The law and policy of control: presidential papers and school library books.

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THE LAW AND POLICY OF CONTROL

PRESIDENTIAL PAPERS AND SCHOOL LIBRARY BOOKS

A Thesis Presented

By

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THE LAW AND POLICY OF CONTROL

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I
INTRODUCTION

Control is a political aspect of legal property. Legal property is rights, relationships, expectations - not things. Control implies and includes the exercise of rights, the manifestation of relationships, and the fulfillment of expectations. In some contexts control - or more precisely the sense of property underlying the control - is a key issue in a political situation. We shall be looking at two such contexts - school library books and presidential papers - to see how the concepts of property underlying their control affected a political situation.

Both school library books and presidential papers - two collections of written material - are under public authority and have a worthy purpose (the former aids in educating children; the latter in making presidential decisions and recording the activities of the Executive Office). Each collection has had a crisis relative to its control caused by partisan and unilateral action on the part of the principal holder of control. This partisan and unilateral action reflected a view of property that was exclusive, one-dimensional, and inappropriate for the situation. The termination of each crisis came through legislative or judicial involvement which changed the control.

"Control" in this thesis refers to the treatment, administration and government of a collection of written material: its content, scope, availability, and accessibility.
The bases for considering legal property rights, relationships and expectations are found in the literature of and about the law. The English political philosopher, Jeremy Bentham, saw property as "a basis of expectation; the expectation of deriving certain advantages from a thing which we are said to possess, in consequence of the relation in which we stand towards it."¹ Property was described as a "bundle of rights" by Oliver Wendell Holmes in his opinion in Pennsylvania Coal Co. v. Mahon (1922).² Bruce Ackerman defined property as "a set of legal relations between persons governing the use of things" in his 1977 work Private Property and the Constitution.³

"School library books" is the term we are using to refer to all materials - books, periodicals, games, kits, filmstrips - normally included in the library collection of an elementary and secondary school. Such a collection consists of curriculum related items, as well as pleasure reading materials and corresponds with the grade and age level of the students utilizing the collection. The subject content of the collection should be well-rounded, both sides of controversial issues should be represented, and the scholarship and physical quality of each item should be high. We are using such a specific term as "school library books," because the crisis we will describe involved printed books that were part of a school library collection: several books were suddenly ordered removed from a school library without consultation with the people directly responsible for the control of the materials.

"Presidential papers" are the materials generated and utilized by a President in his roles of commander-in-chief, chief executive and head
diplomat, government employee and public servant, leader and member of a political party, citizen, and family member. The material of concern to us in this thesis are the official papers of a presidency which include: drafts of policy proposals, position papers, decision-making reports, drafts of speeches, briefing materials, correspondence with executive branch agencies and foreign heads of government, and the files of White House staff members. Because these official materials are neither completely private nor public in nature, their control can be a significant political issue, as we shall see.

The second section of the thesis deals with school library books; section three with presidential papers in office; section four with presidential papers out of office. In each section the usual practices and policies of control will be presented first, followed by a description of the crisis of control in which there was a deviation from standard practice, and then the litigation or legal action terminating each crisis will be described. In the last part of section two, three, and four we shall identify the underlying concepts of property revealed in the standard practice and in the crisis and its termination in order to see how the creation, protection, or expansion of a property right can be the political issue that changes control. Section five (the conclusion) presents the connections between each situation.
A library in an elementary or secondary school is the consequence of the school's acknowledgement of and response to the need for resource materials and pleasure reading available to students and staff in their school - in the setting where the students spend a great portion of their time. The availability of appropriate materials to the particular school's students and staff is the underlying reason for an in-school library. The materials in a school library must be systematically and continuously selected, ordered, and purchased.

The control issue arising with school library materials of concern here is who selects the materials for purchase, and who is involved in resolving the disposition of challenged material. Both of these areas are covered in an acquisitions policy. Such a written statement is almost mandatory now "as money gets tighter and the public becomes more active regarding censorship." The factors considered in a policy are: (1) "evaluation of the population serviced" by the school library (i.e., the composition of the school community and the content of the curriculum); (2) "present purchasing priorities;" (3) extent of the budget available. The sections of an acquisitions policy are: description of the school community; responsibility for selection; Library Bill of Rights of the American Library Association; "philosophy, goals and ob-
jectives;" criteria for selection, selection tools, weeding rationale; procedure to be followed when a complaint is received about material in the library's collection.  

In 1979 Mary M. Taylor sent requests to school districts and individual school libraries in the United States for their acquisitions policies. "Two hundred thirty-three policies were received; one hundred fifty-three schools and districts reported that they had no policies. Many of these recognized the need for a policy and were either working on them or hoped to in the near future."  

Oryx Press published the full policies of fifteen schools/school districts and parts of another thirty-three policies in a collection entitled School Library and Media Center Acquisitions Policies and Procedures. 

Most of the published policies in this compilation specifically stated that "the legal responsibility" for the selection of materials for the school libraries is vested in the area school board or similar group. The authority for the selection of material is "delegated to the professionally trained personnel employed by the school system," such as principals, teachers, librarians, with the final authority being (in some instances) the assistant superintendent or library director. In most of the policies a number of sources are cited for recommendations of potential purchases: teachers, students, principals, parents, as well as the professional reviewing literature (Booklist, School Library Journal, etc.). In some policies controversial material is considered at the selection stage. "[T]he selection of materials on controversial issues will be directed toward maintaining a balanced collection repre-
sitting various views'\textsuperscript{10} is how one policy was worded. In others the selection policy for specific controversial areas—e.g., religion, ideologies, sex and profanity, race, narcotics, alcohol, and tobacco—is spelled out.\textsuperscript{11} Every complete policy included in School Library and Media Center Acquisitions Policies and Procedures has a specific section on the policy and procedures for handling a complaint about material already in the school library. Usually the complainant is required to fill out a form detailing the piece in question and the specific objection, including what, if any, of the item had been read by the complainant. The procedure usually then continues with an informal discussion between the complainant and the librarian covering the basic collection philosophy and objectives of the school library. If this does not satisfy the complainant, then a review committee is set up consisting usually of several teachers, the building principal, the librarian, several community people, and maybe several students. The review committee would read the item and have a hearing at which the complainant could present his/her case, as could the librarian. A recommendation of what will or will not be done with the material in question is made by the review committee and—in some cases—is sent to a higher authority—e.g., the board of education or superintendent—for the final solution. The exact details vary for each policy, but the procedure involved for challenged material almost always involved: (1) informal discussion; (2) a written complaint; (3) a review committee; (4) recommendation by the review committee; (5) acceptance or rejection of the committee's recommendation by a higher authority.
Several policies began their "challenged materials" section with these words: "Occasional objections to a selection will be made despite the care taken to select valuable materials for student and teacher use and the qualifications of persons who select the materials." There is an implication here of support for the staff doing the selection, although this is not spelled out. The policies for the Hawaiian Public School Libraries (prepared by the Hawaii State Department of Education, Multimedia Services Branch), and for the Council Bluffs (Iowa) Public Schools Media Centers are slightly more specific regarding their support for the selector:

The principles of the freedom to read and of the professional responsibility of the staff rather than the materials must be defended. (Council Bluffs)

The principles of the freedom to read and professional responsibility of the staff should be defended. (Hawaii)

Sonoma Valley Unified School District in California explicitly expressed support for the selector of the material: "The board must uphold and defend all media selections made by the media specialist who acts as its agent. Without this support, no librarian will attempt any but the most timid efforts to stock the shelves, and library service in its fullest sense will not exist." From this review of the selection policies and procedures for dealing with challenges to library materials it is clear that many people are involved or can be involved in the control of school library books. However, each has its place and role and designated sequence for
exercising control. When the sequence and roles are ignored then the law may have to step in as happened in the Island Trees Union Free School District in Long Island, New York during the period 1975-1982.

Crisis of Control

In September 1975 several members of the Island Trees Union Free School District School Board attended a conference sponsored by a "conservative organization . . . composed of parents concerned about education legislation in [New York state]." A list of objectionable books (with appropriate excerpts) was distributed to conference attendees.

On November 7, 1975 these Board members searched the card catalog of their high school library. Nine of the books were listed: Go Ask Alice (Anonymous, 1971); Best Short Stories by Negro Writers (L. Hughes, ed. 1967); A Hero Ain't Nothing But a Sandwich (A. Childress, 1973); Laughing Boy (O. LaFarge, 1929); The Fixer (B. Malamud, 1966); The Naked Ape (D. Norris, 1967); Down These Mean Streets (P. Thomas, 1967); Slaughterhouse Five (K. Vonnegut, 1974); Black Boy (R. Wright, 1945).

Later two other books were found: Soul on Ice (E. Cleaver, 1968) in the high school library and A Reader for Writers (3rd ed., J. Archer and A. Schwartz, 1971) in the junior high school library.

