February 9, 1976

Memorandum of Law

FOI REQUESTS FOR MEMORANDA

OF TELEPHONE CONVERSATIONS

This is a preliminary legal analysis of issues raised by requests under the Freedom of Information Act (FOI) for "transcripts" of telephone conversations involving Secretary of State Kissinger. Although the FOI requests speak of "transcripts," the documents in question range from incomplete summaries to detailed memoranda of telephone conversations, but are not, strictly speaking, transcripts.

Succeeding parts of this memorandum (Tabs 1 to 5) treat the following legal questions:

1. Ownership of the Transcripts. If a cabinet official "owns" memoranda of his telephone conversations, the memoranda presumably would be "agency records" within the meaning of the FOI. Conclusions about ownership are not clear. Personal ownership is supported by a Cabinet Paper during the Eisenhower Administration which states that "memoranda of conferences and telephone calls" and other "personal work aids" may be retained by heads of departments upon leaving office. And Porter County Chapter v. Atomic Energy Commission, 380 F.Supp. 630 (N.D. Ind. 1974) holds that a government employee's handwritten notes, not circulated to anyone else in his agency, are personal papers and not "agency records" under the FOI.

On the other side, the cases support an overriding government interest in having a complete record of all agency business. If a telephone memorandum is the Government's only record of a substantial Government decision, the Government may own or have a predominant interest in the memorandum. However, where one has consistently treated a document as private, and where the government already has a complete record of official matters described in the document, the document may be deemed a personal paper. United States v. First Trust Co. of St. Paul, 251 F.2d 686 (8th Cir. 1958).

Finally, conclusions about ownership may be affected by the outcome of the current Nixon papers litigation, as well as by a report due by March 31, 1976, by the National Study Commission on Records and Documents of Federal Officials.

2. The "Agency Record" Requirement. Apart from questions of ownership, an argument might be made that some of the telephone conversation memoranda are White House papers, and hence not "agency records" subject to the FOI. It seems clear the memoranda prepared in Secretary Kissinger's former White House office would not be "agency records," even though they are now stored in the State Department. But this White House papers argument might not protect memoranda prepared in the State Department itself, except perhaps memoranda of a conversation with the President. Moreover, this White House papers argument might bring some of the memoranda under the Presidential Recording and Materials Preservation Act of 1974, whose legislative history indicates an intent not to limit access otherwise available under the FOI (see Tab 3)

The memoranda would receive broader protection if they were personal papers such as those at issue in Porter Country Chapter v. Atomic Energy Agency. The critical fact in that case was that documents had not circulated to anyone in the agency other than the author. Secretary Kissinger's transcripts have not, strictly speaking, been circulated within any agency, but they were initially reviewed by Secretary Kissinger's immediate assistants so that undertakings by the Secretary is a conversation could be followed up. This factor should not by itself convert a personal paper into an agency record, but this is not clear.

3. Exemptions Via Presidential Papers Statutes. FOI Exemption 3 protects materials specifically exempt from disclosure by another statute. The Presidential Recordings and Materials Preservation Act of 1974 may be one such statute. Cf. Nichols v. United States, 460 F.2d 671 (10th Cir. 1972). However, the Act would not apply to memoranda after August 9, 1974, and perhaps not to memoranda prior to August 9, 1974, which were prepared at the State Department. As to memoranda which would be covered, a reference to the FOI in the legislative history casts doubt on whether a complete FOI exemption would exist.

A donation of the memoranda to the National Archives under the Presidential Libraries Act, 44 U.S.C. 2107, would qualify under FOI Exemption 3. Nichols v. United States, supra. The legal effect of the underlying donation, however, may be placed in doubt either by the Nixon papers litigation or by legislation which may be enacted in light of the upcoming report of National Study Commission on Records and Documents of Federal Officials.

4. Exemption for Classified Material. FOI Exemption 1 protects material properly classified under Executive Order 11652. Some of Secretary Kissinger's memoranda contain national security information, but they have been neither reviewed for classification nor marked as classified. Although there are no court decisions on belated classification, E.O. 11652 and regulations thereunder indicate a basis for now classifying those memoranda which have national security information. Also, the Justice Department has taken the view that where an agency has treated a document with the same precautions as would be appropriate for classified material, it may give the document a belated classification if the document contains national security information.

5. Exemption for Intra-Agency Memoranda. Memoranda of conversations between two government officials readily fit within the concept of an inter-agency or intra-agency memorandum in FOI Exemption 5. As for conversations between Secretary Kissinger and someone outside the government, two cases indicate that memoranda of such conversations would also be covered if the conversation involved the expression of opinions or recommendations to Secretary Kissinger. Wu v. National Endowment For Humanities, 460 F.2d 1030 (5th Cir. 1972); Soucie v. David, 448 F.2d 1067, 1978 n. 44 (D.C. Cir. 1971).

Not all intra-agency memoranda are protected under Exemption 5, but only those which "would not be available by law to a party...in litigation with the agency." Clearly, this would encompass advice and recommendations as to what decision or policy the government should adopt. There is also a growing doctrine that the "mental processes" of a government official in arriving at a decision or policy should also be protected. Montrose Chemical Corp. v. Train, 491 F.2d 63 (D.C. Cir. 1974) citing Morgan v. United States, 313 U.S. 409, 422 (1941); International Paper Co. v. FPC, 438 F.2d 1349, 1358-59 (2d Cir. 1971); Soucie v. David, supra, 448 F.2d at 1067; cf. Vaughn v. Rosen, 523 F.2d 1136

(D.C. Cir. 1975), holding that not all "pre-decisional" documents are exempt, but only those which express "opinions on legal or policy matters" or are "a part of the agency give-and-take...by which the decision itself is made." Thus, there is a basis for contending that most if not all of Secretary Kissinger's telephone memoranda are protected under Exemption 5.

Invasion of Privacy. There is still work to be done on whether compelling disclosure of the telephone memoranda would result in an invasion of privacy. If a privacy privilege exists, it more probably would have a basis in tort law principles or in the Constitution than in FOI Exemption 6. It seems clear that Secretary Kissinger, as a party to a conversation, is free to disclose a memorandum of the conversation to others. But query whether he can be compelled to disclose that conversation.

January 30, 1976

FOI REQUESTS FOR TELEPHONE TRANSCRIPTS:

OWNERSHIP OF THE TRANSCRIPTS

This memorandum discusses whether Secretary Kissinger has property rights in memoranda of telephone conversations that were prepared primarily for his personal use during the years 1969-75. The nature and subject matter of these memoranda are described in an annex to this memorandum. If the memoranda are personal property, they cannot be "agency records" subject to an FOI claim. Porter County Chap. v. Atomic Energy Commission, 380 F. Supp. 630 (N.D. Ind. 1974), discussed at Tab 2.

The rights of government employees in materials produced or accumulated during the course of their employment is uncertain, particularly in the aftermath of the Nixon papers controversy. The Supreme Court has never ruled on the question. Although lower court decisions have espoused the principle that material generated by a public official in the course of his employment is owned by the government, some decisions have recognized limited rights of public officials in some materials which relate to official duties.

Nixon v. Sampson Litigation

The question of ownership rights of public officials is currently being litigated in Nixon v. Sampson, 389 F. Supp. 107 (D.D.C. 1975).* Nixon v. Sampson involved the validity of an agreement between former President Nixon and the GSA Administrator under the Presidential Libraries Act, 44 U.S.C. 2107. The agreement purported to donate approximately 42 million documents and tapes of the Nixon Administration to a depository under the GSA

* Judge Richey's opinion in that case was stayed by the court of appeals on January 31, 1975, pending a decision in a companion case, Nixon v. Administrator, in which the constitutionality of the Presidential Recordings and Materials Preservation Act of 1974 was ultimately upheld by a three judge district court. The three judge court requested the court of appeals to lift its stay of Judge Richey's decision in Nixon v. Sampson. The court of appeals has not yet acted. Thus, Judge Richey's opinion has not yet been incorporated into a final judgment.

Administrator and Archivist of the United States. In reality, however, President Nixon retained substantial control over the donation. He was permitted to direct the GSA Administrator at any time to destroy the Watergate tapes. He also obtained the right to withdraw any of the other materials that were to be donated.

President Nixon brought suit for specific performance of this agreement or for writ of mandamus directing Sampson, Philip Buchen and Secret Service Director Knight to comply with the agreement. Neither the United States (on behalf of Sampson) nor the Special Prosecutor (who intervened in the suit) contested Nixon's ownership of the papers. Rather, the Special Prosecutor contended that the Government had an overriding interest in the tapes and papers. The United States argued that the suit was barred by sovereign immunity, in that specific performance will not lie against the Government. However, Jack Anderson, The Reporters Committee For Freedom of the Press, and Lillian Hellman, in separate suits, sought declarations (1) that the tapes and papers belonged to the Government and (2) that they were subject to the FOI. It is through these latter suits (which were consolidated with Nixon v. Sampson) that the "ownership" question arose.

In the consolidated Nixon v. Sampson litigation, Judge Richey held that President Nixon did not own papers and tape recordings "which were generated, created, produced or kept in the administration and performance of the powers and duties of the Office of the President." Judge Richey concluded that such materials and tapes belonged to the Government, "and are not personal property of the former President." 389 F.Supp. at 145.

It is important to keep in mind that President Nixon made an undifferentiated claim of ownership to approximately 42 million materials. He did not distinguish between papers he was personally involved in from those which he never saw. Nor did his claim focus on papers or notes prepared solely for his own personal use.

Because of this, Judge Richey's holding does not control the question of ownership in the Secretary's telephone conversation memoranda. Indeed, Judge Richey's holding applies only to papers that are produced or kept "in the administration and performance of the powers and duties of the Office...." It is arguable that the

Secretary, in having the telephone conversation memoranda prepared, was not strictly speaking acting "in the administration and performance of the powers and duties" of his office. Keeping the memoranda does not further the government's business, but rather serves to protect the Secretary.

Moreover, Judge Richey's opinion implicitly accepts the view that some of the Nixon papers and tapes were personal property. In discussing President Nixon's right of privacy, the opinion notes that Nixon did not have time to remove "his personal materials and tape-recorded conversations," and states that a person's expectation of privacy is not eliminated by "the fact that personal property is in the possession of the government." 389 F.Supp. at 156. Also, the opinion indicates that the Nixon-Sampson agreement was valid insofar as it pertained to personal materials. Id at 143-44. Thus, Nixon v. Sampson would not preclude a claim that Secretary Kissinger's telephone transcripts are personal property. It must be conceeded, however, some of the prior cases quoted in the opinion intimate a broad view of what papers are government, as opposed to private, materials.

