

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

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WILLIAM A. DOBROVIR / ANDRA N. OAKES / JOSEPH D. GESHARDT

2005 L Street, N.W. Washington, D. C. 20036 (202) 785-8919

May 22, 1975

Herbert J. Miller, Jr., Esq.  
Miller, Cassidy, Larroca & Lewin  
Suite 500  
2555 M Street, N.W.  
Washington, D. C. 20037

Re: Nixon v. Administrator  
Civil Action No. 74-1852

Dear Jack:

Given the nature of this case, we would like to proceed informally with an initial discovery request. This request, attached hereto, would be in lieu of an interrogatory directed at identifying specific individuals with knowledge of the facts whose testimony would support the fact allegations in your complaint and/or would bear on the fact issues identified in your prehearing conference memorandum. The defendants and intervenor-defendants would then be in a position to determine what depositions to take. I would appreciate it if you could let us know at the meeting Tuesday whether this informal procedure is acceptable to you.

Sincerely yours,

William A. Dobrovir

Attachment

cc: Honorable Aubrey Robinson  
All Counsel

145,176-137



IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

RICHARD M. NIXON,

Plaintiff,

v.

ADMINISTRATOR OF GENERAL SERVICES,  
et al.,

Defendants.

Civil Action No. 74-1852

REQUEST FOR INFORMATION

Please identify every person known to plaintiff with personal knowledge of facts relating to each of the following issues raised in plaintiff's complaint and/or in plaintiff's prehearing memorandum. As used herein, "identify" means give the full name, business address and title and home address of each person with knowledge of facts relating to each such issue.

Please also specify, by asterisk or convenient sign, each of these persons identified as requested above who plaintiff presently expects will testify in Court, by affidavit or by deposition with respect to each such factual issue.

1. The nature of plaintiff's political activities and the character of the materials relating thereto (Complaint ¶7).

2. Plaintiff's alleged awareness that former Presidents had treated their Presidential materials as their own, and his creation of materials as a result of this awareness (Complaint ¶10).

3. Plaintiff's communications with his wife, family, attorney and physician, and the recording of such communications, their frequency and the segregability of such records (Complaint ¶12, Prehearing Mem. p. 9).



4. The alleged chilling effect of the statute on plaintiff's own future freedom of expression (Complaint ¶53).

5. The alleged discussions among plaintiff and others of private matters, the recording of such discussions, their frequency and the segregability of such records (Prehearing Mem. p. 5).

6. The allegation that a former President's ownership of presidential materials is essential to preservation of their confidentiality (Prehearing Mem. p. 7).

7. The allegation that the materials contain, embody or reflect thoughts, actions and conversations of plaintiff and/or others unrelated to the official functions and duties of the office, specifically

(a) the character of the materials recording such thoughts, actions and conversations, their extent and/or frequency and the segregability of such records;

(b) what are the alleged official functions and duties and the extent to which the thoughts, actions and conversations are unrelated thereto (Prehearing Mem. p. 8).

8. The allegation that the materials contain personal discussions and correspondence between plaintiff and members of his family and close personal friends, the character of the materials recording such discussions and correspondence, their frequency and the segregability of such materials (Ibid.).

9. The allegation that items described in ¶¶7 and 8 above are intermingled and inextricably combined with non-private items (Ibid.).



THE WHITE HOUSE

WASHINGTON

July 15, 1975

MEMORANDUM FOR: LARRY SPEAKES

FROM: BARRY ROTH *BR*

SUBJECT: Nixon Papers Litigation --  
Nixon v. Administrator of  
General Services

Jack Anderson has filed a notice of oral deposition of former President Nixon in connection with the litigation challenging the constitutionality of the legislation (P. L. 93-526) that denies Mr. Nixon custody and control of his Presidential papers. Mr. Nixon's attorneys have filed for a protective order that would allow Nixon to respond instead to questions presented to him in writing.

The Department of Justice, on behalf of the defendant Administrator of General Services (the White House is not a party in this case), will file a motion this afternoon in opposition to Mr. Nixon's motion. Basically, they argue that Anderson's request for an oral deposition is proper so long as Mr. Nixon wishes to continue to use his affidavit in these proceedings. Justice suggests for Mr. Nixon's health, and for convenience in terms of Secret Service protection, that any oral deposition be conducted in or near Mr. Nixon's home rather than in Washington.

Should you receive any inquiries concerning this matter, you may wish to indicate that the White House is not a party in this case, and direct the inquiries to the Department of Justice.

cc: Jack Marsh  
Rod Hills



*Nixon  
folder*

September 4, 1975

IG:DJAnderson:mmo  
145-171-137

Ward & Paul  
410 First Street, S. E.  
Washington, D. C. 20003

Attention: Ms. Kathryn E. Mills

Re: Richard Nixon v. Administrator of  
General Services, et al. (U.S.D.C.  
D.C., Civil Action No. 74-1852)

Gentlemen:

I have enclosed a copy of the deposition of Mrs. Jeanne Davis taken in the above action on July 30, 1975, indicating the changes she wishes to make. Pursuant to Rule 30 of the Federal Rules of Civil Procedure, this should now be submitted to the witness for execution and then filed with the Court.

By copy of this letter, I have sent the pages containing changes to counsel for all of the other parties.

Sincerely yours,

*IS*  
IRWIN GOLDBLOOM  
Deputy Assistant Attorney General



Enclosure

cc: All counsel

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Q What time of day did you execute that?

A By "execute" do you mean sign?

Q Sign, sign the document.

A I don't remember <sup>EX</sup>actly.

Q Was it in the morning?

A I believe it was in the afternoon. I don't remember exactly.

Q Was it late in the afternoon?

A I would say midafternoon but as I say I don't have a specific recollection.