The School Board members who had received the lists mentioned the situation at the next executive board meeting; no action was taken by the Board until after its next regular meeting. On February 24, 1976 the principals of the junior and senior high schools were directed to
remove the books from their respective school libraries. The school
district superintendent wrote to the Board objecting to this method of
banning school library books. He reminded the Board of the procedures,
already in place, for removing books in which objections should be made
directly to the superintendent, who would appoint a committee to study
the complaints and make recommendations. On March 3, 1976, the
School Board president demanded compliance with his original order and
all the questioned books were immediately removed from the school
libraries. After the teachers' union filed a grievance against the
Board and the issue was publicized, the School Board held a press con-
ference. In its press release of March 19, 1976 the Board listed its
criteria for removing the books; the material was said to be "anti-
American," "anti-Christian," "anti-Semitic [sic]" and "just plain
filthy." The release explained that some secrecy and irregularities
were necessary to prevent a run on the library by the students and asked
teachers and parents to support the board's action so its members could
continue to be effective as the district's faithful, elected "Watch-
dogs." A public meeting was held by the Board on March 30, 1976 at
which time it ratified the book removals. The district superintendent
objected to the Board's procedures and criteria and stressed that the
Board should have consulted parents and teachers and followed the estab-
lished procedures for reviewing challenged books before taking the books
off the shelves. The Board responded by establishing a book review
committee which consisted of four staff members (an English teacher, a
social studies teacher, an elementary school principal, a high school
principal) and four community members (a recent graduate of the Island Trees high school, a former school board president, a PTA president and a mailman). The committee was to judge the "educational suitability of the challenged books . . . whether the books were appropriate, in good taste and relevant." The committee submitted its report on July 1, 1976 and four weeks later the School Board "voted separately on each of the committee's recommendations, following four of the suggestions and disregarding seven." Nine books were removed from the school libraries and the curriculum; Laughing Boy was unconditionally restored and Black Boy was restored on a restricted basis. During the period April-July 1976 two incumbent Board members ran for re-election and won; the book issue was "central to their campaign."

Litigation of the Crisis

In January 1977 five students and their parents as next friends filed a lawsuit in the United States District Court for the Eastern District of New York alleging "violation of their federal and state constitutional rights as well as violations of 42 U.S.C. 1983" which states:

Every person who, under color of any statute, . . . subjects . . . any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.
The District Court granted summary judgment in favor of the School Board. The Second Circuit Court reversed and remanded the action for a trial. The School Board petitioned the Supreme Court of the United States for writ of certiorari which was granted and a decision was handed down June 25, 1982.27

The main points presented by each side in the Supreme Court case Board of Education v. Pico are as follows. The students (with their parents as next friends) maintained that (1) school boards must inculcate societal values without casting a "pall of orthodoxy" over the classroom; (2) diversity of values and beliefs underlies the First Amendment and democracy; (3) "precision of regulation" is necessary when First Amendment rights are involved.28 The Board of Education argued that (1) school boards have vast discretion; (2) "basic constitutional values"—such as the suppression of ideas—must be sharply and directly implicated before judicial intervention is appropriate; (3) neither pure expression nor direct and personal student rights were involved here; (4) secondary education is prescriptive, so local school boards must "establish and apply their curriculum in such a way as to transmit community values;" (5) juvenile students do not have "as full blown a constitutional right as adults," and may not "have standing to assert what rights they may have in the case at bar;" (6) the Board's actions were done under its electoral mandate to "operate under the majority principles of municipal corporation law."29

The situation which caused this case as well as the arguments presented, raised these First Amendment questions:
1. To what extent may a school board, acting under a state statutory duty to prescribe books to be used in its schools, be prohibited under the Constitution from removing from a school library or curriculum books which it believes to be educationally inappropriate for the school children?

2. In order for a board of education to constitutionally remove books from curriculum or a school library for content-based reasons must it sustain a burden of proving such removal had a substantial and material basis and that it complied with specific objective criteria?

3. Does "political" motivation render unconstitutional otherwise permissible actions by a board of education in removing books from a school's curriculum and library?

Board of Education v. Pico is the first U.S. Supreme Court case to deal with the removal of books from a school library. However, there have been six cases in the lower federal courts dealing with this situation. Although there is not a great deal of consistency in the Circuit Courts' decisions, these cases may be grouped into three categories.

In the first category are: Presidents Council, Dist. 25 v. Community School Board No. 25, 457 F.2d 289 (2d Cir. 1972); Bicknell v. Vergennes Union High School Bd. of Directors, 638 F.2d 438 (2d Cir. 1980); and Pico v. Board of Education, Island Trees Union Free School Dist., 638 F.2d 404 (2d Cir. 1980). Presidents Council - the earliest book removal case - took the position that "the shelving or unshelving of books [does not present] a constitutional issue, particularly where there is no showing of a curtailment of freedom of speech or thought."
Several years later the same court - the Second Circuit - decided Bicknell and Pico and found a constitutional issue. The "Second Circuit approach" to book removals makes these points: "(1) school officials are no longer viewed as having unlimited power to remove books; (2) where a book removal is accompanied by facts showing irregular intervention by the school board in library operations and an interest to establish certain ideas as proper and to suppress others, the book removal is impermissible; (3) where school officials remove a book from use because of the book's vulgar language or explicit sexual content, the removal is a permissible exercise of the official's discretion." 32

The second category of book removal decisions includes: Minarcini v. Strongsville City School Dist., 541 F.2d 577 (6th Cir. 1976); Right to Read Defense Comm. v. School Comm. of Chelsea, 454 F. Supp. 703 (D. Mass. 1978); and Salvail v. Nashua Bd. of Educ., 469 F. Supp. 1269 (D.N.H. 1979). Characteristics of the "Minarcini approach" to book removal decisions are: "(1) school officials do not have unlimited authority to remove books from libraries when the books have been previously placed in use; (2) students possess a first amendment right to receive information and to have access to diverse viewpoints, and this right is infringed where school officials remove materials from use because of those officials' personal objections to the ideas expressed in the materials; (3) where school officials appear to have removed a book previously in use for reasons other than the lack of shelf space or because the book is worn out or obsolete, the school officials must dem-
onstrate a substantial and legitimate government interest furthered by the removal."33

The third category of Circuit Court decisions dealing with book removals is the approach taken by the Seventh Circuit in Zykan v. Warsaw Community School Corporation, 631 F.2d 1300 (7th Cir. 1980). The main theme was academic freedom and the corollary need of "keeping the academic community free from ideological coercion."34 The court pointed out that (1) "academic freedom had limited relevance at the secondary school level because of the students' limited intellectual and emotional maturity and because of the public school's traditional role in encouraging and instilling basic community values;" (2) school boards are "relatively free 'to make education decisions based upon their personal, social, political and moral views;'" and (3) school board discretion is not "completely unfettered," for a board "could not . . . remove a certain book 'as part of a purge of all material offensive to a single, exclusive perception of the way of the world, anymore than [it] may originally stock the library on that basis.'"35

In its handling of the book removal situation in Board of Education v. Pico the Supreme Court did not achieve a majority opinion. The plurality opinion written by Justice Brennan (in which Marshall and Stevens joined; Blackmun concurred in part and he and White concurred in the judgment) stated that (1) school boards' discretion regarding library books is not absolute under the First Amendment; (2) school boards cannot remove books from a school library "simply because they dislike the ideas contained in those books;"36 (3) students' First Amendment
right of access to ideas within the school library "may be directly and sharply implicated by the removal of books from the shelves of a school library."

The case was remanded for trial to clarify the school board's "justifications" for their decision to remove the books.

The dissenting Justices (Burger, Powell, Rehnquist, and O'Connor) viewed the Court's role in school library book removals as misplaced since such decisions should be the responsibility of locally elected school officials, not judges. Rehnquist asserted the right to receive information was not supported for secondary education by precedent nor by the prescriptive nature of such education.

One commentator pointed out that the Supreme Court's decision has not provided guidance for lower courts on three major issues of book removal cases: (1) "what first amendment right, if any, is implicated when a school library book is removed from a library;" (2) what is the "appropriate standard of review [for] future book removal cases;" and (3) what is the requirement about "procedural regularity" in the school board's decision.

Following the Supreme Court's decision, the Island Trees School Board mandated that the nine books be stamped "Parental Notification Required" and be returned to the library shelves. In December 1982 the "New York State Attorney General told the board the stamp violated the law protecting the privacy of all library records." On January 26, 1983 the Island Trees School Board voted 4 to 3 to allow the nine books to "remain on the library shelves for anyone to read."
Property Concepts

What are the property concepts underlying school library acquisition policies and procedures as represented by the several policies already discussed? First, the school board sees the provision of a school library with materials supportive of the curriculum and promotive of sound reading habits as within its authority (its "bundle of rights") to provide. This is part of its responsibilities due to the relationship the board has to the school library as the final legal governing authority. The board's legitimate expectation is for a viable school system. The school district superintendent - in his role as financial overseer and arbitrator of disputes over selected materials - would feel he had rights and a relationship to the library, plus an expectation to exercise his financial and counseling talents in assuring a wise use of library funds and a fair judgment regarding challenged materials. The school librarian would have a set of rights because of her delegated responsibility for collection development and maintenance, a relationship to the library as "chief selector" and administrator, and an expectation of practicing her profession of librarianship by selecting and maintaining a balanced collection. The Library Bill of Rights of the American Library Association (see Appendix for complete text) supports a balanced collection of materials "presenting all points of view on current and historical issues," which are "not [to be] proscribed or removed because of partisan or doctrinal disapproval." The Library Bill of Rights is one of the credos of librarians.
The role that each of these persons (the board members, the superintendent, the librarian) plays in the establishment, running and progress of the school library determines the scope of each one's bundle of rights, their relationship to the library, and the nature of their legitimate expectation.

These property concepts were evident in the control of the school library books in the Island Trees Union Free School District in New York. A problem arose however when the Island Trees School Board acted as if they had a larger bundle of rights, a more absolute relationship, and a more narrow expectation vis-à-vis the school libraries under their jurisdiction than they in fact had or could claim. By acting beyond appropriate limits, a legal problem was created to be resolved by the courts.

