

**GAO**

United States General Accounting Office  
**Report to Congressional Requesters**

August 1991

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**FEDERAL RECORDS**

**Document Removal by  
Agency Heads Needs  
Independent Oversight**



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General Government Division

B-233631

August 30, 1991

The Honorable David H. Pryor  
Chairman, Subcommittee on Federal  
Services, Post Office, and Civil Service  
Committee on Governmental Affairs  
United States Senate

The Honorable Bob Wise  
Chairman, Subcommittee on Government  
Information, Justice, and Agriculture  
Committee on Government Operations  
House of Representatives

This report responds to your request that we address various questions about senior agency officials removing federal records upon leaving office. Some of your questions were addressed in our earlier report to you.<sup>1</sup> This report addresses the remaining questions.

We concentrated our work on your primary concern about whether current laws adequately protect federal records and the information they contain when senior officials remove documents upon leaving office. Appendixes I and II identify all of your questions and provide our detailed responses to them.

Shortly after his resignation, President Nixon wanted tape recordings made during his Administration to be eventually destroyed. As a result, Congress amended the tradition of treating presidential records as the personal property of the president. Effective January 20, 1981—the beginning of the Reagan Administration—the Presidential Records Act of 1978 (44 U.S.C., ch. 22) required that certain records of departing presidents and their staffs would become government property and be retained by the National Archives and Records Administration (NARA).

In light of these restrictions on presidential records, you were interested in determining whether government records should be better protected when agency heads leave office. As agreed with the Subcommittees, we focused our work on documents removed by the last two agency heads during the Reagan Administration at the Departments of Defense, Justice, State, and the Treasury. Appendix I provides the details of our objectives, scope, and methodology.

<sup>1</sup>Federal Records: Removal of Agency Documents by Senior Officials Upon Leaving Office (GAO/GGD-89-91, July 25, 1989).

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## Results in Brief

Records of departing agency heads were not controlled or kept by NARA as they are for departing presidents. All eight of the former agency heads removed documents when they left office. Two of the four agencies did not know if records were removed by two departing agency heads. While we did not determine if documents meeting the technical definition of "records" were in fact removed by any of the eight officials included in our review, we believe official records might have been removed. For instance, agencies were unaware of classified material in two removed collections and failed to ensure that required security restrictions were followed for a significant amount of classified material in a third collection removed to a private business office. Also, at least half of the document collections included in our review contained original documents that the agencies did not know had been removed. Thus, if classified and original documents were removed, it is possible that official records were also removed. Once documents are removed, the government's access to documents is not ensured, as evidenced by our being denied access to three of the eight collections.

Current internal controls do not adequately ensure that government records and information are properly protected because no independent review of documents is made before they are removed. Reviews, if made at all, are done by subordinates who may not be able to effectively challenge the decisions of departing agency heads. Having complete records is critical to protecting government interests. We believe that NARA should oversee agency heads' plans to remove documents and determine whether their relinquishment and removal are consistent with federal laws and regulations.

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## What Documents Are Allowed to Be Removed?

The Records Disposal Act of 1943 only applies to records and, therefore, does not preclude departing agency heads from removing their personal papers and federal nonrecord materials. Determining whether a document is a record does not depend on whether it is an original or a copy. Federal records are documentary materials, regardless of physical form, that are (1) made or received by an agency under federal law or in connection with the transaction of public business, and (2) preserved, or appropriate for preservation, as evidence of agency activities or because of the value of the information they contain. Letters, memoranda, photographs, maps, tape recordings, and computer disks meeting these criteria qualify as records. Library materials, stocks of publications, and extra copies of documents retained solely for reference are not considered records. Government-owned documentary material that does not meet the criteria is commonly regarded as nonrecord material. However,

according to NARA, most official documentary materials in a government office meet the definition of records.

Personal papers are (1) papers accumulated by an official before joining government service; (2) materials related solely to the official's private affairs, such as those connected with professional affiliations or private political associations; and (3) diaries, journals, or other personal notes that are not prepared or used to transact government business.

The proper creation, maintenance, and disposition of federal records is critical to (1) protecting the legal, financial, and other interests of the government; (2) ensuring continuity and consistency in administration of the government; (3) assisting agency officials and their successors in making informed decisions; and (4) providing the information required by Congress and others for overseeing agency activities. Some records are preserved permanently by the National Archives. However, improperly removed records deprive the government of information needed to reconstruct the development of policies, understand actions taken, and record accomplishments.

The Federal Records Act of 1950 requires NARA to oversee the records management programs and practices of agencies. Under the act, however, NARA's oversight of document removals is greatly limited and NARA does not routinely review documents agency heads plan to remove upon departing office. Once documents have been removed, the government's right of access to them is not ensured.

Special control restrictions are often placed on documents with classified, sensitive, or private information. Executive Order 12356 permits former presidential appointees access to classified items that they originated, reviewed, signed, or received while in office. However, government control of such items is to be maintained. Also, the Privacy Act of 1974 generally prohibits agencies from disclosing personal information maintained in agency records systems without the affected individuals' prior consent.

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## Did Agencies Know What Documents the Eight Officials Removed?

The Departments of Justice, State, and the Treasury did not always know what types of documents or information were removed by one or both of the last two heads of their agencies during the Reagan Administration. In some cases, the agencies did not know what was removed or taken, and there was no independent review of the collections before removal for any of the eight officials.

The four agencies said that six of the eight officials did not remove records but did not know if the other two officials removed records or not. As agreed with the Subcommittees, we did not test to determine if the eight agency heads actually removed records. An attempt to make such a determination would have been laborious and time-consuming. Typically, such a process would include (1) gaining access to the collection (we were denied access to three of the eight collections); (2) sampling documents in the collection; (3) photocopying sampled documents; and (4) taking the copies back to the agency from which they were removed and asking the agency to show us the original or record copy of the document. This last step could involve the agency having to retrieve its records from storage in a NARA records center and locate the individual record from voluminous files.

However, our testing of the collections did show that some types of documents were removed that the agencies were not aware of. The four agencies said that five of the former officials removed only copies of documents (not originals) and did not know whether three officials had removed originals or not. Of the five collections we were granted access to, we found that four of the collections contained some original documents.

The agencies also said that five former officials removed both classified and sensitive documents, and one removed sensitive documents only. The agencies also said they did not know if the remaining two officials had removed any classified or sensitive information. Our tests of five collections revealed that two former officials removed classified documents that the agencies were unaware of. Further, one former official personally retained about 6 linear feet of classified information without following the required controls over such information. As a result of our inquiries, Treasury retrieved these documents.

The agencies said that six of the eight collections were reviewed to determine their contents before removal, one was not reviewed, and it was unknown whether the eighth collection was reviewed. However, the reviews were generally done by subordinates to the officials, who were not independent or in a position to effectively challenge the official. In one case, the agency had a NARA archivist assist in the review of documents, but this was only for a short time. The archivist reviewed some files but primarily reviewed inventories of documents, not the documents themselves. However, NARA is not required to review collections before they are removed by departing agency heads.

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## Access to the Eight Collections of Removed Documents

At the time of our review, none of the eight collections were open to the public. For the most part, three of the eight collections were kept personally by the former officials. The other five collections were kept at the Library of Congress, NARA, or a private archive. Access to the five collections was still controlled by the former officials and some officials restricted public access for 15 years or more.

The access restrictions were generally determined by the former officials, not the agencies from which the documents were removed or originated. We were denied access to three of the collections by the former officials.

