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Dec. 10, 1974

To: Jack Miller

From: Phil Buchen

As we discussed.



Ninety-third Congress of the United States of America

AT THE SECOND SESSION

*Begun and held at the City of Washington on Monday, the twenty-first day of January,
one thousand nine hundred and seventy-four*

An Act

To protect and preserve tape recordings of conversations involving former President Richard M. Nixon and made during his tenure as President, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Presidential Recordings and Materials Preservation Act".

TITLE I—PRESERVATION OF PRESIDENTIAL RECORDINGS AND MATERIALS

DELIVERY AND RETENTION OF CERTAIN PRESIDENTIAL MATERIALS

Sec. 101. (a) Notwithstanding any other law or any agreement or understanding made pursuant to section 2107 of title 44, United States Code, any Federal employee in possession shall deliver, and the Administrator of General Services (hereinafter in this title referred to as the "Administrator") shall receive, obtain, or retain, complete possession and control of all original tape recordings of conversations which were recorded or caused to be recorded by any officer or employee of the Federal Government and which—

(1) involve former President Richard M. Nixon or other individuals who, at the time of the conversation, were employed by the Federal Government;

(2) were recorded in the White House or in the office of the President in the Executive Office Buildings located in Washington, District of Columbia; Camp David, Maryland; Key Biscayne, Florida; or San Clemente, California; and

(3) were recorded during the period beginning January 20, 1969, and ending August 9, 1974.

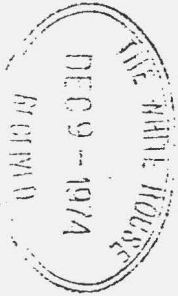
(b) (1) Notwithstanding any other law or any agreement or understanding made pursuant to section 2107 of title 44, United States Code, the Administrator shall receive, retain, or make reasonable efforts to obtain, complete possession and control of all papers, documents, memorandums, transcripts, and other objects and materials which constitute the Presidential historical materials of Richard M. Nixon, covering the period beginning January 20, 1969, and ending August 9, 1974.

(2) For purposes of this subsection, the term "historical materials" has the meaning given it by section 2101 of title 44, United States Code.

AVAILABILITY OF CERTAIN PRESIDENTIAL MATERIALS

Sec. 102. (a) None of the tape recordings or other materials referred to in section 101 shall be destroyed, except as hereafter may be provided by law.

(b) Notwithstanding any other provision of this title, any other law, or any agreement or understanding made pursuant to section 2107 of title 44, United States Code, the tape recordings and other materials referred to in section 101 shall, immediately upon the date of enactment of this title, be made available, subject to any rights, defenses, or privileges which the Federal Government or any person may invoke, for use in any judicial proceeding or otherwise subject to court subpoena or other legal process. Any request by the Office of Watergate



Special Prosecution Force, whether by court subpoena or other lawful process, for access to such recordings or materials shall at all times have priority over any other request for such recordings or materials.

(c) Richard M. Nixon, or any person whom he may designate in writing, shall at all times have access to the tape recordings and other materials referred to in section 101 for any purpose which is consistent with the provisions of this title, subsequent and subject to the regulations which the Administrator shall issue pursuant to section 103.

(d) Any agency or department in the executive branch of the Federal Government shall at all times have access to the tape recordings and other materials referred to in section 101 for lawful Government use, subject to the regulations which the Administrator shall issue pursuant to section 103.

REGULATIONS TO PROTECT CERTAIN TAPE RECORDINGS AND OTHER MATERIALS

SEC. 103. The Administrator shall issue at the earliest possible date such regulations as may be necessary to assure the protection of the tape recordings and other materials referred to in section 101 from loss or destruction, and to prevent access to such recordings and materials by unauthorized persons. Custody of such recordings and materials shall be maintained in Washington, District of Columbia, or its metropolitan area, except as may otherwise be necessary to carry out the provisions of this title.

REGULATIONS RELATING TO PUBLIC ACCESS

SEC. 104. (a) The Administrator shall, within ninety days after the date of enactment of this title, submit to each House of the Congress a report proposing and explaining regulations that would provide public access to the tape recordings and other materials referred to in section 101. Such regulations shall take into account the following factors:

- (1) the need to provide the public with the full truth, at the earliest reasonable date, of the abuses of governmental power popularly identified under the generic term "Watergate";
- (2) the need to make such recordings and materials available for use in judicial proceedings;
- (3) the need to prevent general access, except in accordance with appropriate procedures established for use in judicial proceedings, to information relating to the Nation's security;
- (4) the need to protect every individual's right to a fair and impartial trial;
- (5) the need to protect any party's opportunity to assert any legally or constitutionally based right or privilege which would prevent or otherwise limit access to such recordings and materials;
- (6) the need to provide public access to those materials which have general historical significance, and which are not likely to be related to the need described in paragraph (1); and
- (7) the need to give to Richard M. Nixon, or his heirs, for his sole custody and use, tape recordings and other materials which are not likely to be related to the need described in paragraph (1) and are not otherwise of general historical significance.

(b) (1) The regulations proposed by the Administrator in the report required by subsection (a) shall take effect upon the expiration of ninety legislative days after the submission of such report, unless such regulations are disapproved by a resolution adopted by either House of the Congress during such period.

(2) The Administrator may not issue any regulation or make any change in a regulation if such regulation or change is disapproved by either House of the Congress under this subsection.

(3) The provisions of this subsection shall apply to any change in the regulations proposed by the Administrator in the report required by subsection (a). Any proposed change shall take into account the factors described in paragraph (1) through paragraph (7) of subsection (a), and such proposed change shall be submitted by the Administrator in the same manner as the report required by subsection (a).

(4) Paragraph (5) is enacted by the Congress—

(A) as an exercise of the rulemaking power of the Senate and the House of Representatives, respectively, and as such it shall be considered as part of the rules of each House, respectively, and such rules shall supersede other rules only to the extent that they are inconsistent therewith; and

(B) with full recognition of the constitutional right of either House to change such rules (as far as relating to the procedures of that House) at any time, in the same manner, and to the same extent as in the case of any other rule of that House.

(5) (A) Any resolution introduced under paragraph (1) shall be referred to a committee by the Speaker of the House or by the President of the Senate, as the case may be.

(B) If the committee to which any such resolution is referred has not reported any resolution relating to any regulation or change proposed by the Administrator under this section before the expiration of sixty calendar days after the submission of any such proposed regulation or change, it shall then be in order to move to discharge the committee from further consideration of such resolution.

(C) Such motion may be made only by a person favoring the resolution, and such motion shall be privileged. An amendment to such motion is not in order, and it is not in order to move to reconsider the vote by which such motion is agreed to or disagreed to.

(D) If the motion to discharge is agreed to or disagreed to, such motion may not be renewed.

(E) When the committee has reported, or has been discharged from further consideration of, a resolution introduced under paragraph (1), it shall at any time thereafter be in order (even though a previous motion to the same effect has been disagreed to) to move to proceed to the consideration of such resolution. Such motion shall be privileged. An amendment to such motion is not in order, and it is not in order to move to reconsider the vote by which such motion is agreed to or disagreed to.

(6) For purposes of this subsection, the term "legislative days" does not include any calendar day on which both Houses of the Congress are not in session.

(c) The provisions of this title shall not apply, on and after the date upon which regulations proposed by the Administrator take effect under subsection (b), to any tape recordings or other materials given to Richard M. Nixon, or his heirs, pursuant to subsection (a) (7).



(d) The provisions of this title shall not in any way affect the rights, limitations or exemptions applicable under the Freedom of Information Act, 5 U.S.C. § 552 et seq.

JUDICIAL REVIEW

SEC. 105. (a) The United States District Court for the District of Columbia shall have exclusive jurisdiction to hear challenges to the legal or constitutional validity of this title or of any regulation issued under the authority granted by this title, and any action or proceeding involving the question of title, ownership, custody, possession, or control of any tape recording or material referred to in section 101 or involving payment of any just compensation which may be due in connection therewith. Any such challenge shall be treated by the court as a matter requiring immediate consideration and resolution, and such challenge shall have priority on the docket of such court over other cases.

(b) If, under the procedures established by subsection (a), a judicial decision is rendered that a particular provision of this title, or a particular regulation issued under the authority granted by this title, is unconstitutional or otherwise invalid, such decision shall not affect in any way the validity or enforcement of any other provision of this title or any regulation issued under the authority granted by this title.

(c) If a final decision of such court holds that any provision of this title has deprived an individual of private property without just compensation, then there shall be paid out of the general fund of the Treasury of the United States such amount or amounts as may be adjudged just by that court.

AUTHORIZATION OF APPROPRIATIONS

SEC. 106. There is authorized to be appropriated such sums as may be necessary to carry out the provisions of this title.

TITLE II—PUBLIC DOCUMENTS COMMISSION

SHORT TITLE

SEC. 201. This title may be cited as the "Public Documents Act".

ESTABLISHMENT OF STUDY COMMISSION

SEC. 202. Chapter 33 of title 44, United States Code, is amended by adding at the end thereof the following new sections:

“§ 3315. Definitions

“For purposes of this section and section 3316 through section 3324 of this title—

“(1) the term ‘Federal official’ means any individual holding the office of President or Vice President of the United States, or Senator or Representative in, or Delegate or Resident Commissioner to, the Congress of the United States, or any officer of the executive, judicial, or legislative branch of the Federal Government;

“(2) the term ‘Commission’ means the National Study Commission on Records and Documents of Federal Officials; and

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“(3) the term ‘records and documents’ shall include hand-written and typewritten documents, motion pictures, television tapes and recordings, magnetic tapes, automated data processing documentation in various forms, and other records that reveal the history of the Nation.

“§ 3316. Establishment of Commission

“There is established a commission to be known as the National Study Commission on Records and Documents of Federal Officials.

“§ 3317. Duties of Commission

“It shall be the duty of the Commission to study problems and questions with respect to the control, disposition, and preservation of records and documents produced by or on behalf of Federal officials, with a view toward the development of appropriate legislative recommendations and other recommendations regarding appropriate rules and procedures with respect to such control, disposition, and preservation. Such study shall include consideration of—

“(1) whether the historical practice regarding the records and documents produced by or on behalf of Presidents of the United States should be rejected or accepted and whether such practice should be made applicable with respect to all Federal officials;

“(2) the relationship of the findings of the Commission to the provisions of chapter 19 of this title, section 2101 through section 2103 of this title, and other Federal laws relating to the control, disposition, and preservation of records and documents of Federal officials;

“(3) whether the findings of the Commission should affect the control, disposition, and preservation of records and documents of agencies within the Executive Office of the President created for short-term purposes by the President;

“(4) the recordkeeping procedures of the White House Office, with a view toward establishing means to determine which records and documents are produced by or on behalf of the President;

“(5) the nature of rules and procedures which should apply to the control, disposition, and preservation of records and documents produced by Presidential task forces, commissions, and boards;

“(6) criteria which may be used generally in determining the scope of materials which should be considered to be the records and documents of Members of the Congress;

“(7) the privacy interests of individuals whose communications with Federal officials, and with task forces, commissions, and boards, are a part of the records and documents produced by such officials, task forces, commissions, and boards; and

“(8) any other problems, questions, or issues which the Commission considers relevant to carrying out its duties under section 3315 through section 3324 of this title.

“§ 3318. Membership

“(a) (1) The Commission shall be composed of seventeen members as follows:

“(A) one Member of the House of Representatives appointed by the Speaker of the House upon recommendation made by the majority leader of the House;

“(B) one Member of the House of Representatives appointed

by the Speaker of the House upon recommendation made by the minority leader of the House;

“(C) one Member of the Senate appointed by the President pro tempore of the Senate upon recommendation made by the majority leader of the Senate;

“(D) one Member of the Senate appointed by the President pro tempore of the Senate upon recommendation made by the minority leader of the Senate;

“(E) one Justice of the Supreme Court, appointed by the Chief Justice of the United States;

“(F) one person employed by the Executive Office of the President or the White House Office, appointed by the President;

“(G) three appointed by the President, by and with the advice and consent of the Senate, from persons who are not officers or employees of any government and who are specially qualified to serve on the Commission by virtue of their education, training, or experience;

“(H) one representative of the Department of State, appointed by the Secretary of State;

“(I) one representative of the Department of Defense, appointed by the Secretary of Defense;

“(J) one representative of the Department of Justice, appointed by the Attorney General;

“(K) the Administrator of General Services (or his delegate);

“(L) the Librarian of Congress;

“(M) one member of the American Historical Association, appointed by the counsel of such Association;

“(N) one member of the Society of American Archivists, appointed by such Society; and

“(O) one member of the Organization of American Historians, appointed by such Organization.

“(2) No more than two members appointed under paragraph (1) (G) may be of the same political party.

“(b) A vacancy in the Commission shall be filled in the manner in which the original appointment was made.

“(c) If any member of the Commission who was appointed to the Commission as a Member of the Congress leave such office, or if any member of the Commission who was appointed from persons who are not officers or employees of any government becomes an officer or employee of a government, he may continue as a member of the Commission for no longer than the sixty-day period beginning on the date he leaves such office or becomes such an officer or employee, as the case may be.