The Island Trees School Board considered the school libraries in their district to be the personal property of individual Board members. The Board demanded that the library collections be in conformity with the personal tastes in literature and culture of the individual members. The Board members appear to have forgotten that they were to function as representatives of the entire community's interests, not just their own; hence their demand for "secrecy" in the removal process and their description of themselves as "watchdogs."

The Board's sense of property was three-fold: (1) their bundle of rights included absolute and monolithic control over the school library; (2) their relationship to the school libraries as the legal governing authority gave them the power to do whatever they wanted
with the library collections; (3) their expectation regarding the content of the collection was that the content be personally pleasing to them. The Board also forgot the major axiom of American property law: a person cannot use his property in absolutely any way he pleases, because some actions are "unduly harmful to others." By ignoring the interests and rights of the school superintendent and the school librarian in not following the established procedures for dealing with challenged materials, the Board was claiming for itself the entire bundle of rights, the only relationship, and personal expectations vis-à-vis the school libraries. It was this sense of property which the plurality of the Supreme Court rejected in Board of Education v. Pico. The Court ruled that there is no absolute discretion for a school board in removing books from a school library, although there is an "'inculcative' function" for schools. The Supreme Court in Pico also rejected the Board's blurring of its role as protector of the whole community's interests (including minorities) by acting as a group of private individuals and asserting their personal values. The Court reaffirmed that "no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion." This part of the Supreme Court's opinion is really the reaffirmation of private v. public property interests. As we shall see, it is similar to President Nixon's situation: when his presidential papers (public interest) were treated only in terms of a private interest (what Nixon wanted to do with them), the courts stopped this. The Court is saying one does not have an absolute isolationist control or discretion even with one's own
legal property: there is always a larger arena that must be considered, especially for public officials. This larger arena may be called the "public good." This may be John Locke's enduring contribution to American jurisprudence: the goal of the law is always the benefit of the public good. In his Second Treatise on Government and A Letter Concerning Toleration Locke asserted that the public good was the reason behind governmental power and law:

Legislative power . . . in the utmost bounds of it, is limited to the public good of the society.45

The public good is the rule and measure of all law-making.46

In complaining about the disregard of the established procedures for solving questions about library material, the school superintendent was defending his rights, his relationship and his expectations for the school libraries. Namely, he had the right to be involved in the resolution of the complaint situation because this was his role according to the official policy. His relationship to the library as financial overseer entitled him to speak in defense of how the budget had been spent (what books had been purchased). His expectation of the opportunity to settle a dispute was legitimate. In his objection to the Board's directive that the books be removed from the libraries, the school superintendent noted that:

[W]e already have a policy . . . designed expressly to handle such problems. It calls for the Superintendent, upon receiving an objection to a book or books, to appoint a committee to study them and make recommendations. I feel it is a good policy - and it
is Board policy - and that it should be followed in this instance.47 The fact that the School Board had approved the complaint policy reinforces the superintendent's property claim of some rights in the resolution of a complaint situation, a relationship to the challenged books, and an expectation of being instrumental in settling the dispute.

One of the librarians in Island Trees, Irene Turin, "had from the beginning [of the controversy] spoken out against the suppression of the books."48 The American Library Association and the New York Library Association filed a friend-of-the-court brief with the U.S. Court of Appeals for the Second Circuit in 1979 in support of Pico's appeal of the lower court's ruling in favor of the School Board. The brief clarified what the issue of the case was: "Not at issue here is the right of library or school authorities to select the works they will add to the library's collection during their administration . . . The issue here is not with the works which might be added to the collection, but rather with the preservation of the collection which [the School Board] would destroy, diminish, or disperse."49 The brief identified the nature of a library collection thus:

A library collection limited to works reflecting the ideas, attitudes, and styles bearing the imprimatur of the prevailing majority is no library collection at all but a propaganda machine. The very essence of a library collection is its range, depth, and continuity over time . . . [A] library collection by nature and design reflects a panorama of social, cultural and educational development . . .50
Irene Turin's refusal to leave her position in the Island Trees school library during the years of litigation in the Pico case in spite of "slights" from the "school board and some school officials," plus the *amicus curiae* brief of the library associations are indicative of a sense of property relative to the school library. The librarian's view of property includes the rights to maintain the collection, a relationship to the collection as overseer of its preservation, and an expectation of performing her professional duties. The brief's strong declaration of the nature of a library collection is a claim of a legitimate expectation on the part of the librarian in the school library: because a library collection by nature reflects all viewpoints, the person administering the library is required to provide and maintain such a collection.

A point which was not addressed directly in *Pico* (because the plaintiffs were students claiming violation of a right to read, to receive information, and to know), but which is a definite corollary of the issues involved, is the right of a librarian to serve the library patron's right to read. Robert M. O'Neil discusses the as yet untested First Amendment concerns of librarians themselves in his article "Libraries, Librarians and First Amendment Freedoms." He sees the librarians constitutional rights as deriving from the reader's right to read: "the reader cannot read if there is no material available, and . . . the librarian is a principal source of such material;" nor can the librarian "be required to violate the constitutional rights of readers by withholding materials to which the first amendment ensures
them access."\textsuperscript{53} Whether librarians enjoy "personal first amendment rights" has not been held by a court, but - in O'Neil's opinion - "it would be surprising if the sensitive intellectual work of the librarian could not claim constitutional protection."\textsuperscript{54} O'Neil bases this assertion on academic freedom ("the relevance of libraries and librarians to academic freedom should be obvious . . .[even] the public library shares with the university [library] a responsibility for the gathering and transmission of knowledge from one generation to another"\textsuperscript{55}); and "a new concept of free expression which would encompass the librarian's intellectual and creative processes."\textsuperscript{56} "Today we have relatively discrete bodies of law protecting the expression of students, teachers, reporters, publishers, broadcasters, prisoners, and . . . rock musical producers . . . [T]he professional activity of the librarian seems to merit comparable constitutional protection."\textsuperscript{57} Even though no case law exists to date protecting librarians per se, it is interesting to consider the logical possibility of such law and analyze the sense of property involved. The main property concept in O'Neil's reasoning is that of a legitimate expectation: a librarian expects to derive from employment the freedom and opportunity to perform one's professional activities to the fullest extent.

The case of the Island Trees School Board is classified as a First Amendment case because of the basic arguments used by the plaintiffs. But what really caused the suit? A violation of property rights, relationships and expectations.
The School Board ignored the school superintendent and the school librarian — thereby denying their relationship to the school library and its collection — when the Board decided unilaterally what to do with the nine books in question. By insisting that the books be removed for the non-neutral reasons they gave, the Board trampled on the property rights of the librarian to perform her job of maintaining a balanced collection. The Board also trampled on the property rights of the superintendent to meet the educational needs of all the students in the district and to properly prepare the students to become useful members of a pluralistic society. The Board's actions also denied the expectations of the freedom to practice one's profession.

Because the Board did violate these property interests, did overstep its own bundle of rights, its own relationship to the library, and its own expectations, thereby trampling on others' property interests, this was the catalyst for a lawsuit. Was anything changed by the lawsuit? The Board's actions were reversed and ultimately the books were returned to the library. Since the complaint policy had been in place at the time of the suit, the litigation did not change written policy. Although several members of the Island Trees Board ran for re-election during the years of the litigation and won, hopefully the Island Trees School Board will think twice before taking any future unilateral and partisan actions, especially since its procedures were noted to have been "highly irregular and ad hoc" by the Supreme Court. In addition the plurality opinion in Pico agreed that the School Board did not
have an absolute discretion. This should certainly require a change in
the de facto policy and actions of the Board.
The control of presidential papers has been in the hands of the respective President - whether in office or out of office - from the beginning. While in office, presidential control takes the form of making available or not making available certain materials to Congress and the Courts. Such control is not specifically spelled out for the President in the Constitution. Since the 1950's the term "executive privilege" has been used by most scholars to describe the President's claim of an inherent constitutional right to withhold information from the Congress and the Courts for himself or on behalf of his subordinates. The term implies a concern with how and why a President has the power to withhold information. For us "executive privilege" is the name for presidential control of presidential papers while in office. Our concern here is with the exercise of this control, not its validity.

Out of office, presidential control of presidential papers takes the form of either saving or discarding those materials. This control arose from necessity in the face of our first President's recognition of the value of his papers and his desire to preserve them. Until 1981 control by a former Chief Executive of his administration's papers was based on the tradition of following past practice.

The focus of control of presidential papers while in office (executive privilege) is availability - what materials should be made available to the other branches of government. The focus of control
following a term of office is preservation—what materials should be saved, where, and how. The focus of this section and the next is the proper use v. the abuse of the availability and preservation functions of control.