Prior Cases Supporting Private Ownership

Among the authorities on which Judge Richey relied in Nixon v. Sampson is United States v. First Trust Co. of St. Paul, 251 F.2d 686 (8th Cir. 1958). There, the court said that "records of a government officer executed in the discharge of his official duties ... are public documents and ownership is in the United States." Although Judge Richey cites this statement, the actual holding in case was quite different.

The case involved rough notes made by William Clark during the famous Lewis and Clark Expedition of 1804-05. About 150 years later, these notes were found in the attic of a lady who had just died. The executor of her estate brought suit to quiet title to these notes. The United States intervened, claiming that the notes were Government property.

The court held that Clark's notes were private and not Government property. This was so even though the court found that Lewis and Clark were on an official expedition of the Government. The court relied on the following findings:

-- Clark made his notes "for his personal use in subsequently preparing his own diary."

-- Clark's comrade, Lewis, was directed by President Jefferson to keep an official record of the expedition, but this directive did not extend to Clark. Moreover, since Lewis did in fact prepare an official record of the expedition, this supported the view that Clark's notes were not official records.

-- Lewis, Clark and President Jefferson subsequently treated the journal that Clark prepared from his rough notes as a private document.

-- Although Clark's notes contained much of the data that Jefferson had requested Lewis to collect in the official record, this data was mixed with considerable "personal and private notations...as might not be expected to be found in notes of an official character or in an official record."

-- Private possession of the notes for over a century afforded a presumption of private ownership in the notes, placing the burden on the Government to prove that the notes were not private property.

Secretary Kissinger's telephone transcripts appear to satisfy many of the above criteria. Presumably the Department of State has an official record of most matters discussed in the memoranda. The memoranda have been treated as private, they have been kept for the personal use of the Secretary, and they apparently contain considerable private matter. On the other side, however, it is possible that some of the transcripts embody the only written records of some foreign policy decisions of the United States.

There are a couple of other authorities that indicate the existence of private rights in certain kinds of papers prepared in public office. In Eyre v. Higbee, 35 Barb 502 (N.Y.Sup.Ct. 1861), it was stated that in writing to his private, military secretary, General George Washington did not "part wholly with his property in [these] literary compositions," nor did he give his military secretary "the power of publishing them."

In Folsom v. Marsh, 9 Fed. Cas. 342 (C.C.D. Mass. 1841) publishers of a work entitled "The Writings of George Washington" claimed that their copyright had been infringed by a publication of some of Washington's private letters that these publishers had purchased. The defendants replied by arguing that there could be no infringement because the letters were public in nature. Justice Story, noting (1) that the publishers had expended considerable money and effort to collect the letters and (2) that President Washington himself had "deemed them his own private property," recognized the copyright.

The opinion in Folsom notes that in addition to the private letters, some of Washington's official letters were also involved. Unfortunately, the opinion does not discuss how the official letters were to be distinguished from the private ones. In this respect, the Folsom case is not terribly helpful.

In Re Roosevelt's Will, 190 Misc. 341, 73 N.Y.S. 2d 821 (1947), concerned whether President Roosevelt had made an effective gift of the personal and public papers he had collected. The public papers included Roosevelt's office files and the White House Central Files of his Administration. Roosevelt's "Map Room Papers" were apparently not considered a part of the gift. The Court found that Roosevelt during his lifetime had intended to and did in fact make an effective gift of his personal and public papers to the United States Government, to be preserved at the Franklin D. Roosevelt Library at Hyde Park.

This holding appears to assume that Roosevelt owned both his personal and public papers. But this ownership issued was not addressed. The opinion does go on to state that Roosevelt had "expressed a wish" that a committee "examine his personal papers, and select those which, in

their opinion, should never be made public and those which should remain sealed for a prescribed period of time ...." The court found that this was a mere wish, and not a condition to the gift which the Archivist of the United States was required to follow. Judge Richey, in Nixon v. Sampson, distinguishes this case by asserting that the question of ownership was not involved, but only whether the elements of a valid inter vivos gift had been satisfied. The case can be read to support Judge Richey's characterization.

Finally, there is a case involving Admiral Rickover's copyright interest in speeches Rickover gave while employed by the Government. Public Affairs Associates, Inc. v. Rickover, 268 F.Supp. 444 (D.D.C. 1967), on remand from 369 U.S. 111. The district court held that although the speeches were typed, duplicated and distributed through government facilities, the speeches were "private property... entitled to copyright." 268 F.Supp. at 450. This holding was based on the following considerations:

-- the speeches were prepared at Rickover's home in his free time;

-- Rickover treated the speeches as a private activity and did not seek the permission of his superiors in advance;

-- the copyright notice borne by the speeches listed only Rickover's name without any official title;

-- the subject matter of the speeches did not relate in any way to Rickover's official duties.

The first and last factors listed make the Rickover speeches distinguishable from Secretary Kissinger's telephone transcripts. The second factor is consistent with Secretary Kissinger's treatment of the transcripts. On the latter point, see Porter County Chap. v. Atomic Energy Commission (Tab 2, pages 5-7), holding that a government employee's handwritten notes, not circulated to anyone else in his agency, are not "agency records" under the FOI.

Prior Cases Supporting Government Ownership

There are a number of cases where papers retained by an official were held to be Government property. All appear to be distinguishable from the telephone transcripts problem.

In United States v. Chadwick, 76 F.Supp. 919 (N.D. Ala. 1948), a Department of Labor employee made notes and memoranda while investigating a labor law violation. Upon leaving the Department, the employee took these notes and memoranda. He then was hired as a consultant by the very parties whom he had been investigating. The court held that the notes and memoranda were Government property and enjoined him to return these papers to the Department of Labor. Perhaps the obvious conflict of interest colored the court's decision. Also there was a departmental procedure requiring that all "work papers" relating to an investigation be included in the investigation file.

People v. Peck, 138 N.Y. 386, 34 N.E. 347 (1893), concerned the power of a state Commissioner of Labor statistics to destroy data on which he based statistical reports to the legislature. The court said that without the data, the government could not test the accuracy of the reports. In other words, an official could not deprive the government of a record of government business. The record was deemed government property. Secretary Kissinger's telephone transcripts fit within this rationale only to the extent the transcripts contain the only written record of a foreign policy decision of the United States.

Robison v. Fishback, 175 Ind. 132, 93 N.E. 666 (1911) involved a city employee who devised a new tax assessment index for his city. On retirement, the employee tried to take the index with him. The court held that since the old index had not been kept up to date and since removal of the new index would deprive the city of a record of government action, the city had the predominant property right in the new index. To a similar effect is Coleman v. Commonwealth, 25 Grattan (66 Va.) 865 (1874), where the Virginia Supreme Court went on to state:

> "whenever a written record of the transactions of a public officer in his office, is a convenient and appropriate mode of discharging the duties of his office, it is not only his right but his duty to keep that memorial, whether expressly required so to do or not; and when kept it becomes a public document -- a public record belonging to the office and not the officer; it is the property of the state and not of the citizen; and in no sense a private memorandum." [Id. at 881, emphasis added]

These cases, again, turned on whether the government would be deprived of a complete record of government business. Different considerations were involved in Scherr v. Universal Match Corporation, 417 F.2d 497 (2d Cir. 1944). In both cases, the controlling factors were that the materials in question (in Scherr a statue, in Sawyer a map) were made on government time and upon the direction of a superior officer or official. In both cases, a claim of a copyright interest in by former government employees was rejected. In Sawyer, the court said that such material in the possession of a former employee was to be deemed as held in trust for the United States.

Finally, there is dictum in a footnote in Pearson v. Dodd, 410 F. 2d 701 (D.C. Cir. 1969), that suggests one other consideration. It is suggested, but not stated, that where files are maintained in a government office and are meant to contribute to the work of a government official, the files belong to the government.

In sum, none of the decided cases would preclude a claim that the telephone transcripts are private property; however, where a particular transcript contains the only written record of a foreign policy decision of the United States, it should not be considered private property.

Presidential Materials Preservation Act

The Presidential Recordings and Materials Preservation Act of 1974 (which is discussed more fully in the memorandum at Tab 3) appears, at first blush, to effect the "ownership" of telephone transcripts which originated at the White House during the Nixon Administration. The

Act, however, avoids the question of ownership. It directs the GSA Administrator to "take complete possession and control" of all materials that constitute "presidential historical materials of Richard M. Nixon." Section 105(c) of the Act provides that if any court decision should hold "that any provision of this title has deprived an individual of private property without just compensation, then there shall be paid out of the general fund of the Treasury of the United States such amount or amounts as may be adjudged just by that court."

In short, Congress was uncertain as to who owned papers and recordings from the Nixon Administration. The 1974 Act, therefore, does not provide authority, one way or the other, on the ownership question. It simply provides for just compensation if any of these papers and recordings should subsequently be deemed private property. Thus, even if an FOI claimant should contend that the telephone transcripts fall within the Presidential Materials Preservation Act, Secretary Kissinger could still contend that he owns the transcripts and, hence, that they are not "agency records" within the meaning of FOI.

Trend Away from Private Ownership

Prior to the Nixon years, it seems to have been a relatively frequent practice for retiring government officials to retain some papers concerning matters that they personally worked on. Significantly, a Cabinet Paper during the Eisenhower Administration stated that "ordinarily, it would not be an abuse of discretion [for retiring officials] to withdraw personal work aids such as diaries, logs, [and] memoranda of conferences and telephone calls." Cabinet Paper CP-59/58-4, July 27, 1959, at 6. The events surrounding the Nixon papers controversy, however, cast doubt on whether historical practice will be of much legal significance in the future.

Moreover, Congress has, under the Presidential Recordings and Materials Preservation Act, established a National Study Commission on Records and Documents of Federal Officials. Before March 31, 1976, this Commission must submit to Congress a study recommending legislation "with respect to the control, disposition, and preservation

of records and documents produced by or on the behalf of Federal officials." It is possible that the Commission will recommend, and that Congress will enact, legislation which, in the future, will affect ownership interests in Secretary Kissinger's telephone transcripts. At the present, however, the Commission's work would appear to have no effect on how we respond to the pending FOI requests.

Non-Ownership Concepts

It may be that the concept of "ownership" is outdated in determining who should have control of papers produced by government officials. At least some of the cases discussed earlier in this memorandum focus not so much on who owns a piece of paper, but rather whether the government or the individual has a predominant interest in the paper. For example, where a paper contains the only written record of government business, the courts have in effect held that the government and not the individual has the predominant interest. In the Nichols case, discussed at Tab 3, the court found that although the estate of President Kennedy may have "owned" certain items that were donated to the United States under the Presidential Libraries Act, the estate nevertheless had a "proprietary interest" in these items.

