Government Control of Richard Nixon’s Presidential Material

The Presidential Recordings and Materials Preservation Act directs the Administrator of the General Services Administration to obtain control of all of ex-President Nixon’s “Presidential historical material” and specified tape recordings for use in a variety of settings. In upholding the constitutionality of the Act itself in *Nixon v. Administrator*...
of General Services, the Supreme Court approved the initial seizure of Nixon's presidential material that fell within the scope of the Act. In the absence of regulations detailing the criteria for permanent retention of the materials and archival processing standards to segregate items to be returned to Nixon, the Court declined to decide the constitutional limits on the application of the Act.

This Note attempts to define ex-President Nixon's First and Fourth Amendment rights in his presidential material. These constitutional claims will limit the government's ability to screen and retain the material seized under the Act. Part I of the Note examines the past treatment of presidential material and the provisions of the Presidential Recordings and Materials Preservation Act. Part II proposes a scheme for categorizing presidential material and develops a framework for determining the constitutionally protected interests inherent in the various categories of material. Part III applies this framework to an


In cases involving eminent domain, congressional judgments regarding "public use" have included objects of historical value; such judgments will be respected by courts, unless use is "palpably without reasonable foundation." United States v. Gettysburg Elec. Ry., 160 U.S. 668, 680-81 (1896). One of the first attempts to use the eminent domain power to preserve written historical material was the Kennedy Assassination Act of 1965, Pub. L. No. 89-318, 79 Stat. 1185 (1965). The Act empowered the Attorney General to acquire "right, title, and interest" and to "preserve" any evidence considered by the Warren Commission. Pursuant to the Act, Lee Harvey Oswald's "personal letters, a diary, family photographs, marriage license, [and] the contents of [his] wallet" were seized. Porter v. United States, 335 F. Supp. 498, 500 (N.D. Tex. 1971), rev'd on other grounds, 473 F.2d 1329 (5th Cir. 1973).

analysis of the regulations implementing the Act. The Note concludes with an examination of the provisions of proposed legislation dealing with government ownership and retention of presidential material.

I. Past Treatment of Presidential Material and the Presidential Recordings and Materials Preservation Act

Under the Presidential Libraries Act of 1955, a President may deposit any of his material with the Archivist of the United States and is free to set restrictions on access to such material. Following his resignation, Richard Nixon donated his presidential material to the government under the provisions of the Presidential Libraries Act. The donation agreement put strict limits on access to the materials and provided for their selective destruction under Nixon's direction. The Presidential Recordings and Materials Preservation Act abrogates the terms of Nixon's donation agreement and directs the Administrator of the General Services Administration to “receive, obtain, or retain, complete possession and control” of all material originally covered by the donation agreement. It provides for screening of the seized material to determine what material should permanently be retained, under regulations promulgated by the Administrator and subject to

9. Presidents have traditionally maintained control over the disposition of material produced by them and their staffs while in office. 43 Op. Att'y Gen. 1-3 (1974); National Study Commission on Records and Documents of Federal Officials, Memorandum of Findings on Existing Custom or Law, Fact and Opinion 1-24 (1977) [hereinafter cited as Study Commission Findings]. This has included all the material produced by the White House Office and stored in the White House “central files,” the “non-institutional” files of the National Security Council, material from White House Office staff files, and special files maintained by the President. Id. at 29-35; see Nixon v. Administrator of Gen. Servs., 408 F. Supp. 321, 348 n.34 (D.D.C. 1976), aff'd, 433 U.S. 425 (1977) (materials produced by the Harding, Pierce, Coolidge, and Arthur administrations may have been deliberately destroyed).
10. See 10 Weekly Comp. of Pres. Doc. 1104-05 (Sept. 16, 1974) [hereinafter cited as Nixon-Samelson Agreement]. The agreement specifically incorporated the definition of “historical materials” contained in 44 U.S.C. § 2101 (1970) and covered all such material in the District of Columbia. Id. at 1104.
11. The agreement provided that all of Nixon's presidential material would be shipped to a federal depository near his home in California; that Nixon would retain all legal and equitable title to the material, including literary property rights; and that Nixon would have an absolute veto over access of any party, including successive administrations, to the material. After three years, Nixon could withdraw and destroy all documents. After five years, Nixon could withdraw and destroy all tapes. In any case, all tapes would be destroyed by September 1, 1984 or at Nixon's death, whichever occurred first. Id. at 1104-05.
congressional review. Material is to be retained for two distinct purposes: to preserve material for present or future use upon a showing of "particularized need" and to preserve material of interest to the public for public access. The Act directs the Administrator, in devising standards for retention and public access, to consider the public's need to learn the full truth about Watergate, Nixon's right to sole custody of material not related to Watergate or of general historical significance, and any legally based right or privilege that would prevent or limit access to the material.


14. As used in this Note, "particularized need" refers to a request for specific presidential material after an examination of available information has established that the material will more than likely prove of value for the asserted purpose. The language of the Act and the manner in which it has been construed may permit immediate access to presidential material by parties other than Nixon only upon a showing of particularized need: § 102(b) subjects the material to "court subpoena or other legal process" conditioned on the "rights, defenses, or privileges ... any person may invoke"; § 102(d) grants access to any executive agency or department for "lawful Government use" subject to regulations on access promulgated by the GSA. Presidential Recordings and Materials Preservation Act of 1974, 44 U.S.C. § 2107 (Supp. V 1975). As the Act has been construed by the Court, Nixon can assert any constitutional rights or privileges that might prevent use of the material by an executive agency or department under § 102(d). Nixon v. Administrator of Gen. Servs., 433 U.S. 425, 451 n.13 (1977). Regulations implementing § 102 have been promulgated, 42 Fed. Reg. 40,859-60 (1977) (to be codified in 41 C.F.R. §§ 105-63.302 to 303), and executive branch access to material under § 102(d) is permitted only "to the extent necessary for ongoing Government business." Id. at 40,860 (to be codified in 41 C.F.R. § 105-63.302). Under the regulations governing immediate access, any party other than the archivists or Nixon is prohibited from gaining access to the material; only the archivists can examine the material to retrieve the desired documents or recordings. 42 Fed. Reg. 40,859 (1977) (to be codified in 41 C.F.R. § 105-63.204(e)).


16. Id. § 104(a)(1). The preservation of Watergate material for immediate use in judicial proceedings and disclosure to the public was the predominant congressional objective. At the time of its passage, the Senate bill was characterized as an "emergency measure" to establish protective custody over Watergate material. 120 Cong. Rec. 33849 (1974) (Sen. Nelson). The bill as first introduced was directed only at securing control of the Nixon tapes for use in criminal proceedings and eventual public access. Id. at 31549-50. When the Senate bill was reported out of committee its coverage had been extended to Nixon's presidential "historical materials" as defined by 44 U.S.C. § 2101 (1970). S. Rep. No. 93-1181, supra note 6, at 1-3.


Neither House gave any firm indication of what constituted "historically significant" material. Floor debate indicates that some type of private or personal material is exempt from the Act. 120 Cong. Rec. 33851, 33855 (1974) (Sens. Nelson & Ervin). The predominant belief seems to have been that only material produced in the course of government business would be retained. Id. at 33874-76 (1974) (Sens. Huddleston & Ribicoff); see id. at 37904 (1974) (Rep. Abzug urging retention of government material).

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Regulations relating to permanent retention and public access were submitted to Congress on June 2, 1977, and became effective on December 16, 1977. Under the regulations, the archivists processing the material are directed to segregate “private or personal” material from “Presidential historical materials” and to transfer the former to Nixon. Material that is not “private or personal” and that is not

consider Nixon's constitutional rights, "including his privacy rights," not only in situations involving access to material but also in situations involving permanent retention of the material under § 104(a)(7) as well. Nixon v. Administrator of Gen. Servs., 433 U.S. 425, 460 & n.23 (1977).

19. See 42 Fed. Reg. 63,626-29 (1977) (to be codified in 41 C.F.R. §§ 15-63.104, .400 to .406). Under § 104(b) of the Act, such regulations had to be submitted to Congress and would take effect 90 legislative days after submission, unless disapproved by a resolution adopted by either House. Presidential Recordings and Materials Preservation Act of 1974, § 104(b), 44 U.S.C. § 2107 (Supp. V 1975). This mechanism for congressional approval of agency rule-making, popularly known as the “legislative veto,” has been used with increasing frequency in recent years. Bruff & Gellhorn, Congressional Control of Administrative Regulation: A Study of Legislative Vetoes, 90 Harv. L. Rev. 1369, 1370-71 (1977). With regard to § 104 of the Act, Congress rejected the first three sets of regulations proposed by the Administrator. Id. at 1397-1403 (discussing congressional treatment of proposed regulations).

The Court has yet to rule on the constitutionality of the “legislative veto.” In his complaint challenging the constitutionality of the regulations, Nixon contends that all regulations promulgated pursuant to § 104(b) are unconstitutional and void because § 104(b) “constitutes an unlawful delegation of legislative power to one House of Congress” and “violates Article I of the Constitution and the Separation of Powers doctrine ... .” Second Amended Complaint for Declaratory and Injunctive Relief at 5-6, Nixon v. Solomon, No. 77-1395 (D.D.C., filed Jan. 31, 1978) [hereinafter referred to as Nixon's Amended Complaint]. In its answer to Nixon's complaint, the Government conceded the unconstitutionality of the legislative veto and regulations passed in accordance with such a procedure. Answer at 2 ¶ 14, Nixon v. Solomon, No. 77-1395 (D.D.C., filed Jan. 31, 1978) [hereinafter referred to as Government's Answer]. Although The Reporters Committee for Freedom of the Press has recently intervened and is defending the constitutionality of the legislative veto, Nixon v. Solomon, No. 77-1395 (D.D.C. June 9, 1978) (order granting motion to intervene), it should be noted that the Government’s concession only pertains to the constitutionality of the manner in which the regulations were formulated. As for the substantive provisions of the regulations, the Government contested the majority of Nixon’s allegations of unconstitutionality. In only two instances did the Government concede the unconstitutionality of the substantive provisions of the regulations: the Government agreed with Nixon that both the membership provisions of the Presidential Materials Review Board permitting non-executive branch employees to review presidential material, 42 Fed. Reg. 63,627 (1977) (to be codified in 41 C.F.R. § 105-63.401-2(g)), and the referral provisions requiring archivists to report to the Justice Department evidence of criminal conduct, id. (to be codified in 41 C.F.R. § 105-63.401-2(d)), were unconstitutional. Government's Answer, supra at 3 ¶ 18, 4 ¶ 23. For a discussion of the referral provisions, see note 118 infra. If § 104(b) were found to be unconstitutional and separable from the Act under the separability clause contained in § 105(b), the major provisions of the regulations could be reenacted without congressional participation in a more traditional manner. If § 104(b) were held not to be separable, Congress could amend the Act to accord with constitutional rule-making procedures.

