The original documents are located in Box 31, folder "Nixon - Papers Government Officials Memoranda (3)" of the Philip Buchen Files at the Gerald R. Ford Presidential Library.

9/6/74

To: Larry Silberman

From: Phil Buchen

As we discussed.

September 6, 1974

MEMORANDUM FOR

The Honorable Laurence H. Silberman
Deputy Attorney General
Department of Justice

Attached is the request of President Ford for your legal opinion concerning papers and other historical materials retained by the White House during the administration of former President Richard M. Nixon and now in the possession of the United States or its officials. Also attached is the subpoena served on H. S. Knight, Director of the United States Secret Service, on September 4, 1974.

Philip W. Buchen
Counsel for the President

Attachments

cc: Gen. Haig
Mr. Buzhardt

THE WHITE HOUSE

WASHINGTON

August 22, 1974

Dear Mr. Attorney General:

By this letter I am requesting your legal opinion concerning papers and other historical materials retained by the White House during the administration of former President Richard M. Nixon and now in the possession of the United States or its officials. Some such materials were left in the Executive Office Building or in the White House at the time of former President Nixon's departure; others had previously been deposited with the Administrator of General Services.

I would like your advice concerning ownership of these materials and the obligations of the government with respect to subpoenas or court orders issued against the government or its officials pertaining to them.

Sincerely,

Gerald R. Ford

Gerald R. Ford

The Honorable William B. Saxbe
The Attorney General
Washington, D. C.

to Mr. Buchen

room _____ date 9/6/74

Department of the Treasury
Office of the General Counsel

Attached is a copy of the subpoena served on September 4 on Mr. Knight, the Director of the Secret Service, at the request of the attorneys for Mr. Ehrlichman.

R.R.A.

General Counsel
Richard R. Albrecht
room 3000
ext. 2093

NEW 12/71

Subpoena to Produce Document or Object — Cr. Form No. 21 (Rev. 10-51)

United States District Court

FOR THE

DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA

v.

JOHN M. MITCHELL, et al,

No. 74-110

To H. S. KNIGHT, Director, United States Secret Service,
as Custodian of Presidential Papers (White House Files),
The White House
Washington, D. C.

You are hereby commanded to appear in the United States District Court for the District of Columbia at John Marshall and Constitution in the city of Washington, D. C. on the 16th day of September 1974 at 10:00 o'clock A. M. to testify in the case of United States v. Mitchell, et al and bring with you

(SEE ATTACHED)

This subpoena is issued upon application of the[1] Defendant. Ehrlichman.

August 29, 1974.

ANDREW C. HALL
Attorney for John D. Ehrlichman
66 W. Flagler Street
Miami, Florida 33130

JAMES F. DAVEY
Clerk.
By
Deputy Clerk.

[1] Insert "United States," or "defendant" as the case may be.

RETURN

Received this subpoena at on
and on at
served it on the within named
by delivering a copy to h and tendering to h the fee for one day's attendance and the mileage allowed by law.[2]

Dated:

, 19

By

Service Fees
Travel $
Services
Total $

[2] Fees and mileage need not be tendered to the witness upon service of a subpoena issued in behalf of the United States or an officer or agency thereof. 28 USC 1825.

FPI—LK—8-14-62—120M—998

ACH:ch

ATTACHMENT TO SUBPOENA TO PRODUCE

1. Notes of Presidential conversations of John D. Ehrlichman from June 17, 1972 to and including May 1, 1973, which are stored in reddish-brown binders.

2. The chronological file of correspondence and memoranda of John D. Ehrlichman from June 17, 1972 to and including May 1, 1973.

3. All personal papers of John D. Ehrlichman prepared or received from June 17, 1972 to and including May 1, 1973 which refer to or relate to the following:

   (a) The Watergate burglary.

   (b) The proposal for the development of and the implementation of intelligence gathering activities for the Committee for the Re-election of the President.

   (c) The activities of Donald Segretti.

   (d) The investigation and activities in connection therewith of the "Watergate affair".

   (e) All tape recordings of Presidential conversations involving a discussion of the "Watergate matter".

   (f) The logs of telephone calls received or placed by Richard M. Nixon from June 17, 1972 to and including May 1, 1973.

   (g) The logs of telephone calls received or placed by H. R. Haldeman from June 17, 1972 to and including May 1, 1973.

   (h) The logs of telephone calls received or placed by John D. Ehrlichman from June 17, 1972 to and including May 1, 1973.

   (i) The visitors' logs and/or appointment logs of Richard M. Nixon from June 17, 1972 to and including May 1, 1973.

   (j) The visitors' logs and/or appointment logs of H. R. Haldeman from June 17, 1972 to and including May 1, 1973.

   (k) The visitors logs and/or appointment logs of John D. Ehrlichman from June 17, 1972 to and including May 1, 1973.

   (l) Any and all records of any person, maintained at the White House, which refer to or relate to the "Watergate matter" from June 17, 1972 to and including May 1, 1973.

Office of the Attorney General
Washington, D. C.

September 6, 1974

The President,

The White House.

Dear Mr. President:

You have requested my opinion concerning papers and other historical materials retained by the White House Office during the administration of former President Richard M. Nixon and now in the possession of the United States or its officials. Some such materials were left in the Executive Office Building or in the White House at the time of former President Nixon's departure; others had previously been deposited with the Administrator of General Services. You have inquired concerning the ownership of such materials and the obligations of the Government with respect to subpoenas and court orders addressed to the United States or its officials pertaining to them.

To conclude that such materials are not the property of former President Nixon would be to reverse what has apparently been the almost unvaried understanding of all

three branches of the Government since the beginning of the Republic, and to call into question the practices of our Presidents since the earliest times. In Folsom v. Marsh, 9 F. Cas. 342 (No. 4901), 2 Story 100, 108-109 (C.C.D. Mass. 1841), Mr. Justice Story, while sitting in circuit, found that President Washington's letters, including his official correspondence,[1/] were his private property which he could bequeath, which his estate could alienate, and in which the purchaser could acquire a copyright. According to testimony of the Archivist of the United States in 1955, every President of the United

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1/ The official documents involved in the case were:
Letters addressed by Washington, as commander-in-chief, to the President of Congress.
Official letters to governors of States and speakers of legislative bodies.
Circular letters.
General orders.
Communications (official) addressed as President to his Cabinet.
Letter accepting the command of the army, on our expected war with France. 2 Story at 104-105.
The clear holding on the property point (Id. at 108-09) is arguably converted to dictum by Justice Story's later indication, in connection with another issue, that copyright violation with respect to the official documents did not have to be established in order to maintain the suit. (Id. at 114).

States beginning with George Washington regarded all the papers and historical materials which accumulated in the White House during his administration, whether of a private or official nature, as his own property.[2/] A classic exposition of this Presidential view was set forth by President Taft in a lecture presented several years after he had left the White House:

> The 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 files of the department to which it may be addressed. The President takes with him all the correspondence, original and copies, carried on during his administration. Taft, The Presidency 30-31 (1916).

2/ Statement of Dr. Wayne C. Grover, Archivist of the United States, during the House Hearings on the Joint Resolution of August 12, 1955, 69 Stat. 695, To provide for the acceptance and maintenance of Presidential libraries, and for other purposes (now codified in 44 U.S.C. 2101, 2107 and 2108; hereinafter referred to as the "Presidential Libraries Act"), Hearing before a Special Subcommittee of the Committee on Government Operations, House of Representatives, 84th Cong., 1st Sess., on H.J. Res. 330, H.J. Res. 331, and H.J. Res. 332 (hereafter referred to as "1955 Hearings"), pp. 28, 45.

Past Congressional recognition of the President's title is evidenced by the various statutes providing for Government purchase of the official and private papers of many of our early Presidents, including Washington, Jefferson, Madison, Monroe and Jackson. See 1955 Hearings at 28, 39-42.

Even if there were no recent statutory sanction of Presidential ownership, a consistent history such as that described above might well be determinative. As the Supreme Court said in United States v. Midwest Oil Co., 236 U.S. 459 (1915):

> [G]overment is a practical affair intended for practical men. Both officers, law-makers and citizens naturally adjust themselves to any long-continued action of the Executive Department--on the presumption that unauthorized acts would not have been allowed to be so often repeated as to crystallize into a regular practice. That presumption is not reasoning in a circle but the basis of a wise and quieting rule that in determining the meaning of a statute or the existence of a power, weight shall be given to the usage itself--even when the validity of the practice is the subject of investigation. Id. at 472-73.
>
> . . .
>
> [W]hile no . . . express authority has been granted [by Congress], there is nothing in the nature of the power exercised which prevents Congress from granting it by implication just as could be done by any other owner of property under similar conditions. Id. at 474.