According to information provided by the departments, several officials had removed substantial amounts of documentary materials. One official removed about 280 boxes of materials with an unspecified number of linear feet. Another official's documents measured about 247 linear feet.<sup>2</sup>

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## Conclusions

Current procedures used to review document removal by agency heads—whereby subordinates to the officials review documents with no independent review—are not adequate to ensure that the government's interests are protected. For example, some classified information that was removed did not receive required security protection. Also, agencies did not always know what information was removed by departing agency heads. Further, documents, including original documents and classified information, were removed without agency knowledge. Once these documents are removed, the government's access to them is not ensured. Although our review was not designed to conclusively prove that official records were taken from the government, we believe it is possible that records were removed. Thus, we believe stronger controls are needed over documents that agency heads plan to remove.

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## Recommendation

We recommend that Congress amend the Federal Records Act of 1950 to prohibit agencies from relinquishing any federal documents to agency heads and agency heads from removing such documents until NARA has determined that their relinquishment and removal are consistent with existing federal laws and regulations.

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<sup>2</sup>A 5-drawer file cabinet holds about 11 linear feet of documents.

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## Agency Comments

We did not obtain official written comments on this report from these agencies. However, on August 6 through 8, 1991, we discussed our report with officials from NARA and the Departments of Defense, Justice, State, and the Treasury.

The officials from these five agencies generally agreed with our facts and analysis. They provided suggested revisions that we incorporated in our report where appropriate. They all commented that our draft recommendation, which included a provision that NARA examine documents before they are removed by departing agency heads, would be impractical due to the work load it would impose on NARA. The agencies said that our recommendation would require NARA to examine every document in all collections. Because we did not envision a 100 percent examination, we deleted the specific examination reference from the recommendation to avoid confusion.

Nevertheless, we believe that in determining whether relinquishing documents to departing agency heads is consistent with existing federal laws and regulations, NARA should have the flexibility to decide what examination and testing is needed on a case-by-case basis. For example, NARA's examination of documents could be minimal in areas where NARA has determined that (1) agency heads are knowledgeable of records laws and regulations, and (2) agency records managers have screened all documents and ensured that the agency has other copies of all materials and that no national security, privacy, or other confidential information is being removed. Conversely, we would expect NARA's examination to be more extensive in cases where NARA has determined that (1) the agency head was not familiar with records laws and regulations or (2) agency records managers have not screened all documents to ensure the agency has other copies or that national security, privacy, or other confidential information is being removed. In any event, we believe the independence that NARA would bring to these reviews would help provide reasonable, but not necessarily absolute, assurance that records laws and regulations are adhered to.

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As agreed with the Subcommittees, unless you publicly announce its contents earlier, we plan no further distribution of this report until 30 days from its issue date. At that time, we will send copies to other appropriate congressional committees; the Secretaries of Defense, State, and the Treasury; the Attorney General; the Director of the Office of Management and Budget (OMB); the Archivist of the United States; the Administrator of the General Services Administration; the Librarian of



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Congress; and other interested parties. We will also make copies available to others upon request.

If you or your staff have any questions, please call me on (202) 275-8676. The major contributors to this report are listed in appendix III.

A handwritten signature in black ink that reads "L. Nye Stevens". The signature is written in a cursive style with a large initial "L" and a long, sweeping underline.

L. Nye Stevens  
Director, Government Business  
Operations Issues

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**Abbreviations**

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| FOIA | Freedom of Information Act                   |
| FPMR | Federal Property Management Regulation       |
| GSA  | General Services Administration              |
| IRS  | Internal Revenue Service                     |
| ISOO | Information Security Oversight Office        |
| NARA | National Archives and Records Administration |
| OMB  | Office of Management and Budget              |

# Objectives, Scope, and Methodology

The Chairman of the Subcommittee on Government Information, Justice, and Agriculture, House Committee on Government Operations and the Chairman of the Subcommittee on Federal Services, Post Office, and Civil Service, Senate Committee on Governmental Affairs asked us to address various questions about senior agency officials removing federal records upon leaving office.

We did our review in two phases. The first phase focused on matters related to agency head plans for document removal during the transition from the Reagan to the Bush Administration. The results of that phase were included in our report entitled Federal Records: Removal of Agency Documents by Senior Officials Upon Leaving Office (GAO/ GGD-89-91, July 25, 1989). The second phase, covered in this report, focused on Reagan Administration agency heads who left office.

Our objectives in this second phase were to answer the following questions raised by the Subcommittees:

- (1) Do federal laws governing government records apply to removed documents?
- (2) Where are the documents removed by senior officials maintained and under what conditions and restrictions?
- (3) What types of documents have been removed by senior officials?
- (4) Do agencies know what types of documents have been removed by senior officials?
- (5) Does the federal government retain any control over or interest in removed documents?
- (6) Are departing officials being required to pay for any documents they remove?
- (7) Are there any tax or other financial consequences that result from the removal of papers or their subsequent donation to a private or public archive?
- (8) Do current laws adequately protect federal records?
- (9) Should NARA take a more aggressive role in protecting federal records?

The scope of our work concerning questions 1, 8, and 9 about applicable legislation included a review of (1) relevant federal laws, (2) the legislative history of those laws, (3) relevant federal court cases, (4) an October 1987 NARA task force report on federal records laws and authorities, and (5) applicable legal opinions of the Department of Justice and the Library of Congress' Congressional Research Service.

Concerning questions 2 and 3 about removed documents' locations, restrictions, and types and questions 4 and 5 about agency awareness of types of removed documents and retained government control over the documents, we centered our work on documents removed by former agency heads of the Departments of Defense, Justice, State, and the Treasury, as agreed with the Subcommittees.

Our methodology was twofold. First, we obtained an overview of the extent to which heads of these departments between 1950 and 1980 had established collections of removed papers in the Library of Congress, NARA's presidential libraries, and private archives. We identified their collections of papers by (1) doing a literature search of presidential library research guides, (2) analyzing data in the Library of Congress' National Union Catalog of Manuscript Collections, and (3) interviewing officials and archivists at most of these libraries. For each collection located, we obtained information concerning its size, and whether classified information was included. We also obtained information from department officials about collections of papers maintained "in-house" for former agency heads.

Second, we reviewed the removal of agency documents by the last two heads of the four departments in the Reagan Administration. We generally obtained information by (1) interviewing agency and archive officials; (2) submitting written requests for information to be provided by the four departments; (3) analyzing supporting documentation provided by agency and archive officials, such as available written agreements between the former agency heads and archives and inventories of the collections' contents; and (4) examining, when we were provided access, the documents that agency heads removed and placed in public and private archives and other government locations.

We reviewed collections at the following locations: NARA, Washington, D.C.; NARA's Federal Records Center, San Bruno, California; NARA's Reagan Presidential Materials Staff, Los Angeles, California; the Department of State, Washington, D.C.; and the Archives of the Hoover Institution on War, Revolution and Peace, Stanford, California. We also visited

the Department of Justice in Washington, D.C., to review a set of microfilm that was a duplicate of microfilm provided to one of the former agency heads.

Where access was provided, we focused on (1) whether the documents were originals or copies and (2) whether the documents contained classified information. With respect to classified information, we noted what agency originated the document. We also determined if the documents contained private information about other individuals or other sensitive information. As agreed with the Subcommittees, we did not determine whether any of the documents were records as defined by the Records Disposal Act. For those collections with sizeable quantities of documents, we randomly and/or judgmentally selected from 8 percent to 15 percent of the documents for examination. We designed our sample to test for the presence of original, classified, and sensitive information but not to project the quantity of these types of information in each collection. Therefore, a random, statistically based sample was not needed. We looked at all of the documents in one small collection.