20. 42 Fed. Reg. 63,627 (1977) (to be codified in 41 C.F.R. § 105-63.401-2(g)).
21. Id. at 63,628 (to be codified in 41 C.F.R. § 105-63.104(b)) (defining “private or personal materials”).
22. Id. (to be codified in 41 C.F.R. § 105-63.104(a)) (defining “Presidential historical materials”).
23. Id. at 63,638 (to be codified in 41 C.F.R. § 105-63.401-5(a) to .5(c)).
Watergate related or of general historical significance will also be returned to Nixon.\textsuperscript{24} Access restrictions to material retained by the government are to be devised by the Administrator.\textsuperscript{25}

II. Constitutionally Protected Interests in Presidential Material

A. Categorizing Privacy Interests in Presidential Material

Presidential material can be divided into two broad categories: "public" and "private" material. Material is considered "private" because of the context in which it was produced rather than the particular information it contains.\textsuperscript{26} Material not originating from the President's public role as Chief Executive, head of his political party, or other public capacity, is considered private.\textsuperscript{27} This approach protects the full scope of those activities of the President generally recognized as private, such as his role as father, husband, friend, or diarist,\textsuperscript{28} as well as other

\textsuperscript{24} Id. Screening of the material has begun and is expected to take approximately three years at an estimated cost of $7,109,600. GSA Report to Congress, supra note 2, at F-3.

Pending Nixon's suit challenging the constitutionality of the regulations, see note 19 supra and note 103 infra, archivists have been directed to begin preliminary processing for the purpose of "preserving and establishing intellectual control of the Nixon historical materials." National Archives and Records Service, Preliminary Archival Processing of the Nixon Historical Materials 1 (Apr. 17, 1978). This includes developing "general descriptions of the contents" of the material, \textit{id.}, duplicating original tapes, \textit{id.} at 2, and tentatively identifying materials that are personal or not of general historical interest for eventual transfer to Nixon, \textit{id.} at 3-4.


\textsuperscript{26} This distinction between the content of the material and the private or public nature of the activity from which it originated finds support in the Court's development of libel law. The movement of \textit{Gertz v. Robert Welch, Inc.}, 418 U.S. 323 (1974), away from a public interest or "newsworthiness" test to a public-private figure standard has required an examination of the "nature and extent of an individual's participation in the particular controversy giving rise to the defamation." \textit{Id.} at 352. Thus an individual may be involved in a matter of great public interest yet still be acting in a private capacity. \textit{See} \textit{Time, Inc. v. Firestone}, 424 U.S. 448, 453-54 (1976); \textit{cf.} Note, \textit{The Editorial Function and the Gertz Public Figure Standard}, 87 YALE L.J. 1723 (relevance of "public interest" to public-private figure determination).

\textsuperscript{27} \textit{Cf.} Warren & Brandeis, \textit{The Right to Privacy}, 4 HARV. L. REV. 193, 215-16 (1890) ("some things all men alike are entitled to keep from popular curiosity, whether in public life or not"); even men acting in public capacity maintain core of private activities).

associations, such as physician-patient and attorney-client, traditionally accorded private status under common law. Material created in these situations would not have to deal solely with nonpublic affairs in order to be considered private. For example, taped conversations between Nixon and his wife concerning his conduct in office would qualify as private material; what is at issue is the private act of husband and wife communicating.

In situations involving interpersonal exchanges, conversations, correspondence, or memoranda, the "private" or "public" nature of the material can be determined by identifying the status of the parties to the interchange and examining the contents of the material to the extent necessary to verify whether the individuals are acting in a private or public capacity. Private interpersonal exchanges may involve inter-

material" see Brief for Appellant at 144-46, Nixon v. Administrator of Gen. Servs., 433 U.S. 425 (1977) [hereinafter cited as Appellant's Brief]; cf. Garrison v. Louisiana, 379 U.S. 64, 77 (1964) (public's interest in government official extends only to information which "might touch" on "fitness for office").

29. When considering whether exchanges fall within a traditionally recognized privilege, e.g., attorney-client, the context of the interchanges must be examined in order to determine whether the elements requisite to such a privilege exist. For example, Nixon claims that all communications between himself and attorneys serving as White House counsel fall under the attorney-client privilege and should be returned to him as private material. Interview with R. Stan Mortenson, Miller, Cassidy, Larroca & Lewin (Attorneys for Nixon) (June 5, 1978) (notes on file with Yale Law Journal). It is widely recognized that the privilege only extends to situations in which a lawyer-client relationship exists, 8 J. WIGMORE, EVIDENCE § 2304 (3d ed. 1940), and the client has sought advice concerning his rights or liabilities, id. § 2303. Attorneys serving as White House counsel may render advice to the President on legal issues arising from policy implementation, e.g., constitutionality of warrantless wiretapping of foreign agents, or the President's own rights or liabilities, e.g., tax obligations. In the latter instance the relationship between President and counsel most closely parallels typical attorney-client interaction, and application of the privilege would be appropriate. To apply the privilege to communications between the President and White House attorneys regarding the official duties of the Presidency, however, would ignore the policy underlying lawyer-client confidentiality: ensuring full and open disclosure of the client's case. E. CLAIBY, MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE 175-76 (2d ed. 1972). Confidentiality for official communications between the President and White House counsel is better derived from the constitutionally based doctrine of executive privilege. United States v. Nixon, 418 U.S. 683, 705-06, 708 (1974). In Nixon v. Administrator of Gen. Servs., the Court rejected the argument of the nonfederal appellees that only an incumbent President could assert executive privilege and held that Nixon could raise such a claim under § 104(a)(5) of the Act. 433 U.S. at 447-51. A claim of executive privilege, however, would affect only the disclosure of presidential material, not its retention by the government. By definition, material falling under an executive privilege would qualify as government property. See note 100 infra; United States v. Nixon, 418 U.S. 683, 708, 711 (1974) (executive privilege limited to communications made "in the process of shaping policies and making decisions" during performance of presidential duties). Retention of this material, with access regulated as may be constitutionally required, would not infringe Nixon's First and Fourth Amendment interests. See pp. 1618-20, 1624, 1626-28 infra.

30. In some instances members of the President's family may operate in a public capacity. See Deposition of Richard Nixon, Appellant's Appendix at 603-04, Nixon v. Administrator of Gen. Servs., 433 U.S. 425 (1977) [hereinafter cited as Appellant's Appendix] (Nixon considered conversations with his wife concerning her good will trips
individuals who have previously maintained private relationships with
the President and continue to act in their traditional private capacity,
or individuals having no prior relationship with the President who
have assumed recognizable private roles in his life. Conversely, when
the President interacts with aides, public officials, or national leaders,
thus performing his duties as Chief Executive or head of his party,
engages in other activities unrelated to his private life, these would
be considered public matters.

Private material may also be created when the President, during the
conduct of government business or party affairs, documents his own
observations, ideas, or emotions in a confidential format never in-
tended to be circulated to other individuals. This would be the case
with diaries or other "intrapersonal" material. Such material would
be identifiable from its outside packaging and a limited examination of
its contents.

abroad, her activity in "The Right to Read Program" and "White House restoration
project" to be "official conversations").

In most cases involving presidential material, a judgment regarding the private or public
nature of the activity can be made on a document-by-document basis. The judgment de-
PENDs on the general impression the document conveys: personal greetings in a memoran-
dum between the President and his aide concerning Arab-Israeli negotiations do not turn
the document into "private" material. Cf. Reporters Comm. for Freedom of the Press v.
1978) ("Although personal in some respects . . . [records] transcribed in the discharge of
. . . official duties . . . are property of the United States.") The White House tapes present
a special problem. Because they ran continuously, they contain a mix of private and public
activity. Thus, categorizing privacy interests in the White House tapes involves an exami-
nation of a series of distinct interchanges, each beginning and ending as the participants
change. In addition, the participants may change capacities during the course of a taped
encounter. Appellant's Brief, supra note 28, at 22-23. As in the case of written material, the
transition from public to private capacity, or vice versa, requires a material change in the
nature of the participant's conduct.

31. See Affidavit of Richard Nixon in Appellant's Appendix, supra note 30, at 171-73
(certain presidential activity relates to official conduct of office). Since "public material"
consists of material generated in the performance of presidential duties, the proposed
categorization adopts the statutory standard that has been applied to determine the
status of material produced by executive branch officials other than the President or his
staff. Material made or received by the employees of an agency "in connection with the

32. This position requires the President to supervise the general affairs of the national
party he represents as well as his own immediate campaign organization. J. BURNS,
PRESIDENTIAL GOVERNMENT 159-71 (1966). In the case of the Nixon Presidency, both types
of political activity were embodied in recordings of "political briefings and strategy ses-
sions conducted in Mr. Nixon's offices or over his telephones," Appellant's Brief, supra note
28, at 167-68, in political "briefing books" describing local political officials and their
positions on various issues, id. at 164-65, and in memoranda prepared by White House
staff for use in Nixon's 1972 election, Appellant's Appendix, supra note 30, at 569.

33. "[T]he former President's own personal evening reflections and judgments on
political candidates and issues" were among material seized under the Act. Appellant's
Brief, supra note 28, at 168.
Government Control of Presidential Material

B. Constitutionally Protected Interests in Presidential Material

1. First Amendment Interests

First Amendment protection has long been extended beyond its central purpose of preventing direct government controls on speech itself. When governmental actions intrude upon or deter the exercise of activity protected by the First Amendment, the Court has recognized a limited sphere of First Amendment privacy—a right to withhold protected information from the government.\(^3\) Congressional seizure of presidential papers and materials for preservation and disclosure creates the potential for two distinct types of First Amendment privacy claims.

a. Privacy Interests in "Intrapersonal Speech"

Some presidential material records what this Note defines as Nixon's intrapersonal speech: his recollections, opinions, thoughts, and beliefs that were never intended to be disclosed to other individuals or the general public without his prior approval. Thus Nixon's dictabelt diaries and similar material containing his private thoughts concerning national issues or political affairs\(^5\) are examples of intrapersonal speech.

In the past when the government has attempted to uncover an individual's ideas, beliefs, or viewpoints, the Court has emphasized that such activity violates the privacy of thought protected by the First Amendment.\(^6\) This concept of a sphere of privacy for mental activity is consistent with the view that freedom of expression includes the right to form and hold beliefs and to decide when and where they will be disclosed to the public.\(^7\) This translates into the notion that an individual's thoughts are his own; government intrusion into this fragile

\(^{34}\) E.g., Shelton v. Tucker, 364 U.S. 479, 485-87 (1960) (compelled disclosure of group membership violates right of association); NAACP v. Alabama, 357 U.S. 449, 462-63 (1958) (same); Watkins v. United States, 354 U.S. 178, 197 (1957) (compelled testimony may threaten First Amendment rights). \(^{35}\) See supra. \(^{36}\) Schneider v. Smith, 390 U.S. 17, 19-20, 20 n.2, 24-27 (1968). In Schneider, the Court construed a statute governing the validation of merchant marine licenses to prevent government probing into the "reading habits, political philosophy, beliefs, and attitudes on social and economic issues of prospective seamen." \(^{16}\) at 24. The Court emphasized that the First Amendment creates "a preserve where the views of the individual are made inviolable." \(^{17}\) at 25; see American Communications Ass'n v. Douds, 339 U.S. 382, 421 (1950) (Frankfurter, J., concurring in part) ("probing into men's thoughts trenches on those aspects of individual freedom which we rightly regard as the most cherished aspects of Western civilization"); \(^{18}\) at 442 (Jackson, J., concurring in part) (legislation cannot "embarrass or impede the mere intellectual processes by which . . . expressions of belief are examined and formulated").

area of speech, without some compelling need, would amount to unconstitutional action. 38

b. Privacy Interests in Associational Activity

In *Nixon v. Administrator of General Services*, Nixon argued that certain material contained information concerning his political affiliations within the Republican Party and that seizure of this information violated his First Amendment right of associational privacy. 39 Organizing or associating with others for the advancement of political or social goals has been recognized as activity protected by the First Amendment. 40 At the same time, the Court has made it clear that an associational privacy claim requires a showing that the government conduct in question will deter future associational activity or otherwise destroy the effectiveness of a political organization. 41 This can result from disclosure of information to the public if deterrence is likely to follow, 42 or use of the material to produce a "'chilling' . . . effect . . . that fall[s] short of a direct prohibition against the exercise of First Amendment rights." 43 Mere government seizure of presidential material representing associational activity, with disclosure or use of the material delayed until the possibility of deterrence or chill no longer existed, would not appear to infringe First Amendment interests. 44

38. Watkins v. United States, 354 U.S. 178, 197-200 (1957) (exposure of individual's beliefs or associations, without some compelling government interest, may amount to unconstitutional action).