Q Apart from discussing or working on this affidavit or the substance of the affidavit with counsel from the Justice Department representing the Government defendants, have you -- does this affidavit represent the product solely of your work?

A Some members of my staff assisted in some of the factual information. The final product is my work.

Q Which members of your staff assisted in the factual aspects of the affidavit?

A Mr. Steven Skancke, Mr. John Murphy.

Q Are those the only two members of your staff who assisted in the preparation of this affidavit?

A Yes.

Q What is Mr. Skancke's position?

① typographical error WARD & PAUL  
Washington - Virginia - Maryland

Phone (Area 202) 544-6000

1 A Mr. Skancke is an Assistant to me working primarily  
2 on declassification <sup>and</sup> of freedom of information issues. Mr.  
3 Murphy is the Director of the Document Control Section of the  
4 Secretariat.

5 Q Would you classify both Mr. Skancke and Mr. Murphy  
6 as administrative personnel at the <sup>NSC</sup> ~~NSC~~ staff?

7 A Yes, I would.

8 Q Do either have substantive responsibilities in any  
9 area involved with NSC?

10 A No.

11 Q Do you know if your affidavit or any portion thereof  
12 was reviewed by any other member of the White House or any  
13 member of the <sup>NSC</sup> ~~SEC~~ staff?

14 A Yes, by General Brent Scowcroft. It was also reviewed  
15 by Mr. William <sup>Casselman</sup> ~~Castleman~~.

16 Q Do you know whether Mr. <sup>Becken?</sup> Beuk reviewed your affidavit?

17 A No, I do not.

18 Q Do you know whether Mr. <sup>Sonnenfeldt</sup> ~~Suninfeld~~ reviewed your  
19 affidavit?

20 A No, sir.

21 Q What about Mr. <sup>Eagleburger</sup> ~~Eigelberger~~?

22 A No, sir.

23 Q Did Mr. Kissinger discuss your affidavit with you?

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① typographical error WARD & PAUL  
② " Washington - Virginia - Maryland  
③ " "  
④ misspelling  
⑥ - misspelling

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A No.

Q Do you know whether he reviewed it?

A I do not know.

Q Apart from General Scowcroft, you know of no other senior NSC staff member who reviewed your affidavit?

A I do not.

Q Did you discuss in the preparation of your affidavit the substance thereof with either General Scowcroft or any senior <sup>NSC</sup>~~NSC~~ staff member?

A No, not during the preparation.

Q Yesterday, when you received work that Plaintiff's counsel had requested your deposition, what steps did you take in connection with the preparation for this deposition?

A I was informed by the Justice Department by telephone yesterday. I asked for some statistical material from people in our secretariat. I discussed the matter with Justice Department attorneys and interviewed some of my people who had prepared these statistics to be sure that I understood.

Q Which people did you interview?

A I discussed it with Mr. Skancke, with Mr. Murphy, with Lt. Col. McFarland and with Mr. Roberts, Ed Roberts.

Q Did you discuss with Mr. ---

A I am sorry. Ms. Kathryn Troia also.

*typographical error* WARD & PAUL  
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BUCHEN 7  
~~Beukelman~~

1 Did you discuss the deposition with Mr. Beukelman or  
2 Mr. ~~Castleman~~ <sup>Casselman</sup> or any member of their staffs?

3 A I did not discuss it with Mr. ~~Beukelman~~ <sup>BUCHEN</sup> Mr. ~~Castle-~~ <sup>Casselman</sup>  
4 ~~man~~ was present yesterday when I discussed it with the Justice  
5 Department Attorneys.

6 Q What is Lt. Col. McFarland's position?

7 A He is a general assistant in the Office of General  
8 Scowcroft.

9 Q Mr. Roberts?

10 A He is an ~~NSE~~ <sup>NSC</sup> employee in charge of the Presidential  
11 files maintained in the west basement of the White House.

12 Q When you say that he is in charge of the Presidential  
13 files in the west basement of the White House are you talking  
14 about NSC related Presidential files?

15 A Yes. I am talking about the files maintained by  
16 ~~NSE~~ <sup>NSC</sup> personnel but are considered Presidential files.

17 Q What is Kathryn Troia's position?

18 A She is an assistant in the office of Mr. Kissinger  
19 in the White House. She also works on files.

20 Q When you say she is an assistant to Dr. Kissinger  
21 is she an administrative assistant?

22 A She is a staff assistant and works primarily on the  
23 file material.

- ① misspelling
- ② " "
- ③ " "
- ④ typographical error
- ⑤ " "

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Washington - Virginia - Maryland



1 Q Does she carry secretarial responsibilities?

2 A Secretarial?

3 Q Yes.

4 A No.

5 Q Who is Dr. Kissinger's secretary?

6 A He has several. Irene <sup>DERUS</sup> Duras is one. Do you mean the

7 secretaries in his immediate office who serve both him and

8 General Scowcroft?

9 Q Yes.

10 A Mrs.: Lora Simkus, Mary Stifflemire, Mrs. Florence --

11 I can't remember her last name. There are other secretaries

12 who come in in the evening to man/ the office. I do not recall

13 all their names.

14 Q The three women you named and the fourth whose last  
15 name you could not remember, to whom do they report?

16 A To Mr. Kissinger or to General Scowcroft who is his  
17 Deputy.

18 Q To anyone else?

19 A No.

20 Q In preparing for this deposition today, you said  
21 that you requested some statistical information. What materials  
22 did you bring with you to the deposition?

23 A The list of examples of occasions to have access to

① *misprinting*

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1 material from Presidential libraries, previous presidents,  
2 some figures on the number of boxes of material both originals  
3 and copies of NSC and Presidential material that have been  
4 retired to the special vault where President Nixon's materials  
5 are maintained.