It could be argued that Secretary Kissinger has, vis-a-vis the Government, the predominant interest in his telephone conversation to protect himself and his reputation from future misquotation, to have an accurate basis for future Congressional testimony, etc. On the other hand, one could argue that since the transcripts may be an important account of the conduct of United States foreign policy, the United States should have the predominant interest in the transcripts. These concepts have not as yet been developed by the courts into identifiable legal principles.

Conclusion

Secretary Kissinger would have a basis to contend that the telephone transcripts are private property, or at least of predominant interest to him, so that they do not constitute "agency records" subject to the FOI. The factors to be considered in deciding these questions are:

-- Whether the Secretary has consistently treated the transcripts as private papers.

-- Whether personal or government information predominates and whether the information relates to his official duties.

-- Whether the government already has an official record of matters discussed in the transcripts.

-- Whether the transcripts have been used in transacting government business. On this point, some of the transcripts were at first used by staff aides to follow up on commitments Secretary Kissinger made with others by telephone. However, once follow-up action was taken, the transcripts no longer assisted in the conduct of government business; from this, one might argue that the preservation of the transcripts served only the personal interests of the Secretary.

Apart from these factors, there is a great deal of uncertainty in the aftermath of the Nixon papers controversy. And since the Supreme Court has never ruled on these questions, any conclusion concerning ownership of the transcripts must be made with some caution.

DEPUTY UNDER SECRETARY OF STATE
FOR MANAGEMENT
WASHINGTON

January 27, 1976

Memorandum for Mr. Buchen
The White House

As you know, Secretary Kissinger since he came to Washington in 1969 and until the present has maintained certain papers which are best described as memoranda of telephone conversations. You have requested that I describe these materials more fully.

The earliest such memorandum is dated January 21, 1969. Similar memoranda have been made during all the years of Secretary Kissinger's public service since that time and down to the present time.

As a rough estimate, I calculate that there are 20 file drawers of this material. It has not been indexed or catalogued in any way, except that the papers are maintained in chronological order.

As you know, Secretary Kissinger became Secretary of State on September 22, 1973 and from that date until November 3, 1975 held the Secretary's office in tandem with the office of Assistant to the President for National Security Affairs.

During the period in which Dr. Kissinger held both jobs, telephone conversation memoranda were prepared sometimes in his White House office and sometimes at the Department of State.

I have examined a sample of the memoranda for this period and it is frequently difficult to establish which memoranda were prepared as a result of his being Assistant to the President and which were prepared as a result of his being Secretary of State. We will examine this question further and if there is any basis on which we may clarify the question of attribution I will communicate with you further. At intervals since September 22, 1973 those

memoranda prepared at the White House were sent over to this Department for filing with the Secretary's other files. All such memoranda have been kept at the State Department for convenience. The memoranda for the period prior to September 22, 1973 were brought to the Department within four weeks of Dr. Kissinger's swearing-in as Secretary.

With respect to subject matter, the memoranda cover a considerable range. However, the principal classifications which I would note are the following:

1. Memoranda of telephone conversations dealing with social engagements, both personal and official.

2. Memoranda of telephone conversations with diplomatic officials of foreign governments.

3. Memoranda of telephone conversations with officials of the United States Government.

4. Memoranda of telephone conversations with President Nixon and President Ford.

5. Memoranda of telephone conversations with representatives of news media.

6. Memoranda of telephone conversations with former personal or academic associates offering advice or requesting assistance from Dr. Kissinger with respect to issues both public, quasi-public, and personal.

You will appreciate that the above categories cannot under the circumstances be considered comprehensive; it would require enormous labor on my part to make a definitive catalog of the materials in question. This is more the job of a librarian than it is of anyone on Dr. Kissinger's staff.

Lawrence S. Eagleburger

January 31, 1976

FOI REQUESTS FOR TELEPHONE TRANSCRIPTS:

THE "AGENCY RECORD" REQUIREMENT

Apart from contending that the telephone transcripts were "owned" by Secretary Kissinger, other grounds are available for maintaining that the transcripts are not "agency records" and, thus, not encompassed by the Freedom of Information Act. This is particularly true with respect to transcripts which originated in the White House. It has been held that papers originating in the "Office of the President" are not "agency records" subject to the FOI.

Records of the Office of the President.

The two current FOI requests for telephone transcripts do not seem to be limited to transcripts that originated at the White House. William Safire's request quotes a portion of Secretary Kissinger's Responses to Interrogatories in the Halperin litigation, which refers to telephone conversations "during the period of January 21, 1969 through February 12, 1971." Perhaps this affords a basis for limiting the period covered by the Safire request to a time when Secretary Kissinger worked exclusively at the White House. However, the Safire request then goes on to ask for copies of "all transcripts ... in which my name appears," and "all transcripts" between Secretary Kissinger and General Haig, Attorney General Mitchell, J. Edgar Hoover, other FBI officials, or President Nixon, in which the subject of "leaks" is discussed. Use of the term "all" may preclude one from limiting Safire's request to the period prior to February 12, 1971.

In the second FOI request, Norman Kempster of the Washington Star asks for "all transcripts and summaries now in the files of the Department of State of your telephone conversations with President Nixon." Again, it may be difficult to limit this request to conversations monitored at the White House alone -- it is possible that Secretary Kissinger spoke to Nixon from the State Department during Nixon's Presidency, and that a transcript of the conversation was made.

Insofar as the telephone transcripts originated in Secretary Kissinger's White House office, there is a strong basis for maintaining that these transcripts are not "agency records." In Nixon v. Sampson, Judge Richey held that the immediate Office of the President in the White House was not "an agency" within the meaning of the FOI. By contrast, the Executive Office of the President, which includes offices within the Executive Office Building, were deemed to be "agencies." Since Secretary Kissinger as the President's Special Assistant for National Security Affairs was a part of the President's immediate staff, transcripts originating from his White House office would not, under Nixon v. Sampson, be agency records.

Judge Richey's conclusions on this point were based on both Soucie v. David, 448 F. Supp. 1067 (D.C. Cir. 1971) and the legislative history to the 1974 amendments to the FOI. Soucie v. David involved a request for records held by the Office of Science and Technology, which was in the Executive Office of the President. The court held that for purposes of the Administrative Procedure Act (including FOIA), an agency is "any administrative unit with substantial independent authority in the exercise of specific functions", and concluded that the Office of Science and Technology was included within this definition. 448 F. 2d at 1073.

The court, however, was very careful to distinguish between administrative units which were simply part of the Executive Office of the President, and those that were part of the President's immediate staff. For example, the court noted that it "need not determine whether Congress intended the APA to apply to the President" (id., at 1073), and referred to a House Report concerning the Office of Science and Technology ("OST") which said that the Office was to "function as a distinct entity and not merely as part of the President's staff" (id., at 1074).

The court then suggested that if the OST had been a part of the President's immediate advisory staff, its documents might not be "agency records" subject to the FOI:

> If the OST's sole function were to advise and assist the President, that might be taken as an indication that the OST is part of the President's staff and not a separate agency. [Id., at 1075].

In addition to advising the President, however, the OST had also been delegated by Congress the duty of gathering information on federal scientific programs.

In the 1974 amendments to FOI, Congress added a new definition of the term "agency." That definition provides in pertinent part:

> "(e) For purposes of this section, the term 'agency' as defined in section 551(1) of this title includes any executive department ... or other establishment in the Executive Branch of the government (including the Executive Office of the President), or any independent regulatory agency." [5 U.S.C. §552(3)].

In the Conference Report to the 1974 amendments, the conferees stated specifically that this definition was intended to affirm the "result" reached in Soucie v. David, and then added the following significant sentence:

> The term ["agency"] is not to be interpreted as including the President's immediate personal staff or units in the Executive Office whose sole function is to advise and assist the President. [Senate Report No. 93-1200, 93rd Cong. 2nd Sess., at 15 (1974) ("Conference Report")].

This language should seemingly be read in light of the opinion in Soucie v. David which indicated that two groups of presidential advisers were excluded from the term "agency": (a) members of the President's immediate staff, and (b) units in the Executive Office which simply advised and assisted the President and which did not perform other functions delegated by Congress.

The foregoing legislative history strongly supports the conclusion that telephone transcripts which originated in Secretary Kissinger's White House office are not "agency records" under FOI. It should, however, be determined whether any of the transcripts originated in the NSC offices in the Executive Office Building. The Justice Department has apparently expressed the view that the NSC is an "agency" for FOI purposes.

Custody of Records.

It appears that the mere custody of a record by the Office of the President does not ipso facto remove the record from the reach of the FOI. In Nixon v. Sampson, Judge Richey held that the records from a department or agency --

> would be available to "any person" even if they are sent to the Office of the President for [the President's] consideration.... Thus, these records of the executive departments even though now in the Office of the President must still be considered as records under the FOIA and, therefore, accessible to applicants under the Act. [389 F. Supp. at 145-46]

In support of this conclusion, Judge Richey cited the Supreme Court's decision in EPA v. Mink, 410 U.S. 73 (1973). That case involved a request to the President for EPA reports that had been sent to the White House for the President's consideration. The Supreme Court ostensibly assumed, although it did not decide, that the EPA reports were "agency records" of the EPA.

Thus, it would seem that the physical location of the telephone transcripts is not determinative. Indeed, the fact that transcripts are now stored at the State Department would not seem to preclude a claim that transcripts which originated at the White House are not agency records. In this regard, the Attorney General's 1967 memorandum on the Freedom of Information Act states:

> "Where a record is requested which is of concern to more than one agency, the request should be referred to the agency whose interest in the record is paramount, and that agency should make the decision to disclose or withhold after consultation with the other interested agencies. [Attorney General's Memorandum, at 24]

This suggests two things: (1) if it is decided to characterize the telephone transcripts as papers of the Office of the President, White House approval should be obtained in advance; and (2) the fact that transcripts are stored at the State Department does not make the transcripts records of the State Department.

However, in making this argument, one practical problem arises. In arguing that transcripts stored at the State Department are really White House papers, one may be exposed to the inference that some of the transcrips are part of the Presidential papers of the Nixon Administration and thus subject to the Presidential Recordings and Materials Preservation Act. As described more fully in Tab 3, then are statement in the legislative history of that Act indicating that the regime for administering the Nixon papers under that Act would not preempt existing rights under the FOI.

Personal Papers.