**Practice and Policies of Control**

The first confrontation between the Executive Branch and the Congress over the control of presidential papers occurred in 1792 when President Washington was asked by Congress for information on General Arthur St. Clair's defeat by the Wabash Indians. Washington discussed the request with his Cabinet, concluding that "'the Executive ought to communicate such papers as the public good would permit, ... [and] ought to refuse those, the disclosure of which would injure the public. Consequently [the Executive was] ... to exercise a discretion.'" Because "'there was not a paper which might not be properly produced,'" the requested papers were turned over to Congress. Apparently Congress agreed that the Chief Executive has some power to deny them information, for in 1796 when the House asked Washington for papers relative to the Jay Treaty, the request concluded: "'excepting such . . . as any existing negotiations may render improper to be disclosed.'" In this case Washington did not send the papers "on the ground that the House had no constitutional role in the treaty-making process and that anyway the papers had already gone to the Senate." The House quietly acquiesced.
The tradition of presidential control over presidential papers while in office had begun, however. In 1807 Jefferson was asked by the House for information concerning the Aaron Burr treason conspiracy, excepting anything the President "'may deem the public welfare to require not to be disclosed.'"66 Jefferson withheld the material because it contained "'such a mixture of rumors, conjectures, and suspicions as renders it difficult to sift out the real facts.'"67 Later, President Monroe refused to turn over to the House documents connected with the suspension of a naval officer for misconduct, because "'a communication at this time of those documents would not comport with the public interest nor with what is due to the parties concerned.'"68 Here too Congress had recognized that some material should be properly withheld; they "'asked for information only in 'so far as [the President] may deem [it] compatible with the public interest.'"69

The first "unequivocal assertion of discretionary power to withhold information from the Congress"70 was made by President Andrew Jackson in 1835. Jackson "rejected a request for information, made during a hearing to confirm one of his nominees, regarding 'frauds in the sale of public lands' because he said (1) the information was to be used by Congress in secret session and thereby would deprive a citizen of the 'basic right' of a public investigation, and (2) the inquiry was not 'indispensable to the proper exercise of Congress' power.'"71 During the same year Jackson received another request for information to which he replied: "'This is another of those calls for information made upon me by the Senate which have, in my judgment, either related to subjects
exclusively belonging to the executive department or otherwise en-
croached on the constitutional powers of the Executive ... I
have ... deemed it expedient to comply with several [requests for in-
formation]. It is now, however, my solemn conviction that I ought no
longer, from any motive, not in any degree to yield to these unconsti-
tutional demands." 72 In both of these instances Congress did not press
further for the papers from the President.

President Tyler echoed Jackson's theme of defending presidential
control of executive papers. In March 1842 in response to a request for
information concerning applicants for federal office Tyler said:
"'While I shall ever evince the greatest readiness to communicate to the
House of Representatives all proper information which the House shall
deem necessary to a due discharge of its constitutional obligations and
functions, yet it becomes me, in defense of the Constitution and laws of
the United States, to protect the executive department from all en-
croachment on its power, rights, and duties.'" 73 Later, Tyler gave a
guideline for determining when executive privilege should be invoked.
"'It can not be that the only test is whether the information relates to
a legitimate subject of deliberation. The Executive Departments and the
citizens of this country have their rights and duties, as well as the
House of Representatives; and the maxim that the rights of one person or
body are to be exercised as not to impair those of others is applicable
in its fullest extent to this question.'" 74
Presidents Polk, Buchanan, Grant, Cleveland, Theodore Roosevelt, Calvin Coolidge, and Herbert Hoover also withheld presidential material.\textsuperscript{75}

The "first major assertion of executive privilege in the modern era" occurred in 1941 when Attorney General Robert Jackson refused to allow the House Committee on Naval Affairs to see certain F.B.I. files.\textsuperscript{76} He wrote: "It is the position of this Department, restated now with the approval of and at the discretion of . . . [President Franklin Roosevelt], that all investigative reports are confidential documents of the executive department of the Government, to aid in the duty laid upon the President by the Constitution to 'take care that the laws be faithfully executed,' and that congressional or public access to them would not be in the public interest.'"\textsuperscript{77}

President Truman was even more blunt regarding the extent of presidential control over presidential papers in his reply to a House request for particular F.B.I. files. "Any subpoena or demand or request for information, reports, or files of the nature described, received from sources other than those persons in the executive branch of the Government who are entitled thereto by reason of their official duties, shall be respectfully declined . . . and the subpoena . . . [etc.] shall be referred to the Office of the President for such response as the President may determine to be in the public interest in the particular case. There shall be no relaxation of the provisions of this directive except by my express authority.'"\textsuperscript{78} Later, during debate
in the House Un-American Activities Committee, a member of the Committee, Richard M. Nixon, said of the President's action:

The point has been made that the President ... has issued an order that none of this information can be released to the Congress and that therefore the Congress has no right to question the judgment of the President in making this decision.

I say that that proposition can not stand from a constitutional standpoint or on the basis of the merits for this very good reason: That would mean that the President could have arbitrarily issued an Executive order in the Myers case, the Teapot Dome case, or any other case denying the Congress of the United States information it needed to conduct an investigation of the executive department and the Congress would have no right to question his decision.

Any such order of the President can be questioned by the Congress as to whether or not that order is justified on the merits ... The official Congressional response to Truman's directive was the passage of a House bill making the refusal by "all executive departments and agencies of the federal government" to make available "to all standing, special or select committees" of Congress information needed, a misdemeanor. This bill died in committee in the Senate.

On May 17, 1954 during "Senator McCarthy's hearings on subversion in the army" President Eisenhower wrote the following to the Secretary of Defense, Charles E. Wilson: "Because it is essential to efficient and effective administration that employees of the executive branch be in a position to be completely candid in advising with each other on official matters, and because it is not in the public interest that any of their conversations or communications be disclosed, you will instruct
employees of your Department that in all of their appearances before the
subcommittee of the Senate Committee on Government Operations regarding
the inquiry now before it they are not to testify to any such
conversations or communications or to produce any such documents or
reproductions. This principle must be maintained regardless of who
would be benefited by such disclosures." 82 A memorandum from Attorney
General Herbert Brownell, Jr. which was attached to Eisenhower's letter,
stated that "'the Courts have uniformly held that the President and
heads of departments have an uncontrolled discretion to withhold ...
information and papers in the public interest; they will not interfere
with the exercise of that discretion, and that Congress has not the
power, as one of the three great branches of the Government, to subject
the Executive Branch to its will any more than the Executive Branch may
impose its unrestrained will upon Congress.'" 83 No cases were cited in
this memorandum, because as Arthur Schlesinger, Jr. explained, "there
were no cases to cite." 84 Other commentators have noted that Brownell's
assertion was "inexact," 85 or "simply without foundation." 86 Much of
the wording of this memorandum was taken from a series of three articles
by a Department of Justice attorney, Herman Wolkinson, entitled "Demands
of Congressional Committees for Executive Papers" which appeared in 1949
in the Federal Bar Journal (vol. 10, pp. 103, 223, 319). 87 No cases
were cited in these articles either. 88 Later, in 1958, Attorney General
William Rogers used the identical wording of the Brownell memorandum in
his memorandum prepared for hearings before the Senate Committee on the
Judiciary. He could not cite any cases either, for no cases had
occurred up to that time. The Brownell memorandum can be seen as the first attempt at a written policy of presidential control over presidential papers while in office; in fact, it "became the major authority for the practice for the next few years." The Brownell memo also reveals how absolute presidential control over presidential papers was considered to be, at least by the Executive Office.

Eisenhower's letter and the memo from the Attorney General "soon became the basis for an extension of the claim of 'executive privilege' far down the administrative line from the president." This may explain the increase in the use of executive privilege: from June 1955 to June 1960 there were "at least forty-four instances when officials in the Executive Branch refused information to Congress on the basis of the Eisenhower directive - more cases in these five years than in the first century of American history."

The issue of executive privilege "lay largely dormant during the Kennedy and Johnson Administrations, although President Kennedy in his own name once exercised the privilege, and executive departments and agencies did so three times during each of ... [these] Democratic administrations."

Over four years Nixon claimed executive privilege four times himself; in addition cabinet members and agency heads invoked executive privilege fifteen times on his behalf.

During President Ford's administration executive privilege was claimed when the House Intelligence Committee issued subpoenas for national security information. The requested material dealt with
"'highly sensitive military and foreign affairs assessments and evaluations' as well as consultations and advice to former Presidents Kennedy, Johnson, and Nixon. "94 Congress replied to the President's refusal to produce the documents that "executive privilege could not be invoked by Ford for the documents of previous administrations."95 The President did then turn over documents dating back to 1961.96

Presidents Carter and Reagan each invoked executive privilege for documents requested by Congress that were considered too sensitive to be handed over. However, the Presidents eventually complied with the request for information in an acceptable manner after Congress voted to cite the respective Cabinet members involved for contempt.97 Even in these instances however the control of executive material did not leave the President's hands.

Crisis of Control

"Executive privilege" or a presidential power to withhold information from Congress was not vested in the President explicitly by the Constitution. Nor did it arrive on the American political scene due to an overpowering ambition of our first President. Washington consulted with his Cabinet as to the most appropriate action when first asked for "sensitive" information by Congress. The joint decision of Washington and his Cabinet - recorded in Jefferson's diary - represents the first hint of this interesting implied power. But this power did not remain an entry in a diary. It was invoked, asserted, acted upon
- not by every President and not on numerous occasions. At first the reasons for the use of executive privilege were varied: "(1) a house of Congress or Congress as a whole [had] no power to legislate on the particular matter; (2) foreign affairs [required] the withholding of certain information; (3) the innocent must be protected; (4) the identity of sources of confidential information should not be disclosed; (5) administrative efficiency [required] secrecy." Executive power increased and so did the use and scope of executive privilege. Eisenhower's 1954 letter was an "unprecedentedly sweeping denial to Congress, [but] it had a certain moral justification in the atrocious character of the McCarthy inquisition." Abraham Sofaer points out another major difference between the early Presidents and more recent Chief Executives: the former did not claim an absolute, unreviewable power to withhold information. Jefferson's description of a "discretion to withhold" should not be "equated with arbitrary or absolute power; . . . discretion usually means judgment 'guided by sound legal principles,' producing decisions made 'according to the rules of reason and justice.'" "Discretion" has not always been viewed in this way when Presidents wanted to withhold information.