Moreover, with respect to the practice at issue here, there is recent statutory sanction. The 1955 Presidential Libraries Act, which serves as the permanent basis of the Presidential Library system, constitutes clear legislative acknowledgement that a President has title to all the documents and historical materials--whether personal or official--which accumulate in the White House Office during his incumbency. The Federal Records Act of 1950, 64 Stat. 587, which was the predecessor of the Presidential Libraries Act, authorized the Administrator of General Services to accept for deposit "the personal papers and other personal historical documentary materials of the present President of the United States." Section 507(e), 64 Stat. 588. The word "personal" might have been read as intended to distinguish between the private and official papers of the President.[3/] The corresponding provision of the current law, however, 44 U.S.C. 2107(1), avoids the ambiguity. It envisions the President's deposit of all Presidential materials, not only personal ones. During

3/ Compare Section 507(e) with Section 507(a), dealing with the records of an agency. A memorandum prepared in the Office of the Assistant Solicitor General (now Office of Legal Counsel) on July 24, 1951 indicated that such a distinction between private and official Presidential papers would be inconsistent with historic precedents, and difficult if not impossible to maintain. It accordingly regarded the Records Act's use of the term "personal" as intended merely to exclude the permanent files of the Chief Executive Clerk discussed at page 12 below.

the House debate on the Presidential Libraries Act, Congressman Moss, who was in charge of the bill, expressly stated:

> Four. Finally, it should be remembered that Presidential papers belong to the President, and that they have increased tremendously in volume in the past 25 or 30 years. It is no longer possible for a President to take his papers home with him and care for them properly. It is no accident that the last three Presidents--Hoover, F. D. Roosevelt, and Harry Truman--have had to make special provisions through the means of the presidential library to take care of their papers. 101 Cong. Rec. 9935 (1955).

The legislative history of the Act reflects no disagreement with this position on the part of any member of the Congress. The hearings before a Special Subcommittee of the House Committee on Government Operations indicate congressional awareness of the Act's assumption that all Presidential papers are the private property of the President. 1955 Hearings at 12, 20, 28, 32, 52, 54, 58.

A recent discussion concerning ownership of Presidential materials appears in the report prepared by the staff of the Joint Committee on Internal Revenue Taxation involving the examination of President Nixon's tax returns. H. Rept. 93-966, 93d Cong., 2d Sess. (1974). The report points to the practice of Presidents since Washington of treating their papers, both private and official, as their

personal property; and to the congressional ratification of the practice in the 1955 library legislation. It concludes that "the historical precedents taken together with the provisions set forth in the Presidential Libraries Act, suggest that the papers of President Nixon are considered his personal property rather than public property." Id. at 28-29.

An apparent obstacle to Presidential ownership of all White House materials is Article II, section 1, clause 7 of the Constitution, which provides:

> "The President shall, at stated times, receive for his services a compensation, which shall neither be increased nor diminished during the period for which he shall have been elected, and he shall not receive within that period any other emolument from the United States, or any of them."

But objection based upon this provision is circular in its reasoning, except insofar as it applies to the blank typing paper and materials upon which the Presidential records are inscribed. For the records themselves are given to the President as an "emolument" only if one assumes that they are not the property of the President from the very moment of their creation. As for the blank typing paper and materials, which are of course of negligible

value, they can be regarded as consumables, like electricity or telephone service, provided for the conduct of Presidential business. In any event, the Constitutional provision can simply not be interpreted in such a fashion as to preclude the conferral of anything of value, beyond his salary, upon the President. An eminent authority on the subject states the following:

> As a matter of fact the President enjoys many more "emoluments" from the United States than the "compensation" which he receives "at stated times" --at least, what most people would reckon to be emoluments. Corwin, The President 348 n. 53.

He gives as examples of such additional emoluments provided by the Congress the use of personal secretaries and the right to reside in the White House. Id. at 348-49.

Another obstacle to Presidential ownership of the materials in question is their character as public documents, often secret and sometimes necessary for the continued operation of government. However, without speaking to the desirability of the established property rule (and there is pending in the Congress legislation which would apparently alter it--S. 2951, 93d Cong., 2d Sess., a bill "[t]o provide for public ownership of certain documents of elected public officials"), it must

be conceded that accommodation of such concerns can be achieved whether or not ownership of the materials in question rests with the former President. Historically, there has been consistent acknowledgement that Presidential materials are peculiarly affected by a public interest which may justify subjecting the absolute ownership rights of the ex-President to certain limitations directly related to the character of the documents as records of government activity. Thus, in Folsom v. Marsh, supra, Mr. Justice Story stated the following:

> In respect to official letters, addressed to the government, or any of its departments, by public officers, so far as the right of the government extends, from principles of public policy, to withhold them from publication, or to give them publicity, there may be a just ground of distinction. It may be doubtful, whether any public officer is at liberty to publish them, at least, in the same age, when secrecy may be required by the public exigencies, without the sanction of the government. On the other hand, from the nature of the public service, or the character of the documents, embracing historical, military, or diplomatic information, it may be the right, and even the duty, of the government, to give them publicity, even against the will of the writers. 2 Story at 113.

That portion of the Criminal Code dealing with the transmission or loss of national security information, 18 U.S.C. § 793, obviously applies to Presidential papers even when

they are within the possession of the former President.[4/] Upon the death of Franklin D. Roosevelt during the closing months of World War II, with full acceptance of the traditional view that all White House papers belonged to the President and devolved to his estate, some of the papers dealing with prosecution of the War (the so-called "Map Room Papers") were retained by President Truman under a theory of "protective custody" until December 1946. Matter of Roosevelt, 190 Misc. 341, 344, 73 N.Y.S. 821, 825 (Sur. Ct. 1947); Eighth Annual Report of the Archivist of the United States as to the Franklin D. Roosevelt Library (1947) p. 1. Thus, regardless of whether this is the best way to approach the problem, precedent demonstrates that the governmental interests arising because of the peculiar nature of these materials (notably, any need to protect national security information and any need for continued use of certain documents in the process of government) can be protected in full conformity with the theory of ownership on the part of the ex-President.

4/ Section 11 of Executive Order 11652 makes explicit provision for declassification of Presidential material that has been deposited in the Archives.

Because the principle of Presidential ownership of White House materials has been acknowledged by all three branches of the Government from the earliest times; because that principle does not violate any provision of the Constitution or contravene any existing statute; and because that principle is not inconsistent with adequate protection of the interests of the United States; I conclude that the papers and materials in question were the property of Richard M. Nixon when his term of office ended. Any inference that the former President abandoned his ownership of the materials he left in the White House and the Executive Office Building is eliminated by a memorandum to the White House staff from Jerry H. Jones, Special Assistant to President Nixon, dated the day of his resignation, asserting that "the files of the White House Office belong to the President in whose Administration they were accumulated," and setting forth instructions with respect to the treatment of such materials until they can be collected and disposed of according to the ex-President's wishes. We are advised that the materials previously deposited with the Administrator of General Services were likewise transmitted and received with the understanding

more extensive factual and historical inquiry, which your need for this opinion does not permit. Of course, even if such inquiry should show that these particular documents have been regarded as Government property, that conclusion would not support a generalization of Government ownership with respect to the much more extensive other material covered by this opinion, as to which the Presidential practice and congressional acquiesence are clear.

As to the obligations of the Government with respect to subpoenas and court orders directed to the United States or its officials pertaining to the subject materials: Even though the Government is merely the custodian and not the owner, it can properly be subjected to court directives relating to the materials. The Federal Rules of Criminal Procedure authorize the courts, upon motion of a defendant, to order the Government to permit access to papers and other objects "which are within the possession, custody or control of the government. . . ." Fed. R. Crim. P. 16(b). A similar provision is applicable with regard to discovery in civil cases involving material within the "possession, custody or control" of a party (including the Government)

Fed. R. Civ. P. 34(a). In addition, in both criminal and civil cases, a subpoena may be issued directing a person to produce documents or objects which are within his possession, but which belong to another person. Fed. R. Crim. P. 17(c); Fed. R. Civ. P. 45(b). See, e.g., Couch v. United States, 409 U.S. 322 (1973); Schwimmer v. United States, 232 F.2d 855, 860 (8th Cir., 1956), cert. denied, 352 U.S. 833; United States v. Re, 313 F. Supp. 442, 449 (S.D.N.Y. 1970). I advise you, therefore, that items included within the subject materials properly subpoenaed from the Government or its officials must be produced; and that none of the materials can be moved or otherwise disposed of contrary to the provisions of any duly issued court order against the Government or its officials pertaining to them. Of course both the former President and the Government can seek modification of such subpoenas and orders, and can challenge their validity on Constitutional or other grounds.

Respectfully,

Wm B Saxbe

Attorney General

THE WHITE HOUSE

WASHINGTON

September 10, 1974

Dear Mr. Attorney General:

You are hereby authorized to release for publication your opinion rendered to me on September 6, 1974 concerning the ownership of certain papers and other historical materials retained by the White House Office during the administration of former President Nixon.

Sincerely,

Philip W. Buchen

Philip W. Buchen
Counsel to the President

Honorable William B. Saxbe
The Attorney General
Department of Justice
Washington, D. C. 20530

THE WHITE HOUSE

WASHINGTON

September 10, 1974

Re: United States v. National Broadcasting Company, Inc., (Civil 72-819-RJK C.D. Cal.); United States v. Columbia Broadcasting System, Inc., et al., (Civil 72-820-RJK C.D. Cal.); United States v. American Broadcasting Companies, Inc., (Civil 72-821-RJK C.D. Cal.)

Dear Mr. Kauper:

Your letter to me of this date requests answers to five questions which are needed for your response to the court's order in the above referenced case on September 16, 1974. As I am sure you are aware, it has not been possible to furnish the information in question until their legal status was determined by the Attorney General's opinion of September 7, 1974 and the letter of agreement between former President Nixon and GSA Administrator Sampson dated September 6, 1974 ("Nixon-Sampson Agreement"). Accordingly, the files in question are not within the custody or control of the White House and can only be provided in accordance with the above Nixon-Sampson Agreement, which, of course, makes provision for compliance with court orders.