“(d) Members shall be appointed for the life of the Commission.

“(e) (1) Members of the Commission shall serve without pay.

“(2) While away from their homes or regular places of business in the performance of services for the Commission, members of the Commission shall be allowed travel expenses in the same manner as persons employed intermittently in the service of the Federal Government are allowed expenses under section 5703(b) of title 5, United States Code, except that per diem in lieu of subsistence shall be paid only to those members of the Commission who are not full-time officers or employees of the United States or Members of the Congress.

“(f) The Chairman of the Commission shall be designated by the President from among members appointed under subsection (a) (1) (G).

“(g) The Commission shall meet at the call of the Chairman or a majority of its members.

“§ 3319. Director and staff; experts and consultants

“(a) The Commission shall appoint a Director who shall be paid at a rate not to exceed the rate of basic pay in effect for level V of the Executive Schedule (5 U.S.C. 5316).

“(b) The Commission may appoint and fix the pay of such additional personnel as it deems necessary.

“(c) (1) The Commission may procure temporary and intermittent services to the same extent as is authorized by section 3109(b) of title 5, United States Code, but at rates for individuals not to exceed the daily equivalent of the annual rate of basic pay in effect for grade GS-15 of the General Schedule (5 U.S.C. 5332).

“(2) In procuring services under this subsection, the Commission shall seek to obtain the advice and assistance of constitutional scholars and members of the historical, archival, and journalistic professions.

“(d) Upon request of the Commission, the head of any Federal agency is authorized to detail, on a reimbursable basis, any of the personnel of such agency to the Commission to assist it in carrying out its duties under sections 3315 through 3324 of this title.

“§ 3320. Powers of Commission

“(a) The Commission may, for the purpose of carrying out its duties under sections 3315 through 3324 of this title, hold such hearings, sit and act at such times and places, take such testimony, and receive such evidence, as the Commission may deem desirable.

“(b) When so authorized by the Commission, any member or agent of the Commission may take any action which the Commission is authorized to take by this section.

“(c) The Commission may secure directly from any department or agency of the United States information necessary to enable the Commission to carry out its duties under section 3315 through section 3324 of this title. Upon request of the Chairman of the Commission, the head of such department or agency shall furnish such information to the Commission.

“§ 3321. Support services

“(a) The Administrator of General Services shall provide to the Commission on a reimbursable basis such administrative support services and assistance as the Commission may request.

“(b) The Archivist of the United States shall provide to the Commission on a reimbursable basis such technical and expert advice, consultation, and support assistance as the Commission may request.

“§ 3322. Report

“The Commission shall transmit to the President and to each House of the Congress a report not later than March 31, 1976. Such report shall contain a detailed statement of the findings and conclusions of the Commission, together with its recommendations for such legislation, administrative actions, and other actions, as it deems appropriate.

“§ 3323. Termination

“The Commission shall cease to exist sixty days after transmitting its report under section 3322 of this title.

“§ 3324. Authorization of appropriations

“There is authorized to be appropriated such sums as may be necessary to carry out section 3315 through section 3324 of this title.”

TECHNICAL AMENDMENT

SEC. 203. The table of sections for chapter 33 of title 44, United States Code, is amended by adding at the end thereof the following new items:

- "3315. Definitions.
- "3316. Establishment of Commission.
- "3317. Duties of Commission.
- "3318. Membership.
- "3319. Director and staff; experts and consultants.
- "3320. Powers of Commission.
- "3321. Support services.
- "3322. Report.
- "3323. Termination.
- "3324. Authorization of appropriations."

Carl Albert

Speaker of the House of Representatives.

Lee Metcalf

~~*Vice President of the United States*~~

Acting President of the Senate pro Tempore.

Thursday 12/12/74

*Tapes
+
Documents*

2:35 I understand Mr. Marsh sent a memo to the President saying you need to know whether the President would sign or veto the tapes and documents bill because of a matter involving the Special Prosecutor -- and that you wanted to tell the Special Prosecutor if the President did not plan to veto it.

Terry O'Donnell stopped by Mr. Marsh's office at 1:57 p. m. and said the President reviewed the memo and couldn't make a decision until he had seen the documents.



THE WHITE HOUSE

WASHINGTON

Message from Mr. Marsh's office
2:35 12/12

Mr. Marsh wrote memo to the President saying Mr. Buchen need to know whether the President was going to sign or veto the tapes and documents bill because of a matter involving the Special Prosecutor. If the President did not plant to veto it, Mr. Buchen would like to tell the Special Prosecutor.

Mr. O'Donnell stoped by Mr. Marsh's office at 1:57 pm and said the President had reviewed it (the memo) and he couldn't make a decision on the memo until he had seen the documents.



THE WHITE HOUSE

WASHINGTON

December 13, 1974

MEMORANDUM FOR THE PRESIDENT

FROM: PHILIP BUCHEN

SUBJECT: Enrolled Bill: S. 4016 -- Nixon Papers and Tapes

Friday, December 20, is the last day for action on the referenced bill. This is to outline its anticipated impact and to furnish my views on an appropriate course of action.

Title I

1. General. Title I governs the possession, security and accessibility of tape recordings and other materials of former President Nixon. Three separate stages of implementation are involved.
2. First Stage. Upon enactment, the following provisions of Title I would have to be implemented.
 - (a) Possession. The Administrator of GSA is directed to take complete control and possession of all tapes and other materials of the former President. [Sec. 101]
 - (b) Preservation. None of the tapes or other materials could ever be destroyed absent affirmative congressional consent. [Sec. 102(a)]
 - (c) Access. (i) The tapes and other materials would be made available immediately, subject to any rights, defenses or privileges which may be asserted for "subpoena or other legal process." Thus, the papers and tapes would be subject to subpoena by the Special Prosecutor, by Congress, by state law enforcement officials and by private parties in administrative, civil or criminal proceedings before either a state or Federal tribunal. Moreover, the materials would also be discoverable incident to a state or Federal court action or appropriate administrative proceeding. [Sec. 102(b)]

(ii) President Nixon or his designate would be denied any access to the tapes or other materials within the possession of GSA until the issuance of protective regulations as discussed below. (See 3 infra.) Although there is no express provision for notice from GSA to the former President regarding requests for access, this would be consistent with legislative intent in order to allow him to assert any privilege in opposition to such a request. [Sec. 102(c)]

(iii) Any agency or department in the Executive branch of the Federal government would be authorized access to the tapes and other materials for "lawful Government use." Here too, there is no express provision for notice to allow consideration of a competing privilege but such notice would be consistent with legislative history. [Sec. 102(d)]

3. Second Stage. The Administrator of GSA is directed to issue protective regulations "at the earliest possible date" governing the possession, security and custody of tapes and other materials. On a theoretical plane, some of these tapes and other materials could have been already accessed as discussed above. As a practical matter, however, the regulations can be issued within a week from date of enactment. Therefore, the only real import of this stage is that it triggers access to the tapes and materials by the former President or his designate subject to the restraints of this title. [Sec. 103]
4. Third Stage. The third stage of implementation under Title I involves the establishment of regulations governing general public access to the tapes and other materials.
 - (a) Timing. Within ninety (90) days after enactment of the subject bill, the Administrator of GSA will submit to both Houses of Congress proposed regulations governing public access to the tapes and other materials [Sec. 104(a)]. These regulations



shall take effect upon the expiration of ninety (90) legislative days after submission to the Congress unless disapproved by either House. [Sec. 104(b)(1)]

- (b) Standards. In drafting these regulations, the Administrator is directed to take into account a series of specified needs: (1) to provide the public with the full truth on the abuses of governmental power incident to "Watergate"; (2) to make the tapes and materials available for judicial proceedings; (3) to guarantee the integrity of national security information; (4) to protect individual rights to a fair trial; (5) to protect the opportunity to assert available rights and privileges; (6) to provide public access to materials of historical significance; and (7) to provide the former President with tapes or materials in which the public has no interest as set forth above. [Sec. 104(a)]
5. Judicial Review. A provision is included to allow for expedited judicial review of the constitutional issues which will be raised. [Sec. 105(a)]
6. Compensation. The bill authorizes compensation to the former President if it is determined that he has been deprived of personal property under its provisions.
7. Constitutional Issues. Although Title I is probably constitutional on its face, it will no doubt be substantially cut back as various provisions for access are applied in the face of competing claims, primarily Executive Privilege.

The seven major issues presented by the measure involve: (1) the novel type of eminent domain which it contemplates; (2) the appropriate scope of Executive Privilege; (3) relevant rights of privacy; (4) its impact upon First Amendment rights; (5) the Fifth Amendment privilege against self-incrimination; (6) the claim that it constitutes a Bill of Attainder; and (7) Fourth Amendment claims relating to unreasonable searches and seizures. The bill itself provides the opportunity to litigate each of these possible objections.



Title II

Title II would establish a "Public Documents Commission" to study problems with respect to the control, disposition and preservation of records produced by or on behalf of "Federal officials", defined to include virtually all officers and employees of the three branches of government.

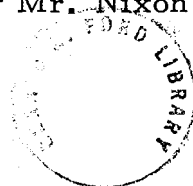
This 17-member commission would be composed of two Members of the House of Representatives; two Senators; three appointees of the President, selected from the public on a bipartisan basis; the Librarian of Congress; one appointee each of the Chief Justice of the United States, the White House, the Secretary of State, the Secretary of Defense, the Attorney General, and the Administrator of General Services; and three other representatives, one each appointed by the American Historical Association, the Society of American Archivists, and the Organization of American Historians.

The Commission would be directed to make specific recommendations for legislation and recommendations for rules and procedures as may be appropriate regarding the disposition of documents of Federal officials. The final report is to be submitted to the Congress and the President by March 31, 1976.

Discussion

1. Should the bill be enacted? There are essentially three arguments against the enactment of the subject bill. First, it is inherently inequitable in singling out one President and attempting to reduce the traditional sphere of Presidential confidentiality only as to him. Second, it holds some potential for political exploitation and could lead to more sensational and destructive exposures of the former President's dealings and the confidential statements or writings of other parties with no purpose other than the satisfaction of idle curiosity. Third, it could require a great deal of unnecessary litigation, depleting further the financial resources of Mr. Nixon and drawing the judiciary further into the quagmire of "Watergate".

On the other hand, there are four factors that support enactment of the bill. First, as noted above, it does provide a remedy for Mr. Nixon



to pursue in asserting relevant rights and privileges. Second, it will introduce some element of finality to White House involvement in the various tapes disputes. Third, a veto would be interpreted as "more cover-up" which would undermine your efforts to put "Watergate" behind us. Fourth, it could enhance the likelihood of an agreement between Henry Ruth and counsel for Mr. Nixon governing access to the tapes and other materials, thereby expediting the mission of the Special Prosecutor.

2. Should the bill be signed or merely allowed to become law?

Assuming that you believe the bill should be enacted, I see no reason for you to withhold your signature. Since this is purely a question of form, there would appear to be no significant reason to risk any political losses that could be incurred.

3. Should a public statement be issued? In my opinion, a statement should be issued. The statement would be shaped along the following lines. First, the existence of constitutional issues might only be noted -- no opinion would be expressed on the relative merits of competing claims. Second, you could indicate your understanding of Congressional intent to the effect that the former President be given every opportunity to litigate any claims of privilege which may be available to him. Third, you would request the Administrator of GSA to move promptly to discharge his duties in accordance with the spirit and the letter of the law. Finally, you would indicate that a talent search is underway to recruit Presidential appointees to the "Public Documents Commission" and that you are hopeful the commission will be able to suggest even-handed and uniform rules governing access to the documents of all Federal officials.

4. Agency Views. The Domestic Council and OMB make no recommendations concerning this measure. The view of the Department of Justice is that S. 4016 should be allowed to become law.



Action

1. S. 4016 should be enacted into law.

Approve _____

Disapprove _____

2. The bill should be signed.

Approve _____

Disapprove _____

3. A public statement should be issued.

Approve _____

Disapprove _____

4. The statement should follow the format noted above.

Approve _____

Disapprove _____

See Me _____



[Mr. Silberman thought that Mr. Buchen might also want to include some reference to the November 9 agreement. If so, that might be appropriately inserted after the first sentence of the second paragraph, by way of affirming that the Administration has demonstrated its desire to achieve full disclosure of the Watergate affair.]

*For file re
Nixon Tapes &
Documents*



I have serious reservations about both the constitutionality of some provisions of this bill and the desirability of its broad expropriation of all materials belonging to the former President. These doubts are apparently shared by the Congress itself, since the bill contains special provisions for judicial review of its constitutionality and provides in its second Title for a full study of the whole matter of control, disposition and preservation of the records of Federal officials.

I am nonetheless signing the bill since it is clear to me that a veto would be overridden and would serve no purpose other than to create what would be an erroneous impression that this President seeks to prevent disclosure of what the legislation refers to as the "full truth" of Watergate. I think it essential to restore the confidence of the people in the presidency, and I am unwilling to imperil that goal in order to perform what would ultimately be a useless act.

The constitutionality of the bill will, I presume, be fully tested in courts pursuant to the provisions explicitly included for that purpose. And the desirability of the principle of public ownership of all Presidential records will likewise be reviewed, without being prejudiced by the disposition this bill establishes, by the Commission created under Title II.