In Porter County Chap., Etc. v. Atomic Energy Commission, 380 F. Supp. 630 (N.D. Ind. 1974) it was held that handwritten personal notes which were prepared by AEC staff members in connection with their official duties and which were not circulated to or used by anyone other than the authors, were not agency records under the FOI. The court made the following findings:

> In executing their responsibilities relating to the AEC's health and safety and environmental reviews, individual AEC staff members frequently prepare assorted handwritten materials for their own use. Such materials are not circulated to nor used by anyone other than the authors, and are discarded or retained at the author's sole discretion for their own individual purposes in their own personal files. The AEC does not in any way consider such documents to be "agency records," nor is there any indication in the record that anyone other than the author exercises any control over such documents. [380 F. Supp. at 633.]

Having noted that the handwritten notes were not "circulated to or used by anyone other than the authors," the court concluded:

> On the basis of its review of the documents in issue, ... the Court finds that these materials are personal notes, rather than agency records. Disclosure of such personal documents would invade the privacy of and impede the working habits of individual staff members; it would preclude employees from ever committing any thoughts to writing which the author is unprepared, for whatever reason, to disseminate publicly. Even if the records were "agency records," their disclosure would be akin to revealing the opinions, advice, recommendations and detailed mental processes of government officials. Such notes would not be available by discovery in ordinary litigation. [Id.]

It might, however, be argued that Secretary Kissinger's telephone transcripts do not fall within the ambit of the above holding. Unlike the handwritten notes in the Porter County case, the telephone transcripts (a) were prepared not by the authors of the words but

by monitoring secretaries, and (b) were "circulated" to staff aides in order to take follow-up action on commitments made during the telephone conversations. These two distinguishing factors may be critical. Nevertheless, the Porter County decision provides a very strong basis for arguing that the transcripts are personal and not "agency records" under the FOI.

January 30, 1976

FOI REQUESTS FOR TELEPHONE TRANSCRIPTS

EXEMPTIONS VIA PRESIDENTIAL PAPERS STATUTES

Exemption 3 under the FOI Act protects materials that are "specifically exempt from disclosure by statute." 5 U.S.C. 552(b)(3). The legislative history reveals that Congress in enacting FOI in 1967 did not intend to affect the protections afforded by nearly 100 extant statutes, which specifically exempted documents from public disclosure. One of these statutes seems to may be the Presidential Libraries Act. 44 U.S.C. 2107. In 1974, Congress enacted the Presidential Recordings and Materials Act. Both of these statutes afford a basis for resisting, under FOI Exemption 3, requests for access to the telephone transcripts.

Presidential Materials Preservation Act

The Presidential Recordings and Materials Preservation Act of 1974, P.L. 93-526, directs the GSA Administrator to take "complete possession and control" of all materials which constitute the "presidential historical materials of Richard M. Nixon." Telephone transcripts originating at the White House during the Nixon Administration could arguably be deemed "presidential historical materials of Richard M. Nixon." GSA's "complete possession and control" over these transcripts would seem to be inconsistent with free public access to the materials under FOI. In this regard, section 104 of the 1974 Act states that public access to the Nixon materials is but one of the factors that GSA must take into account in preparing regulations to implement the Act.

The argument that the Presidential Recordings and Materials Preservation Act should preempt the FOI is buttressed by a recent decision. The Supreme Court in FAA Administrator v. Robertson, 422 U.S. 255 (1975), gave Exemption 3 a broad construction in refusing to compel disclosure of an FAA report concerning the performance of commercial airlines. The Federal Aviation Act authorized the withholding of documents if any person objected to disclosure and if the FAA found non-disclosure to be in the public interest.

The court of appeals had concluded that since the FAA statute did not "specify" which documents or categories of documents were non-disclosable, the FAA reports in question were not "specifically exempt from disclosure by statute." The Supreme Court reversed. It noted that the FAA's non-disclosure provisions served a public purpose by encouraging the airline industry to give candid information to the FAA. In light of this purpose, and since Congress under the FOI intended to exempt documents protected under other statutes, the court said that FOI Exemption 3 should not be construed as in effect repealing the FAA non-disclosure provisions. 422 U.S. at 266.

More on point is Nichols v. United States, 460 F. 2d 671 (10th Cir. 1972), cert. denied 409 U.S. 966. Plaintiffs in Nichols made an FOI request for access to evidence considered by the Warren Commission and other materials relating to the Kennedy assassination. Congress, however, in 1965 enacted P.L. 89-318 which is similar to the Presidential Materials Preservation Act. The purpose of that statute was to preserve evidence considered by the Warren Commission. The evidence was to be placed under the jurisdiction of the GSA Administrator for "preservation under such rules and regulations as he may prescribe." The GSA Administrator delegated his authority to the Archivist of the United States, who in turn prescribed regulations restricting public access. The court held that this regime under the statute for protecting the Warren Commission evidence fell within FOI Exemption 3.

There is, however, inconsistent language in the legislative history to the Presidential Materials Preservation Act. Twice in the House Report there is a statement that none of the considerations which the Administrator of GSA must take into account in regulating access to presidential materials "are intended to limit access by the public, otherwise granted by the FOI Act." It is hard to accept this assertion, which appears in the

report without explanation and almost as if it were added as an afterthought by the staff. See annex to this memorandum. At no other point in the legislative history, including the Senate Report, is the FOI mentioned. Nevertheless, the references in the House Report cast a cloud on whether an FOI exemption will result if the telephone transcripts are deemed within the scope of the Presidential Materials Preservation Act.

There are, in addition, a number of practical disadvantages in proceeding via the Presidential Materials Preservation Act:

-- The act probably would not protect either transcripts made during the Ford Administration, or those made during the Nixon Administration but at the State Department (although State Department transcripts involving conversations with the White House, or of concern to the White House, may qualify as "presidential historical materials of Richard M. Nixon").

-- It might improperly associate the transcripts with the Nixon tapes.

-- GSA could, under the Act and future regulations, afford public access to the transcripts, or declassify them, in a manner inconsistent with State Department or White House standards. This is particularly important where a document has candid references to a foreign country or foreign leaders.

Presidential Libraries Act

Under the Presidential Libraries Act, 44 U.S.C. 2107, the GSA Administrator may accept, for deposit in the national archives system, papers not only of Presidents and former Presidents, but also of any "other official or former official of the Government." A donation under this provision would be subject to whatever restrictions agreed upon between the donor and the GSA Administrator. Arguably restrictions on public access pursuant to 44 U.S.C. 2107 would exempt donated materials from FOI disclosure, by virtue of FOI Exemption 3 -- i.e., the donated materials would be "specifically exempt from disclosure by statute."

Support for such an argument is found in Nichols v. United States, discussed above. Nichols, again, involved FOI access to materials relating to the Kennedy assassination. Most of these materials consisted of "evidence considered by the Warren Commission" and fell within a special statute for preserving these materials. However, the remainder of these materials had been in the posesssion of the Kennedy estate, which donated them to the GSA Administrator under the Presidential Libraries Act. The donation agreements included restrictions on public access.

The FOI plaintiff claimed that the materials were owned by the Government and not by the Kennedy estate and, hence, could not be donated under the Presidential Libraries Act. The court disagreed and stated that "the statute does not require that the depositor of historical materials be the 'owner' of these materials." 460 F.2d at 674. Rather, the court seemed to indicate that the donor need only have some "proprietary interest" in the donated items.

The court reviewed the donation agreement itself and found it to be reasonable in its terms. In light of this, the court held that the donated items were exempt from disclosure under FOI Exemption 3.

In view of the Nichols case, it would seem that a "reasonable" donation agreement under the Presidential Libraries Act would clearly exempt donated materials

from FOI disclosure. There are, however, the following practical considerations to keep in mind:

-- The Presidential Libraries Act applies not only to former officials but also to current ones. Theoretically, Secretary Kissinger could today enter into a donation agreement with the GSA Administrator. However, in today's climate, this may not be a politic thing to do. Thus, in practice, the Presidential Libraries Act may be a viable alternative only upon Secretary Kissinger's retirement.

-- President Nixon's efforts to control his White House papers involved a donation agreement under the Presidential Libraries Act. Nixon's agreement with GSA Administrator Sampson seemed unreasonable. Nixon reserved the right to destroy any of the tapes and to remove any of the papers he was "donating". Assuming Secretary Kissinger could enter into a reasonable donation agreement, he nevertheless may be confronted with a charge that he was following in Nixon's footsteps.

-- The Nichols holding may be subject to question. The Presidential Libraries Act does not "specifically exempt" anything from disclosure. It simply permits the GSA Administrator and a donor of papers to agree on restrictions. It is not entirely clear that materials restricted by agreement qualify as materials "specifically exempt from disclosure by statute" within the meaning of FOI Exemption 3. Cf. FAA Administrator v. Robertson, discussed above -- although the statute in Robertson did not specify which documents could be protected, it did (unlike the Presidential Libraries Act) specifically authorize non-disclosure. Thus, one might argue that donating telephone transcripts under the Presidential Libraries Act should not qualify under FOI Exemption 3.

-- Finally, Judge Richey in Nixon v. Sampson construed the Presidential Libraries Act as being limited to "personal" papers. 389 F. Supp. at 144. This might pose a problem to

the extent that a court characterized the telephone transcripts as non-personal.

Nevertheless, a donation agreement under the Presidential Libraries Act, 44 U.S.C. 2107, is more likely to protect the telephone transcripts from FOI disclosure than is the placing of those transcripts within the Presidential Recordings and Materials Preservation Act.

93D CONGRESS } HOUSE OF REPRESENTATIVES { REPORT
2d Session } { No. 93-1507

# PRESIDENTIAL RECORDINGS AND MATERIALS PRESERVATION ACT

NOVEMBER 27, 1974.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. HAYS, from the Committee on House Administration, submitted the following

## REPORT

[To accompany S. 4016]

The Committee on House Administration, to whom was referred the bill (S. 4016) to protect and preserve tape records of conversations involving former President Richard M. Nixon and made during his tenure as President, and for other purposes, having considered the same, reports favorably thereon with an amendment and recommends that the bill as amended do pass.

The amendment strikes out all after the enacting clause and inserts a substitute text which appears in italic type in the reported bill.

## PURPOSE OF THE BILL

The purpose of the bill is twofold:

(1) to preserve the materials relating to the Presidency of Richard M. Nixon and to provide appropriate access to them; and

(2) to establish an independent commission to study the disposition of records and documents of all Federal officials.

## COMMITTEE ACTION

S. 4016 was passed by the Senate on October 4, 1974, and referred to the Committee on House Administration on October 7, 1974.

