government Information and Individual Rights, Committee on Government Operations, House of Representatives, Rayburn Office Building, Washington, D.C.

DEAR MR. CHAIRMAN: During the course of my testimony before the subcommittee on February 28 I was asked to provide supplemental information on the following two points: (1) Citations to cases which have discussed the Presidential privilege for confidential communications; and (2) history of Justice Department involvement in formulating the model disposition agreement suggested by the Archives to retiring Presidents.

As I indicated in response to Mr. Gleiman's question, *United States* v. *Nixon*, 418 U.S. 696 (1974), is the seminal case establishing a board-based Presidential privilege protecting confidential communications between the President and his advisers. While finding the President's privilege to be a qualified, rather than absolute one, the Court recognized that its underpinnings were constitutional in origin, arising both from the doctrine of separation of powers and from "the valid need for protection of communications between high Government officials and those who advise and assist them in the performance of their manifold duties." *Id.* at 705. The Court continued:

"Human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process [footnote omitted]. Whatever the nature of the privilege of confidentiality of Presidential communications in the exercise of Art. II powers, the privilege can be said to derive from the supremacy of each branch within its own assigned area of constitutional duties. Certain powers and privilege flow from the nature of enumerated powers [footnote omitted]; the protection of the confidentiality of Presidential communications has similar constitutional underpinnings." *Id.* at 705–706.

See also *Nixon* v. *Administrator*, 97 S. Ct. 2777, 2792 (1977); *Dellums* v. *Powell*, 561 F. 2d 242, 246 (D.C. Cir.), *cert. denied*, 46 U.S.L.W. 3220 (1977); *Sun Oil Co.* v. *United States*, 514 F. 2d 1020 (Ct. Cl. 1975); *Committee for Nuclear Responsibility, Inc.* v. *Seaborg*, 364 F. 2d 788, 794 (D.C. Cir.), *cert. denied*, 404 U.S. 917 (1971).

I have also inquired whether the Department of Justice has examined the model agreement development by the Archives for use by former Presidents in transferring their papers to the United States. To the best of our knowledge, no review or approval of the agreement has been asked or given.

Sincerely,

LARRY A. HAMMOND,
Deputy Assistant Attorney General,
Office of Legal Counsel.

Mr. HAMMOND. The cases now are really the *United States* v. *Nixon*, and *Nixon* v. *Administrator*. There is relevant language in several other cases but those are the really controlling precedents.

Both of those cases, as you know, have lengthy discussions about generalized harm considerations.

Mr. GLEIMAN. I still have difficulty with this. You say we do not have to give a President carte blanche. You recognize that Presidents have generally been restricted in the same area in the past. Yet you say that it is unlikely that we can come up with a listing of areas where we would have to restrict access based on confidential privilege and still be able to withstand the test of confidentiality. Is that based on an examination that you have done of the areas that Presidents have restricted in the past?

Mr. HAMMOND. Let me back up a second. If the catalog is a sufficiently open-ended one and if it includes the preservation of any constitutionally based or legally based privilege, sure. If that is the way your list is drawn, if it has a catchall, then the list itself would be sufficient so long as the former President, in addition to the incumbent President, has notice before disclosure.

That is all I am saying.

Mr. GLEIMAN. One last question.

As I understand it, the National Archives for a number of years, has had a model donor agreement that they have offered the Presidents as they have left office. Has this never been submitted to the Justice Department for its approval from the standpoint of constitutionality?

Mr. HAMMOND. I can find out for sure but I think that the answer is "No."

[See Mr. Hammond's letter to the subcommittee of March 13, 1978, at p. 106.]

Mr. GLEIMAN. Thank you.

Thank you, Mr. Chairman.

Mr. PREYER. Thank you very much, Mr. Hammond.

I regret missing some of the earlier part of your testimony. I won't ask you any questions because I am afraid I will re-plow ground that we have been over. But I read your testimony with interest and we appreciate very much your contribution.

Mr. HAMMOND. Thank you very much.