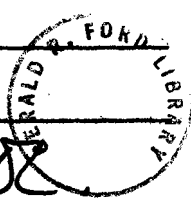
THE WHITE HOUSE
WASHINGTON

12.18.74

TO: Ken Layman

For Your Information: ✓

For Appropriate Handling:



Robert D. Linder

MEMORANDUM

THE WHITE HOUSE

WASHINGTON

December 18, 1974

MEMORANDUM FOR: PHIL BUCHEN

FROM: BOB LINDER *RL*.

Attached are the Department of Justice views on S. 4016 for your consideration.

This letter should become part of the enrolled bill file when the President has finally acted on the matter.

Attachment



Department of Justice
Washington, D.C. 20530

DEC 17 1974

Honorable Roy L. Ash
Director, Office of Management
and Budget
Washington, D. C. 20503

Dear Mr. Ash:

In compliance with your request, I have examined a facsimile of the enrolled bill S. 4016, "To protect and preserve tape recordings of conversations involving former President Richard M. Nixon and made during his tenure as President, and for other purposes."

Section 101 of the bill provides that the Administrator of General Services obtain or retain control of all of the Nixon tapes as well as Presidential "historical materials," as defined by 44 U.S.C. § 2101, covering the period January 20, 1969, to August 9, 1974. There would not appear to be any constitutional impediment to such provisions. The Department of Justice has taken the position that these materials are the private property of the former President, see Opinion of the Attorney General, September 6, 1974, but the bill does not purport to address ownership of the materials, providing instead that if a court determines that the bill results in deprivation of private property without just compensation, then the government shall pay the appropriate compensation. See Section 105(c). The bill apparently contemplates that this would constitute taking the materials under the power of eminent domain. While such a taking would appear to be novel, the fact that the materials of previous Presidents have been purchased with public monies is evidence of the public purposes served in obtaining Presidential historical materials. In addition, the fact that the bill has the effect of voiding the Sampson-Nixon agreement of September 8, 1974 should not affect the validity of the bill. It is settled law that acts of Congress may alter contract rights even where the government is a party to the contract. See Lichter v. United States, 334 U.S. 742 (1948). But see



Lynch v. United States, 292 U.S. 571 (1934). In any case, even if the agreement could not be retroactively voided, the remedy for failure to perform would be damages for breach rather than specific performance.

Section 102 of the bill provides that the materials may be subpoenaed. What this adds to existing law is unclear but there is no difficulty with the provision as it stands. This section also explicitly provides that the historical materials may be utilized "for lawful Government use," a conclusion already implied by tradition and practice. See Opinion of the Attorney General, supra.

Section 104 requires the Administrator to propose regulations providing public access to the materials. In creating these regulations the Administrator is directed to take into account seven factors: (1) the need to provide the public with the full truth about "Watergate"; (2) the need to make the materials available for judicial proceedings; (3) the need to protect information in the materials relating to national security; (4) the need to protect persons' right to a fair trial; (5) the need to protect any person's opportunity to assert any legally or constitutionally based right or privilege which would prevent public access to the materials; (6) the need to provide public access to materials which are not related to "Watergate" but are otherwise of general historical significance; and (7) the need to give to Mr. Nixon for his sole custody and use those materials not related to "Watergate" and not of general historical significance. This section could give rise to problems of a constitutional nature, particularly with respect to the right of privacy and Executive privilege. It cannot be said with assurance, however, that there is no set of regulations which could be drawn under it which would be constitutional, and hence it is in our view not possible to assert that the section is unconstitutional on its face.

There is a suggestion in the legislative history of the bill (not at all reflected in its language) that the Administrator would not only write regulations but would also, apparently through the Archivist, actually make the decisions regarding what material is or is not classified or otherwise is to remain confidential, see H. Rep. No. 93-1507, 93d Cong., 2d Sess. 6 (1974), and regarding what material is "purely personal" and therefore to be given to Mr. Nixon, see 120 Cong. Rec. H11209 (Daily ed. Dec. 3, 1974). The Department of Justice believes that it is essential that the former President retain the power to determine what material is subject to a claim of Executive privilege based upon the need to preserve the confidentiality



of Presidential consultation. The other interests served by the doctrine of Executive privilege, notably the ability to safeguard military and diplomatic secrets, can be protected by the incumbent President. (The present bill enables this to be achieved through the Administrator, who is a Presidential appointee.) But the interest in confidentiality of communications to and from a particular President can adequately be protected only by him, and not by his successors in office, whose political ends may be served by destroying rather than preserving confidentiality. To divorce the power of determining what is confidential from the person who has the paramount interest in the confidentiality would shatter the necessary expectation of privacy and the privilege itself.

By history and tradition former Presidents have been entrusted with the responsibility and power to determine what should remain confidential and what should not. As early as 1846 President Polk realized the importance of, and gave effect to, a determination of a former President that a matter should remain confidential. See Richardson, Messages and Papers of the Presidents, Vol. IV, 433-34.

Former President Truman was subpoenaed in 1953 by a House committee to testify concerning matters that transpired while he was in office. Refusing by letter, he explained that to subject former Presidents to inquiries into their acts while President would violate the separation of powers.

It must be obvious to you that if the doctrine of separation of powers and the independence of the Presidency is to have any validity at all, it must be equally applicable to a President after his term of office has expired when he is sought to be examined with respect to any acts occurring while he is President.

The doctrine would be shattered, and the President, contrary to our fundamental theory of constitutional government, would become a mere arm of the Legislative Branch of the Government if he would feel during his term of office that his every act might be subject to official inquiry and possible distortion for political purposes.

New York Times, Late City ed., Nov. 13, 1953, p. 14, col. 4.



The House committee apparently accepted President Truman's position and did not attempt to enforce the subpoena.

Existing statutory law sanctions the historical practice by allowing former Presidents to place restrictions on access to materials placed in Presidential archival depositories, 44 U.S.C. § 2107(1). In the Department's view the events of Watergate, and the distrust of Executive privilege which they have engendered, neither require nor justify a departure from this sound principle. The broad public access which has already been accorded with respect to tapes and transcripts relating to Watergate reduces the risk of nondisclosure of significant information to a level which does not approach in importance the damage that would be done to a vital constitutional principle.

It is only a portion of the legislative history, and not the language of the bill, which would deprive the former President of his right to determine the application of Executive privilege with respect to material to be made available to the public. That legislative history is contradicted by the bill's express reservation (subsection 102(b)) of the former President's power to assert Executive privilege regarding subpoenaed material--which one would expect to be a case in which such protection is less needed. Because of the foregoing considerations of statutory interpretation and of constitutional principle, we believe the regulations to be issued by the Administrator under S. 4016 should provide for assertion by the former President himself of the doctrine of Executive privilege with respect to those materials he believes must be withheld to preserve the confidentiality of his consultations. Paragraph 104(a)(5) specifically envisions such protection. On that basis, we raise no constitutional objection to the bill itself on Executive privilege grounds.

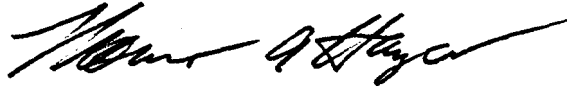
Finally, Title II of the bill creates an independent Commission to study and report regarding appropriate rules and procedures with respect to the control, disposition, and preservation of records and documents produced by or on behalf of federal officials. While the Department maintains a certain skepticism, shared by the sponsor of S. 4016 himself, see 120 Cong. Rec. S20814 (daily ed. Dec. 9, 1974), regarding the desirability of yet another independent Commission, the Department feels that it is most desirable to rethink both the traditions and statutory law regarding historical materials of elected and appointed officials. Such a complete study is much preferable to patchwork attempts to change the law regarding Presidential papers generally in order to solve a particular problem in the heat of the moment. For these reasons the



Department does not oppose the concept of the Commission.

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Sincerely,



Thomas A. Hayes
Deputy Assistant Attorney General
Legislative Affairs



MEMORANDUM

THE WHITE HOUSE
WASHINGTON

JF for filing

December 18, 1974

MEMORANDUM FOR: PHIL BUCHEN
FROM: BOB LINDER *ML*.

Attached are the Department of Justice views on S. 4016 for your consideration.

This letter should become part of the enrolled bill file when the President has finally acted on the matter.

Attachment



Department of Justice
Washington, D.C. 20530

DEC 17 1974

Honorable Roy L. Ash
Director, Office of Management
and Budget
Washington, D. C. 20503

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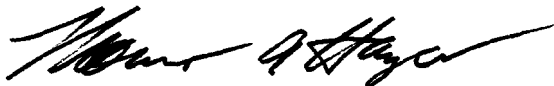
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Finally, Title II of the bill creates an independent Commission to study and report regarding appropriate rules and procedures with respect to the control, disposition, and preservation of records and documents produced by or on behalf of federal officials. While the Department maintains a certain skepticism, shared by the sponsor of S. 4016 himself, see 120 Cong. Rec. S20814 (daily ed. Dec. 9, 1974), regarding the desirability of yet another independent Commission, the Department feels that it is most desirable to rethink both the traditions and statutory law regarding historical materials of elected and appointed officials. Such a complete study is much preferable to patchwork attempts to change the law regarding Presidential papers generally in order to solve a particular problem in the heat of the moment. For these reasons, the

Department does not oppose the concept of the Commission.

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Sincerely,



Thomas A. Hayes
Deputy Assistant Attorney General
Legislative Affairs



Office of the White House Press Secretary

THE WHITE HOUSE**STATEMENT BY THE PRESIDENT**

I have signed S. 4016, the Presidential Recordings and Materials Act. This measure provides the following:

Title I: governs the possession, security and accessibility of tape recordings and other materials of the former President. Included are virtually all documents produced within the White House during the previous Administration. The Administrator of General Services is charged with obtaining "complete possession and control" of the tape recordings and materials which would be made available immediately, subject to any rights, defenses or privileges which may be asserted, for "subpoena or other legal process."

The Administrator is also directed to issue protective regulations "at the earliest possible date" governing the possession, security and custody of the tapes and materials. Finally, the Administrator shall draft regulations governing general public access to the tapes and materials, taking into account a series of specified needs: (1) to provide the public with the "full truth" on the abuses of governmental power incident to "Watergate"; (2) to make available the tapes and materials for judicial proceedings; (3) to guarantee the integrity of national security information; (4) to protect individual rights to a fair trial; (5) to protect the opportunity to assert available rights and privileges; (6) to provide public access to materials of historical significance; and (7) to provide the former President with tapes or materials in which the public has no interest.

Title I also provides for the expeditious judicial review of challenges to the "legal or constitutional validity" of the statute or of any regulation issued under its authority, and any action or proceeding involving "the question of title, ownership, custody, possession or control" of any tape recording or other material. In the event it is determined that the former President has been deprived of personal property under the provisions of Title I, "just compensation" shall be paid to him.

Title II: establishes a "Public Documents Commission" to study problems with respect to the control, disposition and preservation of records produced by or on behalf of "Federal officials." These are defined to include elected Federal officials and any officer of the executive, judicial or legislative branch of the Federal Government. The Commission is directed to make specific recommendations for legislation and other recommendations for rules and procedures as may be appropriate regarding the documents of such officials. A final report fulfilling their mandate is to be submitted to the Congress and the President by March 31, 1976.

more



It has been my consistent policy toward the records of the former President to protect both the records themselves and the legal rights of all parties involved. Following the release of an opinion of the Attorney General of the United States to the effect that the tapes and materials of the former President constituted his personal property, an agreement was entered into by Mr. Nixon and Mr. Sampson, the Administrator of General Services, on September 6, 1974. This agreement was intended to govern the possession, security and accessibility of the tapes and materials and it secured them from destruction or alteration during the periods when they might be needed in court and grand jury proceedings. Since then, a great deal of litigation and public attention have centered on that agreement. Although I believe it would not be appropriate to comment on the various issues, constitutional or otherwise, which are presented by pending cases or by the subject bill, I do want to mention that, by agreement made November 9, 1974, the interests of the Watergate Special Prosecution Force for access to the tapes and materials were fully accommodated.

It is my understanding of the intent of the Congress that this Act will provide the former President and others with the opportunity to litigate any right or privilege which may be asserted relevant to the tapes or materials.

The Administrator of General Services will move promptly to obtain complete possession and control of the tapes and materials and to discharge his other duties under the law.

I will name the Presidential appointees to the "Public Documents Commission" as quickly as possible. I am hopeful that the commission will suggest even-handed and uniform rules governing the documents of all Federal officials.

#



THE WHITE HOUSE
WASHINGTON

For new file:

"Nixon v. Sampson
on Constitutionality of
Papers Act."