The Subcommittee on Printing of the Committee on House Administration held public hearings on H.R. 16902 and other bills relating to the handling of records and documents of Federal officials, including the disposition of the Presidential materials of former President Richard M. Nixon. The hearings were held on September 30 and October 4, 1974.

88-006—74——1

The subcommittee marked up S. 4016 in public sessions on November 19, 1974, and ordered the bill reported on that day by unanimous voice vote. The full committee marked up the bill in public session on November 26, 1974.

The full committee, on November 26, 1974, by a vote of 20 to 0, ordered the bill reported to the House with an amendment.

## BACKGROUND

The disposition and preservation of documents and records of public officials is a matter of continuing importance, particularly to historians, political scientists, and other scholars who have a special interest in preservation of the historical records of the Nation. The disposition of public documents has taken on immediate significance because of the uncertainty regarding the preservation of the tapes and other materials relating to the Presidency of Richard M. Nixon, materials which could provide a full and accurate account of the series of events that have come to be known as "Watergate".

It is unnecessary to recount here the events of "Watergate". It is sufficient to observe that these events led to the approval by the Judiciary Committee of the House of Representatives of three articles of impeachment charging former President Nixon with (1) obstruction of justice; (2) abuse and misuse of Presidential powers; and (3) the failure to comply with congressional subpenas to produce tapes and other materials necessary to the impeachment inquiry. In the face of these unanimous recommendations, Mr. Nixon resigned from office. These events also resulted in the investigation, prosecution, and conviction of high-ranking executive department officials, including several close aides of former President Nixon, for crimes relating to "Watergate".

Information included in the materials of former President Nixon is needed to complete the prosecutions of Watergate-related crimes. This information is necessary so that the Special Prosecutor may expeditiously conclude his work. This information is necessary to provide defendants in these criminal actions material which may be necessary for their defenses, and information necessary to provide the American people with a complete and accurate account of "Watergate".

But beyond the importance of the Watergate-related material, there is a legitimate public interest in gaining appropriate access to materials of the Nixon Presidency which are of general historical significance. The information in these materials will be of great value to the political health and vitality of the United States. It will permit the American people to understand the events of this important 5½ year period, and to pass on to their legislative representatives any mandates for change in the course of events as for reform of governmental institutions.

Despite the overriding public interest in preserving these materials and for providing appropriate access to them, Mr. Arthur F. Sampson, Administrator of General Services, entered into an agreement on behalf of the Federal Government (see Appendix) which, if implemented, could seriously limit access to these records and could result in the destruction of a substantial portion of them.

## NIXON-SAMPSON AGREEMENT

On Sunday, September 8, 1974, President Ford announced a full and unconditional pardon of Mr. Nixon. A few hours later Philip Buchen, Counsel to the President, announced an agreement between former President Nixon and Mr. Sampson regarding the disposition of some 42 million documents and materials relating to the Nixon Presidency.

A legal opinion of September 6, 1974, prepared by Attorney General William Saxbe, took the position that the tapes and other materials of the Nixon Presidency were the private property of Mr. Nixon.

Included within the scope of the agreement is Mr. Nixon's Presidential historical materials as defined in section 2101 of title 44, United States Code. It apparently covers material generated by and collected in the White House and Executive Office Buildings, and includes the recordings, papers, and memoranda produced and collected by Mr. Nixon, by members of his staff, and by staff members of Offices in the Executive Office of the President.

In the agreement, Mr. Nixon asserts that he retains "all legal and equitable title to the materials, including all literary property rights."

The agreement provides that the materials are to be transferred to California for deposit in a GSA facility for at least three years until a permanent depository may be established. The cost of storage is to be assumed by the Federal Government.

Access to the materials would be controlled by Mr. Nixon, who would have absolute veto power over persons who could review the tapes and records.

Although the agreement appears to set forth Mr. Nixon's intention to donate the materials to the Federal Government at some point in the future, it permits Mr. Nixon to withdraw "any or all of the materials" (other than the tapes) after three years for any purpose. This arrangement would permit Mr. Nixon to remove and destroy any of these documents if he wishes to do so.

The agreement further provides that the tape recordings shall remain on deposit until September 1, 1979. Although the agreement purports to donate the tapes to the United States, it allows Mr. Nixon to destroy any of these tapes after September 1, 1979. Further, it provides that the donation of this material is to be based on the condition that the "tapes shall be destroyed at the time of Mr. Nixon's death or on September 1, 1984, whichever event shall first occur."

Thus, the agreement gives Mr. Nixon total control over all the materials and the records of his Administration. It allows him to have access to the materials but excludes others from reviewing these records. By allowing Mr. Nixon to destroy all of the materials, the agreement ignores the public interest in preserving them. It ignores the legitimate continuing need for these materials in many judicial proceedings, including some in which U.S. law enforcement will be frustrated and individual rights impaired if the materials are unavailable to the courts. It ignores the needs of Congress and executive agencies for continued use of the documents in the process of government. And it ignores the needs of historians, political scientists, and other scholars for the information these materials contain on the events of recent years and the workings of our government.

The Special Prosecutor expressed serious reservations about the agreement, and it was determined that none of the materials would be removed from their present locations pending further discussion among Mr. Nixon, the Special Prosecutor, and the White House.

On October 15, 1974, Mr. Nixon brought suit in the United States District Court of the District of Columbia to force Messrs. Sampson, et al., to carry out the provisions of the depository agreement. Several other private parties, including historians, journalists, and scholars, filed, independent actions to block implementation of the agreement. Other parties, including the Special Prosecutor, have moved to intervene as parties in these actions.

The cases were consolidated and a temporary restraining order was issued on October 22, 1974, blocking the Ford Administration from giving Mr. Nixon custody of the materials. This order, with certain subsequent amendments, also gives the Special Prosecutor, defendants in "Watergate" cases, and Mr. Nixon access to the materials.

On November 11, 1974, Senator Ervin, Chairman of the Senate Government Operations Committee, and Senators Nelson and Javits, Chairman Hays and Mr. Brademas filed a memorandum of amici curiae urging the court to maintain the status quo by extending the order until the Congress considered this legislation. Extensive briefs were filed by all the parties in this action in support of motions for preliminary injunctions and oral arguments were heard on November 15 and November 18, 1974.

## DESCRIPTION OF BILL

This legislation would nullify the Nixon-Sampson agreement of September 7, 1974, and would provide that the Federal Government retain custody of the Nixon tapes and Presidential materials. The bill would also establish a 17-member commission to study the disposition of the documents of all Federal officials.

### TITLE I—PRESERVATION OF PRESIDENTIAL MATERIALS OF MR. NIXON

Title I provides that, notwithstanding any other provision of law or any agreement, the Administrator of GSA shall retain custody and complete control of all tapes, papers, documents, and other materials of general historical significance relating to the Presidency of Richard M. Nixon.

The tape recordings include all conversations recorded beginning June 20, 1969, and ending August 9, 1974, which (1) include former President Nixon or individuals who were employed by the Federal Government, and (2) were recorded in the White House or in the Executive Office Buildings or Offices of the former President at Camp David, Maryland, Key Biscayne, Florida, or San Clemente, California.

This title would give the Federal Government custody of all papers, documents, memoranda, transcripts, and other objects and materials which constitute the historical materials of Mr. Nixon as defined in section 2101 of title 44, United States Code.

The material would be immediately available for use in judicial proceedings, either by subpena or other legal process. Production of material in these proceedings would be subject to any "right, defenses,

or privileges" which the Federal Government or any person may raise. A request for access to the material by the Special Prosecutor would be given priority over other requests.

Mr. Nixon, or any person whom he may designate, may have at all times access to the material for any purpose.

The legislation takes no position on the question of ownership of the materials prior to enactment of this title; however, in the event a court determines that this legislation deprives any person of private property without "just compensation", this legislation authorizes the payment of such sums as may be deemed necessary by an appropriate United States court.

To guard against the destruction or removal of any of the materials, the bill provides that none of the materials shall be destroyed, except as may be provided by law. It requires that the materials be maintained within the metropolitan area of Washington, D.C., and provides that the Administrator shall issue at the earliest possible date regulations to protect the material from loss or destruction and to prevent access to the material by unauthorized persons.

The bill directs the Administrator to submit to the Congress, within 90 days after the enactment of the measure, regulations that would provide public access to the tape recordings and other material. These regulations would insure access to material related to "Watergate" as well as material of general historical significance. In preparing these regulations, the Administrator shall take into account the following factors: (1) the need to provide a full accounting of the events of "Watergate"; (2) the need to make the materials available in judicial proceedings; (3) the need to limit general access to material relating to national security; (4) the need to protect every individual's right to a fair and impartial trial; (5) the need to protect any individual's opportunity to assert any legal or constitutional right or privilege which may limit general access to the material; (6) the need to provide public access to material of general historical significance in a manner consistent with procedures that have been used to provide public access to materials of former Presidents; and (7) the need to return to Mr. Nixon purely personal materials, which are not of general historical value.

In the enumeration of criteria to be applied by the Administrator in establishing guidelines for the management of materials referred to in section 101, the committee added in subparagraph (5) the term "privilege" to "legally or constitutionally based rights" as grounds for limitation of access. The committee's purpose is to recognize the legitimacy of the doctrine of executive privilege as stated in the July 24, 1974, ruling of the Supreme Court in *United States* v. *Nixon, President of the United States, et al.*

None of the considerations above enumerated are intended to limit access by the public, otherwise granted by the Freedom of Information Act.

Section 105(a)(6) of this legislation is intended to underscore the concern of the committee that the public be given access to the tapes and other materials of the Nixon Presidency of general historical significance as well as to the materials related to "Watergate." Access under this subsection is to be provided in a manner comparable to procedures that have been followed by Presidents in providing access to their materials. Although it is recognized that some former Presi-

dents have imposed broad restrictions on access to their materials, it is understood that most, and particularly most recent former Presidents, have exhibited an interest in preserving the material intact and providing early public access to the material.

Thus, former President Franklin C. Roosevelt recognized the importance of this approach:

> I have been taking the advice of many historians and others. Their advice is that material of that kind [i.e., Roosevelt's papers] ought not to be broken up, for the future. It ought to be kept intact. It ought not to be sold at auction; it ought not to be scattered among descendants. It should be kept in one place and kept in its original form because Presidential papers and other public papers have been culled over during the lifetime of the owner, and the owner has thrown out a good deal of material which he personally did not consider of any importance which, however, from the point of view of factual history, may have been of the utmost importance. *The Public Papers and Addresses of Franklin D. Roosevelt* 630 (1941).

