The original documents are located in Box 24, folder "Nixon, Richard - Papers: General (1)" of the John Marsh Files at the Gerald R. Ford Presidential Library.

Office of the Attorney General
Washington, D. C.

September 6, 1974

The President,

The White House.

Dear Mr. President:

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

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

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

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

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

> The office of the President is not a recording office. The vast amount of correspondence that goes through it, signed either by the President or his secretaries, does not become the property or a record of the government unless it goes on to the official files of the department to which it may be addressed. The President takes with him all the correspondence, original and copies, carried on during his administration. Taft, The Presidency 30-31 (1916).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

of continuing Presidential ownership.

I must, however, exclude one category of documents from the scope of this opinion concerning ownership and advise you that their status cannot be definitively determined on the basis of presently available information. Although the fact is not recorded in the published materials we have examined, our inquiry indicates that at least in recent memory certain "permanent files" have been retained by the Chief Executive Clerk of the White House from administration to administration. These include White House budget and personnel material, and records or copies of some Presidential actions useful to the Clerk's office for such purposes as keeping track of the terms of Presidential appointments and providing models or precedents for future Presidential action. Retention of these materials by the Chief Executive Clerk is of course not necessarily inconsistent with initial Presidential ownership. In light of the otherwise uniform practice with respect to much more important official documents, relinquishment of these materials may reasonably be regarded as a voluntary act of courtesy on the part of the outgoing Chief Executive. I cannot, however, make an adequately informed judgment concerning these files without

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

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

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

Respectfully,

Wm B Saxbe

Attorney General

PROCLAMATION GRANTING PARDON TO RICHARD NIXON

By the President of the United States of America

Richard Nixon became the thirty-seventh President of the United States on January 20, 1969 and was reelected in 1972 for a second term by the electors of forty-nine of the fifty states. His term in office continued until his resignation on August 9, 1974.

Pursuant to resolutions of the House of Representatives, its Committee on the Judiciary conducted an inquiry and investigation on the impeachment of the President extending over more than eight months. The hearings of the Committee and its deliberations, which received wide national publicity over television, radio, and in printed media, resulted in votes adverse to Richard Nixon on recommended Articles of Impeachment.

As a result of certain acts or omissions occurring before his resignation from the Office of President, Richard Nixon has become

liable to possible indictment and trial for offenses against the United States. Whether or not he shall be so prosecuted depends on findings of the appropriate grand jury and on the discretion of the authorized prosecutor. Should an indictment ensue, the accused shall then be entitled to a fair trial by an impartial jury, as guaranteed to every individual by the Constitution.

It is believed that a trial of Richard Nixon, if it became necessary, could not fairly begin until a year or more has elapsed. In the meantime, the tranquility to which this nation has been restored by the events of recent weeks could be irreparably lost by the prospects of bringing to trial a former President of the United States. The prospects of such trial will cause prolonged and divisive debate over the propriety of exposing to further punishment and degradation a man who has already paid the unprecedented penalty of relinquishing the highest elective office in the United States.

NOW, THEREFORE, I, Gerald R. Ford, President of the United States, pursuant to the pardon power conferred upon me by Article II, Section 2, of the Constitution, have granted and by these presents do grant a full, free, and absolute pardon unto Richard Nixon for all offenses against the United States which he, Richard Nixon, has committed or may have committed or taken part in during the period from January 20, 1969 through August 9, 1974.

IN WITNESS WHEREOF, I have hereunto set my hand this 8th day of September in the year of our Lord Nineteen Hundred Seventy-Four, and of the Independence of the United States of America the 199th.

/s/ Gerald R. Ford

September 6, 1974

Honorable Arthur F. Sampson
Administrator
General Services Administration
Washington, D. C.

Dear Mr. Sampson:

In keeping with the tradition established by other former Presidents, it is my desire to donate to the United States, at a future date, a substantial portion of my Presidential materials which are of historical value to our Country. In donating these Presidential materials to the United States, it will be my desire that they be made available, with appropriate restrictions, for research and study.