Department of Justice
Washington, D.C. 20530

ASSISTANT ATTORNEY GENERAL
CIVIL DIVISION

December 24, 1974

Philip W. Buchen, Esq.
Counsel to the President
The White House
Washington, DC 20500

Thomas P. Wolf, Esq.
Special Assistant to the Administrator
General Services Administration
Office of Presidential Papers
Old Executive Office Building
Washington, DC 20500

Re: Richard Nixon v. Administrator of General
Services and The United States of America
USDC, D. D.C., Civil Action No. 74-1852

Gentlemen:

Enclosed find the following documents for your files
in connection with the above-entitled action:

- (1) COMPLAINT (INJUNCTION; DECLARATORY JUDGMENT).
- (2) APPLICATION FOR TEMPORARY RESTRAINING ORDER.
- (3) TEMPORARY RESTRAINING ORDER (proposed).
- (4) APPLICATION FOR CONVENING OF THREE-JUDGE
DISTRICT COURT.
- (5) SUPPLEMENTAL MEMORANDUM IN SUPPORT OF
APPLICATION FOR APPOINTMENT OF A THREE-
JUDGE PANEL OF THIS COURT.

Sincerely,

Beverly Posey, secretary to

CARLA A. HILLS
Assistant Attorney General
Civil Division

bp
Enclosures



UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Bush

RICHARD NIXON, individually)
and as the former President)
of the United States)
LaCasa Pacifica)
San Clemente, California)
(202) 456-1414,)

Plaintiff,

v.

Civil Action No. 74-1852

ADMINISTRATOR OF GENERAL SERVICES)
1315 Fourth Street, S.W.)
Washington, D. C.)
(202) 343-6161,)

and

THE UNITED STATES OF AMERICA,)
Serve the Attorney General)
of the United States)
Department of Justice)
Washington, D. C. 20530,)

Defendants.

COMPLAINT
(INJUNCTION; DECLARATORY JUDGMENT)

Plaintiff, complaining of Defendants, alleges as follows:

I. Introductory Statement

1. This is a suit by Richard Nixon, former President of the United States, challenging the validity of an Act of Congress purporting to authorize the seizure, confiscation and disclosure of Mr. Nixon's Presidential materials in violation of his rights and privileges both as a citizen and former President. By this action, Plaintiff seeks a temporary restraining order and preliminary and permanent injunctions against enforce-



ment, operation and execution of the Act, as well as a declaration of its invalidity. Plaintiff, by this action, also seeks implementation of a depository agreement or, alternatively, return of his Presidential materials.

II. Jurisdiction and Venue

2. This Court has jurisdiction to hear this action under Title 28 U.S.C. Sections 1331, 1332, 1346, 1356, 1361, and 2282. The amount in controversy, exclusive of interest and costs, exceeds the sum or value of \$10,000. The Defendant Administrator is found in the District of Columbia and many of the acts hereinafter alleged to have been committed were committed in the District of Columbia.

III. Parties

3. Plaintiff, Richard Nixon, is a citizen of the United States and a resident of the State of California. He has served as a member of the House of Representatives and the Senate of the United States, as Vice President, and as President of the United States from January 20, 1969, until his resignation on August 9, 1974.

4. The Administrator of General Services is named a Defendant herein.

5. The United States is named a Defendant herein.

IV. Nature of the Claim

The Presidential Materials
In Question

6. During his term as President, Richard Nixon maintained at the White House, and other Presidential offices, many



of his purely personal materials, including family and law practice records, memorabilia, correspondence and other items which cover periods of time both prior to and during his Presidency. Some of these personal materials are still located within the White House complex and, despite requests, have not at this time been sent to the former President.

7. During his term as President, Richard Nixon maintained within the White House and other Presidential offices materials related to his political activities both before and during his Presidency. Many of these political materials are still located within the White House complex and, despite requests, have not at this time been sent to the former President.

8. In addition to the personal and political materials referred to above, Richard Nixon and members of his staff, during the period Mr. Nixon served as President, generated and retained within the White House, the Old Executive Office Building ("OEOB"), parts of the New Executive Office Building ("NEOB") and other Presidential offices a substantial amount of materials which include, among other things, documents, papers, tapes, photographs, notes and other items, relating to Mr. Nixon's activities as President of the United States and to the conduct of government affairs.

9. All of the materials referred to in paragraphs 6, 7 and 8 herein, which were produced between January 20, 1969, and August 9, 1974, constitute the Presidential materials of Richard Nixon. As has been the case with every President of the United States, the Presidential materials generated and retained during the



term of a President are the property of that President. Mr. Nixon is the owner of his Presidential materials.

10. During Plaintiff's term as President of the United States, he was aware of the fact that those who had previously held the Office of President treated their Presidential materials as their own. Plaintiff was also aware that Congress to that time had never opposed the actions of previous Presidents who had asserted total dominion over their Presidential materials but, to the contrary, had specifically provided a statutory procedure in Title 44 U.S.C. §2107 whereby a President -- if he so desired -- could deposit his Presidential materials with the General Services Administration under restrictions as to their use and access acceptable to the Administrator of GSA. With this knowledge and in reliance thereon, Plaintiff caused to be created and retained a substantial amount of materials which he would not have created or retained if he had concluded that such materials were not his personal property to be used as he deemed appropriate.

11. Many of Mr. Nixon's Presidential materials embody, constitute or reflect communications between himself and his aides relating to the conduct of the Office of the President. The Constitution of the United States affords a privilege of confidentiality as to such materials both during and after the President's term in office subject to exception only upon demonstration of a specific need for relevant evidence in a criminal prosecution. The Supreme Court of the United States has held that the basis of this privilege is "the necessity for protection



of the public interest in candid, objective, and even blunt or harsh opinions in presidential decisionmaking," as well as "the values to which we accord deference for the privacy of all citizens." Plaintiff claims the Presidential privilege as to such materials.

12. Many of Mr. Nixon's Presidential materials constitute, embody or reflect communications between Plaintiff and his wife, family, attorney, physician and others with whom he enjoys a legally or constitutionally protected privilege of confidentiality. Plaintiff claims the privilege as to such materials.

13. Because of the national interest in a swift but orderly transition from the Presidency of Richard Nixon to the Presidency of Gerald Ford, there was not adequate time when President Nixon resigned on August 9, 1974, to arrange for transfer of all of the former President's Presidential materials and his personal records to his California residence or storage facility in the vicinity. Plaintiff directed and therefore acted on the assumption that his Presidential materials would be transferred forthwith to California so that he could personally review the materials or cause them to be reviewed under his direction, and thereafter processed, categorized and ultimately placed in a Presidential Library.

14. Because of demands made by the Special Prosecutor to staff members of the White House, directions were given that Plaintiff's Presidential materials not be sent to his custody in California. To the date of the filing of this complaint,



Mr. Nixon's Presidential materials remain in the custody of officials of the White House, the General Services Administration, and the Secret Service, and have not been shipped to him in California.

Executive Action

15. On or about September 3, 1974, Philip W. Buchen, Counsel to President Gerald Ford, and other representatives of President Ford entered into discussions with a representative of Plaintiff concerning his Presidential materials and the possible deposit of all or part thereof with the United States under conditions whereby the safety of the materials would be assured and whereby access could be gained upon lawful judicial order or other legal processes directed to Plaintiff.

16. On or about September 3, 1974, representatives of Plaintiff learned from Philip Buchen or his agents that William Saxbe, the Attorney General of the United States, had been requested to give an opinion concerning the legal ownership of Plaintiff's Presidential materials and that the Attorney General had concluded that title to the Presidential materials referred to herein vested in former President Nixon, as has been the case with the papers, documents and effects of every President of the United States.

Agreement to Deposit the Presidential Materials.

17. Because Plaintiff had been unable to obtain custody and control of his Presidential materials after his resignation,



he was induced to enter into an agreement dated September 6, 1974 (the "depository agreement") with the Defendant Administrator of General Services.

18. The depository agreement between Plaintiff and Defendant Administrator was executed pursuant to the authority of Title 44 U.S.C. §2107. By that agreement, former President Nixon agreed to place on deposit with the General Services Administration all of his Presidential materials located within the metropolitan area of the District of Columbia, such deposit to be subject to the terms and conditions contained in the agreement.

Some of the Terms and Conditions of the Depository Agreement.

19. The depository agreement, inter alia, provides that Defendant Administrator will transfer the Presidential materials to California and deposit them temporarily in an existing facility belonging to the United States located near Plaintiff's residence, where they will remain on deposit, under stated terms and conditions, until a permanent Presidential archival depository is established.

20. The depository agreement provides that access to Plaintiff's Presidential materials within both the temporary and permanent Presidential archival depository will require use of two keys, one to be given to Plaintiff, as custodian of the materials, and the other to be given to the Archivist of the United States or to members of his staff.

21. The depository agreement further provides that all of the Presidential materials (except tape recordings of



conversations in the White House and Executive Office Buildings) will remain on deposit for a period of three years under terms and conditions specified in the depository agreement. Upon agreement of the parties, the personal materials may be removed without limitation as to time.

22. With respect to the tape recordings of conversations, the depository agreement provides that such recordings will remain on deposit until September 1, 1979. In no event will the tape recordings be destroyed prior to that date. Thereafter, the agreement provides that Plaintiff will and by the agreement did donate to the United States (such gift to be effective September 1, 1979) all of the tape recorded conversations. This gift was conditioned upon Plaintiff's right to order destruction of such of the tapes as he then might direct and upon the further condition that the tapes will be destroyed at the time of the former President's death subsequent to September 1, 1979 or on September 1, 1984, whichever should first occur.

23. In specific recognition of the fact that the Presidential materials should remain available for some period for production in connection with lawful judicial orders or other legal processes, the depository agreement provides that in the event production of the materials is demanded by subpoena or other order directed to an official or employee of the United States, the recipient thereof shall notify Plaintiff so that he, as owner and custodian of the materials, with sole right of access thereto, can respond to the demand and, if appropriate, assert any privilege or defense available. The parties recognized



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that the former President, as owner and physical custodian of the Presidential materials, will be subject to service of process demanding production of the materials and therefore any legally recognized need for the materials or part thereof can be accommodated.

Interference With the
Depository Agreement.

24. On or about September 9, 1974, members of the Watergate Special Prosecution Force met with Philip Buchen, and members of his staff, and agreed with them not to permit any of Plaintiff's Presidential materials to be transferred to California without the prior approval of the Special Prosecutor. Among other things, the effect of this decision was to interfere with the contractual and ownership rights of Plaintiff and to inhibit Plaintiff's ability to protect the constitutionally based privilege of confidentiality in his Presidential materials and to raise other defenses or privileges available under the Constitution or laws of the United States.

25. In an effort to bring about implementation of the depository agreement, for several weeks prior to October 17, 1974, representatives of Plaintiff participated in negotiations with members of the Watergate Special Prosecution Force concerning implementation of the depository agreement in whole or in part. These negotiations did not result in implementation of the depository agreement and members of the Watergate Special Prosecution Force stated at or about that time that they intended to serve a subpoena duces tecum on defendant Buchen demanding production of Mr. Nixon's Presidential materials.

The Demand for Compliance With
The Depository Agreement.

26. On September 13, 1974, the former President requested that steps be taken immediately to implement the depository agreement as to all of the Presidential materials not then subject to subpoena or other court order. As to those materials subject to outstanding subpoenas or court orders, he requested that arrangements be made for storage of such materials in the District of Columbia under conditions whereby access could be gained only by means of the two-key arrangement described in the depository agreement.

27. Subsequent demands for implementation of the depository agreement were made orally to Philip Buchen, to members of his staff, and to the Defendant Administrator, but the depository agreement was not implemented.

Judicial Action.

28. On October 17, 1974, Plaintiff filed a civil action against the Defendant Administrator, Philip W. Buchen, and H. Stuart Knight seeking to compel implementation of the depository agreement. Nixon v. Sampson, et al., C.A. No. 74-1518 (D.D.C.). Within several days thereafter, twenty-one individuals and organizations in two separate actions filed suit against Plaintiff and others demanding access to Plaintiff's Presidential materials and seeking an injunction against implementation of the depository agreement and a declaration that Mr. Nixon did not own his Presidential materials. The Reporters Committee for Freedom of the Press, et al. v. Sampson, et al., C.A. No. 74-1533, (D.D.C.); Hellman, et al. v. Sampson, et al., C.A. No. 74-1551, (D.D.C.).

Jack Anderson, a syndicated columnist, seeking similar relief, intervened in Nixon v. Sampson, et al.

29. At the present time, in addition to the actions referred to in paragraph 28 herein, there are pending approximately twenty-nine civil actions in which former President Nixon has been named as a defendant or in which demands have been made for production of his Presidential materials.

30. On at least one occasion during the pendency of C.A. No. 74-1518, Philip Buchen or his agents, pursuant to a civil subpoena demand in Dellums, et al. v. Powell, et al., C.A. No. 71-2271 (D.D.C.), conducted a search of certain tape recordings of Plaintiff's conversations thereby breaching the confidentiality of those communications. At the present time, Philip Buchen is in receipt of a civil subpoena in Halperin, et al. v. Kissinger, et al., C.A. No. 73-1187 (D.D.C.), demanding production of Presidential materials including those subject to a Presidential privilege. Compliance with this subpoena demand will require a search by Philip Buchen's staff of Plaintiff's Presidential materials and will necessarily entail a breach of the confidentiality of those materials and a violation of Plaintiff's legally and constitutionally protected privileges and rights.