[Mr. Hammond's prepared statement follows:]

PREPARED STATEMENT OF LAWRENCE A. HAMMOND, DEPUTY ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGAL COUNSEL, U.S. DEPARTMENT OF JUSTICE

Mr. Chairman and Members of the Committee:

I appreciate this opportunity to present for your consideration the views of the Department of Justice on the constitutional questions raised by H.R. 10998, the "Presidential Papers Act of 1978." I would like to preface my remarks in much the same way that Judge Carl McGowan did in his opinion for the three-judge District Court in Nixon v. Administrator, 408 F. Supp. 321, aff'd, 97 S. Ct. 2777 (1977). He acknowledged that there must necessarily be an important difference between the role of a court in reviewing a statutory enactment which has not yet been implemented and in reviewing the application of that law to the precise facts of individual cases. 408 F. Supp. at 336. He quoted, as I would like to, from the Supreme Court's opinion in Watson v. Buck, 313 U.S. 387 (1944) where the Court warned against making judgments about statutory enactments in advance of their application:

> Passing upon the possible significance of the manifold provisions of a broad statute in advance of efforts to apply the separate provisions is analogous to rendering an advisory opinion upon a statute or a declaratory judgment upon hypothetical case.

That admonition of restraint should apply with even greater force when one is asked to comment on the constitutionality of a bill that has no accompanying legislative history to guide the reader through the several quite serious and important constitutional interests affected by the proposed legislation. With these considerations in mind, we have approached the review of H.R. 10998 with an eye toward identifying those matters that deserve clarification in order to avoid what might be serious constitutional problems in the ultimate application of the statute, and to identify those few problems which, in the Department's view, would call into question the constitutionality of this legislation prior to its application to particular cases. Although, as the following analysis of the bill will indicate, we believe that congressional intent with regard to certain aspects of the bill should be clarified and certain modifications adopted, it is our conclusion that the subject matter of this bill is well within the province of Congress, that it deals with matters appropriate for congressional concern, and that its underlying purposes may constitutionally be achieved.

The bill has two principal aspects: (1) it would reserve to the United States ownership and control of defined Presidential records; and (2) it would allow public access to such records, under procedures modeled on those contained in the Freedom of Information Act, immediately upon a President's departure from office and the completion of necessary archival processing. I will discuss each of these aspects in turn.

I.

Government Ownership of Presidential Records

The reservation and retention of complete ownership, possession, and control of "Presidential records" in the United States marks a significant departure from past practice. Traditionally, Presidents have been regarded as possessing a property right in their papers, 1/ although a governmental interest in the regulation and disposition of such materials has also been recognized. 2/ The Supreme Court has expressly reserved judgment on the question whether, under existing law, legal title to such materials lies in

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1/ See 43 Op. Att'y Gen. No. 1 (Sept. 6, 1974).

2/ See Folsom v. Marsh, 9 Fed. Cas. No. 4,901, pp. 342, 347 (1841).

the President. 3/ Since H.R. 10998 would have only prospective effect, however, that question would be avoided. Instead the issue becomes whether Congress may properly declare the records of future Presidents to be government property.

It is well established that the work product of government employees prepared at the direction of their employer or in the course of their duties is government property. 4/ Should Congress choose to extend this principle to cover records prepared or received by the President in the course of his duties, no substantial separation of powers problems would, in our view, be raised.

3/ Nixon v. Administrator of General Services, 97 S. Ct. 2777, 2791 n. 8 (1972).

4/ See Solomons v. United States, 137 U.S. 342 (1890); Scherr v. Universal Match Corp., 417 F.2d 497 (2d Cir. 1969), cert. denied, 397 U.S. 936 (1970): Public Affairs Associates, Inc. v. Rickover, 268 F. Supp. 444 (D.D.C. 1967); United States v. First Trust Co. of St. Paul, 251 F.2d 686 (8th Cir. 1958); Sawyer v. Crowell Publishing Co., 46 F. Supp. 471 (SDNY 1942), aff'd, 142 F.2d 497 (2d Cir.), cert. denied, 323 U.S. 735 (1944).