6 Q May I see those, please?

7 A Yes.

8 Q Did you bring any other material with you to the  
9 deposition?

10 A No, except for a document here on which that is  
11 based.

12 Q Is this the document you provided to counsel for  
13 Plaintiff prior to the commencement of the deposition?

14 A Yes.

15 Q Would you identify it?

16 A It is a log of access by NSC staff employees  
17 to the vault on the <sup>2ND</sup> 7<sup>th</sup> floor where President Nixon's material  
18 is kept.

19 Q And you say you brought in addition with that log  
20 a summary or explanation of what is contained in the log?

21 A No.

22 Q What are you holding in your hand?

23 A This was a backup document for the preparation of this.

① TYPOGRAPHICAL ERROR  
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1 A Entry dated November 16, 1974, time in 17:36 time out  
2 17:43 The entrant, Mr. Roberts of NSC, the item Vietnam  
3 material for trip Japan, Korea, USSR; it was shown to Rodman,  
4 Peter Rodman, Mr. Kissinger's staff, and returned.

5 Q Do you know what particular file that was?

6 A No, I do not.

7 Q Do you know how many files that was?

8 A No.

9 Q Would you describe for me what the material was  
10 in the next entry which says <sup>CD</sup>~~SD~~ material looked at?

11 A CD is an abbreviation for Camp David. Much of our  
12 Vietnam material is contained in files described as the Camp  
13 David file. References to CD refer to Vietnam material  
14 maintained in this file which is entitled "Camp David File."

15 Q Do you have any basis for knowing what the material  
16 retrieved from the Camp David file consisted of?

17 A No.

18 Q Do you have any basis for knowing what the Vietnam  
19 material referred to in the previous entry consisted of?

20 A No.

21 Q The next entry says placed 30 boxes of files in  
22 vault. Does that indicate to you that no material was removed  
23 or viewed?

① *typographical error* WARD & PAUL  
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1 A Yes, it does.

2 Q The next entry under the column labeled what says  
3 1969 papers on Thailand. Do you know what was written under  
4 that?

5 A Ernest May study, and TS stands for top secret.

6 Q The entry under action is what?

7 A <sup>VAN ERON</sup> Vanderan, a member of the document control staff  
8 and the entry is not the report we were looking for.

9 Q Do you know what the top secret study was that  
10 Mr. Ernest May was working on?

11 A Yes, I do.

12 Q Do you know what report it was that he was looking for?

13 A Yes, I do.

14 Q Was that report subsequently found?

15 A The first half of the report was found.

16 Q Where was that found?

17 A In the <sup>[files of the Program Analysis Section]</sup> NSC maintained files in the west basement  
18 of the White House. <sup>[of the NSC Staff]</sup>

19 Q Is that in the institutional files?

20 A No, sir.

21 Q That is a separate filing system?

22 A This is the file which I have described in my  
23 affidavit of Presidential material, not institutional material,

① misspelling  
② my statement was in error as I described when I returned to my office and reviewed the facts of the situation. The following answers are still applicable.  
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Washington - Virginia - Maryland

1 Q Moving to page 2 of the report with the first entry  
2 being 2-7-75, do you have any information pertaining to the  
3 meaning of the entry under the what column for that date  
4 labeled HAK trip folder, something, and December, 1972?

5 A HAK are Mr. Kissinger's initials.

6 Q Do you know what trip that was?

7 A No.

8 Q Do you know why that document was removed?

9 A No, I do not.

10 Q Do you know what type of materials would be contained  
11 in that folder?

12 A I do not know what is in this specific folder. I  
13 can tell you that the trip folders normally contain the  
14 briefing material prepared for the conversations on the trip  
15 and they often contain memoranda of conversations, meetings on  
16 the trip.

17 I do not know in this specific case.

18 Q The next entry says K.Troia and under the what  
19 column says nothing. Do you know what that represents?

20 A I do not.

21 Q The next entry under the what column states Intel  
22 Memo for Mrs. Davis. Do you know what that involved?

23 A That was a memorandum that Mr. Roberts was preparing

① TYPOGRAPHICAL ERROR

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OBTAINING



1 checked files for accurate classification. Do you know what  
2 that involved?

3 A Yes, I do. As I have described in paragraph 16 of  
4 my affidavit, we have been reviewing some of the original docu-  
5 ments in those files to determine that they were properly marked  
6 with the declassification category, either what we call the ~~DS~~ <sup>GDS</sup>  
7 general declassification schedule or XGDS, exempt from the general  
8 declassification Schedule. These are schedules which were set  
9 out in Executive Order 11652.

10 We have been going through some of the material to be  
11 sure it was properly marked.

12 Q Has that review been completed?

13 A I don't know.

14 Q There are three separate entries by Kathryn Troia  
15 which appear to be for purposes of checking files for accurate  
16 classifications, is that correct?

17 A From the log, yes.

18 Q During that checking for accurate classification  
19 were documents that were not previously classified, classified?

20 A Not to my knowledge. I don't know.

21 Q Do you know whether there were any that were classified  
22 that were upgraded in classification?

23 A Not to my knowledge.

① TYPOGRAPHICAL ERROR

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1 Q Do you review or assist Kathryn Troia in this work?

2 A No.

3 Q To your personal knowledge, you don't know what  
4 Kathryn Troia did while she checked the files for classification?

5 A No.

6 Q Who informed you that you have been required to review  
7 the original documents to determine whether they were properly  
8 classified and properly marked with the classification and  
9 exempt categories pursuant to Executive Order 11652 you have  
10 discovered documents which are not currently classified as  
11 marked you will add the requisite classification.

12 A Mr. Murphy.

13 Q Does the sentence in your affidavit in paragraph 16  
14 which starts when we have discovered documents which were not  
15 correctly classified, or marked, does that sentence imply to you  
16 that documents have been classified which were not previously  
17 classified or correctly classified?