In the interim, so that my materials may be preserved, I offer to transfer to the Administrator of General Services (the "Administrator"), for deposit, pursuant to 44 U.S.C. Section 2101, et seq., all of my Presidential historical materials as defined in 44 U.S.C. Section 2101 (hereinafter "Materials"), which are located within the metropolitan area of the District of Columbia, subject to the following:

1. The Administrator agrees to accept solely for the purpose of deposit the transfer of the Materials, and in so accepting the Materials agrees to abide by each of the terms and conditions contained herein.

2. In the event of my death prior to the expiration of the three-year time period established in paragraph 7A hereof, the terms and conditions contained herein shall be binding upon and inure to the benefit of the executor of my estate for the duration of said period.

3. I retain all legal and equitable title to the Materials, including all literary property rights.

4. The Materials shall, upon acceptance of this offer by the Administrator, be deposited temporarily in an existing facility belonging to the United States, located within the State of California near my present residence. The Materials shall remain deposited in the temporary California facility until such time as there may be established, with my approval, a permanent Presidential archival depository as provided for in 44 U.S.C. Section 2108.

5. The Administrator shall provide in such temporary depository and in any permanent Presidential archival depository reasonable office space for my personal use in accordance with 44 U.S.C. Section 2108 (f). The Materials in their entirety shall be deposited within such office space in the manner described in paragraph 6 hereof.

6. Within both the temporary and any permanent Presidential archival depository, all of the Materials shall be placed within secure storage areas to which access can be gained only by use of two keys. One key, essential for access, shall be given to me alone as custodian of the Materials. The other key may be duplicated and entrusted by you to the Archivist of the United States or to members of his staff.

7. Access to the Materials within the secure areas, with the exception of recordings of conversations in the White House and the Executive Office Building which are governed by paragraphs 8 and 9 hereof, shall be as follows:

A. For a period of three years from the date of this instrument, I agree not to withdraw from deposit any originals of the Materials, except as provided in subparagraph B below and paragraph 10 herein. During said three-year period, I may make reproductions of any of the originals of the Materials and withdraw from deposit such reproductions for any use I may deem appropriate. Except as provided in subparagraph B below, access to the Materials shall be limited to myself, and to such persons as I may authorize from time to time in writing, the scope of such access to be set forth by me in each said written authorization. Any request for access to the Materials made to the Administrator, the Archivist of the United States or any member of their staffs shall be referred to me. After three years I shall have the right to withdraw from deposit without formality any or all of the Materials to which this paragraph applies and to retain such withdrawn Materials for any purpose or use I may deem appropriate, including but not limited to reproduction, examination, publication or display by myself or by anyone else I may approve.

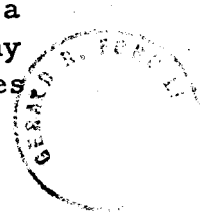
B. In the event that production of the Materials or any portion thereof is demanded by a subpoena or other order directed to any official or employee of the United States, the recipient of the subpoena or order shall immediately notify me so that I may respond thereto, as the owner and custodian of the Materials, with sole right and power of access thereto and, if appropriate, assert any privilege or defense I may have. Prior to any such production, I shall inform the United States so it may inspect the subpoenaed materials and determine whether to object to its production on grounds of national security or any other privilege.

8. The tape recordings of conversations in the White House and Executive Office Building which will be deposited pursuant to this instrument shall remain on deposit until September 1, 1979. I intend to and do hereby donate to the United States, such gift to be effective September 1, 1979, all of the tape recordings of conversations in the White House and Executive Office Building conditioned however on my continuing right of access as specified in paragraph 9 hereof and on the further condition that such tapes shall be destroyed at the time of my death or on September 1, 1984, whichever event shall first occur. Subsequent to September 1, 1979 the Administrator shall destroy such tapes as I may direct. I impose this restriction as other Presidents have before me to guard against the possibility of the tapes being used to injure, embarrass, or harass any person and properly to safeguard the interests of the United States.

9. Access to recordings of conversations in the White House and Executive Office Building within the secure areas shall be restricted as follows:

A. I agree not to withdraw from deposit any originals of the Materials, except as provided in subparagraph B and paragraph 10 below, and no reproductions shall be made unless there is mutual agreement. Access to the tapes shall be limited to myself, and to such persons as I may authorize from time to time in writing, the scope of such access to be set forth by me in each said written authorization. No person may listen to such tapes without my written prior approval. I reserve to myself such literary use of the information on the tapes.