The Supreme Court's opinion in Nixon v. Administrator makes clear that it is within the appropriate ambit of Congress' power to legislate with respect to the preservation of the historically valuable papers of the Chief Executive. 97 S. Ct. at 2808. Mr. Justice Powell's separate concurrence in that case makes the same point at somewhat greater length and concludes that Congress' power in this area is "unquestionable." Id. at 2818. We think it follows that, at least insofar as declaring the President's official papers to be public property is concerned, Congress' action is not subject to serious challenge.

The Supreme Court, has, however, indicated that the mere fact that an individual is under government employ at the time he produces intellectural property such as an invention does not automatically transfer to the government title or interest in such property. 5/ Congress' power to declare Presidential papers to be government property is in this way limited. To the extent that the term "Presidential records" is too broadly defined to include papers that are

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5/ Solomons v. United States, 138 U.S. at 346.

purely private in nature, two questions are raised: (1) may Congress, pursuant to its police power, take a President's personal property for public purposes; and (2) if so, what just compensation must be paid. These issues were left for further consideration in Nixon v. Administrator; only Justice White, concurring, expressed the view that former President Nixon's personal papers could not be taken, even if compensation were paid, merely because they were of historical value. 6/

We do not believe that the lines drawn by either H.R. 10998 or H.R. 11001 between "Presidential" and "private" records would on their face present serious problems of this sort. Significantly, both bills adopt what we think is a sensitive and sensible approach, leaving solely to the President and his personal staff the division of documents and records between those that are personal and private and those that arise in the course of conducting

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6/ 97 S. Ct. at 2813.

his official duties. 7/ Thus, should a judicial challenge at some time be raised, it is more than likely that this aspect of the proposed legislation would be upheld.

The bill also endeavors to distinguish between Presidential papers and materials having to do with his participation in political affairs. While the bill does acknowledge the existence of interests protected here by the First Amendment, we question whether its scope is sufficient to avoid serious constitutional question. As we read the bill only matters that concern a President's "personal participation" would be entitled to protection. In order to perform his role as head of his national political party, the President, it seems reasonable to assume, may well receive considerable

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7/ We retain a mild preference for the language on this matter in H.R. 11001, which requires that nonprivate papers are those that "relate to" the performance by the President of particular official functions. That language may be thought to establish a narrower definition than the language of H.R. 10998, which places in the public domain all matters that arise "in the course of conducting" his official functions. Because the Presidency is a full-time job in the broadest sense, it might be argued that virtually everything the President receives comes to him in the course of his official duties.

information and material that relate to partisan political matters but which only in the most attenuated sense involve his "personal participation." Such materials, while of historical interest, would not seem to fall within the realm of the President's official duties or even ceremonial functions insofar as his political role has traditionally been, and continues to be, distinguishable from his role as party leader. Significantly, moreover, his right to receive such information is as firmly grounded in the First Amendment as are the other associational aspects of the President's political role. His political advisers, for instance, may wish to inform him of the status of congressional election campaigns throughout the country with the knowledge, of course, that he might participate personally in only a very few of them. In the absence of a demonstrated "compelling public need" for such information, it may well not properly be the subject of free public access. See Nixon v. Administrator, 97 S. Ct. at 2802.

II.

Access Under a Modified Freedom of Information Act

The access provisions of H.R. 10998 focus both on internal procedures that touch on the President's management and control over his Office and on standards for disclosure. I will address first those several procedural provisions. The bill requires the President or his personal staff on a regular basis to segregate his official from his personal papers. He is also instructed by section 2(b)(3) of the bill to implement "records management controls" and to take steps to assure his deliberations and activities are "adequately recorded" and "appropriately maintained." Section 2(c) allows the President to dispose of those papers which he deems to be of no value, but it requires him first to obtain the approval of the Archivist and to publish a "disposition schedule" in the Federal Register in advance of any disposal.