18 A Not specifically. Correctly classified could  
19 mean that only the first page was marked and subsequent pages  
20 were not marked. It could mean such things as that.

21 Q To your knowledge, you don't know whether documents  
22 were upgraded in classification or downgraded in classification?

23 A I <sup>do</sup> could not, no.

① TYPOGRAPHICAL ERROR WARD & PAUL  
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1 Q Do you know whether in Mr. Roberts going into that  
2 file and going into the vault and removing those files, whether  
3 it was done at the request of anyone who needed those materials  
4 for a matter dealing with foreign policy?

5 A I do not know that specifically.

6 Q Next five folders of background messages to be  
7 removed by Rodman.

8 A Yes.

9 Q Do you know what that entry involved?

10 A No, I do not.

11 MR. KRULWICH: Is that background or back channel?

12 MR. MORTENSON: Back channel.

13 BY MR. MORTENSON:

14 Q The next entry said check FOIA request-NSC. Do you  
15 know the basis for that entry?

16 A No, except as it appears here. The numbers indicated  
17 are the log numbers, NSC log numbers of specific items.

18 Q Would you describe what NSC log numbers of specific  
19 items means?

20 A We have a logging system in our secretariat. When  
21 material comes to the NSC for staffing, it is logged, assigned  
22 a number, action is assigned to <sup>an</sup> ~~it~~ individual <sup>and</sup> information and  
23 <sup>action</sup> copies are distributed. From that time, that incoming letter

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① TYPOGRAPHICAL ERROR WARD & PAUL  
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1 A All of those which have been handled by the NSC system  
2 in the normal manner. Some sensitive things are receiving  
3 limited treatment.

4 Q What type of material would get into the Presidential  
5 NSC files that would not receive a computer number for identificati  
6 purposes?

7 A Although this is not a specific example, I can see  
8 where a particularly sensitive exchange of correspondence  
9 between a president and a head of state which did not involve  
10 any NSC institutional problem would not have a computer number  
11 on it.

12 It might have been handled immediately by the President  
13 or by Mr. Kissinger.

14 Q What type of problem would you classify as not  
15 involving an NSC institutional matter?

16 A An exchange of correspondence between heads of  
17 state on a particular foreign policy issue or one that has not  
18 been through the normal NSC system. I described some of this  
19 type of information when I described the material that is  
20 maintained in the Presidential files by the NSC people as opposed  
21 to the NSC institution files.

**BREZHNEV**

22 Q To try to get an example, if Mr. ~~Breshnev~~ were to  
23 send President Ford a letter dealing with the sale of wheat

① misspelling

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1 and requests his secretarial staff to maintain it in his files,  
 2 is it possible that you would not become aware of that document  
 3 or indeed other people in the ~~SNC~~<sup>NSC</sup> not become aware of that  
 4 document until Dr. Kissinger determined to place it in the NSC  
 5 filing system?

6 A It is possible.

7 Q The next entry on page 4 lists organized files  
 8 under the what column and nothing removed. Do you know what  
 9 the basis was of that entry?

10 A Not specifically, no.

11 Q The next entry says box number 2 of China material  
 12 for review by Troia. Do you know what the basis for that entry  
 13 was?

14 A Not specifically.

15 Q Do you know generally?

16 A No.

17 Q Did you discuss this with Mrs. Troia?

18 A No.

19 Q Do you know whether or not it had to do with  
 20 a particular matter of national security or foreign policy?

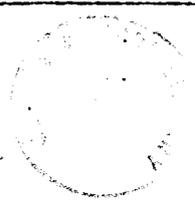
21 A Not specifically, no.

22 Q The next entry says organized files, nothing removed.  
 23 Do you know the basis for that entry?

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① **TYPOGRAPHICAL ERROR** WARD & PAUL  
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A No.

FOIA

Q What is an FOIQ?

A --The letters stand for Freedom of Information Act.

REQUESTS FOR

We have received a flood of declassification and release of classified material. This has been one of the main reasons that we have gone into various Presidential files to identify such material and review it in response to requests.

Q --Has this flood of FOIA requests concerned the NSC staff?

A To what extent?

Q Concerned the staff as to required disclosure of NSC documents?

A We have reviewed each case on its merits and in some cases we have determined that they should not be declassified and released. To that extent, yes, it has been a concern to us.

Q As a general matter, the fact that there has been under the new statute a flood of FOIA requests concerned even some members of the NSC staff?

A Are you talking in general terms, the fact ---

Q Yes.

A Yes, it is of general concern that we are being asked to declassify.

① TYPOGRAPHICAL ERROR  
② " " WARD & PAUL  
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1 and why the documents sought were being searched for?

2 A As I mentioned earlier, I do have specific knowledge  
3 of the search for the 1969 study on Thailand. I was personally  
4 involved in that. I do have specific knowledge of the Church  
5 Committee requests although in this particular log entry  
6 an attempt to identify paper requested by Church Committee,  
7 I don't know what that specific purpose was. But I do have  
8 knowledge of the Church Committee requests.

9 I do have knowledge of the FOIA requests. Here again  
10 the specific log numbers, I have not looked up.

11 Q Do you consider the <sup>F</sup>FOIA requests as pertaining  
12 to NSC needs for national security or foreign policy affairs?

13 A To the extent that the material being requested  
14 is material of a foreign policy or national security nature,  
15 yes, I do.

16 Q Were those searches for in connection with NSC  
17 needs other than the decision process on making them available  
18 pursuant to the FOIA request?

19 A This entry would indicate that they were searched  
20 for for the specific reason of responding to the FOIA request.

21 Q Is it fair to say that the example of NSC needs or  
22 access for -- for access to the Nixon Administration material  
23 which is not in your affidavit at paragraph 10 limited to

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1 dispute and the attempts to bring about a lasting peace in  
2 the Middle East?