The answer to your first question ("Does your staff, or anyone, have the necessary access to the documents and tapes that is required for an answer?") is that only Mr. Nixon or his authorized representative now has such access.

Your second question is: "Approximately how many documents and how many tapes, sent or received during the period October 17, 1969 to December 31, 1972, are involved?" No one on the White

House staff now or, I am informed, at any time since the court's order issued, has had the knowledge or information necessary to answer this question. Given the very broad scope of the information sought in the interrogatories set forth in Mr. Silberman's letter of June 13, 1974 to Mr. Buzhardt, it would be impossible to answer this question without examining virtually every document and tape covered by this time period.

Your third question is whether there is "a subject matter index to the files in question." There is a subject matter index to the central files of the Nixon White House but the index itself would not necessarily be in sufficient detail to disclose the existence of all the information sought in the interrogatories. That index by no means covers all of the Nixon papers for the time period involved, for which there is no comprehensive index to my knowledge, and Mr. Buzhardt has informed me that he is not aware of any such index.

Your fourth question is whether there is a subject matter index to the tapes. The answer is no.

Sincerely,

Philip W. Buchen

Philip W. Buchen
Counsel to the President

Honorable Thomas E. Kauper
Assistant Attorney General
Antitrust Division
Department of Justice
Washington, D. C. 20530

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SEP 10 1974

Honorable Philip W. Buchen
Counsel to the President
The White House
Room 106, Old Executive Office Bldg.
Washington, D.C. 20500

Attention: Dudley H. Chapman, Esquire

Re: United States v. National Broadcasting Company, Inc., (Civil 72-819-RJK C.D. Cal.); United States v. Columbia Broadcasting System, Inc., et al., (Civil 72-820-RJK C.D. Cal.); United States v. American Broadcasting Companies, Inc., (Civil 72-821-RJK C.D. Cal.)

Dear Mr. Buchen:

Reference is made to the Department's letters of June 13, June 21, June 22, August 5, and August 21, 1974, concerning the above cases. These letters all related to the Court's order of July 17, 1974, directing the Government to respond to defendants' interrogatories concerning White House documents and tapes relating to specified matters. We requested that the information sought in the defendants' interrogatories be furnished to us so as to comply with the Court's order.

In view of the Attorney General's opinion of September 7, 1974, and the letter agreement between former President Nixon and GSA Administrator Sampson dated September 6, 1974, it is now requested that your office provide us with a statement which will deal with the feasibility of your staff's providing us with a response to defendants' interrogatories. In that connection, it would be appreciated if the statement would deal with the following questions:

(1) Does your staff, or anyone, have the necessary access to the documents and tapes that is required for an answer?;

(2) Approximately how many documents and how many tapes, sent or received during the period October 17, 1969, to December 31, 1972, are involved?;

(3) Is there a subject matter index to the documents in question?; and

(4) Is there a subject matter index to the tapes?

Since some response must be made to the Court and defendants by next Monday, September 16, 1974, it would be very much appreciated if you would give these questions your urgent attention.

Sincerely yours,

THOMAS E. KAUPER
Assistant Attorney General
Antitrust Division

THE WHITE HOUSE

WASHINGTON

September 10, 1974

Re: United States v. National Broadcasting Company, Inc., (Civil 72-819-RJK C.D. Cal.); United States v. Columbia Broadcasting System, Inc., et al., (Civil 72-820-RJK C.D. Cal.); United States v. American Broadcasting Companies, Inc., (Civil 72-821-RJK C.D. Cal.)

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Your fourth question is whether there is a subject matter index to the tapes. The answer is no.

Sincerely,

Philip W. Buchen

Philip W. Buchen
Counsel to the President

Honorable Thomas E. Kauper
Assistant Attorney General
Antitrust Division
Department of Justice
Washington, D. C. 20530

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SEP 10 1974

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The White House
Room 106, Old Executive Office Bldg.
Washington, D.C. 20500

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Sincerely yours,

THOMAS E. KAUPER
Assistant Attorney General
Antitrust Division

THE GENERAL COUNSEL OF THE TREASURY
WASHINGTON, D.C. 20220

September 13, 1974

Re: U.S. v. Mitchell, et al,
United States District Court
for the District of Columbia
No. 74-110

Dear Mr. Jaworski:

I understand that the subpoena in the above matter served on H. S. Knight, Director, United States Secret Service, on September 4, 1974, has been referred to your office for action. This letter will constitute your authorization to represent Mr. Knight in connection with the subpoena and to make an appropriate motion to quash the subpoena.

Sincerely yours,

(Signed) Richard R. Albrecht

Richard R. Albrecht

Mr. Leon Jaworski
Watergate Special Prosecutor
1425 K Street, N. W.
9th Floor
Washington, D. C. 20005

ATTN: Mr. Philip Lacovara

WATERGATE SPECIAL PROSECUTION FORCE
United States Department of Justice
1425 K Street, N.W.
Washington, D.C. 20005
September 13, 1974

Honorable Philip W. Buchen
Counsel to the President
The White House
Washington, D. C.

Dear Mr. Buchen:

I am writing to set forth our understanding of the situation as it was discussed and agreed during the meeting yesterday afternoon attended by Messrs. Ruth, Vorenberg and Kreindler of our Office, Messrs. Silberman and Wilderotter of the Department of Justice, Mr. Casselman of the White House legal staff, and the two of us.

At that meeting we explained our objections and reservations concerning the basis and thrust of the Attorney General's opinion dated September 6, 1974, and the validity and effect of the letter agreement between former President Nixon and General Services Administrator Sampson, also dated September 6, 1974. Specifically, we noted that, even assuming the correctness of the Attorney General's opinion on the private ownership question, the opinion implies but does not develop a basis for guaranteeing the government's right to utilize those materials for the present legitimate interests of the public. The letter agreement, however, makes no effort to secure or protect these public interests but rather purports to cede to Mr. Nixon the right of exclusive access to all tapes and documents and authorizes him to withdraw or destroy any or all of the tapes and documents without ever making them available for review by the government or people of the United States. We explained our reasons for believing that the September 6 agreement violates various provisions of the Presidential Libraries Act, on which it is apparently based, as well as the spirit of that statute.

In light of these serious problems, I believe you have granted our request that no further action that might possibly affect adversely the interests of this Office will be taken pending further discussions. In particular, none of the files compiled during the Administration of former President Nixon will be moved from their present locations nor will any steps be taken to implement the arrangement of September 6, such as by giving either Mr. Nixon or Mr. Sampson any "keys" to those files or any other access to them.

I believe it is important to state this agreement in the clearest terms possible. On August 14, 1974, I wrote to Mr. Buzhardt, then Counsel to the President, that "the status quo should be maintained and no materials of any type should be relinquished from the custody or control of the White House." (A copy of this letter is attached.) On August 15, 1974, members of our Office met with you and Mr. Buzhardt to discuss this request and it was agreed at that time that none of the files in question would be moved pending further discussions. You authorized us to release a public statement to that effect and we did so, explaining that we were satisfied with that arrangement.

Nevertheless, the agreement of September 6, 1974, about which we were not consulted in any way, purports to recognize that Mr. Nixon was, as of that date, the "custodian" of the files "with sole right and power of access thereto." Apart from the questions we have raised about the legal validity of that agreement, it purports to have transferred legal custody of the tapes and documents to Mr. Nixon and, if valid, may seriously complicate our ability to obtain prompt and effective access to evidence necessary to investigations under our jurisdiction.

Thus, until we can pursue the alternatives that were discussed at yesterday's meeting for clarifying or altering the terms or effect of the September 6 letter agreement, we would appreciate it if the physical arrangements existing at present not be modified in any way. It is our understanding that you have agreed to this request.

Please let me know if the agreement set forth above does not coincide with the discussions as you understand them.

Sincerely,

Philip A. Lacovara
Counsel to the Special
Prosecutor

Enclosure

cc: Honorable Laurence H. Silberman
Deputy Attorney General
Department of Justice
Washington, D. C. 20530

WATERGATE SPECIAL PROSECUTION FORCE
United States Department of Justice
1425 K Street, N.W.
Washington, D.C. 20005

PAL:sek

August 14, 1974

J. Fred Buzhardt, Esq.
Counsel to the President
The White House
Washington, D. C.

Dear Mr. Buzhardt:

When members of our office met with you and Mr. St. Clair yesterday you indicated that the process of transition between Administrations would involve a supplemental appropriation and the appointment of a liaison official between the President and government agencies, including the White House and the Special Prosecutor's office. It was our understanding that this process would take some time, and that in particular no documents or materials to which the former President might be entitled would be or could be removed from the White House files until that time. You also then advised us of your judgment that, by custom, materials in the White House files become the "private property" of a former President when he leaves office.

As you know, materials in the White House files are of extreme importance to a number of investigations within the jurisdiction of this office. In fact, at the time of President Nixon's resignation, there were outstanding a considerable number of unresolved requests from us for access to specific tapes or documents or to categories of tapes and documents. The scope of a former President's entitlement to materials that, during his incumbency, were official White House files is, in our judgment, not free from doubt. Regardless of that question, however, the government, including the Special Prosecutor's office and the grand jury, certainly has a legitimate interest in access to these materials to the extent that they relate to continuing business of the government.