B. In the event that production of the Materials or any portion thereof is demanded by a subpoena or other order directed to any official or employee of the United States,



the recipient of the subpoena or order shall immediately notify me so that I may respond thereto, as the owner and custodian of the Materials, with sole right and power of access thereto and, if appropriate, assert any privilege or defense I may have. Prior to any such production, I shall inform the United States so it may inspect the subpoenaed materials and determine whether to object to its production on grounds of national security or any other privilege.

10. The Administrator shall arrange and be responsible for the reasonable protection of the Materials from loss, destruction or access by unauthorized persons, and may upon receipt of an appropriate written authorization from the Counsel to the President provide for a temporary re-deposit of certain of the Materials to a location other than the existing facility described in paragraph 4 herein, provided however that no dimunition of the Administrator's responsibility to protect and secure the Materials from loss, destruction, unauthorized copying or access by unauthorized persons is affected by said temporary re-deposit.

11. From time to time as I deem appropriate, I intend to donate to the United States certain portions of the Materials deposited with the Administrator pursuant to this agreement, such donations to be accompanied by appropriate restrictions as authorized by 44 U.S.C. Section 2107. However, prior to such donation, it will be necessary to review the Materials to determine which of them should be subject to restriction, and the nature of the restrictions to be imposed. This review will require a meticulous, thorough, time-consuming analysis. If necessary to fulfill this task, I will request that you designate certain members of the Archivist's staff to assist in this review under my direction.

If you determine that the terms and conditions set forth above are acceptable for the purpose of governing the establishment and maintenance of a depository of the Materials pursuant to 44 U.S.C. Section 2101 and for accepting the irrevocable gift of recordings of conversations after the specified five year period for purposes as contained in paragraph 8 herein, please indicate your acceptance by signing the enclosed copy of this letter and returning it to me. Upon your acceptance we both shall be bound by the terms of this agreement.

Sincerely,

Accepted by: Arthur F. Sampson
Administrator
General Services Administration

9/7/74

F/San ICA.
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THE WHITE HOUSE

WASHINGTON

November 6, 1974

MEMO FOR: DON RUMSFELD

FROM: PHILIP W. BUCHEN Phil

Because of the sensitivity of the issues raised by this memo, I would like only you to see it for comment before it goes to the President as early as he can consider it. There is urgency because the Court will rule on a continuing injunction at hearing scheduled for November 15 and we should move well ahead of this if at all possible.

Also, here is copy of letter of November 5, 1974, which Art Sampson asked I deliver to you.

THE WHITE HOUSE

WASHINGTON

November 6, 1974

MEMORANDUM FOR THE PRESIDENT

FROM: PHILIP W. BUCHEN

SUBJECT: Access of Watergate Special Prosecutor to Tapes and Documents of the Nixon Administration

Despite the efforts made to disengage the White House staff of your Administration from the burden and risks of responding to requests or subpoenas initiated by the Special Prosecutor or arising from the present Watergate trial, the responsibility as a result of Judge Richey's order in the cases of Nixon et. al., vs. Sampson et. al., falls on the present White House legal staff acting jointly with Plaintiff Nixon's attorneys.

Subpoenas returnable to grand juries on November 6, as well as others returnable on November 8, 11, and 13 cannot be fully complied with, as the Special Prosecutor understands, despite heroic efforts by Bill Casselman and two other lawyers on our staff plus two more detailed to us by Justice. The problems arise from absence of comprehensive inventories, our unfamiliarity with the files, the scattered locations of the materials in EOB, the complexities of satisfying security requirements imposed by GSA and SS responsibilities, as well as ours, and the lack of available manpower from the small law firm representing Mr. Nixon. Some subpoenas are fairly general in their nature, so as to require extensive searches, and even where specifically identified documents or recorded conversations are sought, sometimes it takes many man-hours to find them or to determine that a requested item is probably nonexistent. The risks that later discoveries will cast doubt on the thoroughness of subpoena compliance are great.