3 A I would not know from his conversations with those  
4 two gentlemen. These documents I mentioned are maintained  
5 in the White House Offices of Mr. Kissinger. They are maintained  
6 by his immediate staff. I do know from conversations with them  
7 over a period of time that he has used that material out of  
8 those files.

9 Q Is that segregated from his own files?

10 A Yes.

11 Q And when did you discuss this with his secretarial  
12 staff?

13 A With his secretarial staff?

14 Q Yes.

15 A This particular question?

16 Q His gaining access to the Nixon Presidential  
17 files that are maintained over in the west wing of the White  
18 House?

19 A I have not discussed this with his secretarial  
20 staff. Under the normal circumstances, this material would  
21 be identified and obtained for him by either Mr. Rodman or  
22 ~~Mr.~~ <sup>Miss</sup> Troia.

23 Q You have discussed this with them?

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1           A     Not with Mr. Rodman recently although I have discussed  
 2 it with Mr. Rodman in the past when we have been engaged in  
 3 searches for material. I discussed it with <sup>Miss</sup>~~Mrs.~~ Troia  
 4 to confirm my understanding of what was in those files.

5           Q     Is it fair to say that your statement in paragraph  
 6 10 about the government, current government business negating  
 7 access to Nixon Administration materials maintained in the  
 8 vault in room 207 does not go to paragraphs 11, 12, 13 and 14,  
 9 which you have described as being occasions in which people  
 10 have had access to the copies maintained outside the vault?

11          A     One of the reasons for maintaining the copies of  
 12 some of this material at the time the originals were moved  
 13 into the vault was based on the fact that we had had occasion  
 14 to go into the originals of this material on several occasions  
 15 during the period before the formal physical transfer of all  
 16 the originals actually took place.

17          We made copies of that material which we had experienced  
 18 having the most reason to need.

19          Q     Let's talk about the August 9, 1974 transition  
 20 between the Nixon and Ford administrations as it pertained  
 21 to the NSC. When you learned of President Nixon's resignation,  
 22 what action did you take or to your knowledge did any member  
 23 of the NSC staff take concerning the deposition of any of the

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1 1974, are you familiar with the fact that it states "of course,  
 2 some Nixon administration files may be needed for future  
 3 reference. These files should be duplicated and placed with  
 4 all other papers accumulated after noon today which constitute  
 5 a new set of files for President Ford."

6 A Yes. It was under that provision that we did what  
 7 copying we did.

8 Q Is it fair to say then that at the time President  
 9 Nixon resigned and then shortly thereafter when the staff  
 10 received instructions to begin segregating the Nixon materials,  
 11 that members of the NSC staff made a judgment concerning their  
 12 future needs of NSC related materials which would otherwise  
 13 be packaged among the Nixon materials and made copies of those  
 14 for their future use.

15 A I am sorry. Could you read that again, please?  
 16 (The record was read by the Reporter.)

17 THE WITNESS: It is fair to say that judgments could  
 18 have been made as to what material we might continue to need.  
 19 I can't say whether there was -- these documents were copied  
 20 at that time or whether existing copies of the documents  
 21 possibly maintained in working files were retained.

22 I can't say whether this negated a copying of all those  
 23 documents at that time. I would rather doubt it. I would think

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① OBVIOUSLY A WRONG WORD -- POSSIBLY "REQUIRED" WASHINGTON - VIRGINIA - MARYLAND

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1 in this particular document the specific titles of material  
2 reflected in these statistics. Generally it is the basis for  
3 that statement.

4 Q From the exhibits 3 and 4, can you describe in general  
5 terms the nature of the access reflected in those documents?

6 A In some cases I can, yes. Let's take item number 2.  
7 The Murphy Commission for studying the organization of the  
8 executive branch asked for the preparation of several case  
9 studies. One of the researchers who was requested to prepare  
10 a case study was Richard Neustadt. He was asked by the Murphy  
11 Commission to review a report which he, Mr. Neustadt, had prepared  
12 for President Kennedy on a particular foreign policy issue,  
13 the title of the report was "Skybolt and ~~NASA~~ <sup>NASSAU</sup>."

14 The document was classified. There were no copies that  
15 we could locate anywhere in our own material.. We were asked  
16 by the Murphy Commission and by Mr. Neustadt to see if this  
17 material could be declassified to the extent that it could  
18 be used in this case study.

19 We did obtain a copy from the Kennedy Library. We did  
20 review it and again made a determination then at that time  
21 that it could not be so declassified.

22 We received subsequent requests from Mr. Neustadt under  
23 the Freedom of Information Act for the declassification and

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1 decision on where that document ought to be filed?

2 A It would depend on the nature of the discussion.  
3 If it were a particularly sensitive discussion, the decision  
4 would probably be made by Mr. Kissinger or by General Scowcroft.  
5 If it were a discussion which was somewhat less sensitive,  
6 I might make the decision.

7 Q And what criteria would you use in determining whether  
8 to put it among the Presidential NSC files or the institutional  
9 NSC files?

10 A I can't imagine any case where we would put a  
11 memorandum of a presidential conversation in the institutional  
12 NSC files. They would always go into the Presidential files.

13 Q Why is that?

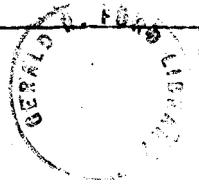
14 A Because they are not institutional business. Our  
15 institutional files relate specifically to those issues which  
16 have come through the NSC mechanism which have been considered  
17 in the NSC or in a subgroup of the NSC or have otherwise been  
18 related directly to the institution of the national security  
19 program.

20 We do not consider presidential meetings with foreign  
21 leaders as the institutional business of the National Security

*Council*

22  
23 Q What about Dr. Kissinger's meetings with members of

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1 presently abroad if there is an issued statement of principles,  
2 where would that be found?