These requirements raise -- as do any congressionally imposed duties on the internal management of the Executive Branch -- a constitutional separation of powers question. Applying the Supreme Court's now familiar analysis, which

is rooted in Mr. Justice Jackson's concurrence in Youngstown Sheet & Tube v. Sawyer, 343 U.S. 579, 634 (1952), and which was embraced and elaborated on by the Court in United States v. Nixon, 418 U.S. 683, 711-12 (1974), and in Nixon v. Administrator, 97 S. Ct. at 2790, there is little question, first, that Congress may legislate in this area. The cases leave no life in the argument that the Executive Branch's internal operation is immune from any form of regulation by Congress. 8/ It is equally clear, however, that absent a showing of some "overriding need" legislation in this area cannot stand if it "prevents the Executive Branch from accomplishing its constitutionally assigned functions." Nixon v. Administrator

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8/ Given the acceptance by the Supreme Court of Justice Jackson's analysis, we think it necessary to mention another possible way in which courts might approach the separation of powers questions under this bill. The constitutional propriety of congressional enactments calling for public access may vary depending upon whether it touches those Article II functions which belong, by textual commitment, exclusively to the Executive Branch, such as the pardon power and the power to receive ambassadors. Since Congress plays no role under the Constitution in these areas, a court might hold that no amount of recordkeeping and public access regulation is appropriate here. We do not, however, regard this as a matter of great significance since the functions that are exclusively Executive in nature are the small portion of the Chief Executive's duties.

97 S. Ct. at 2790. The proper inquiry then with respect to these procedural and recordkeeping requirements is whether they carry a potential for undue disruption of the functioning of the Executive Branch.

Removed as we are from the inner workings of the President's Office, we in the Department of Justice are not in a position to tell this subcommittee whether H.R. 10998's segregating, recordkeeping, and disposal provisions can be carried out without undue interference. We would be inclined to agree with the testimony before this subcommittee of President Ford's former Counsel, Philip Buchen, that, if read broadly, these provisions could substantially disrupt the functioning of the President's Office. See Statement of Philip W. Buchen, at 5-7. On the other hand, the several provisions in question would appear to leave considerable discretion to the President to decide, based upon his own standards of good management, whether his papers are being generated and maintained in an "adequate" and "appropriate" fashion. Moreover, we think it relevant that each of these functions is to be performed by persons within the Executive

Branch and that, as we read the bill, they will not be subjected to review or on-going regulation by any other Branch of government. See Nixon v. Administrator, 97 S. Ct. at 2789; and 2819 (Mr. Justice Powell's separate concurrence).

In order, however, to avoid constitutional confrontations of the sort that might arise under these procedural provisions, we might suggest the inclusion of language similar to that now found in the Executive Order regulating intelligence activities. E.O. 12036 specifies that the Executive will make certain documents, reports, and summaries available to Congress and the disclosures contemplated there are broad ones. There is, however, an introductory admonition that disclosure must be "consistent with applicable authorities and duties, including those conferred by the Constitution upon the Executive and Legislative Branches." E.O. 12036, § 3-4, We understand that this language was acceptable to the Senate and House Intelligence Committees, and we would think it appropriate for Congress to include similar language to assist the President in carrying out the several record-keeping and related requirements of this bill.

There is a second procedural aspect to H.R. 10998, which raises similar separation of powers questions, and which in our view may be troublesome. Section 3, which would add a new subsection (f)(5) to 5 U.S.C. § 552 of the Freedom of Information Act, would allow a sitting President to gain access to the Presidential papers of a preceding President only after complying with certain prefatory requirements. If the particular papers in question are ones not generally available to the public the President must, acting through his counsel, identify "with specificity" the documents required and must state that such documents are "not otherwise available." These things must be done in advance of disclosure, they must be done in writing, and the former President or his representative must be also informed in writing.

Again, we have no way of knowing whether in actual application this provision would prove disruptive of legitimate Executive functions. It may well be that there are very few cases in which documents necessary to the President's current activities will be found only in the papers of his predecessor. Yet particular cases can certainly be

envi ioned in which the President needs to review documents, knows generally that they are among the former President's papers, but cannot either identify them with precision or assure the Archivist that those documents might not be available elsewhere in the Executive Branch. While in some respects a provision of this sort would prove helpful to the President's performance of his Article II functions, 9/ the several procedural restrictions do raise serious questions. These concerns might be alleviated by minor modifications, such as changing the specificity provision to require "so much specificity as is reasonably possible," and altering the availability provision to read "not otherwise known to be reasonably available."