42. Buckley v. Valeo, 424 U.S. 1, 74 (1976) (First Amendment protection extended where claimants can establish "reasonable probability" that they would be subject to threats from government or private parties); see NAACP v. Alabama, 357 U.S. 449, 462 (1958) (record established that members of plaintiff organization would be subject to physical reprisals if disclosure occurred).

43. Laird v. Tatum, 408 U.S. 1, 11 (1972) (dictum).

44. See id. at 10 (no First Amendment chill produced by "mere existence, without more" of broad governmental investigative and data-gathering activity). In addition to the Court's analysis of First Amendment claims in *Buckley, Laird*, and *Shultz*, see United States v. Finance Comm. to Re-Elect the President, 507 F.2d 1194, 1199-1200 (D.C. Cir. 1974) (First Amendment challenge to Federal Election Campaign Act of 1971 premature until organization establishes that deterrence will result from disclosure of contributions). For an example of a case where the claimant made the requisite showing of objective harm, see Pollard v. Roberts, 283 F. Supp. 248, 256-58 (E.D. Ark.), aff'd, 393 U.S. 14 (1968) (per curiam) (Republican Party of Arkansas had First Amendment standing to prevent disclosure of bank records of campaign contributors and contributions when disclosure might deter participation in Republican activities).

Of course, seizure and processing of the material would result in the disclosure of some information to the individuals implementing the collection scheme. However, so long as
2. **Fourth Amendment Interests**

To define Nixon's Fourth Amendment interests in his presidential material, one must determine, first, which materials are protected and second, how much protection each receives.

a. **The Scope of Fourth Amendment Protection**

In scrutinizing government searches and seizures, the Court has examined whether the claimant had a legitimate expectation of privacy in the material in question. This amounts to a reasonable belief that the material will remain free from uninvited examinations or seizures. The Presidential Libraries Act specifically granted Presidents exclusive control over their presidential material. Since past Presidents had excluded or had had the opportunity to exclude all types of presidential material handled by professional and discreet archivists and safeguards existed to prevent the dissemination of potentially damaging material to other entities within the government, First Amendment interests would not be violated. Nixon v. Administrator of Gen. Servs., 433 U.S. 425, 466-67 (1977) (adopting view of district court that review by "professional and discreet archivists" raises "speculative" burden with regard to First Amendment claims).

45. United States v. Chadwick, 433 U.S. 1, 9-11, 13 n.8, 13-14 (1977). In a recent case, the Court has indicated that the principle concern of the Fourth Amendment is intrusions on personal privacy during the course of criminal investigations. See Whalen v. Roe, 429 U.S. 589, 604 n.32 (1977) (right of privacy emanating from Fourth Amendment derived from cases involving "affirmative, unannounced, narrowly focused intrusions into individual privacy during the course of criminal investigations"). Such an emphasis on the connection between the Fourth Amendment and criminal investigations, however, ignores the Court's willingness to find Fourth Amendment privacy interests at stake in situations involving broad governmental searches unrelated to criminal law enforcement. See note 64 infra; Marshall v. Barlow's, Inc., 98 S. Ct. 1816 (1978) (Fourth Amendment applies "during civil as well as criminal investigations"); "privacy interest suffers whether the government's motivation is to investigate violations of criminal laws or breaches of other statutory or regulatory standards"). Recognizing the applicability of the Fourth Amendment to government searches or seizures, whether or not for criminal law enforcement purposes, is consistent with the notion "that the real evil aimed at by the Fourth Amendment is the search itself, that invasion of a man's privacy which consists in rummaging about among his effects . . . ." United States v. Poller, 43 F.2d 911, 914 (2d Cir. 1930) (L. Hand, J).


48. Presidents or their families have retained control over material produced in the course of presidential duties for long periods of time after leaving office. National Study Commission on Records and Documents of Federal Officials, Majority Report 16 (1977) [hereinafter cited as MAJORITY REPORT]. The Kennedy family, for example, controlled tape recordings of official conversations for approximately 12 years after the President's death before donating them to the government. Letter from Dan H. Fenn, Jr., Director of John F. Kennedy Library (undated) (on file with Yale Law Journal). In addition, the record in the Nixon case indicates that the material of some Presidents, e.g., Harding's papers relating to the "Teapot Dome" scandal, may have been deliberately destroyed. See note 9 supra.

49. Donation agreements made under the Presidential Libraries Act have consistently given Presidents or their personal representatives the right to determine which material relates to public activity and is to be transferred to the government. Appellant's Appendix, supra note 30, at 79-101.
The residential material—public and private—from donations made under the Presidential Libraries Act, and an express statutory guarantee permitted this behavior, Nixon could reasonably claim an expectation of privacy regarding his presidential material.50

The Court in Nixon v. Administrator of General Services acknowledged Nixon's privacy interest in private material and used the "reasonable expectation of privacy" test to reach that result.51 Because past Presidents had maintained control over material relating to family matters and personal finances, Nixon had a "legitimate expectation of privacy" for similar material of his own.52

But the Court ignored any Fourth Amendment interest in public material.53 Such an exception for this material seems unjustified.54 Paradoxically, the Court refused to acknowledge Nixon's "legitimate expectation" that he would be able to do what the Act clearly author-

50. In part, Nixon's ability to assert a valid Fourth Amendment claim to his presidential material rests upon the timing of the congressional seizure. Prospective legislation establishing government control of certain material, e.g., interpersonal material produced during performance of presidential duties, would establish the type of prior notice usually held to defeat a Fourth Amendment claim. See Wilson v. United States, 221 U.S. 361, 380-81 (1911) (corporation president could not claim Fourth Amendment interest in corporate records for which he was custodian). Prior notice, however, could not extinguish Fourth Amendment interests in intrapersonal material created in connection with the President's public activity. As one commentator has noted, the expectation-of-privacy approach cannot be used as a device to circumvent significant privacy interests by giving prior notice of unconstitutional government activity. Amsterdam, Perspectives on the Fourth Amendment, 58 MINN. L. REV. 349, 384 (1974).

51. 433 U.S. at 457-58.

52. Id. The Court went so far as to add that this expectation of privacy was independent of the question of ownership of the material, thereby employing the contemporary concept that expectations of privacy transcend property interests. Id.; see Katz v. United States, 389 U.S. 347, 352 (1967).

53. See 433 U.S. at 457-59. The Court seemed to suggest that because past Presidents had eventually donated everything but family material, Nixon had no reasonable expectation of privacy with regard to control of any public material. Id. at 457 & n.19. This was the explicit reasoning of the lower court. 408 F. Supp. at 358 & n.53, 359.

54. The record in the case makes it clear that Presidents have maintained unilateral control over their material until donation. See notes 9 & 49 supra. More importantly, in discussing privacy interests in family material, the Court stated that Nixon's expectation of privacy was not dependent on the past practices of Presidents. 433 U.S. at 458 n.20. Thus the Court's statement suggests that even if past Presidents had refused to maintain exclusive control of their material prior to donation, other factors, such as the Libraries Act, see p. 1603 & note 8 supra, could serve as an independent basis for Nixon's expectations of privacy.

The Court also suggested an alternate ground for limiting Nixon's Fourth Amendment claim: Fourth Amendment protection could only extend to those items Nixon saw. 433 U.S. at 459. Nixon conceded that he only had knowledge of 200,000 documents, but, contrary to the Court's implication, id., he never claimed his Fourth Amendment rights were limited to this body of material. Appellant's Brief, supra note 28, at 141-64. In the past the Court has not required the claimant to have actual knowledge of the seized material in order to raise a Fourth Amendment claim. See Alderman v. United States, 394 U.S. 165, 176 (1969) (individual had Fourth Amendment interest in conversations in his home even though not present at time communications were made and recorded).
ized him to do: protect part or all of the public material in his presidential papers from government retention and public access.

The refusal of the Court to recognize the full extent of Nixon's Fourth Amendment interests allows Congress to retain certain presidential material without being subject to judicial review. The Court exempted from Fourth Amendment protection a vast quantity of material originally prepared and stored subject to an entirely reasonable belief that its disclosure would only occur with presidential approval. A more appropriate resolution of the issue would acknowledge Nixon's Fourth Amendment interest in all presidential material, except for material Nixon deliberately released to individuals outside the executive branch, such as members of Congress or the general public.55

b. The Degree of Fourth Amendment Protection

Even if Fourth Amendment protection extends to a particular item, immunity from government seizure is not absolute. The Fourth Amendment forbids only "unreasonable" searches and seizures: the amendment seeks to strike an appropriate balance between an individual's need for privacy and the government's need for information.66

It is well established that the legislature is bound by the Fourth Amendment when prescribing administrative searches or seizures; the government must make a showing of need sufficient to meet Fourth Amendment standards.57 That the Court in Nixon v. Administrator of

55. In Katz v. United States, 389 U.S. 347 (1967), the Court indicated in dictum that an individual could not maintain a reasonable expectation of privacy in material he "knowingly exposes to the public." Id. at 351. When applying this "knowing disclosure" doctrine to presidential material, a distinction must be made between exposure of material to executive branch employees during the course of Nixon's Presidency and exposure to the general public. The crux of the "knowing disclosure" rationale is that material must be so accessible to the public that any individual can gain familiarity with its contents. Cf. Lewis v. United States, 385 U.S. 206, 212-13 (1966) (Brennan, J., concurring) (individual's home was open to anyone willing to enter). Material produced by the President and his advisers is exempted from the provisions of the Freedom of Information Act. CONF. REP. No. 93-1200, 93d Cong., 2d Sess. 15, reprinted in [1974] U.S. CODE CONG. & AD. NEWS 6285, 6293 (Congress did not intend to expand agency definition in 5 U.S.C. § 552(c) (1976) to include "President's immediate personal staff" or units in Executive Office with sole function to "advise and assist the President"). Moreover, Congress does not have wholesale access to presidential material to expose it to the public. Senate Select Comm. on Presidential Campaign Activities v. Nixon, 498 F.2d 725, 731-33 (D.C. Cir. 1974). It would appear then that unless certain material was voluntarily thrust into the public domain by Nixon, the "knowing disclosure" doctrine is inapplicable.