Other ways the early assertions of executive privilege differed from more recent times are (1) the early Presidents did not deny Congress the authority to pressure the President for information; and (2) early Presidents did not claim executive privilege for all the personnel of the Executive Branch, but only for the President and his closest officers.
Executive privilege has expanded since first enunciated during the Washington administration, but Congress' response has remained the same. Several times one House of Congress attempted to legislate a requirement that the Executive Branch turn over all information whenever information was requested, but the effort died in the opposite chamber.103 "Congress generally [acquiesced] for practical reasons in presidential denial but never [admitted] any principle of uncontrolled presidential discretion. Disagreements were always absorbed in the political process, and contention never led to a serious Executive-Legislative showdown."104 One scholar believes Congress' response historically to the use of executive privilege is why Presidents now "claim to be beyond Congress' power to control" and is "undoubtedly the product in large part of Congress' willingness during [the early] years, often for political reasons, to allow Presidents great latitude."105

The use of executive privilege reached crisis proportions after the Watergate break-in in 1972. The "absolute discretion" and the far-reaching range which had become attached to executive privilege since the 1950's was evident during the investigations of the Senate Watergate Committee and the Watergate grand jury. In the beginning of the investigations President Nixon claimed executive privilege even for his aides, disallowing their appearance before the Senate committee. Then he changed his position. His directive of May 3, 1973 stated: "The President desires that the invocation of executive privilege be held to a minimum."106 On May 29, 1973 however Nixon changed again: he refused "to provide information through oral or written testimony to the
Watergate grand jury or to the Senate Committee . . . [because it] would be 'constitutionally inappropriate' and a violation of the separation of powers."107 Later, Nixon reiterated this position when - in July 1973 - both the Senate Committee and the Watergate grand jury subpoenaed the newly revealed presidential tape recordings. Because of the apparent seriousness of the Watergate break-in and the subsequent cover-up, Nixon's insistence on executive privilege was becoming intolerable.

Legal Resolution of the Crisis

To enforce compliance with the subpoena the Senate Watergate Committee went to court. Although the judiciary eventually ruled against the Committee so that the tapes were not handed over, the U.S. District Court for the District of Columbia did speak about executive privilege: "'[T]he court rejects the President's assertion that the public interest is best served by a blanket, unreviewable claim of confidentiality over presidential communications . . .'"108

The Watergate grand jury also went to court (to the Supreme Court) to force Nixon to hand over presidential papers and tape recordings which had been subpoenaed. Nixon had refused to comply in any way with the subpoena at first, but then in April 1974 agreed to make public the transcripts of 46 tape recordings. The Special Prosecutor at the time - Leon Jaworski - explained his position in a brief before the Supreme Court:
The qualified executive privilege for confidential intra-governmental deliberations, designed to promote the candid interchange between officials and their aides, exists only to protect the legitimate functioning of the government. Thus, the privilege must give way where, as here, it has been abused. There has been a prima facie showing that each of the participants in the subpoenaed conversations, including the President, was a member of the conspiracy to defraud the United States and to obstruct justice... The public purpose underlying the executive privilege for governmental deliberations precludes its application to shield alleged criminality.109

The battle between the President and the Special Prosecutor ended with the Supreme Court's unanimous decision in United States v. Nixon,110 which stated that "neither the doctrine of separation of powers, nor the need for confidentiality of high-level communications, without more, can sustain an absolute, unqualified presidential privilege of immunity from judicial process under all circumstances."111 At least in terms of turning over material to the Courts presidential control is not absolute. Although United States v. Nixon did not concern the use of executive privilege vis-à-vis Congress, but the Special Prosecutor, and although the Court's response to an absolute executive privilege in criminal proceedings - that criminal proceedings take precedent - only settled the evidentiary facet of executive privilege, not the secrecy facet, this decision did dampen the absolute manner in which executive privilege had been invoked.
Property Concepts

What concepts of property are inherent in the President's claim of executive privilege and Congress' rejection of that claim? While in office a President views the exercise of executive privilege as within his bundle of rights as President, as well as consonant with the relationship he has to the papers in question. The papers deal with subjects within his realm of responsibility, and were generated in his office or at least in the Executive Department. Considering the number of times Congress has - when the chips are down - acquiesced to the President's refusal to turn over certain documents, they see their bundle of rights vis-à-vis these documents as smaller and of less importance than the President's bundle. Also, because Congress' relationship to the documents is "once removed" from the President's, their sense of property in this aspect is weak. The doctrine of separation of powers on which executive privilege is based provides a property expectation. For the President the legitimate expectation associated with presidential papers involved in an executive privilege claim is the peace/security of knowing the materials will not be utilized improperly. Congress legitimately expects to have access to any and all materials necessary for properly preparing legislation and holding investigations.

Until the time of President Andrew Jackson the President's view of executive privilege was based on the expectation of preserving the public good by not allowing certain materials to be released. With Jackson's "unequivocal assertion of discretionary power" in 1835 and
Brownell's 1954 memo asserting "uncontrolled discretion" to the Supreme Court's decision in United States v. Nixon, the view of property was a monopoly of the bundle of rights, and an exclusive relationship limited to the Executive Department. Congress complained but no legislation was passed controlling executive privilege.

It was not until President Nixon's unreasonable use of executive privilege during the Watergate investigations - a use that appeared to deny any property sense (however slight) on the part of Congress or any one else in the material in question - that precipitated a law suit and a change in the extent of the presidential control allowed. We shall also see with the control of presidential papers following terms of office, as with the control of school library books, that a too narrow sense of property brought the courts into the picture and revised the control of the material.

In 1973-74 Congress attempted to legislate some guidelines for the use of executive privilege, and for resolving any impasse which might occur between Congress and the Executive over access to presidential material. The Government Operations Committee of the Senate reported a bill during the spring of 1973 "to require that all requested information must be provided unless the President in writing ordered the information withheld." The bill also provided for judicial intervention should Congress and the Executive come to an impasse over access to material. There was opposition in the House committee to officially recognizing executive privilege in law and to having the judiciary "determine what information the Congress has a right to obtain."
sequently, the bill was never brought to the House floor and did not become law.

This attempt at legislation sheds some light on the sense of property held by Congress (or some of it!) vis-à-vis documents under the claim of executive privilege. Congress saw the bundle of rights associated with the control of presidential papers while in office as a shared bundle - as a joint responsibility of the President and the Congress to each protect and promote the public good by its own legitimate functions. The breakdown of the bundle was not 50-50, for there might be instances in which the President should withhold information. The sense of property reflected in the proposed bill also included a mutually legitimate relationship to the documents in question. Even though the bill did not become law the Supreme Court's refutation of an absolute privilege had - as far as the sense of property is concerned - the same effect: the bundle of rights and the relationship were opened up, and even the respective expectations of the President and Congress regarding the performing of their duties were validated. We have already seen that the control of school library books - like presidential papers while in office - was not reversed by the courts, but merely expanded and made more equitable. The President was not denied control, but rather told to be less rigid in exercising his control.
PRESIDENTIAL PAPERS, OUT OF OFFICE

Practice and Policies of Control

As previously explained, the control of presidential papers following terms of office was also in the hands of the respective President from 1797 to 1981. When Washington left Philadelphia for Mount Vernon in 1797, "there was no provision by law then for any place to keep [his papers] - no National Archives, no Library of Congress. The choice was either to take them along at the end of the term or see them thrown away." Washington considered his papers valuable, of interest to others, and therefore, worthy of preservation. He took his presidential papers with him to Mount Vernon, after having separated out the files that were to be left for his successor. He indicated on several occasions his desire to have some facility where others could read his papers. He wrote to the Secretary of War on April 3, 1797, of this desire for a house "'for the accommodation and security of my Military, Civil, and private Papers which are voluminous, and may be interesting.'" Whether Washington had had hopes that government funds might be available to accommodate his papers is unclear." No building was ever provided by the government, nor was Washington able to erect one. His time was taken up restoring Mount Vernon and his other plantations. Washington never did get his papers organized and available for access
as he wished. He bequeathed them to his nephew Bushrod Washington, whose descendants later sold them to the government.

