

**The original documents are located in Box 29, folder “Nixon - Papers Court Cases - Dellums v. Powell” of the Philip Buchen Files at the Gerald R. Ford Presidential Library.**

### **Copyright Notice**

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October 23, 1974

Dear Mr. Silberman:

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

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

Sincerely,

Phillip W. Buchen  
Counsel to the President

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

WC:cg



[11/21/74?]

HON. RONALD V. DELLUMS, )  
et al., )  
 )  
Plaintiffs, )  
 )  
v. ) C.A. No. 2271-71  
 )  
JAMES M. POWELL, et al., )  
 )  
Defendants. )  
 )

MOTION OF RICHARD M. NIXON  
FOR STAY OF ORDER DIRECTING  
COMPLIANCE WITH SUBPOENA DUCES TECUM  
PENDING DETERMINATION OF MOTION TO QUASH

Richard M. Nixon, through his undersigned counsel, hereby moves pursuant to Rule 7, Federal Rules of Civil Procedure, for an order staying the effectiveness of an order entered by this Court on November 14, 1974, pending hearing and determination of the motion of Richard M. Nixon to quash the subpoena served upon Philip W. Buchen for the production of certain White House tape recordings. That motion to quash the subpoena is being filed together with this motion for a stay.

The order to which this motion is addressed directed Mr. Buchen to deliver to plaintiff's attorneys in this case any tape recordings or transcripts of meetings or conversations between May 1 and May 5, 1971, in which the "May-Day" demonstrations were discussed and in which any one of six named individuals participated. The date for compliance with the order by Mr. Buchen, as extended by this Court at a hearing on November



20, 1974, is presently set for Wednesday, November 27, 1974. The grounds for this motion to stay the effectiveness of the order are set forth below and in the Affidavit of Raymond G. Larroca attached hereto. We respectfully request that the Court grant a hearing on this motion at the earliest practicable time.

POINTS AND AUTHORITIES

I. A Stay Is Necessary to Preserve the Claim of Presidential Privilege Pending Determination of the Motion to Quash.

Each of the recordings covered by this Court's order contains communications between Richard M. Nixon, as President of the United States, and high White House aides or officials of the Department of Justice.<sup>1/</sup> Each of those communications is subject to the presidential privilege of confidentiality recognized by the Supreme Court in United States v. Nixon, \_\_\_ U.S. \_\_\_, 94 S.Ct. 3090 (1974). That privilege is asserted by Mr. Nixon in the accompanying Motion to Quash, and for the reasons fully explained therein, it plainly bars any production of the tape recordings pursuant to the plaintiffs' subpoena in this case.

Following the entry of this Court's order denying for the most part Mr. Buchen's motion to quash the subpoena, and following notification to Mr. Nixon's counsel -- for the first time, as explained infra -- of the proceeding and the

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<sup>1/</sup> An examination of the diary of President Nixon for this period discloses no conversations with Chief of Police Jerry Wilson. The diary shows more than nine hours of conversations between the President and one or more of the other individuals named in the order.





order, procedures for compliance were begun. With the consent of Mr. Nixon's counsel, the former President's diary for the relevant period was examined to identify the dates and times of conversations that may have been recorded,<sup>2/</sup> and following the hearing before this Court on November 20, Mr. Nixon's counsel consented to copying of the reels of tape for those time periods by the Secret Service preparatory to a joint review by attorneys for Mr. Nixon and agents of Mr. Buchen. That review alone will consume an estimated thirty hours of time by each of the persons involved, as well as a limited intrusion on the confidentiality of the recordings through review by Mr. Buchen's agents. Both the cost of this review -- at least, absent any provision for plaintiffs' bearing the expense should the subpoena ultimately be quashed -- and the intrusion on the confidentiality of these communications are irreparable injuries to Mr. Nixon, and a stay of the date for compliance is necessary to avoid the occurrence of those injuries attributable solely to the necessity of preparation for compliance on the date now established by this Court.