This attitude was also exhibited by former President Dwight D. Eisenhower. During hearings before the Subcommittee on Printing, John Eisenhower, who has continuing responsibility for maintaining the late President's papers, stated:

> Since we finished on my father's memoirs and I left Gettysburg, I have been involved on a continuing basis with my responsibilities in trying to get those documents out of Abilene into the public domain. Our philosophy is the quicker the Presidential papers can be gotten out into the public domain the more advantageous it is to the former President.

Where restrictions have been imposed by former Presidents, they have been generally limited to matters of national security. It is not the purpose of this section to authorize Mr. Nixon to place restriction on overs to the materials. Any restrictions would be imposed by current government officials in accordance with existing legal authorities and procedures.

The legislation provides that the regulations shall take effect 90 days after submission to the Congress, unless disapproved by a resolution of either House of the Congress. If the committee to which the regulations are referred has not reported a resolution of disapproval within 60 days after their submission to the Congress, any Member may initiate a resolution of disapproval. This title provides that any Member may by resolution discharge the committee of further consideration of the regulations. Such a discharge motion would be privileged and a resolution of disapproval would be in order if the discharge motion succeeds. The effect of this provision would be to permit a vote of disapproval by the whole House, if appropriately raised, 60 days after the relevant committee has had an opportunity to review the regulations.

To assure an expeditious resolution of a challenge to any provision of the title, the bill would vest in the United States District Court for the District of Columbia exclusive jurisdiction to hear any challenge to the legal or constitutional validity of any pro-

vision of that title or any regulations issued thereto. This legislation provides that such a challenge shall be heard by a three-judge panel, with direct appeal to the United States Supreme Court. Any challenge shall be considered a priority matter by both courts, requiring immediate consideration and resolution.

It is the intent of the committee that this section not apply to litigation now pending in which access to the material relating to the Nixon Presidency under the Freedom of Information Act and title to the material in issue. But rather, it is intended to apply to actions filed subsequent to enactment of this title.

*Historical materials*

This title would give the United States custody of all the Presidential "historical material" of Richard M. Nixon. Section 2101 of title 44, United States Code, provides that the term "historical material" includes "books, correspondence, documents, papers, pamphlets, works of art, models, pictures, photographs, plots, maps, films, motion pictures, sound recordings, and other objects or materials having historical or commemorative value." It is understood that these materials include not only memoranda, letters, and other documents generated by Mr. Nixon, but also all documents and material produced or collected by aides to the former President and officials employed in Offices of the Executive Office during the Presidency of Mr. Nixon.

*Private ownership*

The legislation takes no position on the ownership of these materials prior to enactment of this title. The committee believes that at this time the resolution of the question of prior ownership is a matter most appropriately left for the judiciary to decide.

Nevertheless, the committee believes it has the authority to pass legislation concerning the disposition of the Nixon Presidential materials. If the material is already public property, the bill is simply an exercise of the congressional power under Article IV of the Constitution to dispose of the property of the United States—one of the basic constitutional grants of authority to the Congress.

If the material is private property, the legislation would, if necessary, exercise the power of eminent domain. This power to take property is also vested in the Congress, although the authority to determine "just compensation" belongs to the judicial branch.

Moreover, even if these materials are private property, the Federal Government may take "protective custody" of material which is necessary for the continuing use of the Federal Government where it is in the public interest to do so. According to Attorney General Saxbe's opinion:

> None of the considerations above enumerated is intended to limit access by the public otherwise granted by section 552 of title 5, United States Code (the Freedom of Information Act).
>
> Historically, there has been consistent acknowledgment that Presidential materials are peculiarly affected by a public interest which may justify subjecting the absolute ownership rights of the ex-President to certain limitations directly related to the character of the documents as records of government activity * * *. Upon the death of Franklin

D. Roosevelt during the closing months of World War II, with full acceptance of the traditional view that all White House papers belonged to the President and devolved to his estate, some of the papers dealing with prosecution of the War (the so-called "Map Room Papers") were retained by President Truman under a theory of "protective custody" until December 1946. (Citation omitted.) Thus, regardless of whether this is the best way to approach the problem, precedent demonstrates that the governmental interests arising because of the peculiar nature of these materials (notably, any need to protect national security information and any need for continued use of certain documents in the process of government) can be protected in full conformity with the theory of ownership on the part of the ex-President. (Op. of the Att'y Gen., September 6, 1974, pp. 9–10.)

Clearly, it is in the public interest to preserve the materials and to provide access to the materials for judicial proceedings to expeditiously complete the prosecution of Watergate-related crimes and to permit the just resolution of other adjudications requiring access to the materials. Clearly, it is in the public interest to provide general public access to the materials to assure a full and accurate account of "Watergate" and to provide a basis for legislation and executive action to prevent future "Watergates" and clearly it is in the public interest to safeguard the historical record of the Presidency during the last five and one-half years.

## Title II—National Study Commission on Records and Documents of Federal Officials

Title II would establish an independent commission to study the handling of records and documents of all Federal officials. Federal officials would include elected officials, members of the Federal judiciary, and other appointed officers of the government.

The 17-member commission would be composed of two Members of the House of Representatives; two Senators; three appointees of the President, selected from the public on a bipartisan basis, the Librarian of Congress; one appointee each of the Chief Justice of the United States, the White House, the Secretary of State, the Secretary of Defense, the Attorney General, and the Administrator of General Services; and three other representatives, one each appointed by the American Historical Association, the Society of American Archivists, and the Organization of American Historians.

The commission would be directed to make specific recommendations for legislation and recommendations for rules and procedures as may be appropriate regarding the disposition of documents of Federal officials. The final report is to be submitted to the Congress and the President by March 31, 1976.

The Subcommittee on Printing held two days of hearings on legislation relating to the disposition of documents of Federal officials. Testimony during these hearings indicated that the issues relating to the disposition of these documents are so varied and complex that a comprehensive study would be warranted to develop specific recommendations that could be used by the Congress in considering permanent legislation affecting documents of all Federal officials.

The issues that should be considered by the commission are both philosophical and procedural. They include a review of procedures to insure maximum preservation of useful historical material and procedures to assure earliest practicable accessibility of these historical materials to scholars for their use and interpretation. The commission should also consider the extent to which procedures for gaining early access to these materials may affect the willingness of officials to preserve to the maximum extent useful historical matter.

Other issues that should be considered include: (1) the nature of public documents as an adequate documentation of the work of government officials; (2) the disposition of records created by appointed officials such as cabinet officers, White House staff and members of the Federal judiciary; (3) a discussion of a consistent policy regarding records created within the Executive Office of the Presidency; (4) the role of elected officers as they generate and retain files reflecting both politics and public administration; (5) whether personal and truly political matters could be separated from matters of official jurisdiction in public administration; (6) whether the inclusion of political files would inhibit political activities in any way; (7) circumstances under which general public access to materials should be allowed and appropriate procedures to provide such access; (8) the need to protect certain materials for personal, political, or national security reasons; and (9) whether legislation would encourage officials to purge files while still in office.

The bill would establish a commission that would include the leading authorities on, and persons with principal responsibilities for, the disposition of historical records. This commission would ensure the exchange of ideas among experts in the field and lead to highly professional recommendations which will be necessary if the Congress is to legislate intelligently in this area.

Dr. James B. Rhoads, Archivist of the United States, in his testimony in support of the proposal, stated:

> * * * we strongly support the call for a study commission to examine the foundations of historical evidence and the presumptions about what should be kept and how best to preserve it to serve the needs of the future. Our archival problems are both philosophical and procedural; a study commission can be a good approach to solving them * * *.

Dr. Rhoads went on to observe that:

> Study commissions have often overcome great difficulties in organizing governmental efforts in the past: The creation of a national archives system was brought about by the efforts of a number of study commissions; the Brownlow Committee of 1936–40 established the Executive Office of the President and approved the efficiency of the Executive branch; and the Hoover Commissions of 1949 and 1955 overhauled the whole organization of the Executive branch to make it more responsive to the demands of a changed society. I am confident that this study commission can meet with the same level of success in an area of equal complexity.

## CONCLUSION

It is the opinion of the committee that this legislation meets the public interest of preserving the tapes and materials of the Presidency of Richard M. Nixon and that it provides appropriate access to these materials for use in judicial proceedings and for legitimate use by the public. The committee also believes that the bill will constructively contribute to the development of a uniform national policy regarding the handling of the documents and records of all Federal officials.

## SECTION-BY-SECTION SUMMARY OF THE BILL

### SHORT TITLE

The first section provides that this legislation may be cited as the "Presidential Recordings and Materials Preservation Act".

### TITLE I—PRESERVATION OF PRESIDENTIAL RECORDINGS AND MATERIALS

#### DELIVERY AND RETENTION OF CERTAIN PRESIDENTIAL MATERIALS

*Watergate tape recordings*

Section 101(a) provides that, notwithstanding any other law or agreement reached under section 2107 of title 44, United States Code, any Federal employee in possession shall deliver to the Administrator of General Services (hereinafter in this summary referred to as the "Administrator") all original tape recordings of conversations which (1) were recorded by any officer or employee of the Federal Government; (2) involve former President Richard M. Nixon or other individuals who were employed by the Federal Government at the time of the conversation; (3) were recorded in the White House or in certain other offices of Mr. Nixon; and (4) were recorded during the period beginning January 20, 1969, and ending August 9, 1974.

*Retention of historical materials*

Section 101(b) provides that, notwithstanding any other law or agreement reached under section 2107 of title 44, United States Code, the Administrator shall receive and retain all papers, documents, memorandums, transcripts, and other objects and materials which constitute the Presidential historical materials of Mr. Nixon, covering the period beginning January 20, 1969, and ending August 9, 1974.

Section 101(b) also defines the term "historical materials" as having the meaning given it by section 2101 of title 44, United States Code. Section 2101 provides that such term includes books, correspondence, documents, papers, pamphlets, works of art, models, pictures, photographs, plats, maps, films, motion pictures, sound recordings, and other objects or materials having historical or commemorative value.

#### AVAILABILITY OF CERTAIN PRESIDENTIAL MATERIALS

*Prohibition of destruction*

Section 102(a) provides that none of the tape recordings or other materials referred to in section 101 (hereinafter in this summary re-

The issues that should be considered by the commission are both philosophical and procedural. They include a review of procedures to insure maximum preservation of useful historical material and procedures to assure earliest practicable accessibility of these historical materials to scholars for their use and interpretation. The commission should also consider the extent to which procedures for gaining early access to these materials may affect the willingness of officials to preserve to the maximum extent useful historical matter.