General Services upheld the initial seizure of Nixon's presidential material does not mean such standards are not applicable to the subsequent search and retention of material.58

The predominant element of Fourth Amendment protection is a reasonableness test that requires "balancing the need to search (or seize) against the invasion [of privacy] which the search (or seizure) entails."59 The Court has recognized that this reasonableness balance derives much of its content and meaning from the warrant clause and the history of the amendment.60 Thus, the Court has required that the scope and subject matter of a government search or seizure be specifically described61 and that an objective, judicially reviewable showing that the search or seizure is justified in light of the asserted government interest be made.62 These elements ensure that there is a reason-


In justifying the sweeping seizure of Nixon's presidential material, the Court emphasized that material in which Nixon had legitimate privacy interests and which would eventually be returned was commingled with material relevant to the government's objectives. 433 U.S. at 462-65. Alluding to the provisions of the Nixon-Sampson Agreement, supra note 10, giving Nixon the right to selectively destroy material, see notes 10 & 11 supra, and the need to segregate private material in a disinterested manner, the Court rejected Nixon's claim that he alone should process the material as a less restrictive alternative, 433 U.S. at 464 n.25. In Fourth Amendment terms, these facts represent the kind of exigent circumstances ordinarily justifying a relaxation of Fourth Amendment protections. Once all the material is in government hands and exigent conditions no longer exist, Nixon's right to Fourth Amendment protection must be respected.


60. See United States v. United States Dist. Court, 407 U.S. 297, 309-10 (1972). In Chimel v. California, 395 U.S. 752, 760-65, 768 (1969), the Court first adopted Justice Frankfurter's dissent in United States v. Rabinowitz, 339 U.S. 56, 83 (1950), in which he stated that the "test of reason" for a reasonable search was adherence to the tradition underlying the probable cause/warrant elements of the Fourth Amendment. Id.

61. This emphasis on specificity of the search or seizure is consistent with the origins of the Fourth Amendment. See N. Lasson, The History and Development of the Fourth Amendment to the United States Constitution 42-103 (1937). As Lasson points out, the Fourth Amendment was developed in response to the hated "general warrants" and "writs of assistance" used by the British. Id. at 79-103. The general warrants and writs of assistance gave complete discretion to the authorities conducting the search: no chargeable offense was indicated, and no description of the materials to be seized, or places to be reached, was presented. See, e.g., Entick v. Carrington, 95 Eng. Rep. 907, 916-18, 19 Howell's St. Trials 1090, 1094, 1063-64, 1067 (1765).

The Court has consistently recognized that a chief purpose of the Fourth Amendment is to protect against general searches. See, e.g., Coolidge v. New Hampshire, 403 U.S. 443, 467 (1971); Berger v. New York, 388 U.S. 41, 56-60 (1967); Stanford v. Texas, 379 U.S. 476, 481-86 (1965).

62. An important purpose of the warrant clause is to ensure that the need to search or seize is subject to review by an impartial party. See Marshall v. Barlow's, Inc., 98 S. Ct. 1816, 1826 (1978) (warrant necessary to "provide assurances from a neutral officer"
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able need to search and that the search will promote the government interest. Depending on the purpose and nature of the search, various degrees of particularity and objectivity have been required. The Court has attempted to accommodate these standards so as not to defeat legitimate state interests differing from traditional law enforcement objectives. But at the same time, these standards have been enforced with greater rigor as the government intrusion on an individual's privacy increases.

that inspection pursuant to Occupational Safety and Health Act is “reasonable under the Constitution, is authorized by statute, and is pursuant to an administrative plan containing specific neutral criteria”). But even when circumstances render it impossible to secure a warrant, the Court has still required government action to be premised on an objective showing of need. Terry v. Ohio, 392 U.S. 1, 20-31 (1968). Searches or seizures based on the “subjective good faith” of the government agent are to be guarded against. See Beck v. Ohio, 379 U.S. 89, 97 (1964).


64. The Court's most recent attempt to balance such legislatively mandated searches against Fourth Amendment safeguards is Marshall v. Barlow's, Inc., 98 S. Ct. 1816, 1819-26 (1978) (warrantless inspection of "ordinary"—as opposed to traditionally federally licensed—business pursuant to § 8(a) of the Occupational Safety and Health Act of 1970 violated Fourth Amendment; however, warrant need not meet "probable cause [standard] in the criminal law sense" and may be based on "general administrative plan for . . . enforcement of the Act").

For other cases involving searches or seizures outside of a criminal law context, see United States v. Biswell, 406 U.S. 311, 312 n.1, 315-17 (1972) (warrantless search to enforce Gun Control Act of 1968 reasonable in light of limited scope, time, and place of search and closly regulated status of industry); Wyman v. James, 400 U.S. 309, 320-21, 323-24, 326 (1971) (warrantless home inspection pursuant to state welfare law requiring written notice and prohibiting forcible entry, "snooping in the home," or compulsory participation is "reasonable administrative tool" and violates no Fourth Amendment rights); Camara v. Municipal Court, 387 U.S. 523, 530-34, 538-39 (1967) (inspection of residences for housing code violations requires warrant that meets general administrative standards for conducting area inspections).

65. Compare United States v. United States Dist. Court, 407 U.S. 297, 320-21 (1972) (when government activity intrudes on First and Fourth Amendment privacy values, Fourth Amendment requires warrant issued by impartial magistrate to ensure intrusion is justified) with Camara v. Municipal Court, 387 U.S. 523, 537 (1967) (because housing code inspections involve limited invasion of privacy and are neither personal nor aimed at collecting evidence, attenuated probable cause standard sufficient to guard against unauthorized entry into home). This relationship between the degree of Fourth Amendment
In addition to applying standards of objectivity and particularity, however, the Supreme Court has undertaken a balancing of interests. Even when the government has precisely identified the scope of the proposed search and the government interest claimed to justify the search or seizure, courts must determine whether the intrusion into personal privacy caused by the search is reasonable in light of the asserted government need. To be sure, the Court has never explicitly held that a legitimate state interest was not sufficiently important to justify a search that otherwise met Fourth Amendment standards. Yet, unless courts are prepared to insist that government searches and seizures be justified by weighty government interests, constitutional protection for an individual's privacy will be seriously diluted and questionable government intrusions will be permitted as a matter of protection and the intrusiveness of the search is most apparent in the Court's decisions involving searches aimed at preventing the entry of illegal aliens into the United States. Compare United States v. Ortiz, 422 U.S. 891, 895-98 (1975) (search of trunk and chassis of automobiles at checkpoints must be based on probable cause) with United States v. Martinez-Fuerte, 428 U.S. 543, 557-60 (1976) (request at permanent checkpoints for documentation of passengers' nationality may proceed on less than reasonable suspicion because of minimal invasion of privacy).

66. This notion that the reasonableness clause provides an additional standard of protection, aside from the particularity and objectivity requirements of the warrant clause, finds support in the history of the drafting of the Fourth Amendment. See N. Lassen, supra note 61, at 102-03. One commentator has suggested that the warrant clause, rather than encapsulating all components of the "reasonableness" standard, represents a specific response to the abuse of general warrants. T. Taylor, Two Studies in Constitutional Interpretation 23-44, 64-71 (1969). According to this view, even a search to seize specifically designated papers for purposes of criminal law enforcement may result in a review of highly private testimonial material that runs afoul of the reasonableness standard of the amendment's first clause. Id. at 67-68; see Zurcher v. Stanford Daily, 98 S. Ct. 1970, 1978-79 (1978) (dictum) ("This is not to question that 'reasonableness' is the overriding test of compliance with the Fourth Amendment or to assert that searches, however or whenever executed, may never be unreasonable if supported by a warrant issued on probable cause and properly identifying the place to be searched and the property to be seized.")

The Court's opinion in Schmerber v. California, 384 U.S. 757, 766-72 (1966) (forced withdrawal of individual's blood for use as evidence in intoxication charge), indicates that a reasonableness standard will still be applied to searches meeting the requirements of the warrant clause. The Court acknowledged that the extraction occurred incident to a lawful arrest and that the officers had adequate grounds to suspect the individual was intoxicated. Id. at 769-71. The Court, however, found it necessary to analyze the "reasonableness" of the blood test. Because such blood tests were routine procedures involving no risk of trauma and pain and because the test in question had been performed at a hospital by trained personnel, the Court held it to be a "reasonable" search. Id. at 771-72. Thus the Court implied that a similar test made by untrained police officials at the scene of the arrest, regardless of probable cause, might be unreasonable. Id.; see Rochin v. California, 342 U.S. 165, 166, 172-74 (1952) (forced stomach pumping of individual who police saw swallowing morphine violates due process clause). The Court has since implied that the search in Rochin might be one example of the type of search considered unreasonable under the Fourth Amendment. See United States v. Edwards, 415 U.S. 800, 808 n.9 (1974). For a recent example of the application of the reasonableness standard by a lower court, see Division 241, Amalgamated Transit Union v. Suscy, 538 F.2d 1264, 1267 (7th Cir.), cert. denied, 429 U.S. 1029 (1976).
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course. Thus a court faced with a government demand for authority to search highly private material for what appear to be insufficient reasons should adopt the following approach: when less intrusive means exist to achieve the government's purpose, the court should minimize the government intrusion by requiring that such means be adopted.

67. For example, consider the following hypothetical. Congress has passed the "Welfare Assistance Reform Act" directing HEW to collect information for use in revising the existing welfare system to cut federal spending. The Act states that such investigations shall be limited to factors pertinent to welfare spending and shall not be conducted in a manner that violates the civil rights of the subjects of the study. The Act, however, explicitly provides that HEW will have available all information gathering techniques used by federal law enforcement personnel. HEW decides that welfare funding can be restructured and spending reduced only by analyzing the family structure of welfare recipients, particularly patterns of family authority, husband-wife relationships, and child-rearing techniques. HEW believes that this can only be accomplished by studying the family in the context of the home; moreover, prior knowledge of the study by the family will produce unnatural behavior and skew the results of the survey. Consequently, HEW appears before a federal district court seeking a warrant to install electronic surveillance devices in the homes of selected welfare recipients. In accordance with Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2518(5) (1976), the devices are to be used only to intercept conversations directly related to family life and are to be activated only during those hours when the family is most likely to interact, which HEW has determined to be dinner and breakfast. See Scott v. United States, 98 S. Ct. 1717, 1723-25 (1978) (minimization requirements of 18 U.S.C. § 2518(5) (1976) rest on determination of "reasonableness" of agents' conduct; circumstances may not permit absolute determination of relevancy prior to interception).

Such a search might well satisfy the particularity and objectivity requirements of the Fourth Amendment. The scope of the search is limited and particularly described and the showing of government need would rest on objective and articulable factual circumstances. See notes 61 & 62 supra. Yet the court reviewing the HEW request would be forced to assess the government need for the search against the resulting invasion of privacy of the welfare recipients. Unless Fourth Amendment protection for personal privacy is to lose all meaning, the court must first require HEW to formulate less intrusive means of obtaining the desired information, thereby protecting the welfare recipients' privacy. If this is not possible, the court should forbid the search. Cf. Griswold v. Connecticut, 381 U.S. 479, 485-86 (1965) (Douglas, J.) ("Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship.")

The Court's holding in Wyman v. James, 400 U.S. 309 (1971), should not be viewed as establishing precedent to the contrary. Although Wyman allowed the caseworker into the recipient's home, the Court clearly stated that any subsequent search was extremely limited, and that "snooping in the home" was forbidden. Id. at 321. Moreover, the recipient always had the option not to permit entry. Id. at 317, 320-21. The search in the hypothetical is much more extensive than that permitted in Wyman; in addition, the recipient is not given the opportunity to prevent the search.