The Reagan Administration officials included former Secretaries of Defense Caspar W. Weinberger and Frank C. Carlucci III; former Attorneys General William French Smith and Edwin Meese III; former Secretaries of State Alexander M. Haig, Jr. and George P. Shultz; and former Secretaries of the Treasury Donald T. Regan and James A. Baker III. Of these, former Secretaries Weinberger, Haig, and Regan did not grant us access to their collections of papers. The Department of Defense did not accede to our request to look at classified papers removed by former Secretaries Weinberger and Carlucci. In addition, the Department of State did not respond to our request to look at classified papers removed by former Secretary Haig.

Concerning question 6 about payments by officials for document removal, we reviewed relevant federal law and executive branch policy. We also asked the four departments whether they required the former agency heads to reimburse the government for any of its costs.

We obtained an opinion from the Internal Revenue Service (IRS) concerning question 7 about tax benefits to officials who donate documents to archives.

As agreed with the Subcommittees, we did not obtain written agency comments on a draft of this report. However, we provided drafts of this report to NARA and the Departments of Defense, Justice, State, and the

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**Appendix I**  
**Objectives, Scope, and Methodology**

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Treasury and discussed the report with officials from these agencies on August 6 through 8, 1991. We have included their comments in the report where appropriate. We did our work from August 1989 through July 1991 in accordance with generally accepted government auditing standards.

# Findings in Response to Specific Questions

This appendix provides our detailed responses to the Subcommittees' questions, which are listed in appendix I.

## Laws Applicable To, and Government Interest In, Removed Documents

Two of the primary records management laws are the Federal Records Act of 1950, as amended, (primarily in 44 U.S.C., chs. 29 and 31) and the Records Disposal Act of 1943, as amended, (44 U.S.C., ch. 33). The Federal Records Act sets forth records management definitions and objectives. It also establishes the specific records management authorities and responsibilities of the Archivist of the United States, who is the head of NARA; the Administrator of General Services, who is the head of GSA; and the heads of other federal agencies.

The Records Disposal Act defines federal records, establishes government ownership of them, and provides procedures for their disposition. The act defines federal records as follows:

“‘[R]ecords’ includes all books, papers, maps, photographs, machine readable materials, or other documentary materials, regardless of physical form or characteristics, made or received by an agency of the United States Government under Federal law or in connection with the transaction of public business and preserved or appropriate for preservation by that agency or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the Government or because of the informational value of data in them. Library and museum material made or acquired and preserved solely for reference or exhibition purposes, extra copies of documents preserved only for convenience of reference, and stocks of publications and of processed documents are not included.”

The act also specifies that records of the U.S. government may not be removed or destroyed except as provided under the act. None of these provisions permit agency officials to remove records.

A removed document qualifying as a record is governed by the provisions of the Federal Records Act and the Records Disposal Act. Section 3105 of the Federal Records Act requires each agency head to establish safeguards against the removal or loss of records. Section 3106 requires each agency head who is aware of any unlawful removal of records to initiate, with the assistance of the archivist, recovery action through the attorney general. If the agency head does not initiate such action within a reasonable period of time, the archivist may do so under sections 2905 and 3106.

However, removed documents that consist of nonrecord materials or personal papers are not governed by the Federal Records Act and the



Records Disposal Act. There are no laws that establish procedures for the disposition of nonrecord materials. In the absence of statutory restrictions on the disposal of nonrecord materials, the archivist and the Department of Justice have taken the position that agencies have discretion to dispose of nonrecord materials owned by the government as agencies deem appropriate. They also believe that agencies can relinquish unclassified nonrecord materials to a departing official. Once an agency authorizes an official to retain nonrecord materials, those materials become the official's personal property.

Criminal laws may also apply to removed documents or papers. The principal sanction is contained in 18 U.S.C. 2071, which makes it a crime to conceal, remove, mutilate, obliterate, or destroy any record, paper, or document that is filed or deposited in any public office. Another relevant criminal law is found in 18 U.S.C. 641, which prohibits individuals from embezzling, stealing, purloining, or knowingly converting any government record or thing of value to their own or another's use.

The essence of the offense in 18 U.S.C. 2071 is that such removal permanently deprives the government of the use of its records, papers, or documents.<sup>1</sup> Thus, it clearly prohibits the removal of records and might extend to some nonrecord materials. However, it generally does not prohibit the removal of extra copies. The provisions of 18 U.S.C. 641 address the theft of any government "record" or "thing of value." Federal courts have given 18 U.S.C. 641 a broad reading, holding that the law prohibits the theft of copies.<sup>2</sup>

In view of these statutes, it is clear that the government retains a continuing interest in removed documents if they are (1) records or (2) nonrecord materials that were not authorized to be removed. In either case, the government may sue to retrieve the materials.

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<sup>1</sup>United States v. Rosner, 352 F. Supp. 915 (S.D.N.Y. 1972).

<sup>2</sup>See, for example, United States v. DiGilio, 538 F.2d 972 (3d Cir. 1976). (Section 641 violated where Federal Bureau of Investigation clerk-typist made unauthorized copies of official files using government equipment and supplies.)

## Removed Documents' Locations, Restrictions, and Agency Control

Between 1950 and 1980, the Departments of Defense, Justice, State, and the Treasury were headed by 47 officials. Two of these officials headed more than one department. Of the 47 officials, at least 23 established collections of agency documents at public or private repositories after leaving office. More specifically, 19 established collections only at public archives, such as the Library of Congress or NARA's presidential libraries; 3 established collections only at private archives; and 1 established a collection at both types of archives. Some of the collections established by the 23 officials ranged in size from about 3 linear feet to about 1,300 linear feet. In addition to the 23 archive collections, 2 of the 4 departments said they also maintain 11 collections "in-house" for former agency heads.

Collections frequently contain not only documents related to official government business that the officials originated, reviewed, signed, or otherwise acted upon while in office but also purely personal papers. Available information indicates that of the 23 officials who established collections, 15 included documents containing classified information.

Table II.1 summarizes the collections of agency documents established by the heads of the four departments who served between 1950 and 1980.

**Table II.1: Number of Agency Heads Between 1950 and 1980 at Four Departments With Manuscript Collections**

| Department   | Number of agency heads 1950-1980 | Number of agency heads with collection(s) at repositories |                      |                             | Total     | Number of in-house collections |
|--------------|----------------------------------|---|----------------------|-----------------------------|-----------|--------------------------------|
|              |                                  | Public archive only                                       | Private archive only | Public and private archives |           |                                |
| Defense      | 13                               | 5 <sup>a</sup>  | 2 <sup>b</sup>       | 0                           | 7         | 4                              |
| Justice      | 14                               | 7 <sup>a</sup>  | 0                    | 0                           | 7         | 0                              |
| State        | 8                                | 4 <sup>c</sup>  | 0                    | 1 <sup>d</sup>              | 5         | 7                              |
| Treasury     | 12                               | 3 <sup>e</sup>  | 1                    | 0                           | 4         | 0                              |
| <b>Total</b> | <b>47</b>                        | <b>19</b>   | <b>3</b>             | <b>1</b>                    | <b>23</b> | <b>11</b>                      |

<sup>a</sup>Four of these collections include classified documents.

<sup>b</sup>One of these collections includes classified documents stored in a government certified vault.

<sup>c</sup>Three of these collections include classified documents.

<sup>d</sup>The public archive collection includes classified documents.

<sup>e</sup>Two of these collections include classified documents.

Source: Public archive data based on NARA presidential library research guides and/or provided by NARA or the Library of Congress. Private archive data based on the Library of Congress' National Union Catalog of Manuscript Collections and generally confirmed with private archive officials. In-house data provided by agencies.