A stay is also essential to permit consideration by the Court of Mr. Nixon's claim of presidential privilege presented by the motion to quash. Obviously, the confidentiality of the materials will be destroyed and the claim of privilege vitiated by compliance with the subpoena. Because only six

<sup>2/</sup> Because of imperfections in the system used for recording presidential conversations, it is never possible to state with assurance that a particular conversation is contained in the tapes until the tapes themselves have been reviewed.



days remain before the date for compliance, a stay will be necessary to permit consideration of the weighty issues presented by the motion and determination thereof by the Court.

II. The Motion to Quash Has Been Filed As Promptly As Possible Following Notification of the Demand to Mr. Nixon.

As explained in the attached affidavit of Raymond G. Larroca, Mr. Nixon's attorneys received no notice of the subpoena, of Mr. Buchen's motion to quash, or of any hearing before this Court prior to the time the Court's order was entered. Counsel became aware of the existence of a demand for production of presidential materials in this case for the first time on the evening of November 14, 1974, when Raymond G. Larroca was informed by a Justice Department attorney that the Court had entered, or was about to enter, an order directing production of certain tape recordings of presidential conversations. Counsel were engaged all day Friday, November 15, and Monday, November 18, in a hearing before Judge Richey on various motions in consolidated civil actions relating to the custody and confidentiality of the presidential materials. On Monday evening, November 18, counsel explained the order by telephone to an aide to the former President in San Clemente, California, where Mr. Nixon is recuperating from surgery, phlebitis and pneumonia following his recent release from the hospital. A formal claim of privilege was then executed by Mr. Nixon in California and was forwarded to counsel, arriving late in the day on November 20. It is clear, therefore, that Mr. Nixon's motion to quash has been filed at the earliest practicable time following



notification of the existence of the demand for the materials.

We understand that this Court may, at the time of its ruling on Mr. Buchen's motion to quash, have been under the impression that Mr. Nixon had received notice of the subpoena and had chosen not to seek any relief with respect thereto. This may have occurred because (1) the affidavit of Mr. Buchen attached to the motion to quash was actually prepared for and filed originally in the case of Oliver v. Committee for the Re-Election of the President, Civil Action No. 1207-73, a case in which Mr. Nixon was given notice of the subpoena and promptly moved to quash on the ground, inter alia, of presidential privilege; and (2) the memorandum accompanying Mr. Buchen's motion stated, at page 7 fn. 10, that Mr. Buchen is required by the terms of the depository agreement to "notify Mr. Nixon of the existence of the instant subpoena in order to give Mr. Nixon an opportunity to assert whatever privilege or defense he may have with respect thereto." It also appears, from the representations of counsel for Mr. Buchen, that he in good faith believes that oral notice was at some time given; but no one in the office of counsel for Mr. Nixon has any record or recollection of such notice. We regret that this confusion has resulted in the present claim being filed only after the original order was entered, but we suggest that the confusion is understandable in view of the almost daily occurrence of new matters coming to Mr. Buchen's office relating to the presidential materials, many of them involving all varieties of demands for portions of the presidential materials. In any event, in view





of the gravity of the issues and interests at stake -- as well as in view of the fact that the plaintiffs chose to wait until the eve of trial to make any demand for materials the existence of which was known to them for well over a year prior to the demand -- we submit that our request for a stay should not in the least be prejudiced by the time of its filing.

CONCLUSION

For the reasons stated herein, we respectfully request that the Court grant this motion and stay the effectiveness of the order of November 14, 1974, until further order of the Court upon determination of Mr. Nixon's motion to quash.

Respectfully submitted,

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Herbert J. Miller, Jr.

---

Raymond G. Larroca

---

William H. Jeffress, Jr.

---

R. Stan Mortenson

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

Attorneys for Richard M. Nixon





UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

HON. RONALD V. DELLUMS, et al.,     )  
  )  
                                  Plaintiffs,     )  
  )  
                                  v.             ) Civil Action No. 2271-71  
  )  
JAMES M. POWELL, et al.,             )  
  )  
                                  Defendants.     )  
  )  
  )  
\_\_\_\_\_)

AFFIDAVIT OF  
RAYMOND G. LARROCA

District of Columbia : ss

RAYMOND G. LARROCA, being duly sworn, deposes and says as follows:

1. I am an attorney admitted to practice in the District of Columbia. I am an attorney for former President Richard M. Nixon.