Nor should the Court's recent opinion in Zurcher v. Stanford Daily, 98 S. Ct. 1970 (1978), be construed as establishing the absolute incompatibility of a less-intrusive-means approach with Fourth Amendment jurisprudence. Zurcher can be distinguished from the above hypothetical on the grounds that the case involved a search in furtherance of the "State's interest in enforcing the criminal law." Id. at 1979. The Court seemed particularly concerned that any attempt to protect the claimant's interests by requiring the use of a subpoena rather than search warrant would involve serious "hazards to criminal investigation." Id. The central argument of this Note is that when individuals are subject to searches or seizures for purposes other than criminal law enforcement, Fourth Amendment interests may require a less intrusive alternative.
But when this approach is not available, the court should protect individual privacy by forbidding the proposed search. Where a proposed search and seizure is premised on a multitude of government interests, and the material to be searched reflects varying privacy concerns, this balancing approach requires a gradation of competing interests. In the case of Nixon's presidential material, certain private material may be exempt from search or seizure unless there is a particularized and objective showing that an important government interest is at stake; public material may be vulnerable to seizure for more generalized government purposes.

C. **Weighing Privacy Interests in Presidential Material**

1. **Private Material**

   The acceptance of a privacy interest in diaries, family communications, and other private material stems from the private nature of the circumstances surrounding the production and maintenance of the material. Such material is generated out of relationships that have traditionally been recognized by society as conferring a high degree of privacy and that have been protected from other forms of government interference. Aside from constitutional limitations on government activity directly affecting these private relationships, the existence of invasion-of-privacy tort actions demonstrates the desire of society to discourage the exposure of an individual's private affairs. In view of this longstanding social interest in preventing the control or disclosure of an individual's private relationships, an individual's expectation of privacy in such material takes on special significance.

68. At least one Justice has suggested that the protection afforded by the Fourth Amendment should reflect the severity of the crime in question, thereby requiring the gradation of law enforcement interests. Brinegar v. United States, 338 U.S. 160, 183 (1949) (Jackson, J., dissenting); cf. Barrett, *Personal Rights, Property Rights and the Fourth Amendment*, 1960 *Sup. Cr. Rev.* 46, 65 (reasonableness of police techniques should be determined by seriousness of suspected crime).

69. See pp. 1606-08 *supra*.


71. See *Posser, Privacy*, 48 *Cal. L. Rev.* 383, 389-98, 407 (1960) (tort of invasion of privacy said to include intrusions into private activity and disclosure of private facts about individually); Warren & Brandeis, *supra* note 27, at 205-07 (tort of invasion of privacy founded on "general right to the immunity of the person,—the right to one's personality").

72. Thus, the Court in Nixon v. Administrator of Gen. Servs., 433 U.S. 425 (1977), recognized the validity of Nixon's expectation of privacy in communications arising out
2. Public Material

Public material was created and stored under the reasonable expectation that the President would control its disposition and exposure. Such material therefore falls within the scope of Fourth Amendment protection. A lessened degree of Fourth Amendment protection, however, is appropriate for material produced by the President in a public role. In part, the rationale for limiting protection for public material is that the President voluntarily assumed a role in which his activity would predictably be subject to extensive publicity and exposure. But even when the President may have had a reasonable belief that certain material produced in a public capacity would be afforded a high degree of confidentiality because of its sensitive nature, these expectations do not deserve greater Fourth Amendment protection. Constitutional protection for such material does not rest on the need to protect personal privacy, but on the need to protect important government operations or the institutional independence of the Presidency. Protection for this type of material is derived from other constitutional sources, such as the doctrine of executive privilege.

3. Defining Government Interests in Presidential Material

The Presidential Recordings and Materials Preservation Act serves a number of government interests pertaining to the control and preservation of presidential material. Such interests differ in the extent to which they encompass important government needs and are amenable to a specific and objective application.

See p. 1612 supra; cf. ALI Model Code of Pre-Arraignment Procedure § 210.3 (1975) ("writings or recordings, made solely for private use or communication to an individual occupying a family, personal or other confidential relation" should be immune from seizure unless such things have served "a substantial purpose in furtherance of a criminal enterprise"); Fried, Privacy, 77 Yale L.J. 475, 477-81 (1968) (fundamental relationships involving love, trust, and friendship can only exist in context of privacy); Note, Papers, Privacy and the Fourth and Fifth Amendments: A Constitutional Analysis, 69 Nw. L. Rev. 626, 631-36, 648-50 (1974) (suggesting Fourth Amendment privacy values require courts to take into account private nature of material subject to seizure).


By its very nature this material would be generated during the performance of government duties and would be suitable for retention and eventual public access. See note 29 supra (discussing executive privilege claim); cf. Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 491-93 (1975) (material in public records stemming from judicial proceedings is of legitimate public concern).
a. Retention For Particular Uses

i. Immediate Use

The Act contemplates that presidential material may be seized and retained in order to obtain access to specific material to satisfy an objective informational need. Such use of presidential material might arise out of judicial proceedings in which the need for particular documents or tapes has been established or "executive reference," a request from an executive department to examine material needed for ongoing governmental purposes. In such a setting, the party requesting access to the material would have used available sources to gain a clear idea of what documents contained the desired information.

In situations involving immediate use of the material for such purposes, the First and Fourth Amendments would not prevent the search and seizure of both public and private material likely to contain the desired information. The scope of the search needed to satisfy this type of public interest can be limited to prevent an examination of material irrelevant to the stated objective, and the request for the search would rest on an objective and reviewable showing of need.

Once these requirements are satisfied, the reasonableness of the search and seizure must be addressed. The Court has held that, for purposes of the First and Fourth Amendments, the protected or private

75. For a description of regulations allowing for access to the Nixon material for private judicial proceedings, see note 14 supra. Nixon's presidential material has been subpoenaed in at least ten criminal or civil proceedings unrelated to Watergate. Brief of Appellees The Reporters Comm. For Freedom of the Press at 9 & n.7, Nixon v. Administrator of Gen. Servs., 433 U.S. 425 (1977) [hereinafter cited as Brief of Appellees Reporters Comm.].


77. For example, the original regulations allowed the Watergate Special Prosecutor to gain access to the materials only by "specifying those materials that he [had] reason to believe [were] relevant to specified criminal investigations . . . and explaining why access . . . [was] important to a full and fair resolution of [the Watergate] investigations." 41 C.F.R. § 105-302-1. When the Special Prosecutor indicated that he had no further interest in the Nixon presidential material, this provision was deleted. 42 Fed. Reg. 40,859-60 (1977). Presumably, a similar showing would have to be made by a private litigant or government agency to withstand Nixon's constitutional challenge to requests for immediate access. Cf. See v. City of Seattle, 387 U.S. 541, 544-45 (1967) (dictum) (subpoenaed party has right to object to overbreadth and irrelevancy of subpoena). Such a showing would also meet the Fourth Amendment standard of "scrupulous exactitude" required when the seizure of material cloaked with First Amendment interests is at stake, as in the case of material containing intrapersonal speech. Stanford v. Texas, 379 U.S. 476, 485 (1965).
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nature of documentary material does not preclude its examination or seizure for use in judicial proceedings. Consequently, public and private material could be used in criminal or civil proceedings provided that traditional privileges were respected. In the case of executive reference, there may be varying degrees of need. If executive reference is directed at material unavailable elsewhere for the purpose of determining foreign policy commitments or similar objectives, private and public material should be subject to examination and retention. As the objective underlying executive reference becomes less defined and approaches an "official curiosity" standard, private material would warrant more stringent protection.

ii. Future Use

Because the Act sets no mandatory date for the return of seized material, it permits presidential material to be preserved indefinitely for future judicial proceedings or executive reference. The Court approved a similar purpose in upholding the constitutionality of the recordkeeping scheme at issue in *California Bankers Association v. Shultz*. Although future use of presidential material represents an important interest, the problem lies in ensuring that the implementation of a preservation scheme meets First and Fourth Amendment standards.

78. *Warden v. Hayden*, 387 U.S. 294, 309-10 (1967) (rejection of "mere evidence rule" to allow for seizure of material other than fruits or instrumentalities of crime or contraband for evidence in criminal proceedings). The Court has also held that seizure of private papers does not necessarily violate the Fifth Amendment's prohibition against self-incrimination. *Andresen v. Maryland*, 427 U.S. 463, 470-78 (1976). Previously, in *Boyd v. United States*, 116 U.S. 616, 633-35 (1886), the Court had held that the forced production of private papers violated the Fifth Amendment and in doing so amounted to a per se unreasonable search under the Fourth Amendment. *Id.* Because Nixon received a pardon for all criminal acts committed while in office, a Fifth Amendment claim regarding the use of presidential material would only arise with respect to incriminating activity following his resignation. An examination of Nixon's Fifth Amendment rights in such a situation is beyond the scope of this Note.

First Amendment interests in private material embodying intrapersonal speech would not prevent its seizure or use in criminal proceedings. *See Zurcher v. Stanford Daily*, 98 S. Ct. 1970, 1982 (1978) ("presumptively protected materials [under First Amendment] are not necessarily immune from seizure [as evidence] under warrant for use at a criminal trial"). Presumably, this would also be true where use of the material for executive reference or civil proceedings represented the same magnitude of government interest.


In Shultz the Court did not subject the recordkeeping scheme to Fourth Amendment standards, primarily because of its finding that "mere maintenance of the records by banks," with the records only available to the government through legal process, did not amount to a search or seizure, and it rejected the plaintiff's First Amendment claims. When direct government acquisition and preservation of presidential material are at issue, however, Shultz should not apply; under these circumstances, government possession and control of the desired material amount to a seizure. Normally, when the government requests information for some future purpose, Fourth Amendment standards require that the request be "sufficiently described and limited in nature" and based upon a "tenable congressional determination" that the material will in fact prove to be of future use. In the case of presidential material, successive administrations have primarily sought to gain access to information, not recorded elsewhere, relating to the conduct of foreign affairs by the President. Yet Congress could reasonably anticipate that presidential material would be needed for other future uses, such as criminal, civil, or legislative proceedings.

The problem with attempting to assert control over presidential material for these latter purposes is that it may be difficult or impossible to describe particularly the material sought or to demonstrate objectively the extent of government need. One possible solution would be to employ a preservation scheme that involved the impoundment of designated material without further examination until a predicted use actually arose. The invasion of privacy of such a scheme would be

81. Id. at 53-54. It should be noted that the nexus between the required records and the asserted government need was examined by the Court while reviewing plaintiff-banks' due process claim. Id. at 46-49, 49 n.21. The Court found that Congress had made the necessary showing that certain bank records had been useful in criminal proceedings and would continue to be of value in the future. Id. The Court has since held that depositors have no Fourth Amendment interest in bank records maintained under the Bank Secrecy Act and cannot challenge subpoenas directed at such material. United States v. Miller, 425 U.S. 435, 440-45 (1976).