We therefore request that, until White House counsel, representatives of the former President, and this office can explore and hopefully agree upon procedures for assuring access to relevant evidence now located in White House files, the status quo should be maintained and no materials of any type should be relinquished from the custody or control of the White House.

We understand that, on the basis of your discussion with General Haig, he will explore this matter further with the Special Prosecutor and that for the present there will be no change in the status or location of the materials in question.

Sincerely,

Philip A. Lacovara
Counsel to the Special
Prosecutor

THE WHITE HOUSE

WASHINGTON

September 20, 1974

Dear Mr. Rhoads:

Confirming our recent conversation, in which William Casselman also participated, I set forth the following points concerning the letter agreement between former President Nixon and Administrator Arthur F. Sampson of the General Services Administration dated September 6, 1974:

1) A principal reason that I had recommended acceptance of this agreement as to disposition of tape recordings which are covered by paragraphs 8 and 9 was based upon my understanding of the clandestine nature of their origin. It is my belief that such recordings made of conversations engaged in by persons of whom one or more were unaware of the recordings are so offensive and contrary to their interests in personal privacy and in freedom of expression as to justify or even require treatment different from that accorded other materials covered by the agreement. The different treatment specified in the agreement, while allowing for Court-ordered disclosure to appropriate parties over a 5-year period, does preclude other access except as conducted or directed by the former President in accordance with specified safeguards involving the General Services Administration and otherwise allows, and ultimately requires, destruction of the tapes over a second 5-year period.

2) You correctly pointed out that this different treatment of such tape recordings results in cutting off the possibility for historians to learn the conversational contents of the tapes at some future time, even so far in the future as to make it unlikely any persons involved would then be living. You also expressed your opinion that this was a very objectionable result from your point of view and from that of other archivists and historians. I assured you that you were under no obligation to refrain from expressing this opinion freely so long as you hold it, and that I would be willing to assure anyone to that effect who inquires. Also, you may use this letter to overcome any possible

implication that your undertaking or authorizing steps to implement the agreement as written, whether in the initial 5-year period or afterwards, may constitute a retreat from the opinion you expressed.

3) I suggested to you that the historical and archival community may wish to consider fully, under appropriate organizational auspices, the problems posed by the surreptitious use of modern recording techniques to make a "record for history" of private conversations. The problem occurs when not all parties to the conversation have been made aware a recording is in process and also when none of the parties is aware the conversation is being recorded. We discussed generally the concerns to be addressed and their relations to problems, present and future, going far beyond those caused by only the tape recordings covered by the agreement in question. However, those are matters which you and others who may want to take up the suggestion would independently want to determine.

Thank you very much for our meeting and for your thoughtful attention to the points raised.

Sincerely yours,

Philip W. Buchen
Counsel to the President

The Honorable James B. Rhoads
Archivist of the United States
General Services Administration
8th and Pennsylvania Avenue, N.W., Room 111
Washington, D. C. 20408

cc: William Casselman
Administrator Arthur F. Sampson

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COURTNEY A. EVANS
OF COUNSEL

September 20, 1974

Philip W. Buchen, Esquire
Counsel to the President
The White House
Washington, D. C. 20500

Dear Mr. Buchen:

This letter is in reference to a letter dated September 18, 1974, to J. Fred Buzhardt, Jr., Esquire, from Richard Ben-Veniste, Assistant Special Prosecutor, and a letter dated September 13, 1974, to yourself from Mr. Richard Ben-Veniste.

With reference to the letter of September 18, as the attorney for former President Richard Nixon I have no objection to your making available to Mr. Ben-Veniste the five dates specified from President Nixon's daily diary. I would object to an informal turning over of the tape recording of the conversation between President Nixon and John W. Dean, February 28, 1973. Since a copy of that tape has already been furnished to the Special Prosecutor it would seem that the proper way to proceed would be for a subpoena to be served on President Nixon to produce that tape at which time it could be produced pursuant to the procedures which have already been established pursuant to a prior subpoena issued by the Special Prosecutor.

With respect to the items requested in the September 13, 1974, letter, I have no objection to turning over and hereby designate Mr. Jerry Jones, Staff Secretary, White House, to obtain the documents in Item Nos. 1, 2, 3 if available, 5 and 6. Once they have been located and after I have examined them

I believe I will have no objection to their being turned over.

With respect to Item No. 4, reflecting the manifest of Air Force One, if there are security problems involved in making such information available then I would, of course, object to turning over that information.

With respect to Item No. 7 which will require a substantial amount of work, I designate Mrs. Gertrude T. Fry, Librarian, White House, to examine the documents and obtain the information there requested. Again upon my examination it is believed that there will be no objection to it being turned over.

With respect to Item No. 8 which is the blanket request for the President's daily diary from June 17, 1972 through December 31, 1973, I would, of course, object to such a blanket request but would be available to discuss any specific requests for diaries as to specific meetings or dates.

If you have any questions concerning the above, please do not hesitate to contact the undersigned.

Sincerely yours,

Herbert J. Miller, Jr.

HJM/psb

WASHINGTON, D.C. 20548

B-149372 September 20, 1974

See p. 13 re documents agreement

The Honorable Joseph M. Montoya, Chairman
Subcommittee on Treasury, Postal Service
and General Government
Committee on Appropriations
United States Senate

Dear Mr. Chairman:

This refers to your letter of September 12, 1974, wherein you request our views on certain questions arising in connection with the Subcommittee's consideration of two proposed appropriations to the General Services Administration (GSA) which would provide services, facilities, and benefits for former President Richard M. Nixon.

Our opinion is requested concerning the eligibility of former President Nixon for services and facilities under the Presidential Transition Act of 1963; limitations upon nonreimbursable details provided to him under the Presidential Transition Act; and the validity of an agreement between the GSA Administrator and former President Nixon regarding the preservation of the latter's Presidential historical materials. Each of these questions in the order here presented is treated separately below.

Eligibility of former President Nixon under the Presidential Transition Act

We have reviewed the correspondence between GSA and the Department of Justice which was enclosed with your letter to us. In a letter to the Attorney General dated August 12, 1974, the GSA Administrator expressed the view that the Presidential Transition Act does apply in former President Nixon's situation, and requested the Attorney General's opinion on this point. In a letter to the Administrator dated August 15, 1974, the Acting Assistant Attorney General, Office of Legal Counsel, held that the Transition Act is applicable to former President Nixon. While this matter is by no means clear, we agree, for the reasons stated hereinafter, with the conclusion expressed by GSA and the Department of Justice.

The purpose of the Presidential Transition Act of 1963, approved March 7, 1964, Pub. L. 88-277, 78 Stat. 153, 3 U.S.C. 102 note, as stated in section 2 thereof, is "to promote the orderly transfer of the executive power in connection with the expiration of the term of office of a President and the inauguration of a new President." To this end, section 3(a) authorizes the Administrator of General Services to provide, upon request, to each President-elect and each Vice-President-elect, for use in connection with his preparations for the assumption of official duties, necessary services and facilities including (1) suitable office space appropriately equipped and furnished; (2) compensation for office staffs, including the detail of Federal employees; (3) payment of experts or consultants or organizations thereof; (4) travel and subsistence allowances, including rental of Government or hired motor vehicles; (5) communications services; (6) printing and binding expenses; and (7) reimbursement to the postal revenues for the value of mailing privileges authorized under subsection 3(d). Section 4 of the Act provides in part:

> "The Administrator is authorized to provide, upon request, to each former President and each former Vice President, for a period not to exceed six months from the date of the expiration of his term of office as President or Vice President, for use in connection with winding up the affairs of his office, necessary services and facilities of the same general character as authorized by this Act to be provided to Presidents-elect and Vice-Presidents-elect. * * *"

Section 5 authorizes the appropriation of such sums as may be necessary for carrying out the purposes of the Act but not to exceed $900,000 "for any one Presidential transition * * *."

There are certain fairly specific limitations upon the applicability of the Presidential Transition Act. For example, under the definitions of "President-elect" and "Vice-President-elect" contained in subsection 3(c), services and facilities are available only to persons to accede to such offices as successful candidates in a general Presidential election. Also, incumbent Presidents and Vice Presidents who are reelected are not eligible for transition services and facilities; nor would a new Vice-President-elect who is the running mate of a reelected incumbent President. Cf., H. Rept. No. 301, 88th Cong., 1st sess., 5; S. Rept. No. 448, 88th Cong., 1st sess., 3.

In general terms, and even beyond that portion of the stated purpose in section 2, quoted previously, it is obvious from the basic

statutory scheme and legislative history that the Transition Act was enacted only in consideration of a transition occurring through the normal electoral processes. Clearly, no thought was given to the possibility of a Presidential resignation, and, accordingly, it may fairly be said that Congress never specifically intended to make transition services and facilities available to a former President who had resigned. This observation might reasonably be considered sufficient to justify the conclusion that former President Nixon is not eligible for such services and facilities. However, we believe that the absence of a specific affirmative legislative intent in this regard need not be considered dispositive provided that the furnishing of transition services and facilities to a former President by resignation, albeit not foreseen as a possibility, may nonetheless be considered consistent with the express terms of the Transition Act and its general purposes. We further believe that both of these conditions are satisfied.