31. Subsequent to the filing of Nixon v. Sampson, et al., the Special Prosecutor served a series of eight subpoenas duces tecum on Philip Buchen requiring a massive search of Plaintiff's Presidential materials to locate items possibly relevant to the subpoena demands. On November 9, 1974, the Defendant Administrator, Philip Buchen, and H. Stuart Knight entered into an agreement with the Watergate Special Prosecutor whereby the Special Prosecutor and his staff are permitted to conduct a general,

warrantless search and seizure of any and all of Plaintiff's Presidential materials, regardless of their character, without any right by Plaintiff to object thereto or to raise any defenses against the production and use of the Presidential materials by the Special Prosecutor in any manner he may desire, even though at the time the parties executed the November 9 search and seizure agreement they were aware of and at least two of them had agreed to the depository agreement which precluded such warrantless searches but permitted production pursuant to lawful subpoenas according to procedures set forth in the depository agreement. Following execution of the search and seizure agreement, the Special Prosecutor withdrew the eight subpoenas previously served on Philip Buchen.

32. On November 11, 1974, Plaintiff requested the Court in Nixon v. Sampson, et al., to enter a restraining order against implementation of the search and seizure agreement. Concurrently, the Special Prosecutor requested an order permitting implementation. To date no order permitting implementation of the search and seizure agreement has been entered.

Congressional Action

33. On September 18, 1974, ten days after the public announcement of the depository agreement, Senators Nelson, Ervin, Javits, Ribicoff, Metcalf, Huddleston, Chiles, Percy, Muskie, Hatfield, Dole, Montoya and Stevenson introduced a bill (S. 4016) in the United States Senate which was designed to abrogate the statutory-based depository agreement between the General Services Administration and Richard Nixon and to confiscate materials, documents, tapes, and other items generated during Mr. Nixon's term as President of the United States.

34. Among the sponsors of the bill, Senators Ervin and Montoya had served as Chairman and member, respectively, of the Senate Select Committee on Presidential Campaign Activities (the "Ervin Committee"). The Ervin Committee had earlier subpoenaed certain tape recordings of conversations between Plaintiff and others made while Mr. Nixon was President, but the United States Court of Appeals for the District of Columbia Circuit ruled that the Committee was not entitled to the recordings because they were presumptively privileged. (Senate Select Committee on Presidential Campaign Activities v. Nixon, ___ U.S. App. D.C. ___, 498 F.2d 725 (1974).

35. S. 4016 was referred to the Senate Committee on Government Operations which, seven days later, reported it to the full Senate. The Government Operations Committee held no hearings on this controversial and historic measure. S. 4016 passed the Senate on October 4, 1974.

36. Upon referral to the House of Representatives, S. 4016 was sent to the Committee on House Administration on October 7, 1974. That Committee held no hearings on S. 4016, although the Subcommittee had conducted on September 30 and October 4 two hearing sessions on legislation establishing a commission to study the issue of private ownership of materials generated or retained by all constitutional officeholders other than Mr. Nixon, a provision which became Title II of S. 4016. The Committee reported S. 4016 to the full House on November 27, 1974, where it passed on December 3, 1974.

37. Various members of the House of Representatives, sitting as members of the House Judiciary Committee, had earlier

attempted to gain access to portions of Plaintiff's Presidential materials by subpoenaing certain materials in connection with impeachment proceedings against then President Nixon.

38. Various members of the House of Representatives, at the time S. 4016 passed the House, were parties to civil litigation in which they seek access to or production of Plaintiff's Presidential materials.

39. Following conference committee action, S. 4016 passed both Houses of Congress on December 9, 1974 and was sent to President Ford for signature. President Ford signed the legislation into law on December 19, 1974:

Various Provisions
of the Statute.

40. Title I of the Act is specifically directed at one individual, Richard Nixon. It requires the Defendant Administrator to take control of

(1) all recordings made in the White House or Presidential offices in the Executive Office Buildings, Camp David, Key Biscayne and San Clemente, during the period Mr. Nixon was President and which involve Richard Nixon or other individuals who at the time of the conversation were federal employees; and

(2) all historical materials of Richard Nixon, relating to the period of his Presidency, 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 commemorative value." 44 U.S.C. §2101.

41. The Act precludes Plaintiff from access to his Presidential materials until such time as the Defendant Administrator promulgates regulations concerning the security of the materials.

42. The Act purports to permit any agency or department of the executive branch to have access immediately and at all times to the tape recordings and other Presidential materials with priority to be given to requests for access by the Special Prosecutor.

43. The Act purports to make the Presidential materials immediately available for use in any judicial proceeding, subject to rights, defenses or privileges which the Federal Government or any person may invoke.

44. The Act requires Defendant Administrator to submit regulations to each House of Congress for approval within 90 days after enactment of the legislation. Such regulations are to provide for "public access" to Plaintiff's Presidential materials and are to "take into account":

"(1) the need to provide the public with the full truth, at the earliest reasonable date, of the abuses of governmental power popularly identified under the generic term "Watergate";

(2) the need to make such recordings and materials available for use in judicial proceedings;

(3) the need to prevent general access, except in accordance with appropriate procedures established for use in judicial proceedings, to information relating to the Nation's security;

(4) the need to protect every individual's right to a fair and impartial trial;

(5) the need to protect any party's opportunity to assert any legally or constitutionally based right or privilege which would prevent or otherwise limit access to such recordings and materials;

(6) the need to provide public access to those materials which have general historical significance, and which are not likely to be related to the need described in paragraph (1); and

(7) the need to give to Richard M. Nixon, or his heirs, for his sole custody and use, tape recordings and other materials which are not likely to be related to the need described in paragraph (1) and are not otherwise of general historical significance."

45. The Act does not purport to distinguish between personal, political and official items, but directs seizure of all such materials generated during Mr. Nixon's Presidency.

46. The Act directs seizure of Presidential materials clearly subject to claims of Presidential privilege, as well as to other claims by Plaintiff of privileges or rights protected by law or the Constitution.

47. The Act purports to limit Plaintiff's ultimate access to the Presidential materials to purposes consistent with the provisions of the Act and the regulations promulgated thereunder.

48. The Act purports to prohibit transfer of the Presidential materials to California and requires they be maintained in the Washington, D. C. metropolitan area.

49. The Act, together with its legislative history, purports to direct any judicial challenges to the validity of the Act or any issues related thereto to a specific judge of the United States District Court for the District of Columbia.

50. The Act purports to authorize compensation to Plaintiff to the extent the Act deprives him of his property.

Reasons For Invalidity
Of the Act

51. The Act is unconstitutional, unlawful and void in that it violates Plaintiff's right of privacy under the First, Fourth, Fifth and Ninth Amendments to the Constitution of the United States by directing government seizure, inspection and disclosure of private materials and items containing, reflecting or recording the private thoughts, actions and conversations of

Plaintiff for review, use, comparison and other purposes by government officials, agencies, private litigants and the general public.

52. The Act is unconstitutional, unlawful and void in that it violates the Fourth Amendment to the Constitution of the United States by directing the wholesale seizure, impoundment and use of private materials in the nature of a writ of assistance or general warrant thereby constituting an unreasonable search and seizure.

53. The Act is unconstitutional, unlawful and void in that it deprives Plaintiff of rights and privileges otherwise available to him under the Fourth and Fifth Amendments to the Constitution of the United States.

54. The Act is unconstitutional, unlawful and void in that it violates the Presidential privilege of confidentiality recognized by the Supreme Court in United States v. Nixon, ___ U.S. ___, 94 S.Ct. 3090 (1974), by permitting access by government officials and innumerable other persons to materials subject to the Presidential privilege of confidentiality.

55. The Act is unconstitutional, unlawful and void in that it violates the separation of powers doctrine by directing the seizure from a former President of the United States of his private materials to which neither the public nor Congress are entitled to access.

56. The Act is unconstitutional, unlawful and void in that it purports to be an exercise of Congress' power of eminent domain but in fact condemns and seizes private property of Plaintiff without valid public purpose.

57. The Act is unconstitutional, unlawful and void in that it violates the Fifth Amendment to the Constitution by directing the seizure of Plaintiff's materials without due process of law and by purporting to affect Plaintiff's right to judicial review of the Act, both in a manner devoid of equal treatment to persons similarly situated.

58. The Act is unconstitutional, unlawful and void in that it violates the First Amendment to the Constitution of the United States by directing the seizure of materials which contain, reflect, or record political activities of Plaintiff and others, as well as private activities, for review, use, comment and other purposes by government officials, agencies, private litigants and the general public, with a consequent chilling effect on Plaintiff's right to free expression and association.

59. The Act is unconstitutional, unlawful and void in that it purports to abrogate a valid contract entered into by Plaintiff pursuant to statutory authorization.

60. The Act is unconstitutional, unlawful and void in that it constitutes a Bill of Attainder or Bill of Pains and Penalties prohibited by Article I, Section 9, Clause 3 of the Constitution of the United States.

61.. The Act is unconstitutional, unlawful and void in that it directs the seizure of materials embodying, constituting or reflecting privileged communications between Plaintiff and his wife, attorney, minister and physician.

Injury to Plaintiff ..

62. The examination, production or disclosure of the Presidential materials by or to persons other than the former

President poses an immediate threat to the former President's constitutional rights and privileges. This threat constitutes a significant and irreparable injury which cannot be remedied by an action at law but can only be remedied by injunction.

63. The injury suffered by Plaintiff because of Defendant Administrator's actions in failing to implement the depository agreement impairs his constitutional, legal and contractual rights and privileges. This injury is imminent and irreparable and cannot be compensated by an award of damages. The only adequate remedy is mandamus or injunction in the nature of specific performance of the depository agreement by Defendant Administrator, uninhibited by any official or agent of the United States. Specific performance will not work a hardship upon Defendant.

64. Enforcement and implementation of the Act will irreparably injure Plaintiff's rights and privileges under law and the Constitution of the United States. This injury is imminent and irreparable and cannot adequately be compensated by money damages. Plaintiff's only adequate remedy is an injunction against enforcement and implementation of the Act and a declaration of its invalidity.

V. Relief Requested

WHEREFORE, Plaintiff requests this Court:

(a) to temporarily restrain Defendants from taking any action to enforce or implement the Act and to temporarily restrain Defendants from examining, producing or disclosing, or permitting others to examine, produce or disclose Plaintiff's materials covering the period beginning January 20, 1969 and ending August 9, 1974, which are within their custody and control;

(b) to preliminarily and permanently enjoin Defendants from taking any action whatsoever to enforce or implement the Act;

(c) to declare, adjudge and decree that the Act is unconstitutional, unlawful and void in its entirety;

(d) to the extent the Act is deemed to be valid and to lawfully deprive Plaintiff of his private property, to award just compensation for such deprivation;

(e) to permanently enjoin Defendants from taking any action inconsistent with the terms and conditions of the depository agreement;


(f) to order Defendant Administrator to perform those duties owed to Plaintiff with respect to implementation of the depository agreement pursuant to Title 44 U.S.C. §2107;

(g) Alternatively to (e) and (f), to direct Defendants to return to Plaintiff all Presidential materials referred to herein.


(h) to temporarily restrain and to preliminarily and permanently enjoin Defendants from taking any action to enforce or implement the search and seizure agreement of November 9, 1974; and

(i) to grant such other and further relief as this Court deems just and equitable in the circumstances.

Respectfully submitted,


Herbert J. Miller, Jr.


Raymond C. Larroca


William H. Jeffers, Jr.


R. Stan Mortenson


MILLER, CASSIDY, LARROCA & LEWIN
1320 19th Street, N.W., Suite 500
Washington, D.C. 20036
(202) 293-6400

Attorneys for Plaintiff, Richard Nixon

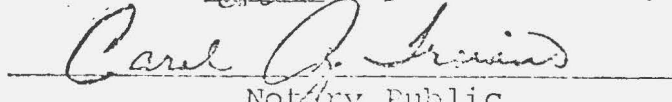
VERIFICATION

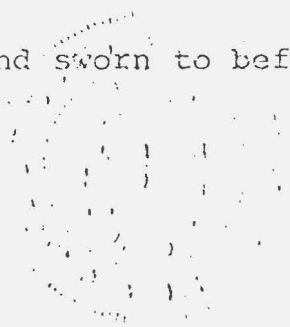
District of Columbia, ss:

R. STAN MORTENSON, being first duly sworn under oath, says that upon information and belief the foregoing is a just and true statement of the facts upon which Plaintiff bases his claim for relief.


R. Stan Mortenson, Attorney for Plaintiff, Richard Nixon

Subscribed and sworn to before me this 20th day of December, 197


Notary Public



THE WHITE HOUSE
WASHINGTON

Barry
will get you
a copy of
the complaint
in this.

attached is
the complaint
which was in
your file
behind
you.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

RICHARD NIXON, individually :
and as the former President :
of the United States :
LaCasa Pacifica :
San Clemente, California :
(202) 456-1414, :
:
Plaintiff, :
:
v. : Civil Action No. 74-1852
:
ADMINISTRATOR OF GENERAL SERVICES:
1315 Fourth Street, S. W. :
Washington, D. C. :
(202) 343-6161, :
:
and :
:
THE UNITED STATES OF AMERICA :
Serve the Attorney General :
of the United States :
Department of Justice :
Washington, D. C. 20530, :
:
Defendants. :

ANSWER

Defendants, by their undersigned attorneys, in answer to the Complaint, herein admit, deny, and allege as follows:

1. The statements contained in paragraph 1 of the Complaint are legal conclusions not requiring answer.

2. The statements contained in the first sentence of paragraph 2 of the Complaint are legal conclusions not requiring answer. For lack of knowledge or information sufficient to form a belief, defendants deny the remaining allegations contained in paragraph 2, except that they admit that the Administrator is found in the District of Columbia.