The remaining access provisions of the bill establish the mechanism for making Presidential papers available for public scrutiny. The bill contemplates that access will be granted to all Presidential papers excepting only those that fall within certain specified categories, viz. properly

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9/ See the statement of the Solicitor General in his brief in Nixon v. Administrator, which is excerpted and discussed in Mr. Justice Powell's separate concurrence, 97 S. Ct. at 2819.

classified information, information relating to Executive Branch appointments, information restricted from disclosure by statute, information presented to the President in confidence "the disclosure of which could reasonably be expected to damage the foreign affairs of the United States or interfere detrimentally with the current affairs of the Government," and information which would have an unwarranted impact upon the privacy of any person. We assume that these categories were drafted with an eye toward preserving the essence of the privilege articulated in the Supreme Court's recent decisions while balancing those considerations which favor wide public access to Presidential papers. In assessing whether the bill satisfactorily preserves the Executive's constitutional role, two questions must, in our view, be addressed: (1) who is to participate in and control the decisionmaking process with respect to particular releases; and (2) does this formulation of categories include all the necessary aspects of the President's privilege.

On the first question we note that the Archivist is the party instructed to make the decisions respecting release.

While the bill does not so specify, it can be fairly assumed -- indeed must be assumed -- that in performing this function he will be guided by the President then in Office. The Archivist is an appointee of the Administrator of the General Services Administration (44 U.S.C. § 2102). The Administrator is himself a Presidential appointee who occupies a position within the Executive Branch and who serves at the pleasure of the President just as do other heads of Executive departments and agencies. (40 U.S.C. § 751(b)). As is true of all other duties performed by these officials, they are ultimately responsible to the President and the President may instruct them in the performance of their duties. No constitutional issues arise as a result of that relationship so long as the President does not give instructions inconsistent with constitutional or appropriate statutory prohibitions. Thus, in performing the responsibilities outlined in H.R. 10998, the Archivist would, we assume, represent the Chief Executive and would perform under his direction the constitutional functions devolving upon the incumbent President discussed in Nixon v. Administrator

and in United States v. Nixon.

A greater problem arises, however, with respect to the role contemplated by the bill for the former President in preserving the papers of his Administration. The bill suggests that, while the Archivist "may consult" with former Presidents, he is under no requirement to do so. We think that on this issue the bill is squarely at odds with the Supreme Court's opinion in Nixon v. Administrator. The Court there directly acknowledged that a former President does have a continuing, and constitutionally based, interest in preserving the confidentiality of privileged communications which he received during his service in Office. 97 S. Ct. at 2793. The Court, and the separate opinions of Justices Blackmun and Powell as well, repeatedly emphasized that the Presidential Recordings and Materials Preservation Act carefully preserved the opportunity to protect and assert "any legally or constitutionally based right or privilege." Id. at 2790; 2814 (Mr. Justice Blackmun); 2816-17 (Mr. Justice Powell). The Act achieved this end by providing that regulations be promulgated which would take into account the need for notice and

an opportunity to object in each case to the former President. Although the Court found it unnecessary to decide the public access issues, we think it plain that in light of the Court's repeated emphasis on this aspect of the statute, without this provision the Act would ultimately be declared unconstitutional. Likewise, we do not think the present bill will survive constitutional scrutiny unless it is amended to provide a similar case-by-case screening mechanism. 10/

The need for a provision allowing the former President

10/ We do not think that this defect is overcome by the fact that the sitting President retains the authority to exert the privileges of the Executive Branch. Obviously, as the Court in the Nixon Papers case explained, if the present and former President disagree over the propriety of a particular disclosure, the judgment of the incumbent, because he will ordinarily be in the best position to assess the consequences of disclosure, will be entitled to great weight. 97 S. Ct. at 2793. Nonetheless, the central point remains: a President cannot offer any assurance to his advisers that their counsel will be received in confidence unless his ability personally to raise the privilege survives his Administration. The Solicitor General so argued in that case and the Court embraced his reasoning in toto. Id. In this connection it may be well also to remember the point that Justice Blackmun felt constrained to add: the transition from one President to another, or from one political party to another in the White House, should not be allowed to disrupt the preservation of Presidential privilege. Id. at 2814.