All eight former agency heads since 1980 removed collections of agency documents. Specifically,

- two established collections at the Library of Congress,
- two established collections with NARA for eventual deposit in the Ronald Reagan Library,
- one personally retained most of his collection but also established part as a collection with NARA for the Ronald Reagan Library,
- one placed part of his collection at a private archive but also has access to a departmental collection established for his personal use, and
- two personally retained their collections.

Several officials removed substantial amounts of documentary materials. One official removed about 280 boxes of materials with an unspecified number of linear feet. Another official's documents measured about 247 linear feet. Some of the documents removed by six of the eight officials contained classified information. One official personally retained about 6 linear feet of documents containing classified information. Although the official's department knew about the removal of these documents, the agency did not retain any control over them as required by Executive Order 12356, which prescribes a uniform system for classifying, declassifying, and safeguarding national security information.

At the time of our review, none of the five collections at public archives were open to the public. With respect to future public access, which can occur only after the collections have been processed by archival staff: Mr. Carlucci has agreed to permit access, except to certain materials that will be further restricted; Mr. Smith has denied access for about 15 years, except to certain materials that will be further restricted; Mr. Haig has denied access for at least 25 years, except to certain materials that will be further restricted; Mr. Weinberger has not provided for access; and Mr. Meese has not yet established the terms of access through an agreement with the archive. Also, Mr. Shultz has not yet established the terms of access to his collection at a private archive.

Individual summaries about each official's removal of documentary materials and access to the materials follow.

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Former Secretary of  
Defense Caspar W.  
Weinberger

The Department of Defense said about 247 linear feet of classified and unclassified, nonrecord departmental papers were removed and placed in the Library of Congress. The collection, according to an agreement between Mr. Weinberger and the Library, is on deposit for at least

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10 years, without transferring the title. Mr. Weinberger, however, may remove any unclassified papers at his discretion. Access is limited to Mr. Weinberger, approved Library staff, and those with Mr. Weinberger's written permission and requisite security clearance. Defense said it relinquished the title to the unclassified papers to Mr. Weinberger but continued to retain ownership and control over all classified papers Defense originated. Defense said access to other classified papers in the collection is to be granted by the originating agency and coordinated through Defense.

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Former Secretary of  
Defense Frank C. Carlucci  
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The Department of Defense said about 33 linear feet of nonrecord departmental papers, some of which were classified, were removed and placed in NARA's Office of Presidential Libraries. By agreement with NARA, Mr. Carlucci gave the collection to the United States of America for eventual deposit in the Ronald Reagan Library. The title passed upon delivery to NARA.

Although Mr. Carlucci wishes the collection to be available for research as soon as possible, NARA is to restrict from public access papers containing information that (1) would invade the personal privacy of, or libel, a living person; (2) is authorized to be kept secret in the interest of national defense or foreign policy; (3) relates to the personal, family, or confidential business affairs of Mr. Carlucci or others; (4) concerns statements made by or to Mr. Carlucci in confidence; (5) is adverse to the conduct of foreign relations or national security; and (6) affects individual privacy, such as law enforcement investigations, proposed appointments to office, or other personnel matters.

Access to papers not open to the public is limited to (1) Mr. Carlucci; (2) NARA staff who work with the papers; and (3) persons with Mr. Carlucci's written authorization, provided that security-classified information is only to be made available in accordance with procedures of the classifying agency and Executive Order 12356. Restricted materials are to be periodically reviewed by NARA to see if they can be opened to public access because of the passage of time or other circumstances. Defense said it continues to retain ownership and control over all classified papers it originated, and access to other classified papers in the collection is determined by the originating agency and coordinated through Defense.

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Former Attorney General  
William French Smith

The Department of Justice said that few current employees know about the removal of documents by Mr. Smith, and there was little documentary evidence concerning the subject. Information provided by Justice, however, indicates that about 45 boxes of documents were removed. A NARA official in Washington, D.C., said he picked up Mr. Smith's documents at Justice, had them copied, and sent the documents and the copies to NARA's Reagan Presidential Materials Staff in Los Angeles, California. We visited the Materials Staff and found 25 boxes of Mr. Smith's documents and 25 boxes of copies. A Justice official said that an unspecified amount of documents was forwarded to Mr. Smith's private California residence. The Director of the Materials Staff said that the collection had not been opened and processed, but there were no indications that it contained classified information.

According to an agreement between Mr. Smith and NARA, the collection is on deposit with NARA for eventual deposit in the Ronald Reagan Library.<sup>3</sup> Mr. Smith stated an intent to donate his documents at his future convenience. Until donation, title to the documents and the photocopies will not pass to the government. Unless the agreement is modified, access will be limited until January 1, 2000—about 15 years after the agreement was made—to Mr. Smith, his heirs, successors, or assigns, or his or their agents, and Library staff who work with the papers. Security-classified information, however, is only to be made available in accordance with procedures of the classifying agency and Executive Order 12356. On January 1, 2000, NARA may permit public access to all of the papers, except those concerning national defense, foreign policy, statutory exemptions, privacy, libel, certain areas of law enforcement, confidential statements, and personal matters. Because Mr. Smith has died, access to papers not then open to the public will be limited to the other persons previously mentioned as long as applicable classified information procedures are followed.

Restricted materials are to be periodically reviewed by NARA, but decisions to open materials to public access will be subject to notification to, and objection by, the identified individuals. Justice did not provide any information concerning control it may have retained over the removed documents.

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<sup>3</sup>On July 29, 1991, the executor of the estate of Mr. Smith, now deceased, and NARA entered into a gift agreement concerning Mr. Smith's documents. The agreement's public access provisions are similar to those originally established.

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Former Attorney General  
Edwin Meese III

Justice said Mr. Meese removed 278 boxes of paper documents with an unspecified number of linear feet and 170 reels of microfilm. According to Justice, 140 boxes were delivered to Mr. Meese's personal residence, 128 boxes were picked up by NARA, 1 box and 170 reels of microfilm were sent to Mr. Meese at the Heritage Foundation in Washington, D.C., and 9 boxes were picked up by Mr. Meese's attorney.

When we visited NARA's Office of Presidential Libraries concerning the 128 boxes Justice said NARA picked up, we found only 64 boxes of materials, which a NARA official said he picked up at Mr. Meese's personal residence. Because Justice and NARA had provided their best available information, we did not attempt to reconcile the discrepancy in the number of boxes and where they were picked up.

NARA sent Mr. Meese a proposed deposit agreement on April 6, 1990, and a proposed gift agreement on March 4, 1991, concerning the donation of his papers to the Ronald Reagan Library. An agreement has not yet been concluded. When concluded, the agreement should contain restrictions regarding access to the collection.

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Former Secretary of State  
Alexander M. Haig, Jr.

The State Department said that less than 95 linear feet of classified and unclassified documents pertaining to Mr. Haig's official business were transferred to the Library of Congress. In 1979, before becoming the Secretary of State, Mr. Haig entered into three agreements with the Library, giving the United States (1) an initial collection of papers and (2) two subsequent amounts to be added relating to his government service and other periods of his life. A fourth agreement between State and the Library was executed in 1982 to transfer additional papers to the Library covering Mr. Haig's tenure as Secretary of State.

Under the terms of the agreements, the copies of government papers in the collection will not be available for public access for 25 years or 5 years after the death of Mr. Haig, whichever is later. However, the papers will not be available for public access unless the originating agency has determined that they contain no classified or restricted information. Mr. Haig is to have unrestricted access to the papers during his lifetime. His research assistants are also to be given access, provided they have appropriate security clearances. Access by others during the restricted time period is limited to (1) Library employees approved by Mr. Haig and (2) persons with his written permission (or after his death the written permission of a committee named in his will). These persons

will not have access to any classified papers unless they have appropriate security clearances. State continues to retain control over all classified papers it originated, and access to other classified papers will be determined by the originating agency.