2. During the early evening hours of Thursday, November 14, 1974, I was informed that the Honorable William B. Bryant, United States District Judge for the District of Columbia, was about to enter, or had entered, an Order in the above-captioned case directing, inter alia, that certain recordings of presidential conversations of then President Richard M. Nixon and his aides be turned over to the attorneys for the plaintiffs herein within five days.



3. Prior to that time, I had not received any notice of any kind whatsoever (1) of the pendency of this action, (2) of the service of any subpoena in this action upon Philip W. Buchen or anyone else, (3) of the filing of any motion to quash any such subpoena by anyone, (4) of any hearing on any such motion, or (5) of any action by the Court here in regard to any presidential materials of former President Richard M. Nixon.

4. During the evening of November 14, I personally made a search of the firm's files relating to Richard M. Nixon and of the entire office of our firm, and I could discover no prior notice or record of notice of any kind from deponent Philip W. Buchen, or anyone else in regard to any of the subjects detailed in paragraph 3 above. I also inquired of my available partners and associates, and none had any record or recollection of any such notice. Subsequent to that time, I have made inquiry of every lawyer and employee of this firm with the same negative results.

5. Until the late evening hours of Thursday, November 14, 1974, and from the early hours of Friday, November 15, until the evening hours of that day, Messrs. Herbert J. Miller, Jr., R. Stan Mortenson and myself were engaged in the preparation for and participation in extensive proceedings in which we represent former President Richard M. Nixon before the Honorable Charles R. Richey, United States District Judge.



6. During the morning hours of Saturday, November 16, 1974, I was at the Executive Office Building in my capacity as counsel for Richard M. Nixon in the case before Judge Richey and in other matters. At that time, I authorized, on behalf of Mr. Nixon, deponent Philip W. Buchen, to inspect the presidential diaries of President Richard M. Nixon for the days March 1 through 5, 1971.

7. Throughout the weekend of November 16-17, 1974, Mr. Miller and Mr. Mortenson and at different times myself, were present in our office preparing for the continuation of the proceedings before Judge Richey on Monday, November 18, 1974.

8. On Monday, November 18, 1974, Messrs Miller and Mortenson returned to the proceedings before Judge Richey where they remained until the greater part of the day. During that day I conferred by telephone with a representative of the former President in San Clemente relative to the Order of this Court of November 14, 1974, in this case. For the remainder of the day I was engaged almost entirely in preparation for scheduled meetings before the Special Prosecutor and with matters involving other aspects of the representation of Richard M. Nixon.




9. As a result of my discussions referred to in paragraph 8 above, I received, at 5:15 P.M., November 20, 1974, a formal claim of presidential privilege from Richard M. Nixon with respect to materials ordered to be produced by the Court's Order of November 14, 1974. That formal claim of privilege is attached to the Motion to Quash the Subpoena filed today on behalf of Richard M. Nixon.



RAYMOND G. LARROCA

Subscribed and sworn to before me  
this 21st day of November, 1974.

  
Notary Public

Commission Expires September 12, 1975





UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

HON. RONALD V. DELLUMS, et al., )  
 )  
 Plaintiffs, )  
 )  
 v. ) C.A. No. 2271-71  
 )  
 JAMES M. POWELL, et al., )  
 )  
 Defendants. )  
 )

ORDER

Upon consideration of the motion of Richard M. Nixon to stay the effectiveness of the order of this Court dated November 14, 1974, which order directs Philip W. Buchen to deliver to attorneys for plaintiffs recordings of certain presidential conversations during the period May 1 - May 5, 1971, and the Court having determined that such a stay is warranted pending determination of Richard M. Nixon's motion to quash the subpoena demanding production of those recordings, it is this \_\_\_\_ day of November, 1974, hereby

ORDERED that the motion for a stay be and the same is hereby granted; and it is further

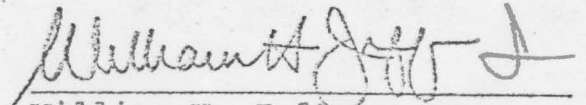
ORDERED that the order of this Court dated November 14, 1974, directing Philip W. Buchen to deliver certain recording and transcripts to plaintiffs' attorneys, be and the same is hereby stayed pending further order of this Court.