At your appearance before the Subcommittee of the House Judiciary Committee, in answer to a question from Congressman Mann, you referred to the Supreme Court decision which "permits the Special Prosecutor to obtain any of the material for its responsibility" and said "I . . . would make certain that that information was made available to the Special Prosecutor's office." (Vol 10, Presidential Documents, No. 42, p. 1311.)

I have discussed at length with Larry Silberman and his colleagues who represent the defendants from this Administration in the pending suits before Judge Richey what alternatives we may have, consistent with your commitment at your Congressional appearance. The only one which seems feasible is to agree in court with the Special Prosecutor that he may have direct access to the stored materials for the purposes of locating and using items for grand jury purposes and criminal trial purposes within his prosecutorial jurisdiction if the court approves such an agreement.

The agreement would be negotiated, if possible, on terms that would allow the Nixon attorneys to have concurrent access and to raise legal objections available to their client against the production of any particular items. Role of non-prosecutorial people in your Administration would be limited to providing archival aid, raising national security issues before production, if ever necessary, and providing reasonable physical safeguards for the materials (preferably at a location within the District more suitable than EOB). No longer would any such people have responsibility for seeing that responses to the requirements of the Special Prosecutor are accurate, complete, and timely when even an unavoidable slip-up in carrying out such responsibility could very adversely impact on your Administration. Although in the course of any such search the Prosecutor may discover evidence of criminality not heretofore suspected, the same effect would occur if anyone on your staff while searching the materials should find such evidence because of his duty to inform the Special Prosecutor in that regard.

Larry Silberman believes that such an arrangement could be proposed to the court without compromising the validity and ultimate operation of the tapes and documents agreement between the former President

and Arthur Sampson, which your staff negotiated. Yet, you should understand that the Nixon counsel may strenuously object on the grounds the arrangement would violate the agreement and his client's ownership rights.

In doing so, such counsel risks for his client a determination by the Court that if the agreement precludes direct access for the ongoing governmental operations of the Special Prosecutor, it is to that extent invalid or may even be invalid in its entirety on grounds that, despite the Attorney General's opinion, the former President is not the legal owner of the materials. Of course, the risks for the former President as to either the legal limits of his rights under the agreement or as to whether he has any rights at all would not be removed by a Nixon concurrence in the proposed arrangements (or by the Court's overruling his objections), because third parties to the litigation would still press for a resolution of such issues in favor of public access or governmental ownership or both.

Yet, his concurrence would avoid inducing the Special Prosecutor to take a stand at least partly on the side of the third parties; and the Nixon position as against third parties should be enhanced by eliminating the issue raised by the government's prosecutorial needs, which is peculiar to the Nixon materials, and by joining parties with an interest in preserving the restrictive terms on which materials of earlier Presidents are being held.

The consequences of this proposal are not wholly predictable as it may:

a) Impinge on numbers of persons whose conduct in office is adversely reflected in the Nixon materials;

b) Enlarge the capabilities of the Special Prosecutor to present evidence to grand juries;

c) Cause resentment on the part of the former President and persons partisan to him;

d) Set something of a precedent for ready access by Federal law enforcement officials to White House documents;

e) Add to the incentive of Congress for passing legislation to provide access, beyond the access proposed here, to the Nixon materials and even to current or future White House materials; and

f) Produce public reaction of mixed sorts, though probably it would be widely favorable.

Nevertheless, I do recommend your authorizing the proposal herein made and would like to discuss the matter with you before you decide.

Approve _____

Disapprove _____

Comment _____

UNITED STATES OF AMERICA
GENERAL SERVICES ADMINISTRATION
WASHINGTON, D. C. 20405

ADMINISTRATOR

November 5, 1974

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

Dear Mr. Buchen:

I am pleased to inform you that we are continuing to fulfill all of the requirements of the temporary restraining order issued by Judge Richey on October 22, 1974. Because of the particular sensitivity of this issue, I have taken the view that the order must be interpreted literally and strictly enforced, and I appreciate the cooperation of the members of your staff in our efforts to comply with the terms set forth by Judge Richey.

All of the items referred to as "Nixon Presidential Materials" which have been transferred to the custody of GSA since January 20, 1969, continue to be secured under my personal supervision. The materials are located in the Executive Office Building, the Archives Building, and the Federal Records Center in Suitland, Maryland; and access is controlled by a single individual who is one of my special assistants (Tom Wolf). With the exception of provisions for emergencies, he is in sole possession of the keys and/or lock combinations to the areas where the records are stored.