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### Former Secretary of State George P. Shultz

The State Department said that Mr. Shultz's collection consisted of less than 60 linear feet of documents pertaining to official business. Most of the documents, many of them classified, were transferred to NARA's Federal Records Center in San Bruno, California, to provide Mr. Shultz access. The remaining documents, which State identified as unclassified nonrecord material and Mr. Shultz's personal documents, were placed by Mr. Shultz in the Archives of the Hoover Institution on War, Revolution and Peace in Stanford, California.

Under Executive Order 12356, State is authorized to provide former presidential appointees access to classified items that they originated, reviewed, signed, or received while in office. In this case, according to State, providing access to Mr. Shultz could be conveniently done for the government if a duplicate collection were created.

On the basis of an identification of topics provided by Mr. Shultz and his staff, State retrieved and copied a collection of documents that was transferred to the Federal Records Center in San Bruno. Some documents were allowed to be temporarily transferred to a secure storage facility at the Hoover Institution for Mr. Shultz's personal use.

The arrangement for the copied collection was designed to meet the primary objective of providing the former Secretary with continued, secure, and convenient access to the documents. State's Deputy Secretary determined that this objective was in the national interest. The Secretary, who was still in office at the time, recused himself from the specific details concerning the arrangement.

According to a State Department official, the documents are State property. Further, State said it controls access to the documents in coordination with NARA officials at the Federal Records Center and designated personnel at the Hoover Institution.

Concerning the nonrecord material and Mr. Shultz's personal documents that were placed in the Hoover Institution's Archives, State said the

nonrecord material consisted of extra copies of agency records preserved only for reference. Although State certified the nonrecord materials before removal as being unclassified, some of the documents we reviewed at the Hoover Institution had classified markings. Thus, State did not retain control over these documents when they were removed. Also, representatives of the Hoover Institution said Mr. Shultz's papers are "closed" to researchers, and access is limited to Mr. Shultz and those who are authorized access by him. Further, the collection will probably remain closed until Mr. Shultz finishes his memoirs. Hoover Institution representatives also said that more specific restrictions will be outlined after the collection has been processed.

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**Former Secretary of the  
Treasury Donald T. Regan**

The Treasury Department said Mr. Regan removed about 99 linear feet of documents to his White House office. In February 1985, he left Treasury and became Assistant to the President and the Chief of the White House staff. According to Treasury information, Mr. Regan and his immediate staff identified the material to be removed, and staff of the Executive Secretariat boxed the documents for transfer. There is no documentation, however, of involvement by the Departmental Records Officer or staff of the Clerk's office, who were responsible for departmental offices' records management. The 99 linear feet of documents, some of which were classified, filled 99 boxes.

Treasury documentation indicated the 99 boxes were moved to Mr. Regan's White House office in July 1986. Treasury officials said they did not retain any control over the classified documents or access to the information. The Director, White House Office of Records Management, was unaware of the documents because they were never subject to White House control. According to Mr. Regan's attorney, the papers were transported from Treasury to storage in the Old Executive Office Building. In about June 1987, the papers were moved to Mr. Regan's current business office.

Our August 1989 inquiry prompted Treasury to contact Mr. Regan about the papers. Mr. Regan's attorney said that in November 1989, following conversations with a Treasury General Counsel representative regarding the documents in Mr. Regan's custody, all of the documents were voluntarily made available to the Treasury Department. Treasury retained those papers it deemed of interest and returned the remainder to Mr. Regan's business office. According to Treasury, it retained about 6 linear feet of documents in folders labeled "Secret" and "Confidential" and placed them in a vault.



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### Former Secretary of the Treasury James A. Baker III

The Treasury Department said that documents relating to departmental business were made available to Mr. Baker at his request. Further, Treasury said Mr. Baker's confidential assistant identified the documents to be removed, and Executive Secretariat staff prepared them for removal. There is no record of involvement by other departmental officials or records management staff. Treasury said it did not have information about the volume or quantity of documents involved, the types of documents, and the location to which they were removed. Also, Treasury said that it did not know at the time of removal if any of the documents included classified information and did not retain any control over the documents or access to them. However, we reviewed the documents—about 7 linear feet—and found several that had classified markings.

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### Types of Documents and Information Removed

We asked the four departments to identify various types of original documents and copies of documents that were removed by the officials. In general, the departments indicated that six of the eight agency heads did not remove any documents that had record status. With respect to the remaining two officials, the departments did not have information to answer our question. The departments indicated that five of the eight agency heads removed only copies of documents, not originals. For the remaining three officials, the departments did not have or provide information to answer our question. The agencies said that of the five agency heads who removed only copies of documents, all removed extra agency file copies of records preserved for reference. One of the five officials also removed copies of documents made solely for his own access.

To the extent that we were provided access to the agency heads' collections, we also examined some of the documents to see whether they were originals or copies. Of the five officials who provided us access, we found small quantities of original documents in four of their collections. Some of the original documents were signed by a former president, a vice president, agency heads, and a chief justice of the Supreme Court. Other original documents included the officials' appointment books and daily schedules. Three agency heads did not let us look at the documents they removed.

Table II.2 summarizes the types of documents removed by the officials.

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Table II.2: Types of Documents That Were Removed

| Department/Official                 | Types of documents           |         |                     |                  |
|-------------------------------------|------------------------------|---------|---------------------|------------------|
|                                     | Agency said official removed |         | Found in GAO sample |                  |
|                                     | Originals                    | Copies  | Originals           | Copies           |
| Defense                             |                              |         |                     |                  |
| Caspar W. Weinberger <sup>a</sup>   | No                           | Yes     | No access           | No access        |
| Frank C. Carlucci III <sup>a</sup>  | No                           | Yes     | No <sup>b</sup>     | Yes <sup>b</sup> |
| Justice                             |                              |         |                     |                  |
| William French Smith                | Unknown                      | Unknown | Yes                 | Yes              |
| Edwin Meese III <sup>a</sup>        | <sup>c</sup>                 | Yes     | Yes                 | Yes              |
| State                               |                              |         |                     |                  |
| Alexander M. Haig, Jr. <sup>a</sup> | No                           | Yes     | No access           | No access        |
| George P. Shultz <sup>a</sup>       | No                           | Yes     | Yes                 | Yes              |
| Treasury                            |                              |         |                     |                  |
| Donald T. Regan <sup>a</sup>        | No                           | Yes     | No access           | No access        |
| James A. Baker III                  | Unknown                      | Unknown | Yes                 | Yes              |

<sup>a</sup>The Department said none of the documents removed by this official were federal records.

<sup>b</sup>The Department did not provide GAO access to classified documents.

<sup>c</sup>The Department said no original records were removed but did not say whether original nonrecords were removed.

Source: Data provided by departments and GAO's review of a sample of removed documents. A GAO sample entry of "Yes" means at least one document of the type indicated was found.

We also asked the four departments to identify types of information contained in the documents that were removed by the officials. The departments indicated that five of the eight agency heads removed documents containing classified and other sensitive information. One agency head removed documents containing sensitive but not classified information. The departments did not have information to answer our question for the other two agency heads.

As we reviewed the collections of the five officials who provided us access, we determined whether they contained classified or other sensitive information. We found documents with classified markings in two of these collections. We also found documents with a variety of sensitive markings, and in four of the five collections, we found documents containing either information we believed to be law enforcement-sensitive or private information about other individuals.<sup>4</sup> For example, some of

<sup>4</sup>The Privacy Act of 1974, as amended, 5 U.S.C. 552a, controls the collection, maintenance, dissemination, and use of personal information about individual citizens. The act generally prohibits agencies from disclosing personal information maintained in agency records systems without the affected individuals' prior consent. We did not attempt to determine whether the private information we found about other individuals was protected by the act.