\_\_\_\_\_  
UNITED STATES DISTRICT JUDGE



CERTIFICATE OF SERVICE

I hereby certify that on this the 21st day of November, 1974, a copy of the foregoing motion, affidavit and proposed order was hand delivered to the offices of David Anderson, Esquire, Room 3328, United States Department of Justice, Washington, D. C. 20530, and to Warren K. Kaplan, Esquire, Melrod, Redman & Gartlan, 1801 K Street, N.W., Suite 1100K, Washington, D. C. 20006. In addition, a copy was mailed, first class, postage prepaid, to Edward L. Curry, Esquire, Assistant Corporation Counsel, District Building, Washington, D. C. 20004.

  
William H. Jeffress, Jr.



THE WHITE HOUSE

WASHINGTON

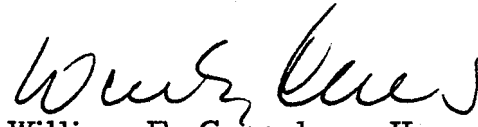
November 25, 1974

Re: Dellums, et al. v. Powell, et al.

Dear Mr. Larroca:

This is to confirm that on Friday, November 22, 1974, we orally advised you of our intention to begin listening to tape recordings made by former President Nixon at 1:00 p. m. on Saturday, November 23, 1974. This action is necessary in order to comply with Judge Bryant's Order issued in the above-styled case.

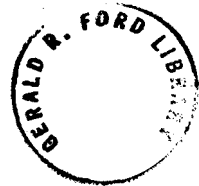
Sincerely,



William E. Casselman II  
Counsel to the President

Raymond G. Larroca, Esq.  
Miller, Cassidy, Larroca & Lewin  
1320 19th Street, N.W.  
Suite 500  
Washington, D.C. 20036

cc: Philip W. Buchen



THE WHITE HOUSE

WASHINGTON

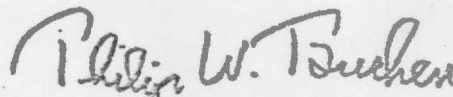
December 2, 1974

Dear Mr. Silberman:

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

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

Sincerely,



Philip W. Buchen  
Counsel to the President

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

cc: Herbert J. Miller, Jr., Esquire





United States District Court

for the

District of Columbia

Hon. Ronald V. Dellums

Plaintiff.

vs.

CIVIL ACTION No. 79-71

James M. Powell

Defendant.

To: Philip Buchan, Counsel to the President  
White House, 1600 Penn. Ave. N.W.

YOU ARE HEREBY COMMANDED to appear in (this court) (the office of

to give testimony in the above-entitled cause on the 3rd day of December, 1974,

at 9:30 o'clock a.m. (and bring with you) all files & records  
maintained by John Dean, former White House  
staff member, dealing with protest demonstrations  
in the District of Columbia

and do not depart without leave.

James F. Davey, Clerk

By Robert R. Davis Deputy Clerk.

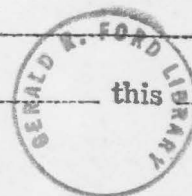
Date Dec 9, 1974  
Maureen G. Shapler  
Attorney for Plaintiff.  
Defendant.

RETURN ON SERVICE

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

Dated

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



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

LAWRENCE H. MIREL  
ELIZABETH MIREL  
8120 WEST BEACH DR., N.W.  
WASHINGTON, D. C. 20012

NUMBER  
234  
985-3081  
550

Dec 2 1974

PAY TO THE  
ORDER OF

Philip Bucher

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THE WHITE HOUSE

WASHINGTON

April 14, 1976

MEMORANDUM FOR

H.S. Knight  
Director  
United States Secret Service

In order to comply with Judge Bryant's order in Dellums v. Powell, this is to request the assistance of the appropriate Secret Service personnel in duplicating the Nixon Presidential tape recordings described in my memorandum of April 14, 1976, to Gertrude Fry (copy attached).

Should you have any questions in this regard, please contact Mr. Barry Roth of my staff.

*P.W.B.*

Philip W. Buchen  
Counsel to the President

cc: Gertrude Fry



THE WHITE HOUSE  
WASHINGTON

Barry said  
you & he  
should discuss  
this before you  
talk to anyone  
he has a  
tentative  
answer.