3 A You mean a public statement?

4 Q A public statement of principles.

5 A It would probably be filed in the White House  
6 central files which is a repository for unclassified material  
7 <sup>OR</sup> ~~for~~ public declarations. If it were an unclassified document,  
8 it would probably be found in the White House Central files.

9 Now in addition I am sure that we would maintain convenient  
10 copies in our own location ~~and~~ of an unclassified document.

11 Q In your institutional files?

12 A Probably, yes.

13 Q What about a communique that was issued?

14 A A public document?

15 Q A public communique?

16 A It would not be maintained in NSC institutional  
17 files.

18 Q What if the agreement reached was not reflected  
19 in a public document?

20 A It would not be maintained in the institutional  
21 NSC files. It would be maintained in the presidential files.

22 Q Where would you file a Nixon to Kissinger  
23 or a Kissinger to Nixon memo discussing proposals for the first

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1 changed, according to Mrs. Davis' testimony, the NSC received  
2 the Jerry Jones memorandum saying that copies should be maintained  
3 of things that they thought they would need for future reference.

4 My question is would a staff member have among his working  
5 files or otherwise a copy of such an understanding?

6 THE WITNESS: It is possible that a senior staff  
7 member who had participated in either the preparations for  
8 a presidential trip or had actually accompanied the president  
9 on the trip would retain in his working files copies of some  
10 of the material that had been generated from the trip.

11 If I may I would like to return to a statement I made  
12 earlier, that as a practice, we discourage individual staff  
13 members from maintaining voluminous personal files. If they  
14 need them for working purposes, fine. But we do discourage  
15 them from maintaining -- duplicate, extensive duplicate files  
16 in their own offices.

17 Q In describing your responsibilities in your  
18 affidavit, you state "~~the~~ **MY RESPONSIBILITIES INCLUDE** the review of the work of NSC  
19 staff members for responsiveness to the requirements of the  
20 president and his assistant for national security affairs,  
21 including organization, presentation, format and proper  
22 coordination."

23 In carrying out that function, do you perform any sub-

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1           A     My office is the central source of information for  
 2 the NSC members and other departments on the status of issues  
 3 going through the NSC system. On the scheduling of meetings,  
 4 the distribution of documents for such meetings, in addition  
 5 to the institutional business, I also am the principal point  
 6 of contact for such people as the executive secretary of the  
 7 Department of State on all issues both institutional and  
 8 non-institutional in which the NSC staff and the office of  
 9 the Secretary of State have reason to communicate.

10           In other words on documents which the State Department  
 11 has sent us for, documents which we have sent the State  
 12 Department and asked them to prepare responses, that sort of  
 13 thing. My office is the central point of contact for that.

14           Q     Is it important for the NSC staff to have a knowledge  
 15 of what occurs at cabinet meetings?

16           A     Only to the extent that they relate to foreign  
 17 policy matters.

18           Q     Are you aware that President Johnson recorded  
 19 certain of his cabinet meetings?

20           MR. ANDERSON: I object to this line of questioning.  
 21 It is totally irrelevant to this affidavit.

22           MR. SKANCKE: You represented that your deposition  
 23 was going to take 45 minutes. I presume that you are going

① MR SKANCKE DID NOT SPEAK DURING THIS DEPOSITION WARD & PAUL Washington - Virginia - Maryland



1 A Yes, the formal criteria derive more from the  
2 exceptions which are laid out in Executive Order 11652 and  
3 the Freedom of Information Act.

4 Q Does that Executive Order contain information of  
5 impact on documents concerning the declassification?

6 A In the exceptions, yes.

7 Q In exercising your judgment regarding declassification  
8 of documents, you would have to be making judgments in the  
9 area of national security and foreign affairs of the United  
10 States?

11 A Yes.

12 Q To whom do you report in your position?

13 A I report directly to Mr. Kissinger or his deputy  
14 General Scowcroft.

15 Q In the average or normal course of business, would  
16 you say -- how often would you personally deal with either  
17 Mr. Kissinger or General Scowcroft?

18 A I would deal personally with General Scowcroft  
19 at least once a day. I would deal personally with Mr. Kissinger  
20 ~~too~~ *VERY infrequently* frequently, particularly now since he is also Secretary  
21 of State and divides his time between two posts.

22 I would have contact with him primarily in connection  
23 with attendance, my attendance at meetings of various NSC

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subgroups which Mr. Kissinger chairs.

I attend many of those meetings.

Q You have ready access to Mr. Kissinger when you need him?

A If I should need him, yes.

MR. GOLDBLOOM: I have no further questions.

REDIRECT EXAMINATION

BY MR. MORTENSON:

Q You have described the declassification process and you have described to us if two staff members agreed on a matter of declassification, I would accept that and declassify the document?

A In almost every case, yes.

Q If you disagree, you then would prepare a memorandum?

A It would depend. The Freedom of Information Act process requires two separate independent determinations. It requires <sup>an initial</sup> ~~a firm~~ determination by one individual and it requires another individual to make the determination on the basis of an appeal.

So that in the -- I am the person on the NSC staff responsible for the initial determination on a Freedom of Information request. In that case, if there were a split on the staff, I would be the one to sign the letter, whatever,

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1 either agreeing or denying the request. On the appeal --  
2 excuse me. On Executive Order 11652 requests, which ~~is which~~  
3 do not involve specifically the Freedom of Information Act,  
4 there is not this two-level distinction.

5 So in those cases, if there were questions, if there was  
6 disagreement, at that point I might well refer them to higher  
7 authority. I would not, however, refer additional -- an  
8 initial denial or granting of a Freedom of Information Act  
9 request to higher authority because that is required to be kept  
10 completely separate.