As noted previously, section 4 of the Transition Act authorizes the provision "to each former President" of services and facilities of the same general character as those authorized for Presidents-elect and Vice-Presidents-elect for a period not to exceed six months "from the date of the expiration of his term of office * * *." While the Transition Act itself does not elaborate upon the quoted language, consideration must be given in this regard to the so-called "Former Presidents Act," approved August 25, 1958, Pub. L. 85-745, 72 Stat. 838, as amended, 3 U.S.C. 102 note. This statute authorizes the provision to each former President of a pension, office space, and staff allowances for the remainder of his life. A pension is also provided for the widow of a former President.

The relationship between the Transition Act and the Former Presidents Act appears significant in several respects. First, subsection (f) of the Former Presidents Act defines a "former President" as an individual who has held the office of President and whose service in that office terminated other than by removal through impeachment and conviction. Secondly, section 4 of the Transition Act expressly provides that the Former Presidents Act, except for the pension provisions, shall not become effective with respect to a former President until six months after the expiration of his term of office as President. This six-month delay in the operation of the Former Presidents Act was included on the assumption that a former President would, for the first six months after he leaves office, receive services and facilities under the Transition Act, and, therefore, was designed to avoid duplication and confusion resulting from the simultaneous operation of both acts during the six-month period. See H. Rept. No. 301, supra, 2-3; S. Rept. No. 448, supra, 4.

In view of the integral relationship between the two statutes, we believe it is reasonable that the definition of "former President" contained in the Former Presidents Act should be considered applicable as well under section 4 of the Transition Act. Former President Nixon would, of course, fall within this definition since he was not actually removed from office by impeachment and conviction.

A related matter is whether former President Nixon's "term of office" has expired for purposes of the Transition Act. The concept of "term of office" has different meanings in different contexts. See generally 67 C.J.S., Officers, §42, p. 196; 41 Words and Phrases, "Term of Office," pp. 621-628. While none of the contexts presented in the cited references are particularly analogous to the present consideration, there is some authority to the effect that a fixed term of office expires when the occupant leaves that office. See, for example, the following passage from the opinion of the New Jersey Supreme Court in Board of Chosen Freeholders v. Lee, 76 N.J.L. 327, 70 A. 925, 926 (1908):

> "The words 'term of office' may in a sense be used to indicate the statutory period for which an officer is elected. We speak of the term of office of the President of the United States and the term of office of the Governor of the state, meaning that the first was four years and the latter three years; but the words 'term of office' may also mean a period much shorter than that for which the particular officer was elected. His term of office may be terminated before the expiration of the statutory period for which he was elected by impeachment, or resignation, or death of the particular officer. The happening of these contingencies is an implied limitation upon the right of the elected officer to continue in office for the period for which he would otherwise be entitled to hold. When such a contingency occurs, the officer's term expires, there is a vacancy, and upon the appointment or election to fill the vacant office the term of another officer begins. To assert that a term of office of an impeached or deceased officer continues is to assert that there may be two terms of office running together, although the office can be filled but by a single person. * * *"

It seems to us that the relationship between the Former Presidents Act and the Transition Act sheds further light upon this matter. Former President Nixon's term of office either expired on the date of his resignation or it must, in effect, be viewed as continuing until January 20, 1977. The latter approach would produce the incongruous result, by literal application of section 4 of the Transition Act, that he would not qualify for application of the Former Presidents Act, other than the pension provision, until six months after January 20, 1977. Even if former President Nixon's term of office is considered to have expired on the date of his resignation, section 4 of the Transition Act would by its terms still delay operation of the Former Presidents Act in his case, other than the pension, for six months. This result, coupled with a holding that the substantive provisions of the Transition Act do not apply, would also be incongruous since, as noted previously, the only basis for the six-month delay is the assumption that a former President is receiving services and facilities under the Transition Act during this period.

For the foregoing reasons, we believe that former President Nixon may be considered eligible for services and facilities consistent with the express terms of the Transition Act; and, as indicated above, the opposite conclusion would seem to produce results which appear clearly at odds with a reasonable construction of the two statutes taken together. It is also our view that provision of transition services and facilities to a President who has resigned would be consistent with the general objectives of the Transition Act. As noted previously, section 2 of the Act states its purpose to be to promote the orderly transfer of executive power "in connection with the expiration of the term of office of a President and the inauguration of a new President." Section 2 goes on to state, in part:

> "* * * The national interest requires that such transitions in the office of President be accomplished so as to assure continuity in the faithful execution of the laws and in the conduct of the affairs of the Federal Government, both domestic and foreign. Any disruption occasioned by the transfer of the executive power could produce results detrimental to the safety and well-being of the United States and its people. Accordingly, it is the intent of the Congress that appropriate actions be authorized and taken to avoid or minimize any disruption. * * *"

Simply stated, we can perceive of no reason why a transition resulting from the resignation of a President would be any less significant in terms of the foregoing considerations as stated in section 2 than a transition following a general election; nor does it appear that the needs of a former President for services and facilities in connection with winding up his official affairs would be any less severe merely because he had resigned. On the contrary, such considerations and needs might even be considered more compelling following a Presidential resignation.

In sum, while former President Nixon's resignation gives rise to a unique situation in consideration of the Presidential Transition Act, it is our view that, on balance, a holding that he is eligible for transition services and facilities is less troublesome in terms of the design, operation, and general objectives of the Act than would be the contrary conclusion.

The analysis and conclusions expressed above do not take into account the particular circumstances leading to former President Nixon's resignation since such circumstances are, in our view, irrelevant to the legal issues presented. Thus the legal issues would necessarily be the same regardless of the reasons for a President's resignation. Finally, it is noted that the Presidential Transition Act is essentially operative on the basis of appropriations made pursuant to the authorization of section 5. Whether or to what extent appropriations are actually justified in the case of former President Nixon is a separate matter which must, of course, be determined by the Congress.

You also request our comments concerning the amount of nonreimbursable details under that portion of paragraph 3(a)(2) of the Presidential Transition Act which states, with reference to staffing for Presidents-elect and Vice-Presidents-elect:

> "* * * Provided, That any employee of any agency of any branch of the Government may be detailed to such staffs on a reimbursable or nonreimbursable basis with the consent of the head of the agency; and while so detailed such employee shall be responsible only to the President-elect or Vice-President-elect for the performance of his duties: Provided further, That any employee so detailed shall continue to receive the compensation provided pursuant to law for his regular employment, and shall retain the rights and privileges of such employment without interruption. * * *" (Emphasis added.)

The same authority to detail Federal employees clearly applies to a former President or Vice President under section 4 of the Act since it is a service "of the same general character as authorized" for the incoming officials; and, in fact, section 4 expressly provides:

> "* * * Any person appointed or detailed to serve a former President or former Vice President under authority of this section shall be appointed or detailed in accordance with, and shall be subject to, all of the provisions of section 3 of this Act applicable to persons appointed or detailed under authority of that section. * * *"

The basic issue which arises in this regard concerns the relationship between the provision for nonreimbursable details and the overall $900,000 limitation upon appropriations authorized by section 5 of the Act, which provides:

> "There are hereby authorized to be appropriated to the Administrator such funds as may be necessary for carrying out the purposes of this Act but not to exceed $900,000 for any one Presidential transition, to remain available during the fiscal year in which the transition occurs and the next succeeding fiscal year. The President shall include in the budget transmitted to the Congress, for each fiscal year in which his regular term of office will expire, a proposed appropriation for carrying out the purposes of this Act."

Thus the question is whether the cost or value of nonreimbursable details, in terms of the salaries represented, is subject to the $900,000 appropriation authorization limitation under section 5 or, more specifically, any amount which is actually appropriated under section 5.

Absent an overall monetary limitation upon appropriations under the Transition Act, the express authority to detail employees on a nonreimbursable basis would clearly operate without restriction in terms of cost or value. In clusion of the appropriation authorization limitation and the legislative history of the Act in this regard are somewhat perplexing in this respect. The original version of the Transition Act legislation included the authority to detail on a reimbursable or nonreimbursable basis. On the other hand, the original bill did not impose a limitation upon appropriations, authorizing instead appropriation of "such funds as may be necessary for carrying out the purposes of this Act." See H.R. 4638, 88th Cong., 1st sess., as introduced on March 7, 1963. The House Committee on Government Operations added a $1.3 million appropriation authorization limitation in the version of the bill which it reported; and some monetary limitation remained in the legislation thereafter. See H.R. 4638 as reported May 15, 1963. However, we find no indication that the Congress ever considered the effect of a monetary limitation upon the provision expressly permitting nonreimbursable details.

At the same time, the legislative history clearly demonstrates that throughout consideration of this legislation the appropriation authorization limitation was viewed as representing the full scope and value of services and facilities under the Act. Thus the House Committee on Government Operations, in adopting a $1.3 million limitation, observed, H. Rept. No. 301, 88th Cong., 1st sess., 4:

> "The limitation of $1,300,000 for expenditures in any one fiscal year seems reasonable in view of the estimates presented. This can be changed by future legislation if experience so dictates. Any request for funds must, of course, be strictly justified before the appropriation is made by Congress."

During floor consideration, Congressman Fascell, the sponsor of the bill, stated, 109 Cong. Rec. 13350 (July 25, 1963):

> "The committee added to the bill a limitation on expenditures of $1,300,000 for all of the purposes of the bill in any one fiscal year. This seems a reasonable figure considering both incoming and outgoing Presidents

and Vice Presidents and was based on the best estimates available to us. Of course, the specific figure to be appropriated in any year must be fully justified before the Appropriations Committee."