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the sensitive documents were marked "Limited Official Use," "Personal and Confidential," "Document . . . Not For Public Use," and ". . . property of the FBI . . . not to be distributed. . ."

Table II.3 summarizes the types of information removed by the officials.

**Table II.3: Types of Information That Were Removed**

| Department/Official    | Types of information         |                              |                         |                              |
|------------------------|------------------------------|------------------------------|-------------------------|------------------------------|
|                        | Agency said official removed |                              | Found in GAO sample     |                              |
|                        | Classified <sup>a</sup>      | Other sensitive <sup>b</sup> | Classified <sup>a</sup> | Other sensitive <sup>b</sup> |
| Defense                |                              |                              |                         |                              |
| Caspar W. Weinberger   | Yes                          | Yes                          | No access               | No access                    |
| Frank C. Carlucci III  | Yes                          | Yes                          | No access               | Yes                          |
| Justice                |                              |                              |                         |                              |
| William French Smith   | Unknown                      | Unknown                      | No                      | No                           |
| Edwin Meese III        | No                           | Yes                          | No                      | Yes <sup>c</sup>             |
| State                  |                              |                              |                         |                              |
| Alexander M. Haig, Jr. | Yes                          | Yes                          | No access               | No access                    |
| George P. Shultz       | Yes <sup>d</sup>             | Yes                          | Yes <sup>d,e</sup>      | Yes <sup>e</sup>             |
| Treasury               |                              |                              |                         |                              |
| Donald T. Regan        | Yes                          | Yes                          | No access               | No access                    |
| James A. Baker III     | Unknown                      | Unknown                      | Yes                     | Yes                          |

<sup>a</sup>Classified data includes confidential, secret, top secret, restricted, or formerly restricted information originated by the Department or by another department.

<sup>b</sup>Sensitive data includes information protected by the Privacy Act or of a private nature about other individuals; information containing privileged information; information marked "Limited Official Use;" or other sensitive information.

<sup>c</sup>This response only applies to the microfilm provided to Mr. Meese at the Heritage Foundation.

<sup>d</sup>This response applies to documents transferred to NARA's Federal Records Center in San Bruno, California.

<sup>e</sup>This response applies to documents provided to Mr. Shultz, who placed them at the Hoover Institution's Archives.

Source: Data provided by departments and GAO's review of a sample of removed documents. A GAO sample entry of "Yes" means at least one document containing the type of information indicated was found.

## Agencies' Knowledge of Types of Documents and Information Removed

Documentation provided by the four departments indicated that they generally knew what types of documents and information six of the eight agency heads removed. The departments said they did not have documentation or information to respond for the other two officials. One department was generally aware of the information removed by its officials but was not aware that part of one official's collection placed at a

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private archive included classified documents. However, that department had reviewed the documents before they were removed to identify classified documents.

The departments reviewed six of the eight officials' collections before removal. In five of the six cases, the review was done by subordinates to the agency heads, not an independent agency. In the sixth case, the Department of Justice arranged for a 2-week detail of a NARA archivist to assist in preparing the departing official's papers for removal, including their review. The archivist reviewed some files but primarily reviewed or compared inventories for already-boxed materials with subject folders in the boxes.

To determine whether each agency knew about the types of documents and information officials removed, we considered (1) their responses to questions we asked, (2) whether they had prepared a written inventory of the removed documents, and (3) whether they reviewed the documents before they were removed. Table II.4 summarizes this information.

**Table II.4: Agency Knowledge of Types of Documents and Information Removed**

| Department/Official    | Indications of agency knowledge |                                 |  |
|------------------------|---------------------------------|---------------------------------|--|
|                        | Able to answer GAO questions    | Prepared inventory of documents | Reviewed documents before removal <sup>a</sup> |
| Defense                |                                 |                                 |  |
| Caspar W. Weinberger   | Yes                             | Yes                             | Yes  |
| Frank C. Carlucci III  | Yes                             | Yes                             | Yes  |
| Justice                |                                 |                                 |  |
| William French Smith   | No                              | Yes                             | Unknown  |
| Edwin Meese III        | Yes                             | Yes                             | Yes  |
| State                  |                                 |                                 |  |
| Alexander M. Haig, Jr. | Yes                             | Yes                             | Yes  |
| George P. Shultz       | Yes                             | Yes                             | Yes  |
| Treasury               |                                 |                                 |  |
| Donald T. Regan        | Yes                             | Yes                             | Yes  |
| James A. Baker III     | No                              | No                              | No   |

<sup>a</sup>The primary purpose of this review was to ensure that records and nonrecord documents containing information that should be protected were not removed.  
 Source: Data provided by the departments.

## Most Officials Were Not Required to Pay for Documents

The government has established by statute and OMB circular a policy of charging user fees for users of government products and services. The government's user fee policy statements, however, do not specifically address the removal of agency documents. Nevertheless, we believe the broad wording of the statements can be interpreted, under certain circumstances, to require agencies to assess user charges against officials who remove documents.

A 1951 user fee statute, now codified at 31 U.S.C. 9701, generally provides that "It is the sense of Congress that each service or thing of value provided by an agency . . . to a person . . . is to be self-sustaining to the extent possible." Under this act, agency heads may prescribe regulations establishing charges that are "fair" and based on four factors: (1) costs to the government, (2) the value of the service or thing to the recipient, (3) public policy or interest served, and (4) other relevant facts. The act contains no guidance on how to weigh these standards. In addition, the act indicates that it does not apply when another law prohibits charges or prescribes a basis for determining charges. Also, the act says that agency heads' regulations are to be as uniform as practicable and subject to policies prescribed by the president.

OMB Circular A-25, issued in 1959, established more specific policy on user charges. Concerning special services, the circular provides that if a measurable federal service (or privilege) conveys special benefits to an identifiable recipient above and beyond those accruing to the public at large, a reasonable charge should be imposed to recover the government's full cost of that service.

The circular also says, however, that no charge should be made for services when the identification of the ultimate beneficiary is obscure and the service can be primarily considered as benefitting the general public. Under the circular, agencies have the responsibility to (1) determine if the services are covered by the circular, (2) determine the extent of special benefits provided, (3) determine costs, and (4) establish the charges. The fee set for a special service is to be governed by its total cost and not, in contrast to the 1951 statute, by the value of the service to the recipient. The total cost is to include all direct and indirect costs using accepted cost accounting principles. Costs are to be determined from the best available records in the agency. New cost accounting systems are not to be established solely for this purpose.

Because of its broad wording, we believe the circular can be interpreted to apply in cases when officials remove agency documents. The circular

may even apply when officials request copies of agency documents after leaving office. Subsequent requests, however, may be more appropriately handled by an agency under the Freedom of Information Act (FOIA), as amended, (5 U.S.C. 552).

In general, FOIA provides that any person has a right of access to federal agency records, unless they are protected from disclosure by specific exemptions or exclusions in the act. FOIA authorizes agencies to assess requesters fees, which are limited to reasonable standard charges for document search, duplication, and/or review, depending on the identity of the requester and the intended use of the information sought. However, FOIA also authorizes agencies to furnish documents without any charge or at a reduced charge if disclosure of the information is in the public interest.<sup>5</sup>

Applying the 1951 user fee statute, Circular A-25, or FOIA to the removal of agency documents would involve some difficult decisionmaking for agencies. For example, in trying to decide whether officials have to pay for documents under the circular's public benefit exception, agencies would have to take into account whether the (1) documents were to be placed in archives and made available to researchers and the public or personally retained by the officials and (2) officials would initially restrict access to the documents for excessive periods of time. Agencies would also have to decide whether documents represented any additional cost to the government, unless the documents were accumulated for the officials' convenience in conducting agency business while in office. If the documents were collected for this reason, agencies would also have to decide whether the documents could be given to the officials rather than destroyed as unneeded nonrecord materials.