to have a role in the public access process applied also with respect to release of material that is of a partisan political nature. As we have stated in the foregoing section of this testimony, the present language of the bill does not cover adequately the President's First Amendment political speech and associational rights. Even if the provision were drawn more liberally, however, we think that some provision would nonetheless be required allowing the former President to assert any First Amendment rights against disclosure on a case-by-case basis. Again, we read the Court in Nixon v. Administrator, 97 S. Ct. at 2802, as clearly acknowledging the need for such an opportunity.

Assuming that the bill is modified to incorporate these necessary provisions for notice and an opportunity to question intended disclosures, we may address the second issue whether the categories of excludible material are coterminous with the responsibility of the Executive Branch to protect against disclosures that might prove detrimental to the public interest. We focus first on the exclusion of information of a confidential nature. In one important respect the provision is too narrowly drawn. It protects from disclosure

cognizable harm and that it does not allow for consideration of the more generalized chilling effect that flows from the loss of assurances of confidentiality within the Executive Branch. As we read the pertinent cases it is clear that the privilege for confidential communications has a presumptive application even where nondisclosure could not be based on the "more particularized" privilege for "military, diplomatic, or sensitive national security secrets." United States v. Nixon, 418 U.S. at 706; Nixon v. Administrator, 97 S. Ct. at 2792. It may well be that this apparent shortcoming in the bill can be corrected if the last phrase of subparagraph (D) is read expansively. That is, if the Archivist could read "interfere detrimentally with the current affairs of the Government" to allow a finding that loss of confidentiality generally was intended to be there comprehended, this provision would probably cover the privilege adequately. If the provision is not to be read in this fashion we think courts would conclude -- even without the facts of a particular case before them -- that this bill cuts into the necessary area of confidentiality and cannot be sustained.

It must be remembered that such communications are presumptively privileged. A statute which stands the presumption on its head, making all such communications available in the absence of a showing of direct and immediate damage or interference would intrude upon what the Supreme Court has defined to be the scope of Presidential privilege. Quite to the contrary, the showing of some substantial need for disclosure is required of those who would override the presumption against disclosure. See Senate Select Comm. v. Nixon, 498 F.2d 725, 730-31 (D.C. Cir. 1974).

Finally, the bill's five-part list of grounds for nondisclosure suffers from what we regard as possibly an overriding defect. Stated simply, we doubt that it is reasonably possible to set forth and preserve in a legislative catalogue all the privileges necessary to the functioning of the President. Two examples might be cited. First, we see no provision for the nondisclosure of investigatory materials arising in the course of law enforcement activities. Second, there is no mention of a privilege against the disclosure of the identity of informants. Both privileges are well recognized, and we assume the subcommittee will agree that

only those confidential communications made personally to the President, or made personally by the President. Insofar as this language would be read to exclude the communications of, and advisory materials received by, the close personal assistants to the Presidents, we think it cannot stand. 11/ It has long been understood that the privilege for confidential communications extends beyond the person of the President to those who serve as his advisers. This understanding has been based on the same practical considerations that led the Court in Gravel v. United States, 408 U.S. 606, 617 (1972), to conclude that a Senator's legislative aide, who served as his "alter ego" in accomplishing critical tasks which the Senator could not himself perform, was entitled to protection under the provisions of the Speech and Debate Clause. We need not dwell on the point, except to say that we think the courts have acknowledged that for the so-called

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11/ By its terms, the bill applies to all documentary materials "made or received . . . by the President, his immediate staff, or a unit or individual of the Executive Office of the President . . ." § 2(e)(2). It must be assumed that much material of a confidential nature would fall within this definition but which would not be received "personally" by the President.