Washington's successors also took their presidential papers with them when they left office and kept them, usually bequeathing them within their family. This practice arose from the lack of any facility in which to deposit presidential papers or any mechanism to sell or cede them to the government.\textsuperscript{118}

After the Manuscript Division of the Library of Congress was set up in 1897, a hundred years after Washington retired to Mount Vernon, there finally existed a facility in which presidential papers could be deposited and made available. Theodore Roosevelt and William Howard Taft arranged for their papers to be placed in the Library of Congress. Other Presidents also arranged for the Library of Congress to have their papers. At various times Congress appropriated funds for the purchase of a President's papers - specifically, those of George Washington, Thomas Jefferson, James Madison, and James Monroe. The Library of Congress now holds the "main body of the papers" of twenty-three Presidents from George Washington to Calvin Coolidge.\textsuperscript{119}

Several Presidents made their own arrangements for the preservation and availability of their papers. The Adams papers were given to the Massachusetts Historical Society, and the "heirs of Rutherford B. Hayes, in collaboration with the state of Ohio . . . founded the Hayes Memorial Library at Fremont."\textsuperscript{120} The decision of which papers would be retained and who would have access to the material was made by the President or his heirs.
Many papers have been lost or destroyed (some through the authority of the President, others by the heirs). One of George Washington's heirs described how he was fulfilling "the requests for Washington souvenirs. 'I am now cutting up fragments from old letters and accounts, some of 1760 . . . to supply the call for anything that bears the impress of his venerated hand. One of my correspondents says send me only the dot of an i or the cross of a t and I will be content.'"¹²¹

"William Harrison's papers were destroyed when his home in North Bend, Ohio burned in 1858. John Tyler's were burned, along with most of the city of Richmond, Virginia, during the Civil War. The war also claimed Zachary Taylor's collection. Sometimes heirs winnowed the papers according to their own standards, destroying what they considered either useless or damaging. The sons of both Millard Filmore and Abraham Lincoln destroyed sections of their fathers' collections. Warren Harding's widow burned some of his papers and edited others."¹²²

On December 2, 1938, a "dramatic and uniquely American departure from previous practice [which] was bound to set an irreversible pattern for the future"¹²³ was set in motion. On that day President Franklin Roosevelt talked with several prominent historians (Charles A. Beard, Samuel E. Morison, William E. Dodd, Randolph G. Adams, and Frederic L. Paxson)¹²⁴ about setting up a presidential library. Roosevelt pointed out that both the Library of Congress and his university wanted to have his presidential papers, but he did not want the collection split up, nor did he think that a nation's "archival heritage" should be concentrated "in such a conspicuously vulnerable location as the national cap-
"His argument reflected a deliberate and conscious break with the past. 'It is my thought that an opportunity exists to set up for the first time in this country what might be called a source material collection relating to a specific period in our history, [to be housed in] a separate, modern, fireproof building . . . so designed that it would hold all of my own collections and also such other material relating to this period in our history as might be donated to the collection in the future by other members of the present administration.'" The historians were enthusiastic about his plan and heartily endorsed it.

Although FDR was quite interested in the American past, there was a practical reason for his desire to be relieved of the burden of caring for his presidential papers — the large amount of material involved. His total presidential records amounted to 5,000,000 sheets of paper in "about 500 five-drawer filing cabinets." Other factors demanded a change in the custody and control practices relating to presidential papers: "warehousing and custodial costs," "the prospect of enormous estate taxes," gifts from heads of foreign governments "that could not be kept with propriety as private property or returned without diplomatic embarrassment." Roosevelt's proposal envisioned a facility that was of necessity "an archives, a library, and a museum all in one.

The financial arrangement for this first presidential library provided for a private corporation — the Franklin D. Roosevelt Library, Incorporated — to be established to "raise funds and to construct and
equip a building to house the records and collections . . . [The corporation] could also retain custody, control, and maintenance itself, or it could ultimately transfer these responsibilities to the United States, provided only that legislation should be enacted enabling the government to accept such property and support it in perpetuity."131 A joint resolution of Congress passed in early 1939 authorized the government to accept the property and provide the maintenance funds for the FDR Presidential Library. This joint resolution represents the first time the federal government made a legal commitment specifically dealing with presidential papers.

The Franklin Delano Roosevelt Library was built in Hyde Park, New York, and opened in 1941. Nearly all (85 percent) of Roosevelt's papers were accessible to scholars when they were formally opened to research in March 1950. "The size and range of the collection, and its availability to scholars so soon after the donor's death, are without precedent in American historiography," according to one scholar.132 Lincoln's papers had just been completely opened in 1950 and the Adams papers were still not accessible to historians at that time.133

In 1950 the Federal Records Act "authorized acceptance for the National Archives of 'the personal papers and other personal historical materials of the present President,' with restrictions on their use specified by the 'prospective depositors.'"134

By 1955, with the addition of the Truman and Eisenhower presidential libraries, a comprehensive plan for the administration of these and future libraries was needed. The Presidential Libraries Act, passed in
that year, authorized the government to accept "the papers and other historical materials of any President or former President of the United States . . ." The Administrator of General Services "hailed [the Act] as an historic event and as laying 'a foundation for the systematic preservation and use of the papers of the American Presidency.' . . . It would . . . establish in law 'a system whereby Presidential papers, in their entirety, may become a part of the National Archives, by gift or by agreement.'" 136

The Presidential Libraries Act "can be viewed as the nation's acceptance, not of a gift, but of [the] burden" of managing such large presidential collections as now occur. The Administrator of General Services testified during hearings for this 1955 Act:

As a matter of ordinary practice, the President has removed his papers from the White House at the end of his term. This has been in keeping with the tradition and the fact that the papers are the personal property of the retiring Presidents. One unfortunate consequence has been that important bodies of Presidential documents have been dispersed and destroyed particularly prior to the 20th century.

All this is recognized in this legislation: there is nothing mandatory in the proposal. It is not an ill-conceived attempt to bind any future President of the United States. Instead, it will provide the vehicle by which the President is assured the integrity of his papers, their proper and orderly arrangement, and their eventual availability to the people as the historical record of his administration . . . In every case, the decision to make the gift will continue to rest with the former President and his heirs and friends. 138
Roosevelt changed the past practices of custody and control of presidential papers by setting up a separate facility devoted to his political papers. The 1955 Presidential Libraries Act legally established the opportunity for future presidents to follow Roosevelt's path. The quantity and variety of presidential materials after 1939, plus the increasingly complex and crucial role of the government in foreign and domestic affairs, compelled Roosevelt's successors to utilize the presidential library system, which they did. There are presidential libraries for Truman, Eisenhower, Kennedy, Johnson, and Ford. Construction of the Jimmy Carter Presidential Library and Policy Center in Atlanta, Georgia began in early 1985.139 A 20-acre site on the campus of Stanford University in California will be the location of the Ronald Reagan Presidential Library.140

Several locations were considered by the Richard M. Nixon Foundation—the group raising money to build a presidential library for Nixon's papers—as possible sites for a Nixon library, including Duke University in North Carolina, the University of California at Irvine and at Fullerton.141 The most recent development in establishing a Nixon Presidential Library is the decision to have a "private Presidential library that is neither controlled nor operated by the government's National Archives and Records Service"142 in San Clemente, California. The city has signed an agreement with the Nixon Foundation. This library "will attempt to include the originals or copies of 'all historically significant materials pertaining to Richard Nixon, his Presidency
and other public offices held by Mr. Nixon which are, or become, available from the government or Mr. Nixon.'"143

Collections of the papers of former Presidents who preceded FDR have also been organized in recent years. A presidential library for Herbert Hoover was established in 1962 at West Branch, Iowa. This library houses his presidential papers as well as material relating to his service as Secretary of Commerce. The Hoover Library on War, Revolution and Peace at Stanford University in California was proposed in 1919; this collection includes not only Hoover's writings on peace, but those of others as well.

In December 1982 a library and research center opened at Mount Vernon, housing "the largest collection of Washington's private papers, the largest collection of Martha Washington's papers, and more than fifty volumes of Washington's personal library."144 The unofficial Calvin Coolidge "presidential library" is the Forbes Library in Northampton, Massachusetts. In the library's Calvin Coolidge Memorial Room are "Coolidge's unofficial correspondence as president and microfilm copies of his presidential papers, the originals of which are in the Library of Congress ... [and] stenographic transcripts of Coolidge's presidential press conferences and his personal library of 899 books."145 Some newly discovered papers of Coolidge - including "correspondence with Presidents Woodrow Wilson, William Howard Taft, and Herbert Hoover; presidential candidates William Jennings Bryan, John W. Davis and Alfred E. Smith; Vice Presidents Charles G. Dawes and Charles Curtis; [and] Henry Cabot Lodge, Will Rogers, and Henry Ford"146 were
recently given to the Forbes Library by the former president's son, John Coolidge.

**Crisis of Control**

August 9, 1974: Richard M. Nixon resigned from the presidency of the United States following the threat of impeachment due to the Watergate scandal. On September 16, 1974 former President Nixon and the Administrator of the General Services Administration, Arthur F. Sampson, concluded a depository agreement (known as the Nixon-Sampson Agreement) covering Nixon's presidential papers. According to the Agreement, Nixon retained title to all the materials but agreed to deposit them with the General Services Administration in accordance with the Federal Records Act. Neither party could gain access to the materials without the consent of the other. Mr. Nixon could not withdraw originals of any written documents for three years, after which time he could either retain them for himself or donate the materials to the United States Government. Similar provisions for review of the tape recordings were established with the time period extended to five years. All of the taped conversations were to be destroyed at the expiration of ten years or upon Nixon's death, whichever occurred first.\(^{147}\)

The Watergate Special Prosecutor requested President Ford to delay the implementation of the Nixon-Sampson Agreement, so that the materials would be available for pending trials. The delay was granted in spite of Nixon's attempts to have the Agreement put into effect immediately.
During this time, several bills were introduced in Congress regarding the Nixon materials. The aim in each case was to provide access to the written documents and recordings so that (1) the truth could be known about the Watergate situation, and (2) subsequent judicial proceedings would have all pertinent information. In hearings it was made clear why Congress was acting in such a manner. Senator Gaylord Nelson called the bill an "'emergency measure' . . . to assure 'protective custody' of the materials." He continued: "[T]here is an urgency in the situation now before us. Under the existing agreement between GSA and Mr. Nixon, if Mr. Nixon died tomorrow, those tapes . . . are to be destroyed immediately; it is also possible that the Nixon papers could be destroyed by 1977. This would be a catastroph[e] from an historical standpoint."  