3-5, inclusive. Defendants admit the allegations contained in paragraphs 3-5, inclusive.



6. For lack of knowledge or information sufficient to form a belief, defendants deny the allegations contained in paragraph 6 of the Complaint, except that they admit that materials presently located within the White House complex, including the Executive Office Building, include correspondence and other items deriving from the period of time represented by the Presidency of Richard Nixon and that despite requests, said materials have not been sent to Mr. Nixon.

7. For lack of knowledge or information sufficient to form a belief, defendants deny the allegations contained in paragraph 7 of the Complaint, except that they admit that materials located within the White House complex, requested by Mr. Nixon, have not been sent to him.

8. Defendants admit the allegations contained in paragraph 8 of the Complaint.

9. The statements contained in paragraph 9 of the Complaint are legal conclusions not requiring answer but, to the extent they may be deemed allegations of fact, they are denied for lack of knowledge or information sufficient to form a belief.

10. For lack of knowledge or information sufficient to form a belief, defendants deny the allegations contained in paragraph 10 of the Complaint.

11. For lack of knowledge or information sufficient to form a belief, defendants deny the allegations contained in paragraph 11 of the Complaint, except that they admit that materials generated within the White House and the Executive Office of the President, during



Mr. Nixon's Presidency, reflect communications between himself and his aides relating to the conduct of the Office of the President. The remaining statements contained in paragraph 11 are not allegations of fact but are legal conclusions not requiring answer.

12. For lack of knowledge or information sufficient to form a belief, defendants deny the allegations contained in the first sentence of paragraph 12. The statement contained in the second sentence of paragraph 12 is not an allegation of fact requiring answer.

13. For lack of knowledge or information sufficient to form a belief, defendants deny the allegations contained in paragraph 13 of the Complaint.

14. Defendants deny the allegations contained in the first sentence of paragraph 14 and admit the allegations contained in the second sentence of paragraph 14.

15. Defendants deny the allegations contained in paragraph 15 of the Complaint, except that they admit that on or about September 3, 1974, Philip W. Buchen, counsel to the President, and others entered into discussions with a representative of plaintiff concerning the deposit and safekeeping of materials created and generated during the Presidency of Richard Nixon. Defendants further aver that said discussions culminated in an agreement between Richard Nixon and Arthur Sampson dated September 6, 1974, and the Court is respectfully referred to that agreement for its terms and conditions.

16. Defendants deny the allegations contained in paragraph 16 of the Complaint, except they admit that



on or about September 3, 1974, representatives of plaintiff were advised by Philip Buchen, or his representatives, that the Attorney General of the United States had been requested to provide an opinion with respect to the ownership of materials created and generated during the Presidency of Richard Nixon. Defendants further aver that on September 6, 1974, an opinion of the Attorney General on the subject was delivered, and the Court is respectfully referred to the opinion for its contents.

17. For lack of knowledge or information sufficient to form a belief, defendants deny the allegations contained in paragraph 17.

18. Defendants deny the allegations contained in paragraph 18 of the Complaint, except they admit that an agreement was entered into by plaintiff and defendant Administrator dated September 6, 1974, and the Court is respectfully referred to that agreement for its terms and conditions.

19-23, inclusive. Defendants deny the allegations contained in paragraphs 19-23, inclusive, except that they admit that an agreement was entered into between plaintiff and defendant Administrator dated September 6, 1974, and the Court is respectfully referred to that agreement for its terms and conditions.

24. Defendants deny the allegations contained in paragraph 24 of the Complaint, except they admit that on or about September 12, 1974, members of the Watergate Special Prosecution Force met with Philip Buchen and



members of his staff and that materials created and generated during the Presidency of Mr. Nixon were not transferred to California.

25. Defendants deny the allegations contained in paragraph 25 of the Complaint, except that they admit that for several weeks prior to October 17, 1974, representatives of plaintiff participated in discussions and negotiations with members of the Watergate Special Prosecution Force and that representatives of the Watergate Special Prosecutor indicated an intention to serve a subpoena duces tecum on Mr. Buchen with respect to materials created and generated during the Presidency of Richard Nixon.

26. Defendants deny the allegations contained in paragraph 26 of the Complaint, except that they admit that Richard Nixon requested that steps be taken to implement the agreement of September 6, 1974.

27. Defendants deny the allegations contained in paragraph 27 of the Complaint, except they admit that subsequent demands for implementation of the depository agreement were made to Philip Buchen and others.

28. In answer to the allegations contained in paragraph 28 of the Complaint, defendants admit the filing of the actions referred to therein and respectfully refer the Court to such actions for a recitation of the issues involved therein.

29. For lack of knowledge or information sufficient to form a belief, defendants deny the allegations contained in paragraph 29 of the Complaint.

30. Defendants deny the allegations contained in paragraph 30 of the Complaint, except they admit that



pursuant to a civil subpoena demand and order of the District Court in Dellums, et al. v. Powell, et al., Civil Action No. 71-2271 (D.D.C.), Philip Buchen or his agents conducted a search of certain tape recordings created during the Presidency of Richard Nixon and that Philip Buchen is in receipt of a civil subpoena in Halperin, et al. v. Kissinger, et al., Civil Action No. 73-1187 (D.D.C.), and the Court is respectfully referred to said subpoena for its terms and conditions.

31. Defendants deny the allegations contained in paragraph 31 of the Complaint, except they admit that the Special Prosecutor served a series of eight (8) subpoenas duces tecum on Philip Buchen, and the Court is respectfully referred to said subpoenas for their terms and conditions; that said subpoenas were thereafter withdrawn, and that on November 9, 1974, an agreement was entered into between defendant Administrator, Philip Buchen, H. Stuart Knight, and the Watergate Special Prosecutor, and the Court is respectfully referred to said November 9th agreement for its terms and conditions.

32. Defendants deny the allegations contained in paragraph 32 of the Complaint, except they admit that on November 11, 1974, plaintiff sought a temporary restraining order in Civil Action No. 74-1518 and that a joint motion of defendants and the Special Prosecutor for modification of the temporary restraining order previously issued in Civil Action No. 74-1518 has been filed and is pending before that Court.



33. Defendants deny the allegations contained in paragraph 33 of the Complaint, except they admit that a bill (S. 4016) was introduced in the U. S. Senate on September 18, 1974, by Senators Nelson, Ervin, Javits, Ribicoff, Metcalf, Huddleston, Chiles, Percy, Muskie, Hatfield, Dole, Montoya, and Stevenson, and the Court is respectfully referred to the language of S. 4016 for its provisions.

34. Defendants deny the allegations contained in paragraph 34 of the Complaint, except they admit Senators Ervin and Montoya served as Chairman and member, respectively, of the Ervin Committee which litigated with plaintiff Nixon, and the Court is respectfully referred to the opinion of the Court of Appeals for its ruling and the nature of the controversy.

35. Defendants deny the allegations contained in paragraph 35 of the Complaint, except they admit that S. 4016 was referred to the Senate Committee on Government Operations which reported it to the Senate without prior hearing and that the Senate passed S. 4016 on October 4, 1974.

36. Defendants deny the allegations contained in paragraph 36 of the Complaint, except they admit that S. 4016 was sent to the Committee on House Administration on October 7, 1974, which reported S. 4016 to the House of Representatives on November 27, 1974, that said Committee considered matters pertaining to the subject matter of S. 4016 and that the House of Representatives passed S. 4016, as amended, on December 3, 1974.



37. Defendants deny the allegations contained in paragraph 37 of the Complaint, except they admit that the House Judiciary Committee subpoenaed certain materials in connection with the impeachment proceedings against then President Nixon.

38. Defendants deny the allegations contained in paragraph 38 of the Complaint, except they admit that members of the House of Representatives at the time S. 4016 passed the House were parties to civil litigation in which access was sought to documents and materials generated and created during the Presidency of Richard M. Nixon.

39. Defendants admit the allegations contained in paragraph 39 of the Complaint.

40-50, inclusive. Defendants deny the allegations contained in paragraphs 40-50, inclusive, of the Complaint and respectfully refer the Court to the provisions of Public Law 93-526 for its terms and conditions.

51-64, inclusive. Defendants deny the allegations contained in paragraphs 51-64, inclusive, of the Complaint.

Defendants deny each and every allegation of the Complaint not hereinabove specifically admitted, qualified or denied.

First Defense

The Complaint fails to state a claim upon which relief can be granted.

Second Defense

The Court lacks jurisdiction over the subject matter of this action to the extent that certain of the claims



set forth in the Complaint cannot be adjudicated until after the promulgation of regulations called for by Public Law 93-526.

Third Defense

The Court lacks jurisdiction over the subject matter of this action.

WHEREFORE, defendants pray that the action be dismissed with costs and that the Court grant such further relief as may seem just and proper.

Respectfully submitted,

Carla A. Hills

CARLA A. HILLS
Assistant Attorney General

Earl J. Silbert

EARL J. SILBERT
United States Attorney

Irving Jaffe

IRVING JAFFE
Deputy Assistant Attorney General

Irwin Goldbloom

IRWIN GOLDBLOOM
Deputy Assistant Attorney General

Bernard J. Carl

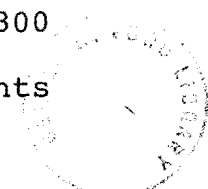
BERNARD J. CARL
Special Assistant to the
Assistant Attorney General

Jeffrey Axelrad

JEFFREY AXELRAD
Attorney, Department of Justice

Attorneys, Department of Justice
Washington, D. C. 20530
Telephone: 202-739-3300

Attorneys for Defendants



CERTIFICATE OF SERVICE

I hereby certify that I have caused to be served by mail, postage prepaid, this 9th day of January 1975 on the attorneys listed below a copy of defendants Administrator of General Services and The United States of America Answer in this proceeding:

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Miller, Cassidy, Larroca & Lewin
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Washington, D. C. 20036

William A. Dobrovir, Esquire
2005 L Street, N. W.
Washington, D. C. 20036

Peter M. Kreindler, Esquire
1425 K Street, N. W.
Washington, D. C. 20005

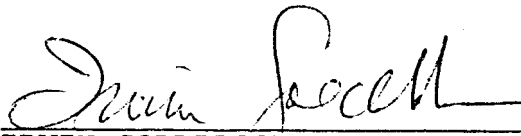
and as a courtesy, copies have likewise been mailed to:

Robert E. Herzstein, Esquire
Arnold & Porter
1229 19th Street, N. W.
Washington, D. C. 20036

Melvin L. Wulf, Esquire
American Civil Liberties Union
410 First Street, S. E.
Washington, D. C. 20003

John H. F. Shattuck, Esquire
American Civil Liberties Union
Foundation
22 East 40th Street
New York, New York 10016

Thaddeus Holt, Esquire
Breed, Abbott & Morgan
815 Connecticut Avenue, N. W.
Washington, D. C. 20006



IRWIN GOLDBLOOM

Attorney, Department of Justice
Attorney for Defendants



Bucher

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

RICHARD M. NIXON, individually)
 and as the former President)
 of the United States)
 San Clemente, California)
 (714) 456-1414,)
)
Plaintiff,)
)
 v.)
)
 ADMINISTRATOR OF GENERAL SERVICES)
 1315 Fourth Street, S.W.)
 Washington, D. C.)
 (202) 343-6161,)
)
 and)
)
 THE UNITED STATES OF AMERICA,)
)
Defendants.)

No. 74-1852

APPLICATION FOR CONVENING OF
THREE-JUDGE DISTRICT COURT

Plaintiff, Richard M. Nixon, upon his complaint heretofore filed, hereby makes application for hearing of this cause and of the plaintiff's motion for an interlocutory injunction herein with a three-judge district court as required by 28 U.S.C.A. §2282, and requests that the Chief Judge of the United States Court of Appeals for the District of Columbia Circuit be notified pursuant to 28 U.S.C.A. §2284, of presentation of plaintiff's application for injunction in order that necessary designation of judges for said court may be made.



POINTS AND AUTHORITIES IN
SUPPORT OF APPLICATION

Title 28, §2282 of the United States Code requires that any action for an interlocutory or permanent injunction restraining the enforcement of any Act of Congress for repugnance to the Constitution be heard by a three-judge court.

Plaintiff by his complaint and application for a temporary restraining order seeks to enjoin the enforcement of Public Law , enacted December 9, 1974, and entitled "Presidential Recordings and Materials Preservation Act." This Act authorizes and commands the Administrator of General Services to seize materials generated by the Office of the President while Richard Nixon was President of the United States and to make them available to third parties as specified in the law. This statute is challenged as unconstitutional because, inter alia, it is an unlawful search and seizure which contravenes the Fourth Amendment; it abrogates the constitutionally based Presidential privilege of confidentiality; it is an unconstitutional intrusion into plaintiff's constitutionally protected right of privacy; and it violates the concept of separation of powers by permitting one branch of government to direct the seizure of the records generated by another branch.