"presumptive privilege" to be meaningful it must extend beyond the President personally to those who serve under and advise him. 12/ See United States v. Nixon, 418 U.S. at 682 ("A President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions . . . ."); Nixon v. Administrator, 97 S. Ct. at 2792 n. 10 (acknowledging the "legitimate governmental interest in the confidentiality of communications between high government officials, e.g., those who advise the President"); Nixon v. Sampson, 389 F. Supp. 107, 150 n. 112 (D.D.C. 1975).

There is a second issue that arises with respect to the confidentiality section of the bill. The provision might be read to allow the nondisclosure of confidential communications only where disclosure would cause some direct and immediately

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12/ To say that the privilege extends to advisers of the President does not mean that any Executive Branch employee may assert that privilege. As I am sure this subcommittee is aware, at least insofar as congressional requests for documents are concerned, it has for many years now been the announced practice of the Executive Branch to limit the invocation of the privilege personally to the President. See e.g., Memorandum for the Heads of Executive Departments and Agencies, dated March 24, 1969 (known as the "Nixon Memorandum").

their preservation is important. Both privileges -- which by the way have their origins as common law "evidentiary" privileges and enjoy an existence apart from what we usually regard as a "Presidential" privilege -- are rooted in the notion that the public interest in furthering effective, and fair, law enforcement requires their preservation.

Our point here is that we doubt that any very specific and restrictive listing of this sort will prove sufficient to cover all of the accepted -- and important -- grounds for a Presidential declination to disclose portions of his papers. 13/ Furthermore, it must be recognized that the law with respect to the types of privileges addressed by this legislation is constantly developing as courts tackle issues arising in particular cases. In passing the "Presidential Recordings and Materials Preservation Act," we think Congress recognized these facts. The approach adopted there is one that recommends itself: the statute simply

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13/ Among the other sorts of information now protected under the Freedom of Information Act is material that may constitute a trade secret.

instructed the Administrator of GSA to draft appropriate regulations which would take into account all of the relevant factors both in favor of and against disclosure and which specifically would protect "any party's opportunity to assert any legally or constitutionally based right or privilege." 44 U.S.C. 2107. We think that a similar provision is desirable, and may well prove essential, to prevent a subsequent judicial ruling that the law is constitutionally flawed.

In contrast to the approach taken by H.R. 10998, that adopted by the majority of the National Study Commission and embodied in H.R. 11001, would allow outgoing or incumbent Presidents to restrict access to selected poritions of their papers for up to 15 years. This proposal has much to recommend it. By precluding all unessential disclosures for a reasonable period, the chilling effect that could result from case-by-case debates on exemptions under the FOIA would be avoided. This compromise, allowing for passage of time, would seem to reduce the impact of a concern over breached confidences. Moreover, allowing for historical distance

between the events underlying the President's documents and their disclosure, would, we think, improve the likelihood of meaningful access. Although effectively reducing the disruption of the Executive Branch functions caused by the fear of immediate disclosure of confidential advice, and the resulting problem with regard to constitutional principles of separation of powers, the H.R. 11001 approach falls short of what we think the Constitution requires in one respect. The proposal provides no opportunity for an assertion of the Presidential privilege should that become necessary at some time more than 15 years after a President leaves office. If the 15-year proposal could be modified to provide some reasonable mechanism for assertion of the privilege in appropriate cases, there is reason to believe that courts might well conclude that a balance struck in this way would both satisfy Congress' legitimate desire to assure greater access to information and preserve the essential viability of the presumptive privilege for confidential communications.

I hope that these comments prove helpful to the sub-committee.

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Mr. PREYER. Our next witness is the Archivist of the United States, Dr. James B. Rhoads, who has served as a member of the National Commission on Records and Documents for Federal Officials.

We are pleased to have you with us today, Dr. Rhoads.

You may proceed with your prepared statement or summarize in any manner you see fit.

STATEMENT OF JAMES B. RHOADS, ARCHIVIST OF THE UNITED STATES, NATIONAL ARCHIVES AND RECORDS SERVICE, GENERAL SERVICES ADMINISTRATION; ACCOMPANIED BY STEVEN GARFINKEL, CHIEF COUNSEL FOR RECORDS AND ARCHIVES

Mr. RHOADS. Thank you very much, Mr. Chairman. I appreciate your welcome and the opportunity to be here. I am accompanied by Steven Garfinkel who is our Counsel.