11 Q If a Freedom of Information request were filed  
12 for a copy of the correspondence between President Nixon and  
13 President Thieu and it were referred to two staff officers  
14 dealing with Vietnam, if they disagreed as to the impact of  
15 that release upon relationships with South Vietnam or any other  
16 foreign country, how would you handle that dispute?

17 A Well first of all a request, a Freedom of Information  
18 request, for correspondence between President Nixon and President  
19 Thieu, we could not consider because under the terms of the  
20 court order, we would not have access to that material except  
21 for the conduct of ongoing business.

22 We have not interpreted responding to a Freedom of  
23 Information request as falling within that category.

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We would not have occasion to consider it.

Q Let me put the same question in the context of a letter between Presidents Ford and Mr. Breshnev. If a Freedom of Information Act request sought access to such a letter and it was referred to staff officers dealing with matters involving Russia and they came back with disagreement on the impact, how would you handle that?

A Depending on the individual letter in question, it would be my inclination -- and this is a little -- I would have to know the specific letter, the contents of the letter. In any exchange of correspondence at the highest level, I would tend, I believe, to be more cautious about the release than I would on another less sensitive or less high level document.

Q Does that mean you would refer it to someone?

A Not a Freedom of Information <sup>REQUEST</sup> unless it were a document which involved another agency. That would not be the case of a presidential letter. But if the request should be for a document, for example, which had intelligence content, I might well refer it to another agency for expression of their view.

But not of a presidential letter, not in the initial stages.

Q You described for us your contact with General

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1 Scowcroft and Dr. Kissinger. What types of matters would you  
2 take up with General Scowcroft?

3 A Almost anything in my own range of responsibilities.

4 Q Would you discuss with General Scowcroft the policies  
5 to be advanced in relationships with China?

6 A No.

7 Q Would you discuss with General Scowcroft or Dr.  
8 Kissinger the policies to be advanced in the SALT negotiations  
9 and positions the United States should take vis-a-vis the  
10 Soviet Union?

11 MR. STANKE: We will stipulate that Mrs. Davis  
12 is not the Secretary of State.

13 MR. MORTENSON: I did not ask for that stipulation.  
14 The focus of my question -- and I think they are quite obvious  
15 to counsel for the Intervenors -- is to find out the range  
16 of Mrs. Davis' responsibilities.

17 BY MR. MORTENSON:

18 Q Would you discuss with either General Scowcroft  
19 or Dr. Kissinger the policies to be followed or not followed  
20 with regard to Vietnam?

21 A No.

22 MR. MORTENSON: No further questions.

23 MR. GOLDBLOOM: We have none.

① MR STANKE DID NOT  
SPEAK DURING  
THIS PROCEDURE  
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1:55 Barry called to ask if you had heard that the three-judge court decided for the government.

Eva: What does that mean?

Barry: Nixon lost.

Eva: What does that mean?

Barry: The statute was upheld.

Eva: What does that mean?

Barry: Nixon doesn't get his papers yet.



THE WHITE HOUSE  
WASHINGTON

*Nixon  
Papers*

January 12, 1976

MEMORANDUM FOR: JEANNE DAVIS  
FROM: PHILIP BUCHEN *P.*  
SUBJECT: Access to Nixon Presidential  
Materials in NSC Custody

On January 7, 1976, the United States District Court for the District of Columbia entered an Order in Nixon v. Administrator of General Services, et al., C.A. No. 74-1852, which provides in part, the following:

" . . . that the injunction shall not bar inspection and photographic reproduction of documentary material when needed for current business of the executive branch of the federal government, pursuant to a request that has been approved by both the head of the agency or department of the executive branch seeking access and by defendant Philip W. Buchen or his successor, although plaintiff shall receive notice of any access requested ten days prior to the grant thereof in order to be able to raise in court any defenses, rights, or privileges that might bar such access, and if such opposition is presented, defendants shall not permit access until the issue has been resolved in court, and any such access granted shall be in accordance with the procedures of 41 CFR §§105-63.201 to .207 . . . ."



Any access by the NSC to the Nixon Presidential materials contained in the vault in Room 205 of the OEOB or otherwise in the custody of the NSC, must be made in accordance with the above-referenced provisions.

Attached is a copy of the GSA regulations referred to above. Although Section 105-63.201 of these regulations provides that the

Administrator is responsible for the preservation and protection of the Presidential materials, the transfer of these materials to GSA continues to be prohibited by the Order.

After consulting with GSA as to its responsibilities under the regulations, we shall suggest to you the precise steps to be taken henceforth for each instance when you desire access to Nixon Presidential materials for current business of the NSC. The purpose of this memorandum is merely to alert you to a change in the legal situation as a result of the new Order issued on January 7, 1976, which replaces the earlier Order of Judge Ritchey under which we had been operating.

cc: Brent Scowcroft  
Bud McFarlane



OFFICE OF  
THE SOLICITOR GENERAL



*Copies  
to Barry*

July 13, 1976

Mr. Buchen:

Here are two copies of our draft in Mr. Nixon's challenge to the Presidential Recordings and Materials Preservation Act. As the Solicitor General told you earlier this afternoon, we must send the draft to the printer no later than Friday, July 16, so that it can be timely filed.

Frank H. Easterbrook  
Assistant to the  
Solicitor General

No. 75-1605

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IN THE SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1976

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RICHARD NIXON, APPELLANT

v.

ADMINISTRATOR OF GENERAL SERVICES, ET AL.

---

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

---

MOTION OF THE FEDERAL APPELLEES TO AFFIRM

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Washington, D. C. 20530.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

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No. 75-1605

RICHARD NIXON, APPELLANT

v.

ADMINISTRATOR OF GENERAL SERVICES, ET AL.