The Act resulting from these hearings - called the Presidential Recordings and Materials Preservation Act (1974) - has two parts. Title I of the Act stipulates that the Administrator of General Services is (1) to take custody of all Nixon's presidential papers; (2) to have the material screened by government archivists to separate the purely private and personal material - so the latter could be returned to Nixon; and (3) to devise regulations governing future public access to some of the material. Title II establishes a commission to "study and recommend appropriate legislation regarding the preservation of the records of future Presidents and all other federal officials."  

The day after the Act became law Nixon filed for declaratory and injunctive relief against enforcement of the Act. He challenged the
constitutionality of Title I as a violation of separation of powers, presidential privilege doctrine, his privacy interests, his First Amendment associational rights, and the Bill of Attainder clause. A three-judge District Court (for the District of Columbia) held that Nixon's constitutional challenges "were without merit" and "dismissed the complaint." Nixon appealed to the Supreme Court, whose majority opinion (seven to two) upholding the decision of the lower court came in 1977 in Nixon v. Administrator of General Services. By upholding the constitutionality of the 1974 Act, the Supreme Court denied Nixon the right or power to classify and weed the papers, and to stipulate the terms of access to the materials.

In accordance with Title II of the 1974 Act the National Study Commission on Records and Documents of Federal Officials was set up. Its report stated that "it's time to bring to an end the tradition that papers generated or received in the conduct of public business belong as a species of private property to Presidents and other public officials. We are satisfied that the tradition of private ownership of public papers became established by reason of the failure of the government to provide an alternative. It is time to remedy the situation."法定解决方案的危机

The remedy was the Presidential Records Act of 1978. The Act separates presidential material into three categories: (1) documentary material; (2) presidential records ("all documents created by the presi-
dent or his staff that [relate] to the official duties of the president; documents dealing with political activities [are] only . . . included if they relate to the president's official duties); (3) personal records ("documents of a personal nature that were unrelated to the president's official duties, such as diaries, journals, or other personal notes; political materials that were unrelated to the president's official duties; and materials connected with the president's own election or with the election of any other official that had no bearing on the president's official duties"). Under the provisions of the Act the "presidential records" category of materials [see (2) above] are owned by the government and are to be managed by the archivist. The President will have some say in access regulations. The Presidential Records Act still allows a president to erect a presidential library (the Presidential Libraries Act remains in effect), but it "mandates that the Government is in possession of [the] papers." The Presidential Records Act took effect on January 21, 1981.

With respect to the control of presidential papers following a term of office the 1978 Act insured the preservation of presidential papers: no longer was this at the mercy of a President's whim or the actions of his heirs, but it almost eliminated the President's control of his papers once he was out of office. The President did retain the right - under the Act - "to restrict access to certain materials for up to twelve years if the documents fell within one of several categories, including national defense or foreign policy, trade secrets, confidential advice between the president and his advisors, personnel files or
files relating to presidential appointments." The Act settled the long-standing ownership issue by changing the tradition of presidential ownership to the legality of governmental ownership.

Property Concepts

A former president felt a property relationship to the papers he generated and utilized while in office that entitled him to remove the material and take it with him. This was especially true for George Washington because "... most of [the letters and documents the President] literally wrote himself, with no help from secretaries or machines. They were accordingly much more individual and personal, as were the similarly handwritten letters he received." William Howard Taft saw the presidential control of presidential papers as due to the relationship between the content of the papers and the President. He explained in a 1915 speech at Columbia University that

[t]he Executive office of the President is not a recording office. The vast amount of correspondence that goes through it, signed either by the President or his secretaries, does not become the property or a record of the government, unless it goes on to the official file of the Department to which it may be addressed.

The retiring President takes with him all of the correspondence, original and copies, which he carried on during his administration.

The rights and privileges afforded a former President were also seen to include the right to remove his papers and determine their dis-
position and treatment. As one of the few Presidents to express an opinion on the control of presidential papers, Grover Cleveland defended presidential control on the basis of "his personal rights" as President:

I regard the papers and documents withheld and addressed to me or intended for my use and action purely unofficial and private, not infrequently confidential, and having reference to the performance of a duty exclusively mine. I consider them in no proper sense as upon the files of the Department, but as deposited there for my convenience, remaining still completely under my control. I suppose if I desired to take them into my custody I might do so with entire propriety, and if I saw fit to destroy them no one could complain.  

A President also took control of his presidential papers because of an expectation that he should review the records to delete what was purely personal, what might be damaging to national security (and therefore should be classified for a certain time period), what might be damaging to the privacy or reputation of individuals or countries (and therefore should either be destroyed or classified), and also that he should say how, when, and where the papers would be available for others' use. The legitimacy of this expectation is revealed in the retention of such review as a presidential function under the provisions of the Presidential Records Act of 1978.

Presidents did remove their papers and do what they wanted with them—purge what was damaging, classify what was still too "hot," organize and make available what would illustrate the accomplishments and crisis of their respective administrations. On the whole Presidents
recognized that "Presidential materials are peculiarly affected by a public interest . . . directly related to the character of documents as records of government activity,"\textsuperscript{162} and strove—especially after 1939—to preserve and promote this public interest. The proliferation of presidential libraries since the idea was first implemented is special proof of Presidents' concern for the public interest, and shows the scope of their sense of their rights and their relationship vis-à-vis their papers. They did not see their bundle of rights as including a right to the wholesale destruction of the material nor their complete inaccessibility, nor did they see their relationship to the material as exclusive; others were to also have a relationship—not in the control\textit{ per se}, but at least in the use of the documents.

Congress saw their relationship to the control of a former Executive's papers as that of the provider of the authority and funds for the National Archives to assume the care and upkeep of presidential libraries. There was "overwhelming bipartisan support" for the Presidential Libraries Act which was promptly passed in 1955.\textsuperscript{163} The bundle of rights Congress had vis-à-vis presidential papers included the rights to protect the papers from harm and to preserve them for posterity; it was from this standpoint that they passed the 1974 Presidential Recordings and Materials Preservation Act. Passage of this Act and the 1978 Presidential Records Act are the first instances of Congress exercising actual control over presidential papers; the expectation to be gained from this was the termination of Nixon's harmful actions with his papers and prevention of such future action.
Presidential control of a former president's papers was not questioned by the government nor changed until President Nixon made known the arrangement he had made with the General Service Administration. How was Richard Nixon different? What did he do or intend to do that caused the government to take custody of all his papers and set the terms of access? Nixon was following tradition in asserting title to his materials, in removing them from the White House, in making plans for a presidential library, and in asserting the power to determine access. What went wrong?

The Nixon-Sampson Agreement provided for very narrow access, for the deliberate destruction of a major portion of the collection, and for Nixon to choose whether to retain or donate the written papers after three years. These terms did not express a spirit of good will toward the nation. The lack of such a spirit, coupled with Nixon's unprecedented resignation, did not inspire confidence that his presidential materials would be in existence or available. Hence, Congress acted to assure the materials would survive.

Franklin Roosevelt's establishment of a presidential library allowed the majority of his presidential papers to be available for use within a few years after his tenure as President ended. By 1974 FDR's example had become tradition or standard procedure. The niggardly terms of the Nixon-Sampson Agreement regarding availability and access to the Nixon presidential papers appeared out of focus with the tradition of the post-World War II era. "The Presidential Libraries Act relied on the good faith of a President that all materials would be deeded by a
President in perpetuity. President Nixon clearly did not indicate by his actions his intention to keep within the spirit of the law."164

The unique manner in which the Nixon presidency ended, coupled with the immediate need to have the material for judicial proceedings arising from Watergate, and the long-term need to fully establish the truth about the Watergate scandal aroused Congress to action. "There can be little doubt that if Mr. Nixon had left office under circumstances similar to his immediate predecessors, Congress would not have seen the need to give his papers immediate attention."165

In contracting for the destruction of certain presidential materials which we have seen are not ordinary papers, but papers "clothed with a public interest"166 - plus leaving unclear what material would be available to others, Nixon dealt with his presidential papers (his property) in a way, "unduly harmful to others."167 Use of one's property in this way is not in accord with a basic premise of American property law,168 and "it is quite justified to take somebody's [property] away from him if it is necessary to stop him acting in a way he should recognize is socially unacceptable."169

Because Nixon's extreme actions forced Congress to examine the whole issue of control of presidential papers, it was discovered that legally the control had never been conferred on the President (presidential control had been practiced for so long it was assumed to be law). As far as the law was concerned, no property rights or relationship existed vis-à-vis the control of presidential papers. In creating a property right/relationship for such control Congress sought to prevent
any repeat of the abuse of Nixon and others with regard to the treatment of presidential materials following a term of office. It was decided the property right should be placed in the government; thus the provisions of the Presidential Records Act. Nixon's abuse of his traditional property right - i.e., his "social" property right to use Ackerman's terminology[170] - was the catalyst for the creation of a legal property right, and this creation changed the tradition of the previous one-hundred eighty years.
A crisis was created in the control of two public collections of written material - presidential papers and school library books - when there was unilateral and partisan action by the principal holder of control. For school library books, this came when the Island Trees School Board, without consultation and without review, ordered nine books removed from the district's school libraries, thereby disregarding a written procedure for challenged materials and acting in line with its own biases. For the presidential papers of a current President the crisis of control occurred when President Nixon claimed absolute control over certain tape recordings, ignoring the needs and demands of the Watergate Special Prosecutor. With regard to the papers of a former President Nixon (again) precipitated a crisis when on his own and with disregard for pending Watergate trials he contracted to destroy some and make inaccessible others of his presidential papers.