LAW OFFICES  
MILLER, CASSIDY, LARROCA & LEWIN  
2555 M STREET, N.W. - SUITE 500  
WASHINGTON, D. C. 20037

AREA CODE 202  
TELEPHONE 293-6400

HERBERT J. MILLER, JR.  
JOHN JOSEPH CASSIDY  
RAYMOND G. LARROCA  
NATHAN LEWIN  
MARTIN D. MINSKER  
WILLIAM H. JEFFRESS, JR.  
R. STAN MORTENSON  
THOMAS B. CARR  
WILLIAM C. BRYSON  
JAMIE S. GORELICK

JOSEPH S. MCCARTHY  
COURTNEY A. EVANS  
ANDREW F. OEHMANN  
OF COUNSEL

May 7, 1976

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

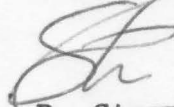
Dear Phil:

Jack asked me to send you a copy of the brief we filed this afternoon in Dellums v. Powell, which is presently pending before the United States Court of Appeals. As you know, the case involves a civil subpoena for twenty-five days of Mr. Nixon's conversations. We strongly believe that this suit presents the vehicle for establishing a former President's right to protect the confidentiality of his conversations while in office.

We would like very much for you to review our brief and, if you agree with our assessment of the strength of the case, request the Justice Department to file an amicus brief on the former President's privilege question. I am sure the Court would accept such a brief if filed before May 18th.

If you have any thoughts concerning this matter, Jack or I would be pleased to discuss them with you.

Sincerely yours,



R. Stan Mortenson

RSM/ps  
Enclosure  
cc: Barry Roth, Esq.  
w/enclosure



THE WHITE HOUSE

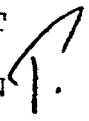
WASHINGTON

June 8, 1976

MEMORANDUM FOR:

THE PRESIDENT

FROM:

PHILIP BUCHEN 

Pending in the Circuit Court of Appeals for the District of Columbia is an appeal by former President Nixon from the District Court order which requires delivery to the Court for in camera inspection of certain tapes covering Presidential conversations. The case is one brought by Congressman Dellums to collect civil damages against John Mitchell and others growing out of the mass arrests of demonstrators in Washington, D.C., during May 1971.

The plaintiff claims that the tapes will probably reveal conversations in which John Mitchell and others conspired to cause the allegedly unlawful arrests. However, plaintiff has been unable to identify the times and places of such conversations and, at our request, the Justice Department opposed the subpoena because of the undue burden on us of having to search many hours of tapings in order to find relevant conversations, if any.

The former President's Counsel took the further position that in a civil action of this sort, no court is entitled to order even in camera inspection over a former President's claim of executive privilege. The prior Supreme Court decision in the Nixon case, involving tapes of conversations sought by the Special Prosecutor, related only to criminal cases. The Court left open the question of whether in civil cases there could be the same public interest in disclosure that overrides a claim of executive privilege by a President.

The situation is further explained in the attached memorandum to me from Bob Bork. In this memo, Bob also states the factors which bear on whether the Justice



Department should take a position in the case at this time to support the position of Nixon's attorney or whether we should await the decision of the Supreme Court of Appeals and then support that position, if necessary, before the Supreme Court.

RECOMMENDATION

I concur in Bob Bork's recommendation.

APPROVE BORK'S RECOMMENDATION \_\_\_\_\_

DISAPPROVE BORK'S RECOMMENDATION \_\_\_\_\_

Attachment





Office of the Solicitor General  
Washington, D.C. 20530

June 3, 1976

MEMORANDUM TO PHILIP BUCHEN

FROM: ROBERT H. BORK  
SOLICITOR GENERAL

RHB

RE: Dellums v. Powell, D.D.C.; appeal of Richard M. Nixon

The question is whether the United States should enter this lawsuit as amicus curiae at the court of appeals level in order to support former President Nixon's claim of executive privilege with respect to tapes of White House conversations.

The district court has required you to turn over to the court, for in camera inspection, certain tapes of Presidential conversations. The court proposes to listen to the tapes to determine whether any of them are relevant to a civil suit against John Mitchell and others growing out of the mass arrests of demonstrators in Washington, D.C., in May 1971. Plaintiffs already have been awarded a substantial money judgment against District officials. In this portion of the litigation they contend that they are entitled to a money judgment against Mr. Mitchell as well, whom they contend was the head of a conspiracy to deprive them of their civil rights.