The Shultz Court also rejected a First Amendment challenge to the recordkeeping requirements on the grounds that an associational privacy claim required the "actual disclosure of records" and a "concrete fact situation in which competing associational and governmental interests" could be weighed. 416 U.S. at 56. Although the seizure and retention of presidential material would not appear to implicate associational privacy claims, see p. 1610 supra, this would not be the case with private material containing intrapersonal speech, see pp. 1609-10 supra. Seizure and retention of this protected material would have to be in furtherance of compelling government objectives.

82. 416 U.S. at 63, 67.


84. The record in Nixon v. Administrator of General Services did indicate that presidential material had been occasionally used for such purposes. Id.
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minimal provided that any subsequent use of the material was subject to full First and Fourth Amendment protections.

Under such a preservation scheme, seizure of private and public material would be constitutional as long as the provisions for future access met First and Fourth Amendment standards. As part of the overall reasonableness of the preservation scheme, however, time limits on retention might have to be established contingent on the expected duration of the government interest justifying the seizure.

b. Retention for a General Disclosure Need

i. Preservation of Material Related to a Specific Event

The prime objective behind the Act was to preserve and disclose material containing information about Watergate. Because the activity falling under that designation can be defined with some degree of specificity, the search and seizure of material falling within the definition would not necessarily offend the particularity requirement of the Fourth Amendment. In addition, an objective review of the

85. The provisions of § 102(b), (d) of the Act accomplish this by allowing Nixon to assert any defense, privilege, or right to prevent immediate access to the material. Presidential Recordings and Materials Preservation Act of 1974, § 102(b), (d), 44 U.S.C. § 2107 (Supp. V 1975); see note 14 supra. As long as these provisions remained in effect for the duration of the preservation scheme, see note 86 infra, private and public material could be retained.

The preservation of private material containing intrapersonal speech for executive reference or use in judicial proceedings, while requiring some review of the material by archivists, see note 44 supra, would not appear to impermissibly infringe First Amendment interests provided that the duration of the preservation scheme was limited and strict Fourth Amendment standards governed access.

86. For example, if material is preserved for use in criminal proceedings relating to noncapital offenses, the preservation period would be coterminous with the five year statute of limitations provided by 18 U.S.C. § 3282 (1976). In the case of the Nixon presidential material, August 8, 1979, marks the date when the statute will have run with regard to noncapital offenses committed by individuals during the Nixon Presidency. Cf. Whalen v. Roe, 429 U.S. 589, 593 (1977) (statute required destruction of state-collected medical prescription records after five-year storage period).

87. The regulations define “Watergate” as including those acts allegedly “conducted, directed, or approved by Richard M. Nixon, his staff or persons associated with him in his constitutional, statutory or political functions as President” that fall within the charters of the Senate Select Committee on Presidential Campaign Activities and Watergate Special Prosecution Force or are described in the Articles of Impeachment adopted by the House Committee on the Judiciary. 42 Fed. Reg. 63,626 (1977) (to be codified in 41 C.F.R. § 105-63.104(c)).

88. The main characteristic of such a search would be its breadth; any document might contain the desired information. But a broad search pursuant to specific standards is not a general warrant. See Andresen v. Maryland, 427 U.S. 463, 480 & n.10, 481-82 (1976) (warrant covering broad range of documents and “other fruits, instrumentalities and evidence of crime at this [time] unknown” held not to violate prohibition of general warrants because officials conducting search understood that its language referred to specific crime under investigation).
search or seizure would be possible; a court could determine the relevance of the seized material to the events of Watergate.

Fourth Amendment protection does not end at this point, for the final determination of reasonableness would still require a balancing of the intrusion on personal security and the government need for the material. Preservation of private material because its informational content related to an event Congress has held to be of national interest would subject interchanges of the most intimate nature to examination and seizure.

The reasonableness requirement would not prevent the seizure of private material. Implicit in the requirement of reasonableness, however, is the consideration of less intrusive means to fulfill the government need. An initial restriction of the search or seizure to public material would prevent an unnecessarily broad and intrusive search of private material. For example, the government could discover that a review of public material has produced the desired information; in such a case the government might disclaim any further interest in private material. If public material did not contain enough information to present an accurate account of an unexplained event of significant public interest, the government would then have to establish that private material was reasonably likely to provide the missing information. Such a showing might be based on references to potentially valuable private information discovered during the review of public correspondence, tapes, or memoranda. In effect the government would have to make an objective showing that would permit a reviewing court to substantiate the claim for access to private material.

89. While this type of review has been traditionally applied in a First Amendment context, one judge has recommended that to determine the reasonableness of government intrusions under a Fourth Amendment standard, such a balancing test is highly appropriate. Hufstedler, The Directions and Misdirections of a Constitutional Right of Privacy, 26 A.B.A. RECORD 546, 562 (1971); cf. LaFave, Administrative Searches and the Fourth Amendment: The Camara and See Cases, 1967 SUP. CT. REV. 1, 14-15 (courts must decide when implementation of government interests through searches or seizures reaches acceptable results). The Court in Nixon v. Administrator of Gen. Servs. considered a less-restrictive-means test to determine the reasonableness of the original seizure but concluded that the commingling of private and public documents, together with the need for uniform processing standards, required the more intrusive comprehensive screening. 433 U.S. at 463-64 & n.25; cf. note 67 supra (discussing Court's refusal to enforce least intrusive means in context of criminal law enforcement).

In any case, where the retention of private material involves intrapersonal speech, First Amendment standards would require the type of less restrictive approach outlined above. 90. This might be the case in a situation similar to the seizure of Oswald's private diaries and papers under the Kennedy Assassination Act. See note 6 supra. The assassination of President Kennedy was an event of recognizable national significance; moreover, the paucity of information surrounding the assassination highlighted the value of any information in Oswald's possession. An additional factor to be considered in judging the reasonableness of the seizure is whether government access to the material has
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Until it was determined that public material was not an adequate source of information, private material could be preserved and shielded from access.

ii. Preservation of Historically Significant Material

Although the impetus for and specific focus of the Act is the need for disclosure of Watergate information, the Act also provides for the preservation of material of historical worth. Rather than specifying significant events other than Watergate, Congress has entrusted that judgment to trained archivists who have experience with historical uses of presidential material. This approach clashes with the particularity and objectivity requirements of the Fourth Amendment. The scope of a search for historical material could hardly be limited to exclude irrelevant matters. Given the unique level of interest in presidential activities, a directive to archivists that they search and seize material of historical significance would require a search of all presidential material.\(^\text{91}\)

Even if Congress had excluded certain broad categories of material from such a search, the seizure and retention of the remaining material would still have to rest on an objective showing of need amenable to judicial review.\(^\text{92}\) This requirement is intended to restrict the ex-

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\(^{91}\) The three-judge district court in Nixon v. Administrator of Gen. Servs. conceded as much: “Virtually any item might be needed by a historian, depending upon what subjects seem fit to study some years from now.” 408 F. Supp. 321, 355 (D.D.C. 1976), aff’d, 433 U.S. 425 (1977). In fact, because a good deal of presidential material is duplicated elsewhere, the most sought-after and historically interesting material may be the most private or intimate, e.g., personal medical history, individual reflections, or husband-wife conversations.

The particularity requirement of the Fourth Amendment was deliberately constructed to reduce official discretion during a search and seizure and to prevent general searches. See note 61 supra. As indicated by the Court in Berger v. New York, 388 U.S. 41 (1967), the Fourth Amendment demands specificity as to the material to be seized and as to the purpose of the seizure. Allowing official wiretapping to discover evidence of criminal activity without identifying what specific crime has been or is being committed amounted to a “roving commission to ‘seize’ any and all conversations.” Id. at 59. Permitting archivists to search and seize private and public material under a historical significance standard would produce the same impermissible result.

\(^{92}\) See note 62 supra.
Exercise of official discretion when Fourth Amendment privacy interests are at stake. A standard of historical significance may permit a professional historian to seize material based on no more than a subjective determination that it gives a better “feel” for the era or provides greater “insights” into the activity of the President. Such a determination is quite different from the type of probable cause analysis used in a criminal law enforcement setting.\(^3\)

When a search in furtherance of a legitimate government interest cannot be structured to satisfy the traditional particularity and objectivity standards of the Fourth Amendment, personal privacy interests may be accommodated by other means.\(^4\) The search in question can be altered to minimize the intrusion on Nixon’s privacy interests in satisfaction of the Fourth Amendment’s reasonableness standard and to protect First Amendment interests in intrapersonal speech.

To allow the examination and retention of private material for its historical significance would unnecessarily intrude on personal privacy. Such governmental searches and seizures would be based on nothing more than public curiosity about the private activity of the President, and the resulting information would be of marginal social value.\(^5\)

93. In a criminal law context, probable cause requires a showing that the items to be seized were either “‘used in the commission of, or constitute evidence of,’” an offense and are to be found at the place searched. LaFave, *Search And Seizures: “The Course Of True Law Has Not . . . Run Smooth”*, 1966 U. ILL. L.F. 255, 257-62 (quoting Ill. Rev. Stat., ch. 38, § 108-3 (1965)). The crux of such a showing of “probative liability” is that the offense has been defined by the legislature to include identifiable factual components; the magistrate or police official is able to match the facts before him with the prescribed conduct as outlined by the legislature. The legislative mandate in the case of a standard of historical significance is so vague that it permits official seizure of material based on unreviewable judgments as to probable historical worth, even if such material was not originally covered under the legislative directive. For a discussion of a similar Fourth Amendment problem in the area of vagrancy and loitering laws, see Note, *Orders to Move On and the Prevention of Crime*, 87 YALE L.J. 603, 607-10 (1978).

When First Amendment values are at stake, as in the case of private material containing intrapersonal speech, the Court has held that a search and seizure must not rest on “the whim of the officers” charged with its execution. Stanford v. Texas, 379 U.S. 476, 485 (1965).

94. See *Terry v. Ohio*, 392 U.S. 1 (1967). In *Terry*, the Court made it clear that notions of Fourth Amendment protection in one context (searches incident to arrest) need not be transported to situations involving other types of government interests (protective frisks). *Id.* at 25-27. The Court took pains, however, to ensure that the protective frisk approved was limited in scope and based on some objective showing of need. *Id.* at 18-25; cf. *Camara v. Municipal Court*, 387 U.S. 523, 538-39 (1967) (probable cause need not depend “upon specific knowledge of the condition of the particular dwelling”; warrant could be issued on basis of general standards to ensure Fourth Amendment protection).

95. The Presidential Recordings and Materials Preservation Act has been viewed as an attempt to provide the nation's citizens with information to help them “evaluate and perhaps to shape the present and future”: the “promotion of such understanding could hardly be more integral to a society based on democratic principles and devoted
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The public's desire to be informed about the conduct of the Presidency could be satisfied as long as public presidential material was available for study by future generations. Public material would relate to activities of recognizable historical importance and legitimate public interest. Moreover, because this category of material has been made available to historians and has proved to be of historical value, the subjectivity of the archival judgment would not be as great as in cases dealing with private material. Consequently, the reasonableness balance would allow for the implementation of a historical significance standard for public material, while exempting private material from such an archival determination. 96

to freedom of expression . . . . " Nixon v. Administrator of Gen. Servs., 408 F. Supp. 321, 349-50 (D.D.C. 1976), aff'd, 433 U.S. 425 (1977). Although the Court has recognized that one goal of the First Amendment is "producing an informed public capable of conducting its own affairs," Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 392 (1969), it has also indicated that information relating to an individual's private activities plays a minor role in furthering First Amendment values and that the individual therefore deserves increased protection. See note 26 supra. In effect, the public's "right to know" about the President can be distinguished and accorded less weight than its "right to know" about the conduct of the Presidency. Bloustein, The First Amendment and Privacy: The Supreme Court Justice and the Philosopher, 28 Rutgers L. Rev. 41, 94-95 (1974) (some aspects of individual's life bear no logical relationship to right of democratic people to be informed; curiosity in such material not sufficient grounds for First Amendment protection).