Why should these actions create a "crisis" of control? The School Board is legally responsible for the school library collection. A President has power over the documents he creates or causes to be created in his department. Over the years Congress even acknowledged the President's power to control which materials could be shared. Witness the Congressional comments made to Presidents Washington, Jefferson and Monroe when certain information was requested: "Excepting anything the President 'may deem the public welfare to require not to be
disclosed. Since George Washington took his papers with him upon leaving office, no one seriously questioned presidential control over presidential papers once a President's time in office was over. The Presidential Libraries Act made the handing over of the day-to-day management of presidential papers to trained archivists and librarians voluntary and merely legalized one option for storage of the material — the presidential library. The access conditions of a presidential library collection was largely set by the former President. The School Board and the President have the right — one might even say privilege — to control their respective collections.

Tradition or past practice, policy, and in some instances, statute are the bases for this right to control. Control over school library books was founded on the legal responsibility of the school board for every facet of the district's school system and on a board-approved policy for dealing with challenged material. Control over presidential papers under executive privilege was based on the practice of Presidents from the beginning and on the Brownell memorandum of 1954 with its assertion (although incorrect) that "'Courts had uniformly held that the President and heads of departments have an uncontrolled discretion to withhold ... information and papers in the public interest.'"172 Control of the papers of a former President by that President was based on the tradition of following George Washington's example, and was later sanctioned in the Presidential Libraries Act which specifically avoided changing presidential control. From a property perspective both the School Board and the President were entitled to control, because the
Board had legal property in the school library books of its district (based on the Board's mandate for existing) and the President had social property in his presidential papers from the time he took office until his death due to existing social practices that had marked these materials as belonging to him.173 Why then was there such a fuss about the actions of the Island Trees School Board and President Nixon - why did their actions create a "crisis" of control?

Because their actions were exclusive, one-dimensional and ignored the rights, interests of others and were inconsistent with the nature of the public sphere of which these materials are a part. The Island Trees School Board thought only of its own likes and dislikes in literature and culture, considered only its view of the function of education, and overlooked the rights of the school superintendent and the school librarian. The Board also disregarded the needs of students for a broad-based education and to see an example of governmental authority which was fair and just. In addition the Board showed a lack of awareness of the purpose of a public school library. The contents of a person's private library can be as narrow and circumscribed as one wishes, but a library serving a diverse public such as a public school library must have a balanced collection. President Nixon thought mainly of his own reputation in refusing to turn over the tape recordings, neglected the judicial need to uncover the truth and the political need for the Executive Office to express honesty and integrity. Likewise, once he left office, Nixon acted out of a very narrow perspective - disregarding the continuing need to find out the truth about Watergate and the archival tradi-
tion of having the papers of a presidential administration available for historians and researchers (especially since the advent of the presidential library system). In property terms the reason the actions of the Island Trees Board and President Nixon caused such a stir was because these actions violated the basic rule of property: a person cannot use his property in absolutely any way he pleases, because some actions are "unduly harmful to others." These actions slighted the rights, relationships and expectations of others properly involved in the control and use of the collections.

The termination of each crisis - which meant preserving existing property interests and creating new ones - came from the law. The Supreme Court instructed the Island Trees School Board to follow its policy of control, not ignore it, and thus preserve appropriate control - i.e., the existing property interests of the school superintendent and school librarian - over the school library books. The Supreme Court also loosened up the control of the materials of a current President by knocking down absolute discretion in the use of executive privilege - at least in terms of criminal proceedings. Congress took control of Nixon's papers and legislated a change which ended the tradition of presidential control of a former President's papers.

The legislative and judicial actions honored the property rights, relationships and expectations of all involved in the control of the respective collections. By following its own already-in-place policy for challenged materials the Island Trees School Board would be respecting the property interests of the school superintendent and school librari-
an. By narrowing presidential discretion in executive privilege situations the Supreme Court allowed Congress' property rights, relationships and expectations in the materials to be taken into account. The Presidential Records Act — the legislation which changed the control of presidential papers following a term of office — recognized and preserved a former President's property in his papers by allowing him some say in the classification of certain material. This 1978 Act also preserved the property expectations of future researchers of a specific administration and created a new property interest in the presidential papers of a former President — that of the government.

The creation, protection, or expansion of the property interests of all legitimately involved in the control of two public collections of written material — school library books and presidential papers — did indeed force a change in the control of each collection.
END NOTES


2260 U.S. 393 (1922).


6Taylor, p. xii.

7Taylor, pp. xii-xiii.

8Taylor, p. ix.

9Taylor, pp. 5-6, 10, 63, 95, 137.

   The school libraries with this provision are: Hawaiian Public School Libraries; Northern Trails Area Education Media Center, Clear Lake, Iowa; McAllen Independent School District Learning Resources Centers, McAllen, Texas; Council Bluffs Public Schools Media Centers, Council Bluffs, Iowa; Laredo Independent School District Learning Resources Centers, Laredo, Texas; Jenison Public Schools, Jenison, Michigan.

10Taylor, p. 11.

11Taylor, p. 56.

12Taylor, pp. 55, 60, 66.

   The school libraries with this policy statement are: Sonoma Valley Unified School District Media Centers, Sonoma, California; Fairfield Public School Library Resource Center, Fairfield, Connecticut; Council Bluffs Public Schools Media Centers, Council Bluffs, Iowa.
13 Taylor, p. 66.

14 Taylor, p. 9.

15 Taylor, p. 55.


18 Pray, p. 419.


22 Brief for Appellee at 4, Pico v. Board of Educ., 638 F. 2d 404.

23 Pray, p. 420.

24 Pray, p. 420.

25 Pray, p. 420.

26 Pray, p. 420.


33Langvardt, p. 123.
34Langvardt, p. 131.
35Langvardt, pp. 131-132.
41American Libraries, p. 119.
42Ackerman, p. 98.
47Board of Education v. Pico, 457 U.S. 853, 857 note 4 from App. 44.
51Hentoff, p. 12.


54O'Neil, p. 307.

55O'Neil, p. 308.

56O'Neil, p. 308.

57O'Neil, pp. 302, 309.


63Younger, p. 757.

64Younger, p. 757.


67Younger, p. 758.

68Younger, p. 759.

69Schlesinger, p. 8, col. 4.

70Dorsen and Shattuck, p. 12.

71Dorsen and Shattuck, p. 12.
72Younger, p. 760.

73Younger, p. 761.

74Younger, pp. 761-762.


76Dorsen and Shattuck, p. 9.

77Younger, p. 767.

78Younger, p. 768.


81Younger, p. 768.

82Younger, pp. 768-769.

83Younger, p. 769.

84Schlesinger, p. 8, col. 4.

85Bishop, p. 478.


87Bishop, p. 478. Also Schlesinger, p. 8, col. 3.

88Bishop, p. 478.


91Schlesinger, p. 8, col. 5.

92Dorsen and Shattuck, p. 10.

95Congressional Quarterly's Guide to Congress, p. 158.
98Younger, p. 773.
99Schlesinger, p. 8, col. 3.
100Sofaer, p. 45.
101Sofaer, p. 45.
102Sofaer, p. 46.
103Younger, pp. 765, 767-768.
104Schlesinger, p. 8, col. 4.
111418 U.S. 683, 706.

117 McDonough, pp. 8-9.


119 McDonough, p. 5.


121 Hirshon, p. 372.


123 Jones, p. 147.

124 Jones, pp. 144-145.

125 Jones, p. 145.

126 Jones, p. 145.

127 Jones, p. 147.

128 Jones, p. 148.

129 Jones, p. 148.

130 Jones, p. 149.

131 Jones, p. 150.

132 Jones, pp. 154-155.

133 Jones, p. 154.


Spencer, p. 375.


158 Livernash, p. 3052.

159 Brown, p. 8.

160 McDonough, p. 4.

161 Cook, p. 310.


167 Ackerman, p. 98.

168 Ackerman, p. 26.

169 Ackerman, p. 151.

170 Ackerman, p. 117.

171 Dorsen and Shattuck, p. 13.

172 Younger, p. 769.

173 Ackerman, p. 117.

174 Ackerman, p. 98.
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Cong. Rec. 22 April 1948, p. 4753.


Cong. Rec. 3 October 1974, pp. 33848-33857.


Briefs, Cases, and Statutes


APPENDIX
LIBRARY BILL OF RIGHTS

The American Library Association affirms that all libraries are forums for information and ideas, and that the following basic policies should guide their services:

1. Books and other library resources should be provided for the interest, information, and enlightenment of all people of the community the library serves. Materials should not be excluded because of the origin, background, or views of those contributing to their creation.

2. Libraries should provide materials and information presenting all points of view on current and historical issues. Materials should not be proscribed or removed because of partisan or doctrinal disapproval.

3. Libraries should challenge censorship in the fulfillment of their responsibilities to provide information and enlightenment.

4. Libraries should cooperate with all persons and groups concerned with resisting abridgement of free expression and free access to ideas.

5. A person's right to use a library should not be denied or abridged because of origin, age, background, or views.

6. Libraries which make exhibit spaces and meeting rooms available to the public they serve should make such facilities available on an equitable basis, regardless of the beliefs or affiliations of individuals or groups requesting their use.

American Library Association (1980)