There are a few items of concern which continue to require attention. One of them, of course, if your request for a plan to relocate materials from the White House and Executive Office Building. I am personally involved in this effort, and will submit a detailed plan to you no later than November 11.

We are about to undertake some processing of the materials so that we will have an accurate box-by-box inventory and more effective aids for retrieval purposes. I should like to discuss these measures and our relocation plan with you as soon as possible.

Because of the effect of the litigation and associated matters on the administration of the White House, it would be particularly beneficial if Mr. Rumsfeld could attend our meeting. Accordingly, I have sent him a copy of this letter, and have instructed Tom Wolf of my staff to work with both your and Mr. Rumsfeld's secretaries to arrange a mutually convenient time for such a meeting.

Sincerely,

(Signed) A. F. Sampson

ARTHUR F. SAMPSON
Administrator

cc: Honorable Donald Rumsfeld
Assistant to the President
The White House

H/K - Close hold File - Nixon/Sam Cr Lm.

WHEREAS, Gerald R. Ford, President of the United States, has determined and informed his Counsel that the due administration of justice and the public interest require that the Special Prosecutor have prompt and effective use of those Presidential materials of the Nixon Administration now located in the White House complex that are relevant and ~~important~~ to ~~ongoing~~ criminal investigations and prosecutions within the Special Prosecutor's jurisdiction; and

WHEREAS, this Agreement, if implemented, would accommodate the needs of the Special Prosecutor with respect to such materials;

NOW, THEREFORE, the undersigned have agreed as follows:

1. Upon letters from the Special Prosecutor to Counsel to the President specifying those materials that he has reason to believe are relevant to specified criminal investigations or prosecutions within the Special Prosecutor's jurisdiction and explaining why access to such materials is important to a full and fair resolution of those investigations and prosecutions, the Special Prosecutor or his designees shall be afforded access to the materials under the following procedures:

a. Documents

1. Where files are organized by subject matter, only those files may be examined which, because of their titles, may contain documents relevant to these specified investigations and prosecutions.

2. Where files are organized chronologically, only that portion of the file covering the time period relevant to the request may be examined.

3. Where no chronological or subject label is on a file, the file may be examined to determine whether the file contains relevant materials.

4. In order to assist in these searches, the Special Prosecutor may request the assistance of members of the archival staff detailed to the White House in making a list of file titles or other index.

b. Tape Recordings: Only the tape recordings of conversations specified by letters according to the above procedures may be listened to.

2. The Special Prosecutor shall be allowed to make copies of only those tapes of conversations and documents that he determines are relevant to investigations or prosecutions within his jurisdiction. Prior to the Special Prosecutor receiving such copies, Counsel to the President may review the copies to determine whether they may not be disclosed for reasons of national security. The originals of any tapes and documents, copies of which are provided to the Special Prosecutor, shall be retained and, if necessary for a criminal proceeding, will be given to the Special Prosecutor for such proceeding in exchange for the copies.

3. Richard M. Nixon or his attorney or designated agent shall be given notice of, and may be present during, searches pursuant to this Agreement. Also, Mr. Nixon or his attorney or designated agent, shall be afforded access to and/or copies of those tapes of conversation and documents for which the Special Prosecutor is allowed copies. The Counsel to the President also may designate individuals to be present during these searches.

4. No Presidential materials shall be removed to locations in Washington, D.C. other than the White House complex without the approval of the Special Prosecutor and no portions of such materials shall be removed to locations outside of the District of Columbia without an indication from the Special Prosecutor that he has no further need for such portions except upon contrary court order.

5. The parties to this Agreement shall move jointly to modify, if necessary, the temporary restraining order as now outstanding in Civil Action number 74-1518 in the United States District Court for the District of Columbia to permit implementation of this Agreement.