Thereafter the following colloquy occurred, id. at 13351:

"Mr. GROSS. * * * Can the gentlemen from Florida tell me, if he will, please, how many $100-a-day consultants it is expected will be employed to take care of the incoming President and Vice President in 1964?

"Mr. FASCELL. I may say to the gentleman from Iowa whatever the President can substantiate in his budget request and whatever he can get out of the Committee on Appropriations and whatever may be necessary or required within the limitation of the authorization under this act.

"Mr. GROSS. It is wide open insofar as this bill is concerned, and insofar as the committee is concerned, that is, the Committee on Government Operations?

"Mr. FASCELL. No, I would not say it is wide open at all. We do have a limit on the authorization and we do follow the normal appropriation procedure."

The Senate Committee on Government Operations retained the House-passed $1.3 million limitation in the version of the bill which it reported. The Senate Committee incorporated the explanation of the House report in this regard. See S. Rept. No. 448, 88th Cong., 1st sess., 3. The Senate report also set forth, as had the House report, recommendation No. 8 of the President's Commission on Campaign Costs, which read in part:

"We endorse proposals to 'institutionalize' the transition from one administration to another when the party in power changes. Important reasons for doing so exist wholly aside from the costs to the parties. The new President must select and assemble the staff to man his administration, and they in return must prepare themselves for their new responsibilities.

"We recommend that the outgoing President be authorized to extend needed facilities and services of the Government to the President-elect and his associates. We also recommend that funds be appropriated, to be spent

through normal governmental channels, for that purpose." Id. at 2. (Underscoring supplied.)

During floor consideration in the Senate, an amendment was adopted which reduced the appropriation authorization limitation to $500,000, 109 Cong. Rec. 19737 (October 17, 1963); and the conferees agreed upon a compromise figure of $900,000. H. Rept. No. 1148, 88th Cong., 2d sess., 2.

Remarks during consideration of the conference report in each House again reflect the understanding that the limitation was comprehensive. In the Senate, Senator Miller observed with reference to the limitation, 110 Cong. Rec. 3397 (February 24, 1964):

> "* * * the Senator from Washington pointed out, in the conference, that this amount is a ceiling; it is not necessarily the amount of money that will be appropriated. This is an authorization bill; and the Appropriation Committees may not approve amounts up to the ceiling thus set. The expenditures may not come anywhere near that amount. So perhaps the Senator from Georgia and I will, later, have an opportunity together to do something about getting this amount back to the amount which we think it really should be."

Senator Jackson added:

> "I desire to point out that we feel that this is definitely a ceiling; and in my judgment--speaking only for myself, although I am sure I also speak for the Senator from Iowa [Mr. Miller]--they can get along with well under the $900,000 figure." Id.

On the House side, Congressman Fascell stated, 110 Cong. Rec. 3539 (February 25, 1964):

> "* * * In the conference we agreed on $900,000 as a reasonable amount, with the expectation that if expenditures went higher than that amount, as we had anticipated in the authorization of the House bill, we could by way of supplemental request take care of the needed additional appropriation."

Again, a colloquy occurred between Congressman Gross and Congressman Fascell, id. at 3540:

"Mr. GROSS. Is the $900,000 to cover both the President-elect and Vice-President-elect?

"Mr. FASCELL. Yes.

"Mr. GROSS. Would this cover the cost of jet planes and the Cadillacs to be assigned to them during the interim period?

"Mr. FASCELL. If such were assigned to them, I would assume they would be covered in the budget request.

"Mr. GROSS. This will not be in addition thereto?

"Mr. FASCELL. Whatever the services are, itemized in the bill, are authorized and which would be covered by the appropriation. Since the authorization fixes those services, one could not go beyond that."

As indicated previously, the legislative history leaves no doubt that the appropriation authorization limitation was enacted with the intent that it would cover all services and facilities provided under the Transition Act. This intent is further reflected in the second sentence of section 5, relating to budget submissions. We believe that this manifestation of congressional intent is sufficient to overcome any implicit authority under the provisions of the Act to furnish services or facilities other than the detail of Federal employees on a nonreimbursable basis. Nevertheless, we must conclude that this legislative history is simply inconsistent with the Act's express grant of authority for nonreimbursable details. Accordingly, it is our opinion that nonreimbursable details under the Transition Act are not subject to monetary limitations under section 5 or any amount appropriated pursuant to section 5. Since, for the reasons stated above, it appears that this result may not have been intended, the Congress might wish to consider amending paragraph 3(a)(2) of the Transition Act to delete the reference to details on a nonreimbursable basis.

In this regard, it is our understanding that nonreimbursable services and facilities in addition to the detail of employees—such as use of existing Federal office space, equipment, and communications

facilities—have in the past been provided under the Transition Act. While our decision at 48 Comp. Gen. 786, 789 (1969), referred to in the text hereinafter, might be considered as implicitly approving such additional nonreimbursable services and facilities, this was not intended and that decision should not be so viewed.

Notwithstanding the absence, in our view, of a monetary limitation, details of Federal employees are clearly subject to certain other conditions and restrictions under the Transition Act. First, as stated in the first proviso of paragraph 3(a)(2), such details may be made only with the consent of the head of the employing agency; although we know of no particular formalities which would apply in this regard.

Second, definite time limitations apply. By virtue of section 3(b), a Federal employee could be detailed to the staff of a President-elect or Vice-President-elect only for a period commencing on the day after a general Presidential election and ending not later than the date of inauguration. In the case of a former President or Vice President, the detail would be limited by section 4 to a period not to exceed six months following the date of expiration of the term of office, or, in former President Nixon's case, the date of his resignation. These time limitations would apply even if appropriations under the Act were made available for a longer period. See 48 Comp. Gen. 786, 789, (1969) (copy enclosed).

Finally, such details would be subject to the general limitations upon the purposes for which any services or facilities are provided pursuant to the Transition Act. In the case of a President-elect or Vice-President-elect, section 3(a) authorizes necessary services and facilities "for use in connection with his preparation for the assumption of official duties as President or Vice President * * *." Section 4 limits provision of services and facilities to a former President or Vice President to those necessary "for use in connection with winding up the affairs of his office * * *." See 48 Comp. Gen. 786, 789, supra; and our letter of September 11, 1974, to Congressman Joseph P. Addabbo, B-149372, page 2 (copy enclosed). In this regard, we feel constrained to suggest that the Subcommittee carefully review the list of Federal employees presently detailed to former President Nixon and the functions which they are to perform. For example, GSA's list of employees now detailed to former President Nixon (Revised Justification, dated September 10, 1974) includes a "butler" and a "maid" who are on the payroll of the Park Service, as well as three "military drivers." It is not apparent to us how such employees would be used by a former President in connection with winding up the affairs of his office.

Validity of an agreement between the GSA Administrator and former President Nixon regarding the preservation of the latter's Presidential historical materials

The September 6 agreement between former President Nixon and the Administrator of GSA provides in some detail for the disposition of Mr. Nixon's Presidential historical materials. The term "historical materials" in the agreement is assigned the meaning given it by 44 U.S.C. 2101, as including—

> "books, correspondence, documents, papers, pamphlets, works of art, models, pictures, photographs, plats, maps, films, motion pictures, sound recordings, and other objects or materials having historical or commemmorative value."

The stated purpose of the agreement is to preserve the materials until such time as Mr. Nixon's intention to donate a "substantial portion" thereof to the United States is consummated. His desire, in making the donation, is said to be that the materials be available, with appropriate restrictions, for research and study.

In 1950, legislation was first enacted authorizing the Administrator of General Services to accept for deposit—

> "the personal papers and other personal historical documentary materials of the present President of the United States, his successor, heads of executive departments and such other officials of the Government as the President may designate * * *,"

subject to restrictions specified by the depositors. Section 507(e) of the act of September 5, 1950, chapter 849, 64 Stat. 578, 588. The intent of this provision was to make it possible for the documents in question to be preserved by the Government with related official records and to be available for scholarly research. H. Rept. No. 2747, 81st Cong., 2d Sess., 15 (1950). Such materials had in the past often been dispersed and, sometimes, lost.

As enacted, the 1950 law did not provide for the Administrator to accept for deposit the papers of a former President, nor was there any provision for the establishment of depository libraries for Presidential papers apart from the National Archives. In 1955, legislation was enacted to achieve both these purposes. Act of August 12, 1955, ch. 859, 69 Stat. 695. Section 1 of the act of August 12, 1955, as amended, 44 U.S.C. 2107, authorizes the Administrator to accept for deposit--

> "the papers and other historical materials of any President or former President of the United States * * * subject to restrictions agreeable to the Administrator as to their use * * *."

The act also provides that:

> "The Administrator, in negotiating for the deposit of Presidential historical materials, shall take steps to secure to the Government, as far as possible, the right to have continuous and permanent possession of the materials * * *." 44 U.S.C. 2108(c).

The House Government Operations Committee report on H. J. Res. 330, 84th Congress, the derivative source of the act of August 12, 1955, states that:

> "The enactment of the resolution into law would end the lack of a systematic arrangement for the preservation and use of Presidential papers that has resulted in irreparable loss or dispersion of important bodies of Presidential documents during the 166 years of our Nation's existence. It would enable our Presidents and former Presidents to plan for the preservation of their papers at the place of their choice with the knowledge that the Government has made provision to receive them in the archives of the Nation with adequate provisions for their preservation, with proper safeguards for their administration, and with restrictions on their use that recognize and protect the President's rights." H. Rept. No. 998, 84th Cong., 1st. sess. 2 (1955).

