



COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

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B-149372

MAY 12 1978

The Honorable Jack Brooks
Chairman, Committee on Government
Operations
House of Representatives

Dear Mr. Chairman:

You requested our comments on H.R. 11001, 95th Congress, a bill to amend title 44, United States Code, to establish a system for the management and disposal of the official records of the President.

As you know, the ownership and control of Presidential papers and papers of other Federal officials has, in recent years, been a matter of some concern not only to the Congress but to the general public and, in particular, to members of the scholarly community. As a result of that concern, and in particular because of the so-called Nixon-Sampson agreement, which purported to give former President Nixon a right not only to control access to his Presidential materials but also provided for their destruction in certain circumstances, the Congress passed and the President signed Pub. L. No. 93-526, the Presidential Recordings and Materials Preservation Act.

Title I of the Act abrogated the Nixon-Sampson agreement and directed the Administrator of General Services to take possession of all Mr. Nixon's Presidential papers, to return to him those determined to be private, and to determine conditions for public access to the rest. Constitutionality upheld, Nixon v. Administrator of General Services, 433 U.S. 425 (1977). Title II established the National Study Commission on Records and Documents of Federal Officials (Commission). The Commission was directed to report to the Congress and the President on the control, disposition, and preservation of records and documents produced by or on behalf of Federal officials. One of the sponsors of the legislative proposals which became title II of the Act was Representative Brademas, who is also one of the sponsors of H.R. 11001. The other sponsor of H.R. 11001, Representative Ertel, was a member of the Commission.

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The final report of the Commission, dated March 31, 1977, reflects some fundamental disagreements among the Commissioners. Indeed, the majority of the Commissioners endorsed one report, while the Chairman and one other Commissioner submitted an alternate report.

The differences between the majority report and the alternate report are a reflection of the difficult philosophical and legal issues which must be dealt with in any attempt to provide systematically for public access to records of a President. Both reports recommend that Congress declare all records produced by or on behalf of Federal officials to be public property, in accordance with Congress' power under Article 4, Section 3, of the Constitution to dispose of and make rules respecting the property of the United States. (In Nixon v. Administrator, *supra*, the Supreme Court refrained from deciding whether the President has legal title to his papers, but pointed out that, even if he does, the materials are not immune from regulation making them publicly available. 433 U.S. at 445, footnote 8.)

The fundamental difference between the approach of the majority report and the alternate report is that the majority would create a special category of records called "public papers," which are distinguished from what are called "Federal records." "Public papers" may be generated by the President, the Members of Congress, and Federal judges, but not by appointed officials in executive branch agencies. With regard to the President, public papers consist of documentary materials that he or his immediate staff made or received in connection with his constitutional or statutory duties or that were made or received by units of the Executive Office of the President whose sole function is to advise and assist the President. "Federal records" are, again in the context of the President, documentary materials made or received by units of the Executive Office of the President other than those whose sole function is to advise and assist him. Although public papers are, under the majority approach, to be treated as property of the United States, they are to be treated differently from Federal records, in that the President (or a judge or Member of Congress) would have the right to control access to public papers for 15 years from the time he leaves office. (There is another category, personal papers, which are considered to remain the President's private property.)

The alternate report by the minority of the Commission does not agree that there should be a distinction, such as that proposed by the majority, between public papers and Federal records. The alternate

report proposes that all documents which are not personal papers be treated as Federal records. The President and other officials would have no unique control over papers representing advice. Access to all records (other than personal papers) would be open to the public in accordance with the terms of the Freedom of Information Act. The Act would have to be extended to the President, the Congress, and the judiciary, to carry out the recommendation of the alternate report.

H.R. 11001 incorporates many of the concepts of the majority of the National Study Commission. It recognizes a distinction between "Presidential records" (which correspond to what are termed "public papers" in the majority report) and Federal records. As to the Presidential records, the bill would, like the majority Commission report, allow the President to control access for a period of up to 15 years from the end of his term in office. The bill, like both the majority and alternate reports of the Commission, declares the Presidential records to be the property of the United States. We are in favor, in general, of the attempt to deal systematically, as H.R. 11001 does, with the problems of ownership of and access to official records.

One significant difference between the approach taken by H.R. 11001, on the one hand, and both the majority and alternate reports of the Study Commission, on the other, is that the bill deals only with Presidential papers and records. Pub. L. No. 93-526 charged the Commission with considering the disposition, control, and preservation of documentary materials and records produced by Federal officials. Although Pub. L. No. 93-526 recognizes that there may be a distinction between Presidential documents and records and other Government records, it takes the approach that the Commission should study the problems associated with the control of documents throughout the Government.

In our view, it would be useful for the Congress to consider the problem in its entirety, rather than to deal separately, as does H.R. 11001, with the issue of Presidential records. We take no position on the merits of the dispute between the majority and the minority of the Commission. However, we believe that the Congress should have the opportunity to consider, in connection with the proposed legislation, whether the nature of Presidential papers warrants treatment different from that to be given to papers of the judiciary, Members of the Congress, and other Federal officials.

Another significant difference between H.R. 11001 and the majority report of the Commission, which the Committee may wish to review, is in proposed section 3503(b) of title 44. Under the bill, the President

may, during his incumbency, dispose of records which he determines, after consultation with the Archivist of the United States, "to be of insufficient administrative, historical, or informational value to warrant their continued preservation." In the Commission majority report, this determination is not left to the President. He would have to have the prior concurrence of the Archivist to dispose of public papers, and at least 60 days' notice to the public and the Congress would have to be given about the proposed disposition.

In this respect, we favor the Commission approach. This Office has, as you know, an official interest in having unrestricted access to the records of a President, whether they are considered to be "Presidential records" or "Federal records." Under the bill, both categories could be destroyed without notice upon the President's determination during his term. After he left office, notice would be required. We recognize the need to dispose of valueless records but we see no compelling reason why the process of disposition should be less stringently controlled during a President's incumbency than afterward.

Also, in this connection, we believe any legislation on this subject should be limited to dealing with public access to records. This is in order to avoid any implication that the President or other Federal official could impose restrictions on access to Federal records of any kind which might operate to prevent access for official purposes by this Office or by the Congress.

If H.R. 11001 were adopted, it would presumably be necessary to adopt conforming amendments to the Presidential Libraries Act, 44 U.S.C. §§ 2101 et seq., which is based apparently on an assumption that the papers and other historical materials of a President or former President are his personal property. See 44 U.S.C. § 2107.

Finally, in proposed 44 U.S.C. § 3505a(1), there is a reference to regulations to be promulgated by the Archivist dealing with public notice and description of Presidential records scheduled for disposal in accordance with section 3502(c). Proposed section 3502 does not deal with disposal of records. The reference presumably should be to section 3503(d).

Sincerely yours,

R. F. KELLY

Comptroller General
of the United States