The Supreme Court in Idlewild Bon Voyage Liquor Corp. v. Epstein, 370 U.S. 713, 715 (1962), defined the duty of a district judge in determining an application for a three-judge court as follows:

When an application for a statutory three-judge court is addressed to a district court, the court's inquiry is appropriately limited to determining whether the constitutional question is substantial, whether the complaint at least formally alleges a basis for equitable relief, and whether the case presented otherwise comes within the requirements of the three-judge statute.

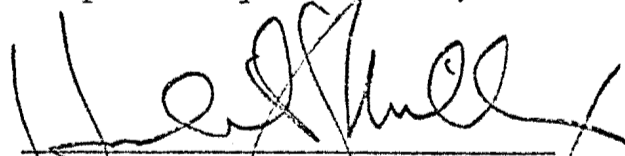
Each of those requirements is plainly met in this case.

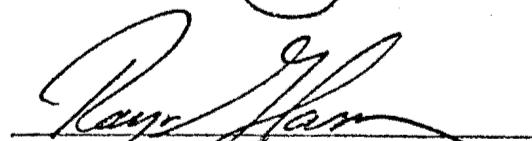
Nothing in the Act under challenge creates an exemption from the requirements of §2282. The judicial review section of the Act, Section 105(a), places "exclusive jurisdiction" of challenges to the "legal or constitutional validity of this title or any regulation issued under the authority granted by this title" in "the United States District Court for the District of Columbia." While that provision purports to deprive Mr. Nixon of the right to sue in his home district of California, it does not create any exception to the requirements of §2282 with respect to a suit to enjoin enforcement of the Act.

CONCLUSION

For the reasons stated herein, this application should be granted and a statutory three-judge court empaneled as provided in 28 U.S.C. §2284.

Respectfully submitted,


Herbert J. Miller, Jr.


Raymond G. Larroca




William H. Jefferson, Jr.


R. Stan Mortenson

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(202) 293-6400

Attorneys for Richard M. Nixon



Bush

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

RICHARD M. NIXON,)	
)	
Plaintiff,)	
)	
v.)	Civil Action No. <u>74-1852</u>
)	
ADMINISTRATOR OF GENERAL SERVICES)	
)	
and)	
)	
THE UNITED STATES OF AMERICA,)	
)	
Defendants.)	

APPLICATION FOR TEMPORARY
RESTRAINING ORDER

Plaintiff Richard Nixon, through his undersigned attorneys, hereby moves pursuant to Rule 65, Federal Rules of Civil Procedure, for an order temporarily restraining the enforcement, operation or execution of an Act of Congress passed December 9, 1974, and signed by the President on December 19, 1974, entitled "Presidential Recordings and Materials Preservation Act," until such time as plaintiff's motion for a preliminary injunction may be heard and determined, and further enjoining defendants, their agents and employees from examining, producing or disclosing the presidential materials of the Nixon Administration.

This application is made upon the verified complaint, on the following grounds:

1. The Presidential Recordings and Materials Preservation Act directs the Administrator of General Services to seize



the tape recordings of former President Nixon's conversations during his term in office, and all other "Presidential historical materials" -- including, apparently, every piece of paper or object generated by the former President or the White House staff from January 20, 1969, through August 9, 1974. It further directs the Administrator to make all such materials available immediately for use in judicial proceedings subject to subpoena or other legal process; grants full access to all the materials "for lawful Government use"; and requires the Administrator to submit to Congress, within 90 days, regulations designed to "provide public access" to the materials, which will become effective 90 legislative days after their submission unless disapproved by a House of Congress during that period. The Act permits former President Nixon access to the materials once the Administrator promulgates certain security regulations, and apparently also permits him to raise, in objection to subpoenas or other demands for use of the materials in judicial proceedings, privileges and defenses available to him -- though it does not guarantee any opportunity nor provide any mechanism for the assertion of these privileges and defenses.

2. The papers and materials of every President of the United States in the nation's history have been treated as the private property of the President and have been preserved, destroyed, transferred, or otherwise disposed of by him after his term in office. The principle of private ownership has guaranteed to every President the right and ability to protect the privacy and confidentiality of his Presidential materials



in the way he has deemed most appropriate. The Presidential Recordings and Materials Preservation Act for the first time in the nation's history attempts to abolish this right and ability, and does so not as to the materials of all former Presidents but as to the materials of Richard Nixon alone.

3. The Presidential materials of Richard Nixon, like the Presidential materials of every other former President, include confidential communications among the President and his aides and advisers. The Constitution of the United States bars either the Congress or the judicial branch from invading the confidentiality of these communications except where production is necessary to serve a demonstrated, specific need for evidence in a criminal prosecution. United States v. Nixon, ___ U.S. ___, 94 S. Ct. 3090 (1974). Through the Presidential Recordings and Materials Preservation Act, Congress has for the first time in the history of this nation purported to invade this privilege of confidentiality by legislation.

4. The Presidential materials of Richard Nixon which the Act purports to seize include confidential communications between the former President and his attorneys, his wife, his ministers, and his physicians, as well as his aides, his advisers, his friends, and persons -- including heads of foreign governments -- with whom he has spoken and corresponded. The Act purports to permit immediate access to these communications by any government agency or employee, and potential access by the public generally. The Act is, so far as we can determine, the first attempt by Congress in this nation's history to deprive



a citizen by legislation of such records of his private communications, and to open up such records for inspection by others.

5. Through the enactment of the Presidential Libraries Act of 1955, Congress sought to encourage Presidents and former Presidents to deposit their Presidential materials with the General Services Administration of the United States in order to preserve such materials for historical purposes, under contractual and statutory guarantees that restrictions preserving the confidentiality of such materials imposed by the depositor would be respected. Six former Presidents, including Richard Nixon, have entered into such contracts for the deposit of their Presidential materials. Through the Presidential Recordings and Materials Preservation Act, Congress has for the first time abrogated such a contract after it was entered into in reliance on the existing statutory guarantees, and it has done so not as to all former Presidents but as to Richard Nixon alone.

6. These and other unprecedented and enormously significant effects of the Act raise grave constitutional questions which are, in part, central to the structure of our national government and the separation of powers; and which are, in other respects, vital to the preservation of individual rights and liberties. It is incredible that the Congress should have passed the Act without full consideration and, as reflected by comments made in the floor debates, without full understanding of the effects and the significance of its action. The reasons given by the sponsors for such ill-considered haste were that the legislation was necessary to prevent destruction of the Presi-



dential materials and to ensure their availability for use in judicial proceedings pursuant to subpoena. Yet as the sponsors well knew, the materials are and have been since September 7, 1974, subject to a depository agreement made pursuant to statute which bars any destruction or removal of any of the materials for three years, and ensures that they will be available for production under subpoena and lawful court order. This Court should not allow itself to be rushed to permit implementation of the statute on the same kind of misrepresentations and misinformation that led Congress to act so precipitately.

7. In ruling on an application for a temporary restraining order the Court must consider the "probability of irreparable harm, probability of success on the merits, the balancing of interests and the preservation of the status quo. . . ." Palmigiano v. Travisono, 317 F.Supp. 776, 785 (D.R.I. 1970). See United States v. Washington Post Co., 446 F.2d 1322, 1325 (D.C. Cir. 1971). There can be no doubt of the immediate irreparable injury that the Act will cause to plaintiff Nixon: for it permits immediate access to the tapes and papers not just by G.S.A. but also by every government agency and employee, and also makes them amenable to production pursuant to subpoena or other legal process under circumstances which effectively deprive Mr. Nixon of the ability to protect the Presidential privilege of confidentiality and other personal privileges that he has as to the materials. "The unauthorized seizure of one's papers, if unlawful, and thus an injury, is an irreparable injury." Bell v. Waterfront Comm'n of New York Harbor, 183 F.Supp.



dential materials and to ensure their availability for use in judicial proceedings pursuant to subpoena. Yet as the sponsors well knew, the materials are and have been since September 7, 1974, subject to a depository agreement made pursuant to statute which bars any destruction or removal of any of the materials for three years, and ensures that they will be available for production under subpoena and lawful court order. This Court should not allow itself to be rushed to permit implementation of the statute on the same kind of misrepresentations and misinformation that led Congress to act so precipitately.

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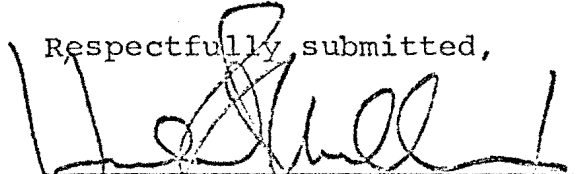
175, 177-178 (S.D.N.Y. 1960), aff'd, 279 F.2d 853 (2d Cir. 1960).


8. The relief sought by this application is purely and simply to preserve in toto the status quo as to the presidential materials, permitting no access, no disclosure, and no transfer of those materials until such time as the Court may hear and determine plaintiff's motion for a preliminary injunction which will be filed as soon as time permits.


9. Notice of this application has been given by telephone to the office of the defendant Administrator as well as to the office of the Deputy Attorney General of the United States and the office of the United States Attorney for the District of Columbia.

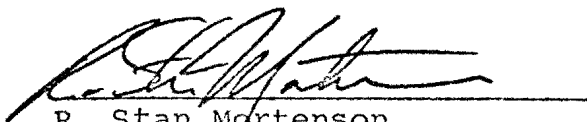
WHEREFORE, it is respectfully requested that this application be granted and a temporary restraining order entered in the form attached hereto.

Respectfully submitted,


Herbert J. Miller, Jr.


Raymond G. Larroca


William H. Jeffress, Jr.


R. Stan Mortenson

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Attorneys for Plaintiff



UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

RICHARD M. NIXON, individually)
and as the former President)
of the United States)
San Clemente, California)
(714) 456-1414,)

Plaintiff,)

v.)

No. _____)

ADMINISTRATOR OF GENERAL SERVICES)
1315 Fourth Street, S.W.)
Washington, D. C.)
(202) 343-6161,)

and)

THE UNITED STATES OF AMERICA,)

Defendants.)

TEMPORARY RESTRAINING ORDER

Upon consideration of the application of plaintiff Richard Nixon for a temporary restraining order, and the defendants having been notified of such application and the Court having heard the parties in open court, and the Court having determined that a temporary restraining order is necessary to maintain the status quo as to the presidential materials of former President Nixon and to prevent irreparable loss by plaintiff Nixon of the confidentiality of the presidential materials as to which he claims rights of ownership and privilege, it is hereby this ____ day of December, 1974,

ORDERED that the defendant Administrator of General Services and his agents and representatives, and every other employee,



agent or representative of the defendant United States of America,
be and the same hereby are enjoined from taking any action, under
the purported authority of the Presidential Recordings and
Materials Preservation Act or otherwise, to examine, produce
or disclose, or to permit others to examine, produce or disclose,
the Presidential historical materials of Richard M. Nixon within
the possession, custody or control of the defendants; covering
the period beginning January 20, 1969, and ending August 9, 1974;
and it is further

ORDERED that plaintiff Nixon shall not be required to post
any bond; and it is further

ORDERED that this temporary restraining order shall be
effective for ten (10) days and shall be renewed upon proper
application of any party.

UNITED STATES DISTRICT JUDGE

Date: _____

Time: _____



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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

RICHARD NIXON,)	
)	
Plaintiff,)	
)	
v.)	C.A. No. 74-1852
)	
ADMINISTRATOR OF GENERAL SERVICES)	
)	
and)	
)	
THE UNITED STATES OF AMERICA,)	
)	
Defendants.)	

SUPPLEMENTAL MEMORANDUM
IN SUPPORT OF APPLICATION
FOR APPOINTMENT OF A
THREE-JUDGE PANEL OF THIS COURT

On December 20, 1974, plaintiff Nixon filed suit to enjoin enforcement; operation and execution of an Act of Congress (P.L. 93-526) for repugnance to the Constitution of the United States. Together with the complaint, plaintiff filed an application for appointment of a three-judge panel of the United States District Court for the District of Columbia as required by 28 U.S.C. §2282. This supplemental memorandum is submitted in support of that application and addresses, primarily, those points raised by the Court in hearing on plaintiff's request for a temporary restraining order.

I. The Complaint Raises Substantial
Questions Concerning the Statute's
Constitutionality

When faced with an application to convene a three-judge court, a single district court judge's inquiry is limited



to determining (1) whether the constitutional question is substantial; (2) whether the complaint at least formally alleges a basis for equitable relief; and (3) whether the case otherwise comes within the requirements of the three-judge statute.

Nieves v. Oswald, 477 F.2d 1109 (2d Cir. 1973). The substantiality of the constitutional questions posed are to be measured against whether they appear "essentially fictitious," Bailey v. Patterson, 369 U.S. 31, 33 (1962), "wholly insubstantial," ibid., "obviously frivolous," Hannis Distilling Company v. Baltimore, 216 U.S. 285, 288 (1910), "obviously without merit," Ex parte Poresky, 290 U.S. 30 (1933), or whether their unsoundness clearly results " . . . from the previous decisions of [the Supreme Court] as to foreclose the subject and leave no room for the inference that the question sought to be raised can be the subject of controversy." Ex parte Poresky, supra, 290 U.S. at 32. See Rowland v. Tarr, 480 F.2d 545 (3rd Cir. 1973).