The act reflects the recognition that papers and other materials generated and collected by a President in the course of his official duties may become his personal property. We note that the Attorney General has opined, in a letter to the President dated September 6, 1974, that it has apparently been "the almost unvaried understanding of all three branches of Government since the beginning of the Republic" as reflected in "the practices of our Presidents since the earliest times" that the papers and other materials of a former President are his personal property, subject only to certain limitations directly related to the character of the documents as records of Government activity such as, for example, security classification.

Under the September 6 agreement, Mr. Nixon retains legal and equitable title to the materials and sole control of access to and use of them for the present. He makes a gift to the Nation of the White House recordings effective September 1, 1979, although they are all to be destroyed September 1, 1984, or at his death, whichever first occurs, and he can order any of them destroyed after September 1, 1979. He expresses his intention to donate a portion of the other materials to the Nation, after he has reviewed them.

The various restrictions on the use of and access to the materials deposited with the Administrator are very broad. However, in negotiating such agreements the Administrator, it seems clear, is to be guided by the legislative goal, which is to secure to the Nation to the extent possible the use of Presidential historical materials, and to prevent their dispersion into private hands, or their loss.

In view of this responsibility of the Administrator, and of the broad discretion given him by 44 U.S.C. 2107 and 2108(c) we cannot say that the September 6 agreement is not valid. We have no basis to assume that the Administrator did not diligently seek to achieve the statutory objectives, or that it would have been possible to negotiate an agreement more favorable to the United States, particularly since the alternative may have been that Mr. Nixon would make no deposit of the materials but rather would assert his recognized right of ownership of them to the exclusion of any right of access by the United States. Accordingly, we consider the September 6 agreement to be a valid exercise of the Administrator's authority.

- - - - -

We trust that the foregoing is of assistance to the Subcommittee in its consideration of the pending appropriation requests.

Sincerely yours,

Comptroller General
of the United States

Enclosures

WHITE HOUSE STAGING AREAS

CENTRAL FILES MATERIAL
4052 Cubic Feet on 168 shipping pallets
OEOB Rooms 430, 431, 432, 433, 435, 437, 439
Key Lock; GSA Area Manager Dan Spaulding has the only key

CENTRAL FILES MATERIAL & WHITE HOUSE STAFF OFFICE FILES
1644 Cubic Feet on 69 shipping pallets
OEOB Rooms 423, 425, 427, 428
Key Lock; GSA Area Manager Dan Spaulding has the only key

WHITE HOUSE STAFF OFFICE FILES
1580 Cubic Feet on 74 shipping pallets
OEOB Rooms 417, 419, 421, 428
Key Lock; GSA Area Manager Dan Spaulding has the only key

WHITE HOUSE STAFF OFFICE FILES
312 Cubic Feet on 13 pallets
OEOB Room 438
Key Lock; Access Restricted to Office of Presidential Papers Personnel

CENTRAL FILES "CONFIDENTIAL FILE" (Under Alarm System)
1104 Cubic Feet on 46 pallets
OEOB Rooms 434-436, 443-445
Key Lock; Access Restricted to Office of Persidential Papers Personnel

WHITE HOUSE STAFF OFFICE "SENSITIVE" FILES (Under Alarm System)
424 Cubic Feet unpalletized
OEOB Room 405
Key Lock; Access Restricted to Office of Presidential Papers Personnel

September 20, 1974
Office of Presidential Papers

WHITE HOUSE VAULT AREAS

SPECIAL FILES
1053 cubic feet
OEOB Rooms 84-84 & 522
Gertrude Brown Fry is custodian

STAFF PERSONNEL FILES
105 cubic feet
OEOB Rooms 41-43
Jane Dannenhauer is custodian

NSC NIXON PRESIDENTIAL FILE
450 cubic feet (estimate)
OEOB 205
Ed Roberts is custodian

NATIONAL ARCHIVES BUILDING
(All material in vaulted stack areas 1W2 & 2W2 unless otherwise noted)

WHITE HOUSE CENTRAL FILES AND WHITE HOUSE STAFF OFFICE FILES
5224 cubic feet (3392 cubic feet of total now on 141 pallets in "Trevor Alley" and basement storage area)

PRE-PRESIDENTIAL PAPERS OF RICHARD NIXON
1675 cubic feet

DONATED PERSONAL PAPERS AND DONATED AUDIOVISUAL MATERIAL
357 cubic feet

REPUBLICAN NATIONAL COMMITTEE NIXON MATERIALS
377.5 cubic feet (329 cubic feet on 14 pallets in "Trevor Alley" and basement storage area)

COMMITTEE TO RE-ELECT THE PRESIDENT
1466 cubic feet

STAFF, COMMISSION, COMMITTEE, ETC. FILES (NON-WHITE HOUSE)
132 cubic feet

WHITE HOUSE COMMUNICATIONS AGENCY NIXON MATERIALS
1273 cubic feet

NAVAL PHOTO CENTER AUDIOVISUAL NIXON MATERIALS
104 cubic feet

BOOKS, PUBLICATIONS, AND AUDIOVISUAL MATERIALS PURCHASED/OWNED BY U.S. GOVERNMENT
637 cubic feet (586 cubic feet on 25 pallets in "Trevor Alley" and basement storage area)

WHITE HOUSE PHOTO OFFICE NIXON MATERIAL
168 cubic feet on 8 pallets in 2W2

Combination access to stack areas 1W2 & 2W2:
Richard A. Jacobs, Deputy Assistant archivist for Presidential Libraries
Adrienne Thomas, Assistant to Deputy Archivist
Terry W. Good, Office of Presidential Libraries
Jo Ann Williamson, Office of Presidential Libraries
Richard E. McNeill, Office of Presidential Libraries
James B. Byers, Office of Presidential Libraries
Howard McNeill, Office of Presidential Libraries

Access to "Trevor's Alley" and receiving area: NARS service personnel during daytime hours, areas secured after hours.

September 20, 1974
Office of Presidential Papers

NATIONAL ARCHIVES BUILDING
(All material in vaulted stack areas 1W2, 2W2, and 19E3)

GIFTS
6,000 cubic feet (estimated)

Combination access to stack areas 1W2, 2W2, and 19E3:

Richard A. Jacobs, Deputy Assistant Archivist for Presidential Libraries
Adrienne Thomas, Assistant to Deputy Archivist
Terry W. Good, Office of Presidential Libraries
Jo Ann Williamson, Office of Presidential Libraries
Richard E. McNeill, Office of Presidential Libraries
James B. Byers, Office of Presidential Libraries
Howard McNeill, Office of Presidential Libraries

September 20, 1974
Office of Presidential Papers

SUITLAND STAGING AREAS

GOVERNMENT PUBLICATIONS
1406 cubic feet

WHITE HOUSE SUPPLY
2009 cubic feet (includes 432 cubic feet in transit from EOB)

STATE DEPARTMENT BULK MAIL
619 cubic feet

September 20, 1974
Office of Presidential Papers

	In GSA Custody as of Sep 18	Revised Estimate of Materials still to be received by GSA
. . . WH Central Files in EOB	6,908	0
. . . WH Central Files in NARS	5,517	Ø
. . . WH Staff Office Files (estimated)	2,244	1,025
. . . WH Special Files (in vaults)	Ø	1,600
. . . Other Materials in NARS courtesy storage (e.g. CRP)	4,613	Ø
. . . Audiovisual Materials (WHCA, NARS, and NPC)	1,987	205(NPC)
. . . WH Photo Office (estimated)	168	Ø
. . . Government Publications at Suitland	4,042	Ø
. . . Gift Materials in NARS		0
	25,379	2,830
	31,379 (with 6,000 cubic Feet of gifts)	

THE WHITE HOUSE

WASHINGTON

October 1, 1974

MEMORANDUM FOR: H. STUART KNIGHT

FROM: PHILIP BUCHEN P.W.B.

SUBJECT: Access to White House Files

This is to authorize Mr. Jerry Jones to enter the room in the Executive Office Building where the Presidential tapes are stored and to locate and remove for review a copy of the tape for the Executive Office Building for April 19, 1973. Mr. Jones is also authorized to re-enter to replace the copy of the tape after the review is completed. The sole purpose for removal is to allow Herbert J. Miller, Jr., attorney for Richard M. Nixon, to listen to the tape.

cc: Jerry Jones
J. Fred Buzhardt

THE WHITE HOUSE

WASHINGTON

October 9, 1974

Miller, Cassidy, Larroca & Lewin
1320 19th Street, N. W.
Fifth Floor
Washington, D. C.

Attention: Mr. Herbert J. Miller, Jr.

Gentlemen:

You have already been furnished, as I am told, with a copy of a Subpoena duces tecum directed to me and captioned United States of America v. John N. Mitchell, et al., D. D.C., Criminal No. 74-110, which was issued upon application of defendant John D. Ehrlichman. I enclose an additional copy, reproduced from the original in my possession, to serve as notice of the subpoena to you and your client, the Honorable Richard M. Nixon, in accordance with paragraph 9B of the September 6, 1974, Agreement between your client and the Administrator, General Services Administration.