I wish to thank the chairman for inviting me to present testimony on H.R. 10998 and H.R. 11001, bills which propose new systems for controlling, managing, and disposing of Presidential and Vice Presidential papers. The fact that these hearings are being held before this committee gives ample evidence of the Congress interest in and concern about this issue. I am gratified by this concern and welcome the opportunity to participate in the discussion of such an important issue.

Both of the bills being considered by this committee are based on the fundamental belief that citizens legitimately have a right to as much information as possible about the operation of their Government. This is also the assumption that guides professional archivists in their work. There is, therefore, no question about our strong support for the goals represented in these two bills.

These bills do, however, represent somewhat different solutions to demands from the public, journalists, historians, archivists, and the Congress for a new approach to preserving and making available the records of the Presidency. Traditionally the papers of elected officials, including both the President and Members of Congress, have been considered private property to be disposed of or cared for in whatever manner the official dictated. For the most part, Presidents from Herbert Hoover through Gerald Ford have chosen to donate the papers of their administrations to the U.S. Government to insure that the papers would be preserved and made available for research. Only one modern President sought to donate his papers under restrictions judged to be unacceptable by professional archivists.

On the other hand, preservation of the papers of other Presidents and other elected officials has often been haphazard.

Despite some shortcomings in the current system, we supported its continuation because we believed in the essential soundness of the Presidential Libraries Act which we administer. But events of the past few years have compelled archivists as well as others to thoroughly reconsider alternative approaches.

I served as the delegate of the Administrator of General Services on the National Study Commission on Records and Documents of Federal Officials—popularly known as the Public Documents Commission—which was chartered by Congress to conduct an indepth study of the status of the papers of the President, Members of Congress,

the judiciary, and other Federal officials. Although my views were already changing, my work with the Commission accelerated that process and at its conclusion I unreservedly supported the Commission's majority recommendations for legislation which would draw distinctions between personal papers and official papers of elected officials and would specify the differing legal status of each category of documents. Both H.R. 10998 and H.R. 11001 although limited to the documents created in the White House by or for the President and Vice President, incorporate several of the Public Documents Commission's recommendations.

I, therefore, wholeheartedly agree with the fundamental goal of both bills though I differ with some aspects of how to carry out that goal. I also continue to support the Public Documents Commission's recommendations regarding the papers of Members of Congress and the judiciary.

We think that it is especially important to insure that the definitions and procedures included in any proposed legislation dealing with the distinctions between personal papers and official records should be as unambiguous as possible and, therefore, less open to challenge when the law is implemented. I do not think this is the time to go into extensive, detailed comments on suggested definitional changes. We have, however, prepared such comments upon the request of this subcommittee and we hope that those comments will be given serious consideration.

I must admit that our concern for clear procedures and definitions is more than academic since both bills being considered in these hearings propose that the Archivist carry out their provisions. Like everyone else, I suppose, we like to have operating guidelines.

The most obvious point of divergence in these two bills lies in their differing approaches to control of those documents which both bills define as Presidential records. In both instances the Presidential records are considered property of the United States to be taken into the custody of the Archivist at the conclusion of a President's term of office. At this point the bills diverge.

H.R. 10998 would strip a former President of all control over access to the Presidential records of his administration by making the records subject to an amended Freedom of Information Act at the time that the Archivist assumes custody of the records.

H.R. 11001, on the other hand, has adopted the recommendation of the Public Documents Commission permitting the former President to place restrictions on the records for up to 15 years from the time his term of office ends.

As a member of the Public Documents Commission I supported the recommendations that a President be permitted to control access to his papers for up to 15 years and I continue to do so. The Commission considered a great many factors in reaching the decision to make this recommendation and I believe that the reasons for the Presidential restriction period were good ones.

The materials under discussion represent the written record of the highest level policy discussions and decisions on issues of fundamental importance to all of us. The documents serve an important function at the time they are created and an important function later when they are used by the public and scholars to study and make judgments about the way decisions were made and why. Many of the Commission's witnesses expressed the belief that fewer and less candid