In view of the broadly stated provisions of the user fee statute, Circular A-25, and FOIA, agencies have discretion in deciding whether an official must pay for documents, and such decisions should be made on a case-by-case basis.

We asked the four departments if they required the eight agency heads to pay for document costs. Defense said it did not require any reimbursement from Secretaries Weinberger or Carlucci. Justice said it did not have information to respond concerning Attorney General Smith and

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<sup>5</sup>The public interest is met when the information is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.

did not require Attorney General Meese to pay. State did not require Secretary Haig to pay but did require some reimbursement from Secretary Shultz. Treasury did not require Secretary Baker to pay and did not have information to respond concerning Secretary Regan.

With respect to Secretary Shultz's duplicate collection of documents transferred for his use to the Federal Records Center in San Bruno, California, State said the Secretary reimbursed the Department \$3,800 for duplication costs associated with copying the collection, including personnel and equipment costs. According to State, although the duplication of the documents represented an ordinary and necessary expense of Department operations, the reimbursement was made to avoid any appearance of impropriety.

Concerning the agency heads who were not asked to reimburse the government for any costs, information provided by the departments indicates that the documents removed by all but one of the officials consisted of extra agency file copies preserved only for reference rather than copies of documents made solely for releasing them to the officials.

Although Justice did not require any reimbursement from Attorney General Meese, it said the Department incurred small costs for copying, screening, and moving the documents. The cost of the microfilm provided to Mr. Meese was about \$1,400.

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## No Tax Benefits for Officials Who Donate Documents

We requested IRS's opinion on the tax consequences that result from a former federal official's donation of removed documents accumulated during government service to a private or public archive. Specifically, we asked:

- Are there any tax consequences that result from a former federal official's donation of removed documents to a private or public archive?
- Would any tax benefits be available to an heir of a former federal official who donates documents removed by the official to a private or public archive?

IRS responded as follows:

"Generally, an individual who contributes property other than money to an entity described in section 170(c) of the Internal Revenue Code is allowed a charitable contribution deduction for the fair market value of the property at the time of its contribution, reduced as provided in section 170(e)(1), and subject to the statutory

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limits applicable to all charitable contributions by individuals. Section 170(e)(1)(A) provides that the amount of any charitable contribution of property is reduced by the amount of gain which would not have been long-term capital gain if the property contributed had been sold by the taxpayer at its fair market value. Long-term capital gain means gain from the sale or exchange of a capital asset held for more than 6 months. Section 1223(3). Under section 170(e)(1)(A), if a taxpayer donates property that would give rise to ordinary income rather than long-term capital gain, the allowable deduction is limited to the taxpayer's basis in the property. A memorandum or similar paper prepared by or for the donor gives rise to ordinary income rather than long-term capital gain. See section 1.170A-4(b) of the Income Tax Regulations. Therefore, the federal official's charitable contribution deduction may not exceed the official's basis in the papers.

"The federal official's basis in the papers is the cost incurred by the federal official in creating the papers. In most of the cases you describe, the cost to the federal official will be zero. Accordingly, the federal official will generally be denied a charitable contribution deduction for the papers. See *Morrison v. Commissioner*, 71 T.C. 683 (1979) aff'd 611 F.2d 98 (5th Cir. 1980).

"The result is different in the case of a federal official's heir who donates the federal official's papers to public or private archives. As provided in section 1014(a)(1), the heir's basis in the documents will generally be the fair market value of the documents at the date of decedent's death. Moreover, the sale of the property by the heir at its fair market value would generally give rise to long-term capital gain if held for more than 6 months. Accordingly, under section 170(c)(1)(A), if the property is held for more than 6 months, the heir would generally be allowed a charitable contribution deduction equal to the fair market value of the papers, subject to the statutory limits applicable to the deduction for charitable contributions by individuals. Under section 170(e)(1)(B), however, the heir may be limited to a deduction equal to the heir's basis if the use by the donee of the property is unrelated to the purpose or function that constitutes the basis for the donee's exemption from tax or the contribution is made to or for the use of a private foundation that is not a private foundation described in section 170(b)(1)(E). Thus, if either of these section 170(e)(1)(B) circumstances exist, the heir's charitable contribution deduction is limited to the heir's basis in the property.

"The result is also different if the documents are donated to an archive that is not an entity described in section 170(c) of the Code. Generally, section 170(c) includes as a charitable contribution a contribution or gift to or for the use of (1) a State, or a political subdivision of the State or possession, or the United States or the District of Columbia, if the contribution is made for exclusively public purposes, (2) certain corporations, trusts, community chests, funds, or foundations, and (3) certain other organizations. If the donation is to an archive that does not meet the requirements of section 170(c), the donation is not a deductible charitable contribution but is a gift. The gift may be subject to federal gift tax."



## NARA Has Limited Authority to Oversee Removal of Documents

The Federal Records Act, as amended by the National Archives and Records Administration Act of 1984 (Public Law 98-497), divides oversight responsibilities for records management in the federal government between NARA and GSA. NARA's responsibilities include providing guidance and assistance to federal agencies to (1) ensure adequate and proper documentation of the policies and transactions of the federal government and (2) ensure proper records disposition. GSA's responsibilities include providing agencies with guidance and assistance to ensure economical and effective records management.

In carrying out their oversight responsibilities, NARA and GSA each have the responsibility to (1) promulgate records management standards, procedures, and guidelines and (2) conduct inspections or surveys of records and records management programs and practices within and between federal agencies.

Executive Order 12356 makes the Administrator of General Services and, by delegation, the Director of GSA's Information Security Oversight Office (ISOO) responsible for implementing and monitoring the government's classified information security program. To accomplish its mission, ISOO is to

- develop, in consultation with agencies, and promulgate, subject to National Security Council approval, directives for program implementation, which will be binding on agencies;<sup>6</sup>
- oversee agency actions to ensure compliance with the program and implementing directives; and
- conduct on-site reviews of each agency's information security program.

The Paperwork Reduction Act of 1980 (Public Law 96-511, as amended) requires the Director of OMB to direct and oversee federal records management. The act makes records management part of a broader program of federal information resources management and authorizes the Director to

- provide advice and assistance to the Archivist and the Administrator of General Services to coordinate the administration of the records laws with information policies, principles, standards, and guidelines and

<sup>6</sup>In compliance with this requirement, the Director issued Directive No. 1 (32 CFR Part 2001), which includes guidance to agencies on how they can properly safeguard the disposition and destruction of classified information.

- review agencies' compliance with the requirements of the records laws and regulations promulgated by the Archivist and the Administrator of General Services.

Individual agencies, however, remain primarily responsible for managing their own records. For example, the Federal Records Act assigns the head of each federal agency the responsibility to

- make and preserve records,
- establish a records management program,
- establish safeguards against the removal or loss of records, and
- initiate action through the Attorney General to recover unlawfully removed records.

Individual agencies are also responsible, under Executive Order 12356, for safeguarding classified information as part of their information security programs.

To help meet its responsibilities, NARA has issued governmentwide regulations concerning the removal of documents by federal officials upon leaving office. Effective July 1, 1990, sections 1222.40 and 1222.42 of Title 36 of the Code of Federal Regulations provide the following:

"Removal of records. Agencies shall develop procedures to ensure that departing officials do not remove Federal records from agency custody.