96. In his concurrence in Nixon v. Administrator of Gen. Servs., Justice White stated that "the validity of the Act would be questionable if mere historical significance sufficed to withhold purely private letters or diaries," 433 U.S. at 487-88, and added that he "would question whether a mere historical interest in purely private communications would be a sufficient predicate for taking them for public use." Id. at 490. Justice White refused, however, to address the question directly because of appellees' concession at oral argument that Nixon's "dictabelt diaries" and "personal letters, among his family or friends" would be returned "regardless of their historical significance." Id. at 489 n.*. The majority opinion recognized this concession and indicated that the Government "should now promptly disclaim any interest in materials conceded to be appellant's [Nixon's] purely private communications and deliver them to him." Id. at 459 n.22 (emphasis added).

The scope and effect of this concession by appellees is unclear. By voluntarily removing material from the coverage of the Act and the legislatively mandated retention criteria of § 104(a)(7), the appellees effectively reconstrued the Act and their construction was adopted implicitly by the Court. 433 U.S. at 459 n.22. Assuming that their concession is binding during implementation of the Act, the crucial question is what material falls within the concession. The majority opinion of the Court limited the concession to items referred to by the appellees, e.g., "dictabelt tapes," "personal letters, among his [Nixon's] family or friends." Id. at 489 n.*. A wide variety of private material, including interchanges recorded on the White House tapes, business records, or material generated out of common law privileges, falls outside the concession and would be subject to retention based on "historical significance." In his concurring opinion, Justice White seemed to interpret the concession more broadly, holding it to apply to "personal property of any kind not involving the actual transaction of government business." Id. at 487.

This Note argues that all private material is constitutionally protected, regardless of
c. Retention Based on Superior Property Rights

Finally, the Act has been viewed as establishing control over government property. Although the property interest in Nixon's presidential materials has never been formally determined, the definition of government property in cases involving other high government officials would restrict such a proprietary claim to material produced during the performance of presidential duties. All private material would be excluded, except for some intrapersonal documents or recordings. The scope of search and seizure necessary to implement the standard would be limited to a particular type of material qualifying as government property and the determinations of the individuals performing the search would be based on objective criteria that could be reviewed by a third party.

The reasonableness of such a seizure would still involve a balancing of government property interests against Nixon's privacy interests. Most material qualifying as government property would be generated by the President and his aides in their public capacity. Because this material presents weaker privacy claims, its seizure as government property would not appear unreasonable: by definition it resulted from the use of government materials and personnel during the performance of high level government activity.

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on the basis of proprietary interests raises more serious problems. Nixon's expectations of privacy concerning this material are significant; moreover established case law makes it clear that both the First and Fourth Amendments require greater protection for such material. Finally, because proprietary claims arise from the use of government funds and time to create the material, Nixon might accommodate such an interest by compensating the government for the value of any intrapersonal material he retains. The strong privacy interests in intrapersonal material, combined with an alternative means of satisfying a proprietary claim, would make the seizure and permanent retention of such material unreasonable and therefore unconstitutional.

III. Application of the Constitutional Framework to Regulations Implementing the Act

A. Permanent Retention

The regulations promulgated by the General Services Administration call for the permanent retention of material that Congress cannot constitutionally retain. First, the regulations do not adequately distinguish public material from private material. Second, the regulations provide for permanent retention of private material for purposes that violate the First and Fourth Amendments.

1. Private Material

The regulations contain an exemption designed to protect private material from retention. Material "relating solely to a person's family or other non-public activities, and having no connection with his constitutional or statutory duties or political activities as President" will be returned. But the terms of this exemption fail to establish that private material includes anything arising out of private activity, rather than material whose content solely "relates" or is "connected"


102. 42 Fed. Reg. 63,626 (1977) (to be codified in 41 C.F.R. § 105-63.104(b)) (defining "private or personal" material); id. at 63,628 (to be codified in 41 C.F.R. § 105-63.401-5(a)) (providing for return of "private or personal" material).
to nonpublic activities; the proposed categorization is simply too narrow to provide adequate protection for private material.\textsuperscript{103}

Of course, before material can be retained permanently, it must be found to be sufficiently related to Watergate or of sufficient historical significance that retention is warranted. But, as indicated earlier,\textsuperscript{104} private material containing information related to Watergate could only be retained after a showing that public material failed to provide an adequate record. Retention of private material pursuant to a standard of historical significance\textsuperscript{105} would also violate the reasonableness test.

\textsuperscript{103} The regulations do represent an attempt to circumvent the retention criteria of § 104(a)(7) of the Act. Rather than subject all material seized under the Act to the broad retention criteria of § 104(a)(7) (Watergate related or of general historical significance), the regulations appear to implement a two-step process. Material relating to “family” or “non-public” activities is to be identified and channeled directly to Nixon, without any examination as to whether it is historically significant or Watergate-related. 42 Fed. Reg. 63,627 (1977) (to be codified in 41 C.F.R. § 105-63.401-2(a), .401-2(b)) (providing for segregation of material); \textit{id.} at 63,628 (to be codified in 41 C.F.R. § 105-63.401-5(a)) (providing for return of segregated material to Nixon).

While this approach would seem to incorporate the private-public distinction suggested in this Note, see pp. 1606-08 \textit{supra}, the protection that the regulations afford to private material falls short of the proposed standard. The “relating solely” or “having no connection with” criteria the regulations use to define private material are sufficiently broad to allow retention of material generated out of private activity but containing references to public behavior. This could include material arising out of private interpersonal exchanges and intrapersonal material. Regardless of any constitutional interest in such material, some items may be covered by the concessions of the appellees in the case and required to be returned to Nixon without any archival review. See note 96 \textit{supra}.

Nixon has already filed suit to test the constitutionality of the regulations relating to immediate access and public access. See note 19 \textit{supra}. As part of his complaint, Nixon alleges that certain material relating to personal and political affairs cannot lawfully be deemed “Presidential historical materials” and must be returned to his custody. Nixon’s Amended Complaint, \textit{supra} note 19, at 12-13. In light of the Fourth and First Amendment interests inhering in intrapersonal and private material, Nixon’s claim seems well grounded, at least where certain government interests are involved. See pp. 1620-29 \textit{supra}.

\textsuperscript{104} See p. 1624 \textit{supra}.

\textsuperscript{105} See pp. 1625-27 \textit{supra}. The regulations define “general historical significance” as “having administrative, legal, research or other historical value as evidence of or information about the constitutional or statutory duties or political activities of the President, which an archivist has determined is of quality sufficient to warrant the retention by the United States of materials so designated.” 42 Fed. Reg. 63,626 (1977) (to be codified in 41 C.F.R. § 105-63.104(d)) (emphasis added). The GSA standards recognize the difficulty of providing a concrete definition of “historical significance” and vest the archivists with unlimited discretion in making the determination. GSA REPORT TO CONGRESS, \textit{supra} note 2, at G-18. The explanations provided by GSA for its regulations justify this delegation of authority: “In practice, archivists routinely apply this definition to determine which records the General Services Administration will authorize for disposal, and, conversely, which records must be retained.” \textit{Id}. In such circumstances, however, the material is not cloaked with Fourth and First Amendment interests. A court reviewing the archivist’s determination of “historical significance” with respect to presidential material cloaked with a Fourth and First Amendment interest is faced with the dilemma of deferring to the judgment of a professional historian unfamiliar with the constitutional restrictions applicable to his actions.
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As the regulations currently stand, even in cases in which the information fits the definition of "private or personal," if the document or recording contains both private and official information, the original will be retained, with Nixon receiving a copy of the private information.\footnote{106} This process ignores the crux of Nixon’s First and Fourth Amendment claims regarding private material; to permit any private material to remain in government hands without an adequate justification would be unconstitutional. Unless the government could legitimately claim that there was no possible way to excise private material, private and public material would have to be separated, with only the latter made available for public disclosure.\footnote{107}

As indicated earlier, private material is not totally exempt from retention: material that might be of use in judicial or legislative proceedings, or needed for executive reference, could be subject to a preservation scheme requiring only minimal processing and permitting access upon a showing of particularized need.\footnote{108} The regulations fail to adopt such an approach; private and public material will be immediately processed for public access. Material failing to meet retention standards will be returned to Nixon.\footnote{109}

2. Public Material

The regulations are clearly designed to retain material generated during Nixon’s performance of his presidential duties.\footnote{107} This material presents the weakest Fourth Amendment claim and seizure of public

\footnote{106} 42 Fed. Reg. 63,628 (1977) (to be codified in 41 C.F.R. § 105-63.401-5(c)). It also appears that all original copies of all of Nixon’s tapes will be retained. Id. at 63,629 (to be codified in 41 C.F.R. § 105-63.404(a)). Although the Act directs GSA to obtain control of “all original tape recordings,” Presidential Recordings and Materials Preservation Act of 1974 § 101(a), 44 U.S.C. § 2107 (Supp. V 1975), it does not specifically direct GSA to retain the original tapes in order to fulfill the public access requirements of § 104. Id. at § 104(a). The tapes contain recordings of private conversations between Nixon and his family, physicians, clergy and attorney. Appellant’s Brief, supra note 28, at 21-23. Because the White House taping system was voice activated it also recorded Nixon’s personal dictabelt dictations. Nixon v. Administrator of Gen. Servs., 433 U.S. 425, 545 n.1 (1977) (Rehnquist, J., dissenting). Thus a wide range of personal material will be retained because it is interspersed with official information.

\footnote{107} Placing restrictions on access to personal material that is retained does not render Nixon’s Fourth Amendment claim groundless. Privacy interests in private material could not be flaunted by placing access restrictions on such material, waiting until all interested parties were dead, and then claiming there were no longer privacy interests in the material. If Fourth Amendment protection is to remain meaningful, the asserted government interest in the material must be balanced against privacy interests at the time of seizure.

\footnote{108} See pp. 1621-23 supra.

\footnote{109} 42 Fed. Reg. 63,628 (1977) (to be codified in 41 C.F.R. § 105-63.401-5(a)).