E. Restore

Signature lines (Buchen, Sampson, Knight and Ruth)

TITLE	AUTHOR
The Crippled Giant	J. William Fulbright
Problems of Knowledge and Freedom	Noam Chomsky
The Chicanos	Matt S. Meier and Feliciano Rivera
The Voices of the Silent	Cornelia Gerstenmaier
Presidents Bureaucrats and Foreign Policy	I. M. Destler
The Presidency on Trial	Stuart Gerry Brown

John O. Marsh, Jr. rcb

HOWARD KERR
THE WHITE HOUSE

DEAR HOWARD

On Friday you requested information regarding GSA personnel maintaining the former President's papers. My apologies for not getting back to you sooner, but I had military reserve duty Saturday.

To be sure, no personnel are assigned the function of maintaining the papers. We do have people assigned to the office of Presidential Papers who are assigned the task of implementing Judge Richey's orders in pending litigation. They are:

NAME	Grade/Step	Job Title	Salary
THOMAS WOLF	~~15/8~~	SPEC ASST	36,000
MARTHA WILLIAMS	6/4	SECY/STENO	10,421
ELIZABETH KARABATSOS	10/1	CONF. ASST.	14,119
MARTIN TEASLEY	11/2	LIBRARIAN	15,997
TERRY GOOD	12/2	ARCHIVIST	19,078
SUSAN YOWELL	9/2	RESEARCH ASST.	13,269
DICK McNEILL	7/1	AUDIOVISUAL SPEC.	10,520
Sally McCarthy	7/2	WRITER	10,871
Mary Filippini	7/2	WRITER	10,871
JOANN Williamson	11/2	ARCHIVIST	15,997

In addition, Veterans Admin. has personnel on detail to the office. Dave Hoops has the

information on those people.

I'll follow this up with a clean copy on Monday AM.

Sincerely.

Don Young

11/17

THE WHITE HOUSE

WASHINGTON

December 2, 1974

MEMORANDUM FOR THE PRESIDENT

FROM: PHILLIP AREEDA

SUBJECT: Legislation on Nixon Papers and Tapes

The Problem

Current versions of the bills dealing with the Nixon papers and tapes have eliminated the worst wholesale disclosure features of earlier versions but remain undesirable. Without any hearings, the Senate has passed S. 4016, and the House of Representatives will consider its version during the first week of December. Your congressional friends need to know whether you intend to sign or veto it.

Content of the Bills

Both bills give GSA possession of Nixon tapes and papers (including his own end-of-day dictated thoughts and recollections) and make them available -- subject to any claim of right or privilege -- for subpoena or other legal process. Thus, the papers and tapes would be subject to subpoena by the Special Prosecutor, by private parties in civil or criminal cases, or by Congress. The bill does not limit any such subpoena or legal process.

In addition, both bills provide for more general access to these materials under regulations to be promulgated by GSA to disclose the full truth of "Watergate" abuses.* Such regulations

* It is not readily apparent how such regulations can be framed to expose Watergate-type abuses without opening those records to broad-scale examination.

are required to recognize (1) in the Senate version, "the need to prevent unrestricted access" to non-Watergate matters, or (2) in the House version, "the need to provide public access to those materials . . . which have general historical significance . . . in a manner which is consistent with . . . public access to materials of former Presidents." Both bills would protect classified material, individual rights to a fair trial, and any legal privileges.* Both bills give Nixon unrestricted access at Washington to all these materials and give him sole custody of tapes and materials unrelated to Watergate and "not otherwise of general historical significance."

Finally, the House bill creates a "Public Documents Commission" of seventeen members appointed by the House (2), Senate (2), Chief Justice (1), President (4), Government agencies (5), and named private historical associations (3). The commission is to study problems concerning "the control, disposition, and preservation" of records "produced by or on behalf of federal officials," including legislators and judges.

Appraisal**

Many people believe that the former President's acts forfeit the claims he might otherwise have to prune or sanitize

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* The House bill authorizes Congress to appoint counsel to intervene in any litigation regarding Nixon tapes and documents. One Congressman has already intervened successfully under existing law.