Mr. Nixon interposed a defense of executive privilege to the subpoena requesting you to surrender the tapes. The Civil Division lawyers representing you did not interpose such a defense, but they did argue that the subpoena is burdensome.

Important issues are at stake and there are arguments for and against participation on the privilege issue at this time. The major argument in favor of filing a brief as amicus curiae in support of the claim of executive privilege is that the decision by the Court of Appeals for the District of Columbia Circuit may have substantial importance as a precedent. A decision against the privilege could pose a threat to the integrity of the decisional processes of the Presidency.

It is contended, for example, that the privilege may never be asserted by a former President but only by an incumbent. Should that position become the law, the privilege would lose much of its value, for it would shield discussions only for a few years or months. Participants in decision-making could have no assurance that the succeeding President would invoke the privilege to protect the confidentiality of their discussions.





Indeed, a succeeding President might welcome the embarrassment of his predecessor's administration.

The contention that the privilege may be defeated in a private damage action is also troublesome. It will be necessary to find a line so that confidentiality can be the general rule.

Important as these issues are, however, there are several factors militating against our participation in the case at the court of appeals level. These are listed below.

1. Our brief would be very late even if we filed at once. The real problem, however, is that we have inadequate time to work out a theory for this troublesome field of law. That problem is acute since we must simultaneously file papers in the Supreme Court in another Nixon Tapes case that presents a problem of consistency.

2. Many of the issues presented in this case overlap issues presented in Nixon v. Administrator of General Services, jurisdictional statement pending, No. 75-1605, the case concerning Congress' attempt to claim Mr. Nixon's tapes and papers for the public at large. Mr. Nixon has claimed in that case, among other things, that the statute is unconstitutional as a violation of his executive privilege because it allows GSA to read the papers and listen to the tapes for the purpose of drawing regulations controlling access to those materials. The Civil Division defended that suit in the district court and sought to minimize the extent to which a former President can control his tapes and papers. That argument prevailed, although the district court's opinion went beyond the arguments presented in several respects.

In the Dellums case, if we entered amicus curiae, we would do so in order to argue that a former President has some degree of control over his papers and tapes. Clearly, there is a good deal of tension between our objectives of upholding the constitutionality of the Presidential Recordings and Materials Preservation Act in the GSA case and protecting the integrity of presidential decision-making processes in Dellums.

The GSA case has just reached my office and I think we must take the time to work out a fully coherent legal position before filing anything further. This strongly argues against going into Dellums at the court of appeals stage since that would have to be done immediately.

3. Dellums is an unfortunate case on its facts. There are strong pressures that will drive the court of appeals to decide the case against Mr. Nixon, and if we attempt to make this a pivotal case, the precedential cost of a defeat may be enhanced.



a. Written minutes of meetings, in the hand of Assistant Attorney General Wood, indicate that Mr. Nixon was involved in making the decisions in question. Confidentiality has thus already been breached, and, to a substantial extent, the tapes would simply confirm or deny reports already in evidence.

b. The Presidential conversations in question probably are essential to plaintiffs' case. They are more than mere evidence. They may be part of the conspiracy itself; the conversations may themselves conceivably be criminal acts. What is more, the court of appeals may well feel obliged to assume that a criminal conspiracy has taken place, in light of the jury's verdict and the judgment in related proceedings against the District.

c. There is no reason to believe that it will be difficult for the district court to review the tapes in camera and exclude non-germane materials. The only issue open at this stage is whether even that limited judicial review is forbidden. If, after hearing the tapes, the court proposes to turn over to plaintiffs what we believe to be sensitive materials, an objection could be interposed then and litigated on a solid factual basis.

4. There is not much to lose by waiting. If the court of appeals takes a position adverse to the position we take in Administrator of General Services, or if it otherwise writes an opinion that is unfortunate, we can make our views known to the Supreme Court, since whichever side loses in the court of appeals is virtually certain to petition for a writ of certiorari. By then we will have worked out our legal strategy and will not risk taking positions we may later regret, a risk that would be considerable if we hurriedly filed a brief in Dellums at this time.