\footnote{110} “Presidential historical materials” include any material “made or received” by Nixon or his staff in connection with “his constitutional or statutory duties.” 42 Fed. Reg. 63,626 (1977) (to be codified in 41 C.F.R. § 105-63.104(a)).
material based on superior property rights or a desire to preserve information about Watergate or historically significant activity would not necessarily violate Fourth Amendment standards.\(^{111}\)

The regulations also indicate that any material produced by the President in his role as head of his party may be retained if related to Watergate or of general historical significance.\(^{112}\) Political material of this sort represents weaker Fourth Amendment interests because it was created during activity of a public nature. Any First Amendment interests in such material would not be implicated by retention; a valid First Amendment claim could only arise in response to an attempt to use or disclose the material representing associational activity.\(^{113}\)

**B. Archival Screening**

Neither the district court nor the Supreme Court directly addressed the constitutionality of archival processing procedures.\(^{114}\) Concern for Nixon’s First and Fourth Amendment interests, however, requires that screening procedures be designed to minimize intrusions on Nixon’s privacy with regard to material that cannot constitutionally be retained.\(^{115}\) Commentary to the first set of regulations submitted to Congress stated that each piece of material will be subject to “virtually a word by word” review; each hour of tape will be subject to an average of twenty hours of review to produce transcripts.\(^{116}\)

111. *See* pp. 1620-29 *supra*.
112. The definition of “Presidential historical materials” includes material made or received by the President in connection with “political activities as President,” 42 Fed. Reg. 63,629 (to be codified in 41 C.F.R. § 105-63.104(a)); this is narrowed somewhat by the definition of personal material which exempts from seizure material reflecting “non-public activities.” 42 Fed. Reg. 63,626 (1977) (to be codified in 41 C.F.R. § 105-63.104(a), .104(b)). Therefore, political affiliations unrelated to the President’s Republican Party role or other public political activities may not be retained.
113. The GSA had previously indicated that this material was excluded from the coverage of the Act. *See id.* The terms of the Act, in particular § 101(b)(1), are broad enough to cover this material, however, especially if the Act is viewed as asserting control over the corpus of material originally covered by the Nixon-Sampson Agreement. *See* note 10 *supra*.
114. The district court recommended certain procedures for minimizing the intrusion into private or personal material. These included requiring the archivists to scan the outer packaging of the material to determine its contents, using Nixon to aid in the preliminary identification of material, giving Nixon a voice in the selection of archivists, and providing Nixon with notice of all proposed classifications before they are effectuated. Nixon v. Administrator of Gen. Servs., 408 F. Supp. 321, 339-40 (D.D.C. 1976), aff’d, 433 U.S. 425 (1977). The public access regulations implement the last suggestion regarding notice to Nixon. 42 Fed. Reg. 63,627 (1977) (to be codified in 41 C.F.R. § 105-63.401(c)).
115. The Court has made it clear that the scope of a search must be limited to attaining the objectives that justified its inception. *See* Sibron v. New York, 392 U.S. 40, 65 (1968).
116. GSA REPORT TO CONGRESS, *supra* note 2, at D-3, E-6. The preliminary archival
These procedures may prove unnecessarily intrusive. Once the categories of material that cannot appropriately be retained pursuant to a particular government purpose have been defined, only a cursory review is necessary to identify such material and return it. Procedures should be established to weed out material that is protected before an exhaustive review takes place. This would be the case with private material subject to a search to preserve public material for disclosure to the public.

processing standards issued by the National Archives and Records Service, see note 24 supra, partially minimize intrusions into private material. During the duplication of tapes, archivists will listen to a private conversation "only as much as necessary to establish its private nature and to determine its duration." National Archives and Records Service, supra note 24, at 2. When segregation of presidential material takes place, however, archivists "will accomplish page by page review" of textual material and a "systematic review of tape recorded conversations." Id. at 4. The current regulations fail to indicate just how intensive the archival review will be. 42 Fed. Reg. 63,626 (1977) (to be codified in 41 C.F.R. §§ 105-63.104(h), 63.401-2(a) to -2(c)) (as part of "initial archival processing" archivists directed to reproduce and transcribe tape recordings and review material for return to Nixon). As part of his attack on the constitutionality of the regulations, see notes 19 & 105 supra, Nixon contends that the absence of "standards or procedures to minimize the intrusion" into private materials violates his First and Fourth Amendment rights. Nixon's Amended Complaint, supra note 19, at 7 ¶ 16.

117. Private material could be identified by determining the status of the parties involved in its creation and examining its contents to the extent necessary to determine whether they were acting in a private capacity. Any search more intrusive than the one outlined above would represent a needless invasion of Nixon's privacy. As the Court has recognized, searches or seizures that are reasonable at their inception may become unreasonable because of the manner in which they are carried out. See Terry v. Ohio, 392 U.S. 1, 19-20, 29-30 (1968).

118. One more aspect of the regulations may result in intrusive forays into private material. The regulations require any archivist who discovers materials "which reflect an apparent violation of law" during the initial processing period to report this to the Administrator for referral to the Justice Department or other appropriate investigative agency. 42 Fed. Reg. 63,627 (1977) (to be codified in 41 C.F.R. § 105-63.401-2(d)). Because of his pardon, Nixon suffers no immediate jeopardy from such a requirement. Moreover, other individuals who can be prosecuted for any illegal activity contained in the material, such as his family or friends, probably lack Fourth Amendment standing to contest the search. See Couch v. United States, 409 U.S. 322, 335-36, 336 n.19 (1973) (individual did not have reasonable expectation of privacy in material controlled by third party). Imposing an obligation on archivists to report criminal violations could expand the scope of the search beyond that necessary to further the original objectives of the Act. Under the type of search proposed earlier, archivists need only examine material until it becomes apparent that it embodies private activity. See note 117 supra. Under the "plain view" exception to the Fourth Amendment's warrant requirement, any incriminating material discovered at this stage in the search could be used to establish criminal liability. Coolidge v. New Hampshire, 403 U.S. 443, 469-70 (1971) ("plain view doctrine" applies only to inadvertent discoveries of incriminating material). Because the regulations do not contain any provisions requiring minimally intrusive processing techniques, archivists are free to continue to examine private material, after its private nature has been established, for evidence of criminal activity. Such a search would amount to a planned warrantless seizure of incriminating material. As the Court in Coolidge indicated, the "plain view" exception was never intended to legitimize such deliberate seizures. Id. at 471 & n.27. In such a case, the archivists would be performing a "general search" of private material in violation of traditional Fourth Amendment standards. See note 61 supra. As indicated earlier, see note 19 supra, the Government has recently conceded the unconstitutionality of this provision. The government concession, however, may be
Conclusion

The *Nixon* case establishes that retroactive legislation directed at the public material of a President does not necessarily violate Fourth or First Amendment interests. Once the current custodians of public material are identified,\(^{110}\) retention would have to be accomplished through a nonintrusive procedure, such as compulsory process, unless exigent circumstances justified an actual search and seizure. Any attempt to obtain control of private presidential material would only be legitimate for the type of government interests and standards discussed earlier.\(^{120}\)

Much attention has centered on the prospective regulation of presidential material. Title II of the Presidential Recordings and Materials Preservation Act established a National Commission to study the disposition of the official papers of federal officials, including the President, Congressmen, and federal judges.\(^ {121}\) A number of bills have been introduced providing for government ownership of the work unnecessarily broad. Incriminating material inadvertently appearing in "plain view" during minimal processing could be used as criminal evidence without violating the Fourth Amendment.

\(^ {119}\) Correspondence with the six Presidential Libraries reveals a degree of uncertainty concerning the number of private individuals currently possessing public presidential material and the amount of material they have. The Assistant Director of the Johnson Library stated that "White House aides have retained some of the records generated by their offices"; the Director of the Eisenhower Library said that it was "probable" members of the White House staff possess "official documents" from the Eisenhower administration; Directors of the Kennedy, Truman and Roosevelt Libraries felt it was unlikely presidential material from their respective administrations remained in private hands; the Director of the Hoover Library merely indicated that the Hoover family had donated all the official material in its possession to the Library (correspondence on file with *Yale Law Journal*). President Ford has donated all of his public presidential material to the government. \(^ {120}\) WEEKLY COMP’T. OF PRES. Doe. 1709-19 (Dec. 20, 1976). But it is not yet known whether White House staff of the Ford administration possess public presidential material.

\(^ {120}\) *See* pp. 1619-29 *supra*.

\(^ {121}\) 44 U.S.C. §§ 3315-3324 (Supp. V 1975). The National Study Commission proposal creates a category of "Public Papers," defined as "documentary materials that the President . . . made or received in connection with the President's constitutional or statutory duties." *Majority Report, supra* note 48, at 29. The President would remain in control of his "Public Papers" during his term of office, but such material could not be destroyed without the approval of the Archivist of the United States. *Id.* The Majority Report, however, proposes no sanctions if material is destroyed without the approval of the Archivist. Conceivably, willful destruction of presidential material could fall under the general prohibition against destruction of public records. *See* 18 U.S.C. § 2071 (1976). "Public Papers" would be donated at the end of the President's administration, with access restrictions ranging from 10-15 years. *Majority Report, supra* note 48 at 30. Under the Commission's proposal, records pertaining to the President's "personal participation in party politics," family affairs, or papers created for "his own use rather than in connection with his Presidential duties" are considered to be his personal property. *Id.* at 31-32. In terms of the analysis presented in this Note, the Commission's proposal gives too much protection to public political activity and ignores privacy interests in all intrapersonal material.
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product of elected officials. These proposals reflect growing interest in establishing public ownership rights in material prepared on the job and relating to official duties.

By making clear that official material would be retained by the government, these proposals would avoid the more serious Fourth Amendment problems created by the seizure of the Nixon papers. Once prior notice of a superior property interest is established, any expectation of privacy arising from temporary possessory rights is unreasonable. But the problem of constitutional protection for a President's intrapersonal material prepared as part of his official activity would remain.

In theory, the President may have an option not to create intrapersonal material during the conduct of the Presidency. But practically, the decision whether or not to create intrapersonal material amounts to a Hobson's choice. The nature of the job demands that the President document ideas, attitudes, and opinions on the multitude of social and political issues confronting him as he governs. Even in the case of prospective retention, intrapersonal material should be exempt from seizures based on proprietary rights or a desire to preserve and expose the material to the public.

122. One of the most recent proposals for government ownership of official presidential material is H.R. 11001, 95th Cong., 2d Sess. (1978). H.R. 11001 defines “Presidential records” as anything made or received by the President or his staff that does not constitute “personal papers” and is appropriate for retention. “Personal papers” are defined as anything of a “purely private or non-public character” not related to the President's official duties; diaries or personal notes “not circulated or communicated in the course of transacting Government business”; and political materials not related to official duties or the President’s activity as leader of his party. Thus, H.R. 11001 exempts intrapersonal material from retention regardless of content. Political material resulting from public activity would be retained.


123. A prospective scheme would not eliminate all Fourth Amendment protection. See note 50 supra. This Note suggests that prospective ownership of presidential material will have to exclude a small category of intrapersonal official material, absent a more compelling need than proprietary rights. H.R. 11001 is the only proposal to provide this protection for presidential material. The only court to rule on the ownership issue found that all property generated or kept in the administration and performance of the powers and duties of the Presidency is government property. Nixon v. Sampson, 389 F. Supp. 107, 133 (D.D.C.), dismissed as moot, No. 74-1518 (D.D.C. Sept. 21, 1977), appeal docketed, No. 74-1553 (D.C. Cir. Nov. 18, 1977). The district court had held that the "emoluments" clause of the Constitution, U.S. Const. art. II, § 1, cl. 6, specifically prohibits the President from removing material of "incalculable" value, 389 F. Supp. at 137. Under the scheme for retention developed in this Note, only official material that reflected intrapersonal activity could be removed. It makes no sense to construe the "emoluments clause" to prevent the return of a small amount of material imbued with First and Fourth Amendment interests, when the President receives services that could technically be designated "emoluments" throughout his term of office and are not subject to constitutional attack. Op. ATT’y GEN., supra note 6, at 5.