The Agreement contemplates that your client will respond to any such subpoena. So I trust that, if you intend to raise no timely objections in Court, you will work out timely and satisfactory arrangements for production of the documents, consistent with the present circumstances that the documents are still located here under appropriate safeguards. Since the Agreement specifies that you will determine whether to object to production of materials, and will inform the United States if you determine not to object so that it may inspect the materials for the limited purpose stated in the Agreement, I intend to take no action to quash the Subpoena duces tecum and will abide by any Court order as it may affect me.

Sincerely,

Philip W. Buchen

Philip W. Buchen
Counsel to the President

Enclosure

bcc: Larry Silberman
Irving Jaffe
Leon Jaworski
Bill Casselman

United States District Court

FOR THE

DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA

v.

John N. Mitchell, et al

No. 74-110

To PHILIP BUCHEN
The White House
Washington, D. C.

You are hereby commanded to appear in the United States District Court for the District of Columbia at John Marshall & Constitution, in the city of Washington, on the 1st day of October, 1974 at 9:30 o'clock A.M. to testify in the case of United States v. Mitchell, et al, and bring with you the documents and tapes described on the attached schedule.

This subpoena is issued upon application of the[1] Defendant, John D. Ehrlichman.

September 26, 1974

JAMES F. DAVEY
Clerk.

By Robert L. Line
Deputy Clerk.

Andrew C. Hall
Attorney for Defendant Ehrlichman
Twelfth floor, Concord Building
66 West Flagler Street
Address
Miami, Florida 33130

(305) 377-0241

[1] Insert "United States," or "defendant" as the case may be.

RETURN

Received this subpoena at _____ on _____ and on _____ at _____ served it on the within named _____ by delivering a copy to h_____ and tendering to h_____ the fee for one day's attendance and the mileage allowed by law.[2]

Dated: _____

_____, 19____ By _____

Service Fees
Travel _____ $
Services _____
Total _____ $

[2] Fees and mileage need not be tendered to the witness upon service of a subpoena issued in behalf of the United States or an officer or agency thereof. 28 USC 1825.

FPI—LK—8-14-62—120M—998

1. John D. Ehrlichman's handwritten report of April 14, 1973 of his investigation of Watergate and Watergate-related activities.

2. A proposed newspaper advertisement dealing with Watergate allegations and facts concerning those allegations, prepared sometime between the Democratic National Convention and Labor Day, 1972.

3. Notes of a draft statement dictated by then President Richard M. Nixon, waiving executive privilege.

[Items 1 through 3 are located in a folder marked, "April, 1973 Watergate Notes".]

4. Notes of Presidential conversations with John D. Ehrlichman for the following dates:

November 27, 1972

November 28, 1972

November 30, 1972

December 8, 1972

December 11, 1972

December 18, 1972

February 7, 1973

February 14, 1973

February 16, 1973

February 17, 1973

February 23, 1973

February 24, 1973

February 27, 1973

March 17, 1973

March 20, 1973

March 21, 1973

March 23, 1973

March 29, 1973

March 30, 1973

March 31, 1973

April 2, 1973

April 3, 1973

April 4, 1973

April 12, 1973

April 15, 1973

April 16, 1973

April 17, 1973

April 18, 1973

April 19, 1973

April 20, 1973

April 25, 1973

April 26, 1973

April 27, 1973

August 26, 1972

November 1, 1972

5. Memorandum dated June 26 or 27, 1972 from the Central Intelligence Agency to the Federal Bureau of Investigation indicating the results of an intra agency review made by the Central Intelligence Agency as to the involvement of persons alleged to be connected with the break in of Democratic National Headquarters.

6. The tape of the Presidential conversation on or about July 28, 1972 wherein the President of the United States asked John Ehrlichman to cause a deposition to be taken of Maurice Stans in lieu of testimony by Mr. Stans before the Grand Jury.

7. The tape recording produced by the White House Communications Agency of a meeting in the State Dining Room of the White House on September 12, 1972 between the President, Vice-President, Members of the Cabinet, Republican Congressional leadership, and White House Staff.

8. All news summaries prepared by the White House for use by the President or the Presidential staff from June 17, 1972 to and including July 21, 1972.

THE WHITE HOUSE
WASHINGTON

10/9/74

Phil,

Here is the language worked out by Irv Jaffe on the Ehrlichman subpoena. I have no problem with it.

Bill Casselman

D R A F T

Honorable Richard M. Nixon
San Clemente, California

Dear Mr. Nixon:

I am enclosing a copy of a Subpoena directed to me and captioned United States of America v. John N. Mitchell, et al., D. D.C., Criminal No. 74-110. This subpoena was issued upon application of defendant John D. Ehrlichman.

In accordance with paragraph 9B of the September 6, 1974 Agreement between you and the Administrator, General Services Administration, I am notifying you of the enclosed Subpoena duces tecum so that you may respond thereto as you deem appropriate, in keeping with the Agreement. Since the Agreement specifies that you will determine whether to object to production of materials, and will inform the United States if you determine not to object so that it may inspect the materials, I intend to take no action to quash the Subpoena duces tecum and will abide by any Court order concerning the materials subpoenaed.

Sincerely,

PHILIP W. BUCHEN
Counsel to the President

cc: Herbert J. Miller, Esq.
1320 19th Street, N.W.
Washington, D.C.

WATERGATE SPECIAL PROSECUTION FORCE
United States Department of Justice
1425 K Street, N.W.
Washington, D.C. 20005

October 17, 1974

William Casselman, II, Esq.
Counsel to the President
The White House
Washington, D. C.

Dear Mr. Casselman:

This is to confirm our telephone conversations last evening during which you informed me that Herbert J. Miller, Jr., counsel to former President Nixon, had indicated that he would file an action this morning seeking specific performance of the letter agreement between Mr. Nixon and Arthur G. Sampson, Administrator of the General Services Administration, dated September 7, 1974.

You assured me that the tapes and documents compiled during the administration of former President Nixon, now stored in various areas of the Executive Office Building and within the physical control of Mr. Buchen, would not be moved pending a determination of any court proceedings relating to ownership and custody of the materials. It is my understanding that this assurance merely carries forward the agreement between this office and the White House that the physical arrangements for the Nixon materials would not be changed, and the September 7 letter agreement would not be implemented pending discussions between this office and the White House concerning the Special Prosecutor's continuing interest in these materials for ongoing investigations and prosecutions.

Sincerely,

PETER M. KREINDLER
Counsel to the
Special Prosecutor

cc: Philip W. Buchen, Esq.
Counsel to the President

THE WHITE HOUSE

WASHINGTON

October 25, 1974

Dear Mr. Silberman:

Service has been made upon me of the attached Subpoena duces tecum and check with respect to the case of Dellums, et al., v. Powell, et al., D. D. C., Civil Action No. 2271-71.

This is to request that the Department of Justice handle this matter on my behalf. If additional information or assistance is required, please contact William E. Casselman II of this office. I would appreciate very much your sending this office copies of any materials you file with the Court in this matter.

Sincerely,

Philip W. Buchen
Counsel to the President

Honorable Lawrence Silberman
Deputy Attorney General
Department of Justice
Washington, D. C.

BY ENDORSEMENT THIS CHECK WHEN PAID IS ACCEPTED IN FULL PAYMENT OF THE FOLLOWING ACCOUNT

DATE		AMOUNT	

IF INCORRECT PLEASE RETURN. NO RECEIPT NECESSARY

LAW OFFICES OF
MELROD, REDMAN & GARTLAN
SUITE 1100-K
1801 K STREET, N. W.
WASHINGTON, D. C. 20006

No. 19456

Oct. 24 1974 15-55/540

PAY TO THE ORDER OF Philip Buchen $ 21.00

[illegible] DOLLARS

AMERICAN SECURITY
AND TRUST COMPANY
WASHINGTON, D.C. 20013

MELROD, REDMAN & GARTLAN

Jerry M. Hartman

⑆0540⑈0055⑆ 13⑈858 46 483⑈

CIVIL SUBPOENA

United States District Court

for the

District of Columbia

HON. RONALD V. DELLUMS, et al.,
Plaintiff.

vs. CIVIL ACTION NO. 2271-71

JAMES M. POWELL, et al.,
Defendant.

To: PHILIP BUCHEN, Counsel to the President
White House, 1600 Pennsylvania Avenue, N. W., Washington, D. C.

YOU ARE HEREBY COMMANDED to appear in (~~this court~~) (the office of MELROD, REDMAN & GARTLAN, 1801 K Street, N. W., Suite 1100K, Washington, D. C. 20006) to give testimony in the above-entitled cause on the 1st day of November, 1974, at 3:00 o'clock P. m. (and bring with you) all tapes and transcripts of White House conversations during the period of April 16 through May 10, 1971, at whih "May Day" demonstrations (5/3-5/7/71) were discussed,

and do not depart without leave.

James F. Davey, Clerk

By Robert L. Lowe
Deputy Clerk.

Date October 24, 1974

Warren K. Kaplan

Attorney for { *Plaintiff.* S / ~~*Defendant*~~ }

RETURN ON SERVICE

Summoned the above-named witness by delivering a copy to h..... and tendering to h..... the fees for one day's attendance and mileage allowed by law, on the ..... day of ....., 19....., at .....

Dated .....

.....

Subscribed and sworn to before me, a ..... this ..... day of ....., 19.....

.....

NOTE.—Affidavit required only if service is made by a person other than a U. S. Marshal or his deputy.