In light of all of these factors, I think we ought not appear as amicus curiae in the court of appeals to argue the issue of executive privilege.



THE WHITE HOUSE

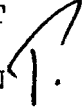
WASHINGTON

June 8, 1976

MEMORANDUM FOR:

THE PRESIDENT

FROM:

PHILIP BUCHEN 

Pending in the Circuit Court of Appeals for the District of Columbia is an appeal by former President Nixon from the District Court order which requires delivery to the Court for in camera inspection of certain tapes covering Presidential conversations. The case is one brought by Congressman Dellums to collect civil damages against John Mitchell and others growing out of the mass arrests of demonstrators in Washington, D.C., during May 1971.

The plaintiff claims that the tapes will probably reveal conversations in which John Mitchell and others conspired to cause the allegedly unlawful arrests. However, plaintiff has been unable to identify the times and places of such conversations and, at our request, the Justice Department opposed the subpoena because of the undue burden on us of having to search many hours of tapings in order to find relevant conversations, if any.

The former President's Counsel took the further position that in a civil action of this sort, no court is entitled to order even in camera inspection over a former President's claim of executive privilege. The prior Supreme Court decision in the Nixon case, involving tapes of conversations sought by the Special Prosecutor, related only to criminal cases. The Court left open the question of whether in civil cases there could be the same public interest in disclosure that overrides a claim of executive privilege by a President.

The situation is further explained in the attached memorandum to me from Bob Bork. In this memo, Bob also states the factors which bear on whether the Justice



Department should take a position in the case at this time to support the position of Nixon's attorney or whether we should await the decision of the Supreme Court of Appeals and then support that position, if necessary, before the Supreme Court.

RECOMMENDATION

I concur in Bob Bork's recommendation.

APPROVE BORK'S RECOMMENDATION \_\_\_\_\_

DISAPPROVE BORK'S RECOMMENDATION \_\_\_\_\_

Attachment





Office of the Solicitor General  
Washington, D.C. 20530

June 3, 1976

MEMORANDUM TO PHILIP BUCHEN

FROM: ROBERT H. BORK  
SOLICITOR GENERAL

RHB

RE: Dellums v. Powell, D.D.C.; appeal of Richard M. Nixon

The question is whether the United States should enter this lawsuit as amicus curiae at the court of appeals level in order to support former President Nixon's claim of executive privilege with respect to tapes of White House conversations.

The district court has required you to turn over to the court, for in camera inspection, certain tapes of Presidential conversations. The court proposes to listen to the tapes to determine whether any of them are relevant to a civil suit against John Mitchell and others growing out of the mass arrests of demonstrators in Washington, D.C., in May 1971. Plaintiffs already have been awarded a substantial money judgment against District officials. In this portion of the litigation they contend that they are entitled to a money judgment against Mr. Mitchell as well, whom they contend was the head of a conspiracy to deprive them of their civil rights.

Mr. Nixon interposed a defense of executive privilege to the subpoena requesting you to surrender the tapes. The Civil Division lawyers representing you did not interpose such a defense, but they did argue that the subpoena is burdensome.

Important issues are at stake and there are arguments for and against participation on the privilege issue at this time. The major argument in favor of filing a brief as amicus curiae in support of the claim of executive privilege is that the decision by the Court of Appeals for the District of Columbia Circuit may have substantial importance as a precedent. A decision against the privilege could pose a threat to the integrity of the decisional processes of the Presidency.

It is contended, for example, that the privilege may never be asserted by a former President but only by an incumbent. Should that position become the law, the privilege would lose much of its value, for it would shield discussions only for a few years or months. Participants in decision-making could have no assurance that the succeeding President would invoke the privilege to protect the confidentiality of their discussions.





Indeed, a succeeding President might welcome the embarrassment of his predecessor's administration.

The contention that the privilege may be defeated in a private damage action is also troublesome. It will be necessary to find a line so that confidentiality can be the general rule.

Important as these issues are, however, there are several factors militating against our participation in the case at the court of appeals level. These are listed below.