Plaintiff Nixon, as former President of the United States, has filed suit to enjoin enforcement of a statute unique in the annals of this country: an Act seizing for purposes of public exposure the Presidential materials of a former President. By his complaint, Mr. Nixon presents at least eleven grounds upon which the Act is repugnant to the Constitution. These range from claims based upon invasion of privacy and denial of due process to breach of the separation of powers doctrine as well as various constitutional and common law privileges.



There can be no question that the complaint, on its face, raises issues never before faced by the Supreme Court or any lower court, including this Court in Nixon v. Sampson, et al., C.A. No. 1518 (D. D.C.). Whether Congress, for example, can direct the seizure of a President's historical materials, even with compensation, without unconstitutionally intruding upon the presidential privilege recognized by the Supreme Court in United States v. NIXON, U.S. _____, 94 S. Ct. 3090 (1974) presents an issue of first impression of extreme importance and historical significance. That issue, like others posed in plaintiff's complaint, simply cannot be characterized as "obviously without merit," "wholly insubstantial," or "essentially fictitious."

Nevertheless, this Court in oral argument on plaintiff's request for a temporary restraining order, implied that from its initial review of the statute the Court believes Congress has managed to weave an intricate pattern around the constitutional objections posed by plaintiff's complaint. Apart from the fact that such tentative analysis by the Court should not control as to whether the claims presented by plaintiff are "substantial," plaintiff believes that a brief explanation of two points raised by the Court in this regard will demonstrate that the Court's initial judgment concerning the Act's constitutionality are based on erroneous premises.



First, the Court indicated that it disagreed with plaintiff's allegations that the new Act would deprive the former President of his "personal" materials.^{1/} Therefore, the Court implied, Mr. Nixon's allegations concerning invasion of privacy and breach of confidential privileges are without force. To the contrary, §101(b)(2) of the Act defines the "historical materials" to be seized under the Act by reference to the definition in 44 U.S.C. §2101. That definition clearly encompasses materials other than those strictly related to plaintiff's official duties in office. But even if this Court were correct in its interpretation of what items are to be commandeered and made public under the Act, the same issues of privacy, breach of separation of powers, intrusion on constitutional privileges and rights, and unlawful exercise of Congressional powers would be presented by plaintiff's complaint for injunction against enforcement of the statute. And, being substantial constitutional questions, would require resolution by a three-judge panel.

The second point brought out by the Court in oral argument was that Congress had included in the Act provisions whereby Mr. Nixon can assert defenses, privileges or rights to prevent use of the materials in judicial proceedings or

1/

For purposes of an application to convene a three-judge court, the allegations of a complaint must be taken as true. See discussion infra, p. 11-12.



disclosure to the public. There are three apparent problems with the Court's reading of the Act in this respect. First, the statutory references to asserting defenses, privileges or rights pertain only to §102(b) and §104(a). Section 102(b) relates to the use of Mr. Nixon's presidential materials in judicial proceedings and Section 104(a) relates to regulations permitting public access. Nothing in the Act purports to afford Mr. Nixon the right to assert defenses, privileges, or rights against disclosure of the materials to agencies or departments in the executive branch of the federal government who, under §102(d), are to have access at all times to the tape recordings and other materials. Accordingly, if an executive agency or department wishes, for example, to listen to recordings containing private conversations of plaintiff and his wife or attorney, Mr. Nixon has no right under the Act to prohibit this intrusion upon his right of privacy.

Second, nothing in the Act purports to permit Mr. Nixon to raise defenses, privileges or rights to prevent the Administrator or his staff from listening to the recordings or rummaging through his materials prefatory to promulgating regulations, or to searching for subpoenaed items for use in judicial proceedings,^{2/} or reviewing and indexing the materials

2/

Although Mr. Nixon apparently has the right to interpose objections to production of subpoenaed materials at the proceedings in which they are to be introduced, he has no right to stop the search for subpoenaed items.



to determine which should and which should not be made generally public.

These few readily apparent examples in which the sanctity of Mr. Nixon's rights, privileges and defenses will be violated under the Act without any safeguard are sufficient to demonstrate that the two attempts by Congress to preserve Mr. Nixon's rights in these materials are wholly inadequate,^{3/} and despite this Court's initial reaction to the contrary, do not provide a single, simple answer to the complex issues posed in plaintiff's complaint.

Therefore, plaintiff's application for a three-judge district court cannot be denied for failure to raise a substantial constitutional question.

II. The Challenged Act Does Not Nullify the Requirements of 28 U.S.C. §2282.

During oral argument this Court expressed the view that plaintiff's application for appointment of a three-judge district court for the District of Columbia is inappropriate because the Act plaintiff challenges mandates jurisdiction in a single-judge District Court for the District of Columbia. That is not the case. The basis given by this Court for its view was that the original Senate version of S.4016 contained a

3/

As alleged in plaintiff's complaint, the act of depriving Mr. Nixon of custody and ownership of his materials may itself have the effect of negating some defenses or privileges otherwise available to Mr. Nixon to assert in judicial proceedings or actions.



mandatory three-judge court provision which was dropped as a compromise by the conferees who faced a House version not containing a three-judge court provision.

The fact is that both the Senate and House versions of S.4016 contained a provision requiring all challenges to the Act or regulations thereunder to be heard by a three-judge panel of the District Court for the District of Columbia, with direct appellate review in the Supreme Court. Well aware of the pendency of Nixon v. Sampson, et al., the House and Senate conferees deleted the mandatory three-judge court provision which would have ousted this Court of jurisdiction. Instead, the final version contained the following language:

Sec. 105. (a) The United States District Court for the District of Columbia shall have exclusive jurisdiction to hear challenges to the legal or constitutional validity of this title or of any regulation issued under the authority granted by this title, and any action or proceeding involving the question of title, ownership, custody, possession, or control of any tape recording or material referred to in section 101 or involving payment of any just compensation which may be due in connection therewith. Any such challenge shall be treated by the court as a matter requiring immediate consideration and resolution, and such challenge shall have priority on the docket of such court over other cases.

The change in language had the effect of permitting Mr. Nixon (or others for that matter) to amend the pleadings in the pending suits to challenge to the validity of the Act. As stated by Congressman Brademas during the House floor debate:



The amendment would allow for an expeditious review of any legal challenge to this legislation. There is now pending before a single-judge District Court for the District of Columbia a proceeding in which the major issues have already been briefed and argued and in which the major parties are present. Under the amendment, the pleadings in the pending litigation could be amended to take into account additional issues regarding the validity of the legislation and the United States could be added as a defendant to any claim for compensation by Mr. Nixon. Cong. Rec. Vol. 120, daily copy H.11444, December 9, 1974. (emphasis added).

Congressman Brademas was clearly correct. Prior to deletion of the mandatory three-judge district court provision, any challenge to the Act in any form would have required a three-judge panel. By the amendment, the door was left open whereby Mr. Nixon "could" (in the words of Mr. Brademas) amend his pleadings in Nixon v. Sampson, et al. to seek a declaration of the Act's unconstitutionality. In that event, there would be no need for a three-judge panel. However, if Mr. Nixon concluded, as he has, that an injunction against the statute is the only way to protect his rights - because a request for declaratory relief will not prevent the injury he will suffer from the implementation of the Act in the interim - then the mandatory three-judge provision of 28 U.S.C. §2282 comes into play and nothing in §105(a) of the Act purports to confer on a single judge the authority to do what 28 U.S.C. §2282 says must be done by three judges of the district court.



That Congress did not intend to negate the provisions of 28 U.S.C. §2282 is evidenced by a careful reading of 105(a) which reveals no reference whatsoever to a "single-judge" panel. To conclude that Congress so intended, this Court would have to interpret the words "The United States District Court for the District of Columbia" as meaning only a single-judge panel thereof as opposed to a three-judge panel. Such an interpretation would fly in the face of the fact that three-judge panels appointed under the provisions of 28 U.S.C. §2282 and §2284 constitute "The United States District Court for the District of Columbia" the same as does a single-judge thereof. This unusual interpretation should not be attributed to the language of the Act when there is no specific Congressional directive to do so. Similarly, the specific requirements of 28 U.S.C. §2282 cannot yield to a statute that does not directly purport to supercede its effect.^{4/}

4/

Those who may oppose appointment of a three-judge panel of the United States District Court for the District of Columbia will no doubt argue that despite the language of §105(a), the intent of Congress in amending the mandatory three-judge court provision was to confer on this Court jurisdiction over all future challenges to the Act. Although there may be those who lobbied various Congressmen for that purpose and even Congressmen who desired to achieve that result, the fact is that the language of the statute will not support it. Moreover, the sole legislative history on the point (the floor comments of Mr. Brademas) is certainly ambiguous at best. In floor colloquy with Congressman Dennis, Mr. Brademas answered the question of why Mr. Nixon was being deprived of his ability to challenge the legislation in his home district of southern [sic] California by stating (continued)



Under the circumstances, there is simply is no sound basis to conclude that the requirements of 28 U.S.C. §2282 have been superceded by inference supported only by nearly non-existent, and then equivocal, legislative history on the point.

III. Gonzalez v. Automatic Employees Credit Union, et al. Is Inapplicable.

The recent Supreme Court decision in Gonzalez v. Automatic Employees Credit Union, et al., _____ U.S. _____, 43 L.W. 4025 does not support a denial of plaintiff's application for convention of a three-judge panel. Gonzalez involved an appeal to the Supreme Court from a three-judge district court decision dismissing plaintiff's complaint for lack of standing. Gonzalez argued that appellate jurisdiction rested in the Supreme court under 28 U.S.C. §1253. The Court held that plaintiff's route for appeal was to the court of appeals, not the Supreme Court. Although the dismissal of Gonzalez' complaint clearly had the effect of denying him the injunction he sought, the Court noted that the dismissal was based on a jurisdictional point and did not go to the merits of the constitutional issues.

4/ continued from preceding page

"The answer to that question is, of course - if my colleague from Indiana will yield further - most of the materials which are presently involved in this particular matter are located here within the District of Columbia or the Metropolitan Washington area, and most of the participants, moreover, are in this area. Cong. Rec. Vol. 120, daily copy, H.11444, December 9, 1974.

The answer certainly implies that Congress' objective was to restrict jurisdiction to the United States District Court for the District of Columbia but was not related to the requirement of a single versus a three-judge panel thereof.

The Gonzalez opinion has had the effect of cutting back the instances in which appeals from three-judge panel decisions will lie in the Supreme Court, a result which reflects the Court's desire to restrict its mandatory review docket to those cases falling strictly within 28 U.S.C. §1253. But nothing in Gonzalez cuts back or otherwise affects the propriety of convening three-judge panels required under 28 U.S.C. §2282. Gonzalez merely affects the appellate review procedure applicable to the panel's decision once convened.

IV. The Complaint Formally Alleges a Basis for Equitable Relief.

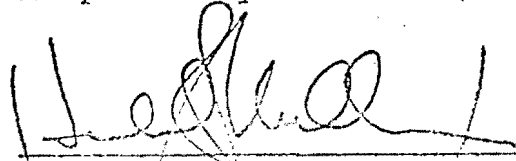
The only additional consideration before the Court with respect to the three-judge court application is whether the complaint formally alleges a basis for equitable relief. The complaint clearly requests a preliminary and permanent injunction against enforcement of an Act of Congress; relief that cannot be granted by a single-judge court. The complaint also alleges that the injury plaintiff will suffer will be irreparable and not compensable by monetary damages. And the complaint alleges the threatened danger is imminent. These allegations, if proven, form a basis for grant of an injunction.



And because all allegations in the complaint must be taken as true for purposes of the three-judge court application, Goosby v. Osser, 409 U.S. 512, 521 n.7, (1973), the three-judge panel must be appointed.

December 23, 1974

Respectfully submitted,


HERBERT J. MILLER, JR.

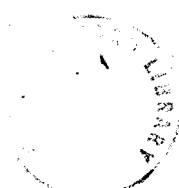

RAYMOND G. LARROCA


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R. STAN MORTENSON

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1320 19th Street, N.W., Suite 500
Washington, D.C. 20036
(202) 293-6400

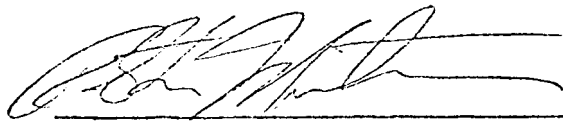
Attorneys for Plaintiff Nixon



CERTIFICATE OF SERVICE

I hereby certify that I caused a copy of the foregoing
"Supplemental Memorandum in Support of Application for Appointment
of a Three-Judge Panel of This Court" to be served by hand this
23rd day of December, 1974, to the following:

Erwin Goldblum, Esquire
Civil Division
Department of Justice
Room 3627
Washington, D. C. 20530



R. Stan Mortenson