"Removal of nonrecord materials. Nonrecord materials, including convenience or personal copies of agency records, may be removed from Government custody with the approval of the head of the agency or the individual authorized to act for the agency on matters pertaining to agency records. Agencies shall develop procedures to ensure that nonrecord materials that are security classified or that contain other agency restrictions on access are properly protected when removed from agency custody."

Earlier guidance by the Archivist, designed primarily to amplify and interpret related laws and regulations, was contained in informational bulletins that had no independent regulatory effect. For example, in commenting on documentary materials that government officials were permitted to retain, Federal Property Management Regulation (FPMR) Bulletin B-106 said the following:

"The legal definition of records (44 U.S.C. 3301) specifically excludes 'extra copies of documents preserved only for convenience of reference.' These extra copies of documents are commonly regarded as nonrecord materials and are disposable

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without reference to the requirements of chapter 33, title 44, U.S. Code. Although these materials cannot be considered as personal papers, a Government official may accumulate for convenience of reference extra copies of papers and other materials which he or she has drafted, reviewed, or otherwise acted upon. When deposited in a research institution, extra copies can serve the needs of historical scholarship. Government officials may be permitted to retain these extra copies, provided that retention would not (1) diminish the official records of the agency; (2) violate confidentiality required by national security, privacy, or other interests protected by law; or (3) exceed normal administrative economies." [Underscoring supplied.]<sup>7</sup>

Guidance in NARA Bulletin 89-2 subsequently said the following:

"Nonrecord materials may be removed from Government custody, but only with the approval of the head of the agency or the individual authorized to act for the agency on matters pertaining to agency records. An employee may not remove from Government custody copies of any documentary materials that are security-classified unless these materials are transferred directly from the employee's agency to a facility that meets Federal requirements for the protection of security-classified material. An employee also may not remove from Government custody copies of any documentary materials containing other agency restrictions on access unless the materials are transferred directly to a facility that agrees to observe the applicable restrictions." [Latter underscoring supplied.]<sup>8</sup>

In addition, in 1985 the Archivist issued a pamphlet entitled For the Record: Guidelines for Official Records and Personal Papers. This pamphlet, and its 1988 revision, directed the attention of executive branch officials to the policies and procedures governing the creation, maintenance, and disposition of the documentary materials that may accumulate in their offices. It gave information to help officials distinguish federal records from nonrecord materials and personal papers. The pamphlet also highlighted legal provisions, discussed the impact of automation, and identified sources of additional information.

OMB has not issued any governmentwide policies or guidelines pertaining to records removal. OMB officials view NARA as having primary responsibility for the government's records management program.

Although NARA, OMB, GSA, and ISOO have some records management oversight responsibilities, NARA clearly has responsibility concerning the removal of agency documents by federal officials. NARA's statutory role is to guide and assist agencies rather than enforce applicable laws and

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<sup>7</sup>FPMR Bulletin B-106 was issued on October 30, 1980, when the Archivist headed GSA's National Archives and Records Service. NARA was created as an independent agency on April 1, 1985.

<sup>8</sup>Bulletin 89-2 was issued on November 14, 1988, and expired on November 14, 1990. This bulletin canceled FPMR Bulletin B-106.

regulations. Unless agencies invite NARA's participation, NARA's oversight of the removal of specific agency documents is limited because NARA does not routinely review documents that agency heads plan to remove from the agencies.

Nevertheless, we believe agencies should be able to properly manage the removal of documents by officials who are not agency heads. However, requiring agencies to deal with their own agency heads involves unusual accountability considerations. We believe such situations would require independent oversight by NARA.

Therefore, we believe that agencies should be prohibited from relinquishing any federal documents to agency heads and agency heads from removing documents until NARA has determined that their relinquishment and removal are consistent with existing federal laws and regulations. This determination would serve as an additional safeguard against impropriety or the appearance of impropriety.

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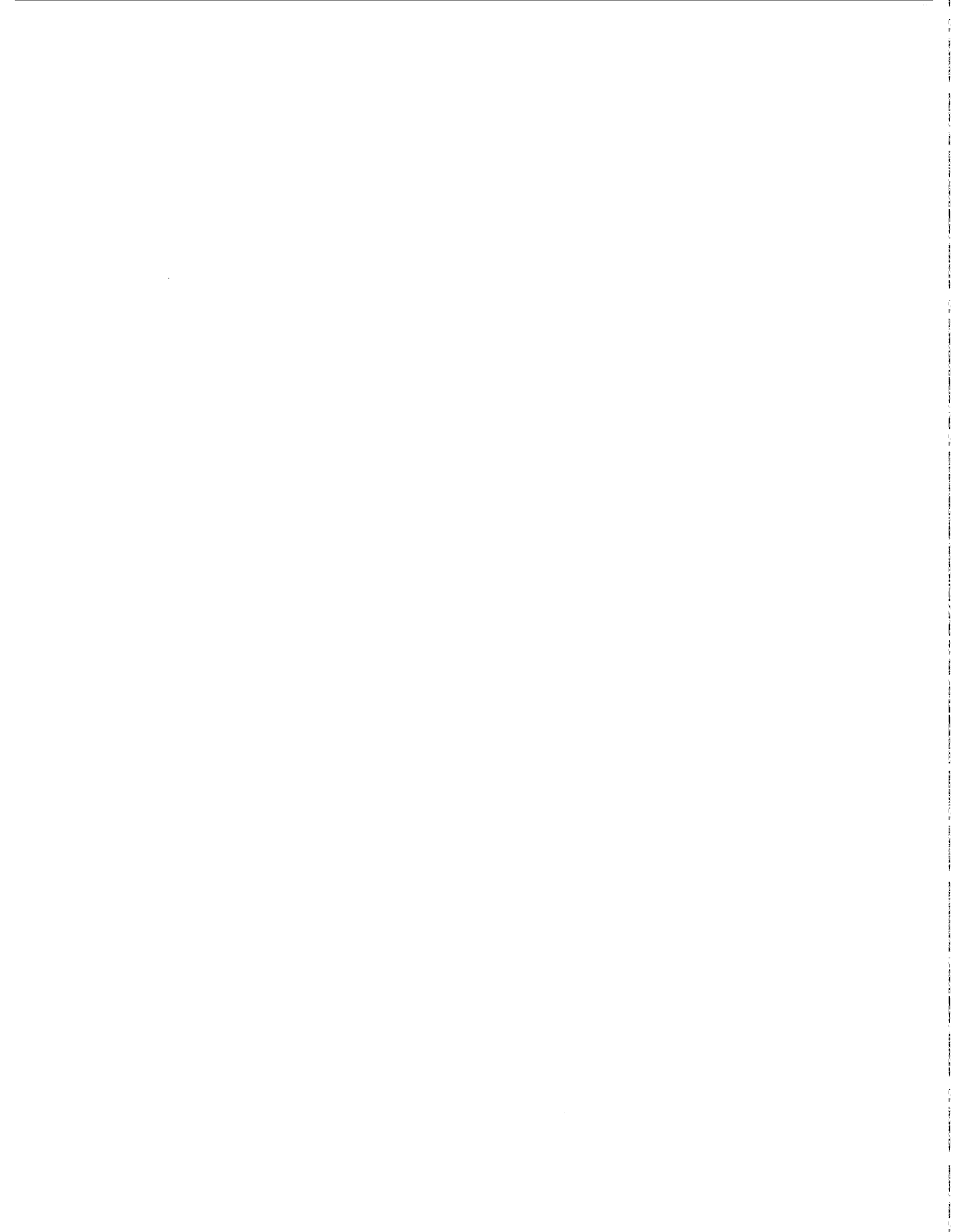
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