Other issues that should be considered include: (1) the nature of public documents as an adequate documentation of the work of government officials; (2) the disposition of records created by appointed officials such as cabinet officers, White House staff and members of the Federal judiciary; (3) a discussion of a consistent policy regarding records created within the Executive Office of the Presidency; (4) the role of elected officers as they generate and retain files reflecting both politics and public administration; (5) whether personal and truly political matters could be separated from matters of official jurisdiction in public administration; (6) whether the inclusion of political files would inhibit political activities in any way; (7) circumstances under which general public access to materials should be allowed and appropriate procedures to provide such access; (8) the need to protect certain materials for personal, political, or national security reasons; and (9) whether legislation would encourage officials to purge files while still in office.

The bill would establish a commission that would include the leading authorities on, and persons with principal responsibilities for, the disposition of historical records. This commission would ensure the exchange of ideas among experts in the field and lead to highly professional recommendations which will be necessary if the Congress is to legislate intelligently in this area.

Dr. James B. Rhoads, Archivist of the United States, in his testimony in support of the proposal, stated:

> * * * we strongly support the call for a study commission to examine the foundations of historical evidence and the presumptions about what should be kept and how best to preserve it to serve the needs of the future. Our archival problems are both philosophical and procedural; a study commission can be a good approach to solving them * * *.

Dr. Rhoads went on to observe that:

> Study commissions have often overcome great difficulties in organizing governmental efforts in the past: The creation of a national archives system was brought about by the efforts of a number of study commissions; the Brownlow Committee of 1936–40 established the Executive Office of the President and approved the efficiency of the Executive branch; and the Hoover Commissions of 1949 and 1955 overhauled the whole organization of the Executive branch to make it more responsive to the demands of a changed society. I am confident that this study commission can meet with the same level of success in an area of equal complexity.

FOI REQUESTS FOR TELEPHONE TRANSCRIPTS:

EXEMPTION FOR CLASSIFIED MATERIAL

Exemption 1 under the FOI permits an agency to withhold classified information. As with other FOI exemptions, reliance on Exemption 1 assumes that the document in question is an "agency record" (see Tab 2) otherwise subject to the FOI. In addition, if the pending FOI requests for the telephone transcripts are to be denied on grounds that they contain classified material, this may be inconsistent with a claim that the transcripts are personal papers.

Exemption 1 exempts from FOI disclosure materials that are

> "(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order ...."

Thus, there are two aspects to Exemption 1. Under part (A), information to be kept secret must satisfy the criteria set forth in the applicable Executive Order. This requirement has been construed as meaning any material classified under the Executive Order on classification, E.O. 11652. EPA v. Mink 410 U.S. 73 (1973).

Under part B, it must be shown that the documents at issue have in fact been properly classified. The Conference Report on the 1974 Amendments to the FOI states that a document must be properly classified "pursuant to both procedural and substantive criteria contained" in E.O. 11652. H.R. Rep. No. 93-1380, 93d Cong. 2d Sess., at 12.

With respect to the "substantive criteria" in E.O. 11652, Secretary Kissinger's telephone transcripts would be classifiable only to the extent that they contain national security information. It is unlikely, therefore, that all of the transcripts would be classifiable.

With respect to "procedural criteria", section 6 of E.O. 11652 requires that all classified documents be appropriately and conspicuously marked as classified. This raises two questions concerning the telephone transcripts: (1) can they be now marked as classified even though some have been in existence for several years; and (2) can they be classified en masse.

Classifying Old Documents

There appear to be no court decisions on the question of whether a document can be classified several years after it was made. One must, therefore, examine E.O. 11652 and the regulations issued pursuant to it, to determine whether the belated marking of classifiable material constitutes proper classification.

Section 4(A) of Executive Order 11652 provides that "each classified document shall show on its face its classification ... whether it is subject to or exempt from the General Declassification Schedule," and also "the office or origin [and] the date of preparation and classification ...."

The latter term concerning "the date of preparation and classification" suggests that the processes of preparation and classification are distinct and that each may be undertaken at a different time. If this is indeed the case, then there should be no objection if one were now to classify Secretary Kissinger's telephone transcripts.

On May 17, 1972, the National Security Council issued a Directive (37 F.R. 10053) pursuant to Section 6 of E.O. 11652 (which authorizes the issuance by the NSC of binding Directives relating, inter alia, to the "making" of classified material). Part IV of that NSC Directive provides in part:

> "At the time of origination, each document or other material containing classified information shall be marked with its assigned security classification and whether it is subject to or exempt from the General Declassification Schedule."

This suggests that in order for a record to be properly classified, it must be physically marked as classified at the time of its "origination." On the other hand, the NSC Directive then goes on to state:

> "The person who signs or finally approves a document or other material containing classified information shall be deemed to be the classifier."

The latter sentence seems to imply that a document has not been "classified" until and unless (a) the appropriateness of classifying the document has been reviewed and (b) the document itself has been "signed" or approved." In other words, classification involves more than simply marking a document. Where documents are not marked at the time of their "origination," the NSC Directive states only that --

> "Should the classifier inadvertently fail to mark a document [using one of the formulae specified in the directive] the document shall be deemed to be subject to the General Declassification Schedule."

The Directive does not say that failure to mark a record at the time of its origination ipso facto precludes a subsequent classification of the record.

In dealing with this complex problem of subsequent classification, one must also take into account the State Department's classification regulations which were promulgated pursuant to Section 7(B)(1) of E.O. 11652 and which may be applicable to the classification of records kept by Secretary Kissinger. Section 912.1 of the Uniform State/AID/USIA Security Regulations provides in pertinent part:

> "Any person who originates a classified document has the responsibility to assign the appropriate classification at the time the document is prepared. The final classification and declassification schedule, however, must be approved by an official with the appropriate level of classifying authority.

This language again suggests that the classification process is not complete until the appropriateness of a classification has been reviewed and approved by an official having the requisite classifying authority.

Thus, an argument can be made that a classifiable document can be given a classification marking sometime after it was made. However, there are considerations on the other side. If Secretary Kissinger's telephone transcripts should now be classified ostensibly in response to the pending FOI requests, a court may question (or at least scrutinize more carefully) the classification.

Classifying Documents En Masse

If some of the transcripts are classifiable, must someone engage in the painstaking work of reviewing each of the tapes and records one by one, or can certain categories of tapes and records be classified en masse without an item-by-item review?

One might contend that since the transcripts are of considerable volume, and since some of them clearly contain national security information, it would be consistent with E.O. 11652 to make an interim en masse classification of such materials pending a more detailed review. One might, for example, simply affix a classification marking to the front of each tape that clearly contains some national security information; * such a classification would, of course, be a qualified one,

*See NSC Directive of May 17, 1972, Part IV.B, which provides that the classification of a document shall be conspicuously marked or stamped at the top and bottom of the outside of the front cover (if any), on the title page (if any), on the first page, on the back page, and on the outside of the back cover (if any)."

applicable only to national security information contained in the tapes or records.

There appear to be no precedents to support the making of blanket classifications. Moreover, if many of the telephone transcripts were broadly classified, the classifications would be subject to judicial review under the FOI and the court could compel disclosure of non-classifiable information. 5 U.S.C. 552(a)(4)(B).

In Camera Inspections

At the time the FOI was first enacted in 1967, there was considerable uncertainty as to how far a court could go in reviewing an agency's claim that certain material was exempt from disclosure. The Act stated simply that the courts shall determine the matter de novo and the burden is on the agency to sustain its action. As for materials exempted because classified, the Supreme Court held that U.S. district courts could not make in camera inspections of classified documents for purposes of separating out any "non-secret" components. EPA v. Mink, 410 U.S. 73 (1973).

The 1974 amendments to the FOI in effect overruled this holding in EPA v. Mink and increased judicial authority to conduct in camera inspections. The Act now provides:

> "[T]he court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in Subsection (b) of this section, and the burden is on the agency to sustain its action. [5 U.S.C. 552(a)(4)(B)]."

The Conference Report, however, states that "in camera examination need not be automatic" and that before a court orders in camera inspection, "the Government should be given the opportunity to establish by means of testimony or detailed affidavits that the documents are clearly exempt from disclosure." Senate Report No. 93-1200, at 9. The Conference Report then goes on to state:

> "[T]he Executive departments responsible for national defense and foreign policy matters have unique insights into what adverse effects might occur as a result of public disclosure of a particular classified record. Accordingly, the conferees expect that federal courts, in making de novo determinations in Section 552(b)(1) cases under the Freedom of Information law, will accord substantial weight to an agency's affidavit concerning the details of the classified status of the disputed record. [Id., at 12].

This would appear to indicate that if the State Department denies the pending FOI requests for telephone transcripts on the basis of Exemption 1, and if the FOI claimants seek judicial review, an in camera judicial inspection of the transcripts might be resisted by presenting affidavits attesting (1) that the transcripts contain national security and foreign policy materials, and (2) that the transcripts have been properly classified or that they fall under some other FOI exemption.

Segregable Matter

Although information in a document may qualify for one of the FOI exemptions, it does not necessarily mean that the entire document will be protected from disclosure:

> "Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection." [5 U.S.C. 552(a)]

This means that even if a particular telephone transcript contains classifiable material, the classification may not extend to the entire transcript. Moreover, the courts are empowered to make determinations not only with respect to an entire record, but also as to "any part thereof." 5 U.S.C. 552(a)(4)(B).

In conclusion, Exemption 1 will not afford a basis for withholding all of the transcripts. Although transcripts containing national security information can probably be marked as classified at this late date, the process of marking the appropriate transcripts would take time and any classification would be potentially the subject for an in camera inspection by a court.

February 9, 1976

FOI REQUESTS FOR TELEPHONE TRANSCRIPTS

EXEMPTION FOR INTRA-AGENCY MEMORANDA

This memorandum addresses the question of whether the telephone transcripts are exempt under FOI Exemption 5 for "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. 552(b)(5). At least two questions are involved: (1) are the transcripts, including those of conversations with persons outside the government, "inter-agency or intra-agency" memoranda; and (2) would the material in the records "be available by law to a party...in litigation with the agency."

Intra-Agency Memorandum Requirement

Records of conversations between persons in the Government would seem to fall readily in the category of "inter-agency or intra-agency" memoranda under FOI Exemption 5. The difficult problem involves conversations with those outside government.

The Congressional purpose underlying Exemption 5 -- the protection of internal deliberations of government officials -- would not, at first glance, seem to encompass memoranda of a communication with someone outside the government. It might be argued that conversations with such persons are not equivalent to internal deliberations within the Government.