** The bills are consistent with the arrangements already made with the Special Prosecutor and would probably give him greater access than he now has. The bills are not necessarily inconsistent with the original Sampson-Nixon agreement, for they provide for compensation to Nixon in the event that the Courts hold that this legislation deprives him of "any individual or private property". The Courts are thus left to decide upon the existence and scope of Nixon's property interests in the tapes and papers. (Note, incidentally, that such new legislation would not deprive Nixon of any "contract rights" because the original agreement was incapable of conferring upon him any greater interests in these materials than he already possessed. If he did not "own" them, GSA would not have had the legal power to dispose of them, and certainly not by a "contract" which gave the Government nothing it did not already possess.)

his papers as other Presidents had the opportunity to do. Yet, the bills are not confined to "Watergate" matters. Although both bills limit direct and unqualified public access, the House limitation is rather modest. And both allow any judicial or congressional subpoena.* Congressional committees and subcommittees will surely fish extensively in the Nixon papers and tapes on virtually every subject, including your own conversations.

I believe these bills to be undesirable for two reasons. First, they deprive one President of the privileges of his predecessors and in a manner exceeding what is needed to expose "Watergate." To be sure, the privileges accorded former Presidents are hard to justify, and the public does have a valid interest in White House records. But new rules should be well considered, should protect against political exploitation by successors or political opposition in Congress, and should apply even-handedly to all past Presidents or only to future Presidents. Second, this legislation will probably lead to the sensational and destructive exposure of the details of President Nixon's dealings. Quite apart from any illegal or even arguably illegal dealings, the tapes presumably reveal the inner workings, candid views, and sharp calculations of political life, including those of Nixon, his staff, departmental officials, legislators, and private citizens. Not only would this invade the "privacy" of unsuspecting participants in such meetings, the hair-down discussion of political realities could, though not unusual, demean and embarrass the participants, the Republican Party, the Presidency, and perhaps government generally. Perhaps GSA regulations can be formulated to limit these dangers, but the only barrier to Congressional subpoena would be constant litigation by Nixon or by GSA to claim executive privilege, the privacy of outsiders, etc. Such privileges are uncertain in scope in the face of suspicions of wrongdoing, as are Nixon's legal resources or our will to resist in a "middleman" role. Nixon will claim that any such statute is unconstitutional, but we cannot predict that he would prevail.

The Public Documents Commission is, in my view, a sound idea, although a smaller and less formal study group would be far better.

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* Congress could, of course, subpoena the tapes even if they were held by Nixon, but the frequency and scope of such subpoenas are likely to be much greater when the Government itself becomes their lawful owner.

Options

(1) Seek delay. Ask friendly Congressmen to seek to delay enactment of everything except the Public Documents Commission. After all, our agreement with the Special Prosecutor eliminates any need for speed, at least with respect to "Watergate" matters.

(2) Seek revision. Ask friendly Congressmen to seek ameliorating changes in the legislation. You could indicate acquiesence in the principle of access (a) by an impartial and non-political institution, such as the Special Prosecutor or a new tribunal, (b) for the sole purpose of uncovering criminal behavior or, at most, "clear abuses" of power, (c) with no greater disclosure of tape details to the public or to Congress than necessary for this purpose. There is certainly no reason to refrain from quietly urging friendly Congressmen to seek such ameliorating changes in the pending legislation. But you need to decide (a) whether to warn them that you might not be able to veto a bad bill, or (b) whether to seek such changes publicly and forcefully as a possible prelude to a veto.

(3) Plan to veto. A veto would, if not overriden, prevent an unsound bill from becoming law. And we could forcefully emphasize (a) contrary historical custom since George Washington, (b) the excesses of the bills and (c) the lack of congressional deliberation as revealed in the lack of hearings in either house on these bills. But a veto would be interpreted as "more cover-up" which, together with the pardon, "will prevent the full story of Nixon abuses from coming out." (Indeed, there may well be additional evidence of criminal behavior in those papers and tapes.)

A veto might be tolerable if (a) coupled with Option #2 and if (b) forceful opposition begins immediately in order to prevent later surprise and perhaps to generate discussion or even support on the issues.

But we must not underestimate the adverse public reaction that would result from a veto. Certainly, a veto should not even be considered unless it could be sustained.

(4) Plan to sign. Signing the bill (or if timing permits, allowing it to become law without your signature) would enact an unsound law, but would avoid the political disadvantages of a veto.

THE WHITE HOUSE
WASHINGTON

Dec. 13, 1974

To: Jack Marsh

From: Phil Buchen

Keep available

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 _____