1. Our brief would be very late even if we filed at once. The real problem, however, is that we have inadequate time to work out a theory for this troublesome field of law. That problem is acute since we must simultaneously file papers in the Supreme Court in another Nixon Tapes case that presents a problem of consistency.

2. Many of the issues presented in this case overlap issues presented in Nixon v. Administrator of General Services, jurisdictional statement pending, No. 75-1605, the case concerning Congress' attempt to claim Mr. Nixon's tapes and papers for the public at large. Mr. Nixon has claimed in that case, among other things, that the statute is unconstitutional as a violation of his executive privilege because it allows GSA to read the papers and listen to the tapes for the purpose of drawing regulations controlling access to those materials. The Civil Division defended that suit in the district court and sought to minimize the extent to which a former President can control his tapes and papers. That argument prevailed, although the district court's opinion went beyond the arguments presented in several respects.

In the Dellums case, if we entered amicus curiae, we would do so in order to argue that a former President has some degree of control over his papers and tapes. Clearly, there is a good deal of tension between our objectives of upholding the constitutionality of the Presidential Recordings and Materials Preservation Act in the GSA case and protecting the integrity of presidential decision-making processes in Dellums.

The GSA case has just reached my office and I think we must take the time to work out a fully coherent legal position before filing anything further. This strongly argues against going into Dellums at the court of appeals stage since that would have to be done immediately.

3. Dellums is an unfortunate case on its facts. There are strong pressures that will drive the court of appeals to decide the case against Mr. Nixon, and if we attempt to make this a pivotal case, the precedential cost of a defeat may be enhanced.



a. Written minutes of meetings, in the hand of Assistant Attorney General Wood, indicate that Mr. Nixon was involved in making the decisions in question. Confidentiality has thus already been breached, and, to a substantial extent, the tapes would simply confirm or deny reports already in evidence.

b. The Presidential conversations in question probably are essential to plaintiffs' case. They are more than mere evidence. They may be part of the conspiracy itself; the conversations may themselves conceivably be criminal acts. What is more, the court of appeals may well feel obliged to assume that a criminal conspiracy has taken place, in light of the jury's verdict and the judgment in related proceedings against the District.

c. There is no reason to believe that it will be difficult for the district court to review the tapes in camera and exclude non-germane materials. The only issue open at this stage is whether even that limited judicial review is forbidden. If, after hearing the tapes, the court proposes to turn over to plaintiffs what we believe to be sensitive materials, an objection could be interposed then and litigated on a solid factual basis.

4. There is not much to lose by waiting. If the court of appeals takes a position adverse to the position we take in Administrator of General Services, or if it otherwise writes an opinion that is unfortunate, we can make our views known to the Supreme Court, since whichever side loses in the court of appeals is virtually certain to petition for a writ of certiorari. By then we will have worked out our legal strategy and will not risk taking positions we may later regret, a risk that would be considerable if we hurriedly filed a brief in Dellums at this time.

In light of all of these factors, I think we ought not appear as amicus curiae in the court of appeals to argue the issue of executive privilege.



Paper sent to Ba J

THE WHITE HOUSE  
WASHINGTON

June 10, 1976

ADMINISTRATIVELY CONFIDENTIAL

MEMORANDUM FOR: PHILIP BUCHEN  
FROM: JIM CONNOR JEC  
SUBJECT: Dellums v. Powell, D. D. C.  
Appeal of Richard M. Nixon

The President reviewed your memorandum of June 8 concerning the above case and approved the recommendation made by the Solicitor General and supported by yourself:

"Do not appear as amicus curiae in the court of appeals to argue the issue of executive privilege."

Please follow-up with appropriate action.

cc: Dick Cheney




THE WHITE HOUSE

WASHINGTON

June 11, 1976

MEMORANDUM FOR: ROBERT H. BORK  
SOLICITOR GENERAL

FROM: PHILIP BUCHEN 

SUBJECT: Dellums v. Powell, D.D.C.;  
appeal of Richard M. Nixon

Following receipt of your memorandum of June 3rd and submission to the President, the President has approved your recommendation not to appear as amicus curiae in the Court of Appeals to argue the issue of executive privilege.

I would appreciate your having someone from your office call Jack Miller to indicate that you are not filing a brief, giving him such explanation as you think appropriate.