However, at least two cases have purported to construe Exemption 5 as applying to views which outsiders provide to government agencies. In Soucie v. David, 448 F.2d 1067 (D.C. Cir. 1971), a court said that a scientific report prepared by outside experts at the request of a government agency should fall within the coverage of Exemption 5:

> The rationale of the exemption for internal communications [Exemption 5] indicates that the exemption should be available in connection with the Garwin Report even if it was prepared for an agency by outside experts. The Government may have a special need for the opinions and recommendations of temporary consultants, and those individuals should be able to give their judgments freely without fear of publicity. A document like the Garwin Report should therefore be treated as an intra-agency memorandum of the agency which solicited it. [448 F.2d at 1078 n. 44.]

The question was more directly addressed in Wu v. National Endownment for Humanities, 460 F.2d 1030 (5th Cir. 1972). In that case, a Chinese scholar applied for a grant from the National Endowment for the Humanities. In reviewing the scholar's application, the Endowment requested the views of outside experts. The experts did provide opinions, most of which were in writing and one of which was oral. The court held that documents containing these opinions "are intra-agency memoranda even though the five professors were not actual agency employees." 460 F.2d at 1032.

One of the factors on which the court relied was that Congress had specifically authorized the Endowment to use the services of experts and consultants. But this does not seem to be the principal consideration. In discussing whether documents from other outside experts were subject to Exemption 5, the court stated:

> The community of Chinese scholars and of others in specialized fields is small, and the members are the only ones qualified to evaluate each other's work. Surely they would be hesitant to be frank with the Endowment in their evaluations of a colleague's work if they knew he could readily obtain their comments from the Endowment. The Endowment's interest in retaining the services of these outside experts clearly outweighs the public's interest in whatever factual excerpts there may be in the memoranda appellant seeks. Id at 1034 (emphasis added).

Similarly, it could be argued that the Secretary of State should have access to views and comments from as many possible sources, including persons outside the Government, and that it is in the public interest that he have the candid views which only a policy of non-disclosure could provide.

Memoranda Not Available in Litigation: Advice and Recommendations

FOI Exemption 5 does not exempt all inter-agency and intra-agency memoranda, but only those which would not "be available by law to a party...in litigation with the agency." Courts have interpreted this provision as drawing a distinction between factual material on the one hand, and material used in the deliberative or policy-making process on the other. If a document is a part of the deliberative or policy-making process of an agency, it is exempt from disclosure under Exemption 5. EPA v. Mink, 410 U.S. 73, 89 (1974).

For example, it is clear that where a document expresses advice or recommendations as to what policy the government should adopt, the document can be protected, at least in part, under Exemption 5. The legislative history reveals that Exemption 5 was enacted to protect the full and frank exchange of opinions within and between agencies. S. Rep. No. 89-813, at 9; H. Rep. No. 89-1497, at 10. At the same time, however, it was made clear that Exemption 5 was to be construed "as narrowly as consistent with efficient government operation." Id.

Narrow construction of Exemption 5 appears to have manifested itself in two ways to date. First, it has been held that even though a memorandum may reveal the deliberative process of an agency, if that memorandum sets forth the final decision of an agency on a matter, it cannot be protected under Exemption 5. NLRB v. Sears Roebuck Co., 421 U.S. 132 (1975); Vaughn v. Rosen, 523 F.2d 1136 (D.C. Cir. 1975).

Second, where a memorandum contains both factual material as well as recommendations, an agency would have to disclose the factual portion of the memorandum if it is severable from the recommendation portions. EPA v.

Mink, supra, 410 U.S. at 91; Grumman Aircraft Eng. Corp. v. Renegotiation Board, 425 F.2d 578, 582 (D.C. Cir. 1970). On the other hand, if the factual material in a memorandum is "inextricably intertwined" with advice and recommendations in the memorandum, the factual material can be withheld. Soucie v. David, 448 F.2d 1067, 1078 (D.C. Cir. 1971). Thus, if a telephone transcript contained factual descriptions intertwined with advice and recommendations, the entire transcript would undoubtedly be withholdable. The more difficult problem is where a document contains no advice or recommendations per se, but simply reveals a policy-maker's state of mind.

Mental Processes and Evaluations

There is a growing body of decision which indicates that even though a document may not contain what are, strictly speaking, advice and recommendations, the document may nevertheless be withheld if it reveals the mental or deliberative processes by which policies are formulated or decisions made.

This concept appears to have been first developed in the FOI area in International Paper Co. v. F.P.C., 438 F.2d 1349 (2nd Cir. 1971). That case involved a request for staff memoranda upon which a final decision was ultimately based. The court concluded:

> "To allow disclosure of these documents would interfere with two important policy considerations on which [Exemption 5] is based: encouraging full and candid intra-agency discussion, and shielding from disclosure the mental processes of Executive and Administrative officers." 438 F.2d at 1358-59 (emphasis added).

The Court in International Paper derived this language in part from Carl Zeiss Stiftung v. V.E.B. Carl Zeiss Jena, 40 F.R.D. 318 (D.D.C. 1966), affirmed 384 F.2d 979 (D.C. Cir. 1967). In the Carl Zeiss case, it had been held that to allow discovery in litigation of certain intra-agency memoranda would entail the probing of the mental processes of administrative and executive officers of the government; thus, discovery was disallowed.

The "mental processes" theme was picked up in Soucie v. David, supra, where the D.C. Circuit said that Exemption 5 "might include a factual report prepared in response to specific questions of an executive officer, because its disclosure would expose his deliberative processes to undue public scrutiny." 448 F.2d at 1067.

This rationale is given an additional gloss in Montrose Chemical Corp. v. Train, 491 F.2d 63 (D.C. Cir. 1974). This case involved a summary, prepared by the EPA staff, of evidence presented at a public hearing. The EPA Administrator had asked EPA staff members to prepare this summary to help the Administrator digest the lengthy record of the hearing. The FOI plaintiff claimed that the summary contained only factual material and no recommendations or deliberative material and, thus, should be outside the protection of Exemption 5.

The court disagreed. It noted that one of the exemption's purposes was to protect not simply "deliberative materials," but also the "deliberative processes" of an agency, 491 F.2d at 68, and held that the summaries were protected under Exemption 5:

> To probe the summaries of record evidence would be the same as probing the decision-making process itself. To require disclosure of the summaries would result in publication of the evaluation and analysis of the multitudinous facts made by the Administrator's aides and in turn studied by him in making his decision. Whether he weighed the correct factors, whether his judgment scales were finely adjusted and delicately operated, disappointed litigants may not probe his deliberative process. Id. at 68.

As a caveat, the court said that where factual material contained in a summary "is not already in the public domain, a different result might be reached." Id. at 71. Thus, it might be argued that the decision is not applicable to Secretary Kissinger's telephone transcripts because the material contained in those transcripts is presumably not in the public domain. However, the court

appeared to have a broader rationale for its decision. The court based its decision on prior cases which held that the mental processes of government officials should not be subjected to public or judicial scrutiny. In particular, the court described litigation known as the Morgan cases.

In one of the Morgan cases, the Supreme Court had concluded that the Secretary of Agriculture was required to afford a public hearing prior to making a certain decision. However, the Court also indicated that once the Secretary had made a decision following a full hearing, "it was not the function of the court to probe the mental processes of the Secretary in reaching his conclusions...." Morgan v. United States, 304 U.S. 1, 18 (1938).

Subsequently, after a decision by the Secretary of Agriculture following a full public hearing, the Secretary was deposed and questioned about the grounds on which he made his decision. The Supreme Court held that this was an improper scrutiny into the mental processes of the Secretary. Morgan v. United States, 313 U.S. 409, 422 (1941).

One case which might, at first blush, undermine the "mental processes" doctrine is Vaughn v. Rosen, 523 F.2d 1136 (D.C. Cir. 1975). The Vaughn case involved Civil Service Commission reports that evaluated personnel management in various agencies. The Civil Service Commission denied an FOI request in part under Exemption 5, claiming that the reports were pre-decisional memoranda which simply made evaluations on which an agency might subsequently act. The court held that Exemption 5 did not apply and that the fact that a document was pre-decisional was not sufficient to invoke Exemption 5:

> [T]o come within the privilege and thus within Exemption 5, the document must be a direct part of the deliberative process in that it makes recommendations or expresses opinions on legal or policy matters. Put another way, pre-decisional materials are not exempt merely because they are pre-decisional; they must also be a part of the agency give-and-take -- of the deliberative process -- by which the decision itself is made. (Emphasis added)

It seems that the telephone transcripts would be clearly distinguishable from the evaluation reports the issue in Vaughn. The court in Vaughn found the evaluation reports to be final agency opinions, "final objective analyses of agency performance under existing policy." Thus, the court relied on the fact that the reports comprised objective statements of a final agency position. The notion of "finality" was enhanced by the fact that agencies receiving these reports often did not take further action on them.

By contrast, there would be no basis for concluding that the telephone transcripts were a record of final agency action -- except insofar as a transcripts might be the Department's or NSC's only complete record of a substantial government decision. Otherwise, the material in the transcripts would seem to be what the court in Vaughn called "a part of the agency give-and-take -- or the deliberative process -- by which the decision itself is made."

In sum, there is a substantial basis for one to argue that, to the extent Secretary Kissinger's telephone transcripts reflect his mental processes, or the mental processes of other government officials, or the evaluations of either, the transcripts should be withholdable under Exemption 5.

In Camera Inspections

To establish that the telephone transcripts contain material impinging upon the deliberative process, a court might decide to make an in camera inspection of the transcripts. The FOI Act states expressly that courts "may examine the contents of...agency records in camera" to determine if "any of the exemptions apply." 5 U.S.C. 552 (a)(4)(B). This has been held to encompass Exemption 5. EPA v. Mink, 410 U.S. 73 (1974).

EPA v. Mink, however, also decided that with respect to Exemption 5, in camera inspections were not to be mandatory. The Court noted that any member of the public who makes an FOI request is permitted to do so without any showing of need for the material requested. Under such circumstances, the Court said, it would be inappropriate

for members of the public to "require that otherwise confidential documents be brought forward and placed before the district court for in camera inspection -- no matter how little, if any, purely factual material may actually be contained therein." 410 U.S. at 92.

The Court then added that under Exemption 5, "an agency should be given the opportunity, by means of detailed affidavits or oral testimony, to establish to the satisfaction of the district court that the documents sought fall clearly beyond the reach of material that would be available to a private party in litigation with the Agency." Id. at 93*

Thus, it is very possible that an in camera inspection would not be necessary to establish that the telephone transcripts fall within Exemption 5, and that "affidavits or oral testimony" would suffice.

*Although the 1974 amendments to the FOI Act affected a portion of the decision in EPA v. Mink, they do not disturb the court's conclusions with respect to Exemption 5.