---

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

---

MOTION OF THE FEDERAL APPELLEES TO AFFIRM

---

Pursuant to Rule 16(1)(c) of the Rules of this Court, appellees Administrator of General Services and the United States of America move to affirm the judgment of the United States District Court for the District of Columbia in this case.

OPINIONS BELOW

The opinion of the three-judge district court (J.S. App. 1a-106a) is reported at 408 F. Supp. 321. Opinions of the court of appeals concerning the convening of the three-judge district court (J.S. App. 139a-202a) are reported at 513 F. <sup>2d</sup> Supp. 427 and 430.

JURISDICTION

The judgment of the three-judge district court (J.S. App. 107a-108a) was entered on January 7, 1976. A notice of appeal (J.S. App. 109a) was filed on March 4, 1976, and the jurisdictional statement was filed on May 3, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1253.



QUESTIONS PRESENTED

Whether the Presidential Recordings and Materials Preservation Act is unconstitutional on its face as a violation of (1) the separation of powers doctrine; (2) presidential privilege doctrines; (3) appellant's right to privacy; (4) the First Amendment; (5) the equal protection component of the Due Process Clause of the Fifth Amendment; or (6) the Bill of Attainder Clause.

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

Article I, Section 9, clause 3 of the Constitution provides:

<sup>Full  
ident</sup> No Bill of Attainder or ex post facto Law shall be passed.

Article IV, Section 3, clause 2 of the Constitution provides:

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

The First Amendment to the Constitution provides in relevant part:

Congress shall make no law \* \* \* abridging the freedom of speech, or of the press; \* \* \*.

The Fourth Amendment to the Constitution provides in relevant part:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, \* \* \*.

The Fifth Amendment to the Constitution provides in relevant part:

No person shall \* \* \* be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Presidential Recordings and Materials Preservation Act, 88 Stat. 1695 <sup>f</sup>et seq., 44 U.S.C. (Supp. IV) 2107 note and 3315-3324, is set out at J.S. App. 110a-123a.

STATEMENT

Appellant resigned as President of the United States effective August 9, 1974. When he left office a large quantity of documents, files, and other materials, which had been accumulated by him and his staff during his term as President, <sup>remained</sup> ~~were~~ left in the government's custody (J.S. App. 7a-9a). These materials include approximately 42 million pages of documents. Appellant estimates that he personally prepared or reviewed 200,000 documents from this collection (J.S. 4). The materials also include 880 reels of tape recordings of conversations in the Oval Office, the Cabinet Room and the Lincoln Sitting Room in the White House, and appellant's offices in the Executive Office Building and Camp David (J.S. App. 40a). After appellant's resignation, government archivists began to collect these materials for shipment to California, in accord with appellant's instructions (J.S. App. 9a-10a).

Before releasing any materials for disposition according to appellant's pre-resignation instructions, President Ford asked the Attorney General for advice about the ownership of the materials. The Attorney General concluded that, with the possible exception of one type of document, the materials were owned by appellant by virtue of historical practice and the absence of any statute to the contrary (43 Op. Att'y Gen. No. 1 (September 6, 1974); J.S. App. 124a-133a).<sup>/</sup> The ownership interest was not unqualified, however. The Attorney General informed the President that:

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<sup>/</sup> The Attorney General expressed no opinion concerning ownership of certain "permanent files." These files consist of materials traditionally retained in the White House from administration to administration, such as "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" (J.S. App. 132a). Appellant claims no rights to these materials in this action (J.S. 12).

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. [J.S. App. 129a.]

The opinion also stated that any ownership interest was qualified by exposure to court orders regarding the materials and based upon their unique nature (J.S. App. 132a-133a).

Following the President's receipt of this opinion the Administrator of General Services executed an agreement with appellant ~~regarding the materials~~ (J.S. App. 134a-138a).<sup>/</sup> Under the terms of the agreement appellant retained title to all of his presidential historical materials but agreed to donate a substantial portion of the materials to the United States at a future date so that they would "be made available, with appropriate restrictions, for research and study" (id. at 134a). While appellant reviewed the materials, they were to be deposited with the General Services Administration ("GSA") under the Federal Records Act, 44 U.S.C. 2101 et seq., and transferred to California, where they would be stored in locked areas. Neither appellant nor GSA could gain access to the materials without the consent of the other (id. at 135a).

The agreement provided that for three years appellant would not withdraw any original writing, although he could make and withdraw copies of any such materials. Appellant agreed not to withdraw any original tape recording of conversations in the White House or Executive Office Building until September 1, 1979, and to make reproductions of the tapes only with GSA's consent. After the initial three-year period, the agreement provided, appellant could withdraw any of the materials other than the tape recordings (id. at 136a). During this time

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<sup>/</sup> The agreement is reported at 10 Weekly Comp. of Pres. Docs. 1104 (1974).

appellant (or government archivists working under his direction) was to review the materials; those he did not withdraw would be donated to the United States, with appropriate restrictions on public access (id. at 138a). Following the initial five-year period, appellant would be entitled to designate any tape recording to be destroyed. All of the tape recordings were to be destroyed after ten years (September 1, 1984) or upon appellant's death, whichever event occurred first (id. at 136a).

Implementation of this agreement was delayed at the request of the Watergate Special Prosecutor (J.S. App. 12a). Appellant then brought suit for specific performance of the agreement. The Special Prosecutor and Jack Anderson, a reporter, intervened; the case was consolidated with actions brought by the Reporters Committee for Freedom of the Press and by Lillian Hellman, both seeking to enjoin transfer of the materials and to gain access to them under the Freedom of Information Act, 5 U.S.C. (Supp. IV) 552.

While these consolidated actions were pending, Congress passed and the President signed the Presidential Recordings and Materials Preservation Act, 88 Stat. 1695 et seq., 44 U.S.C. (Supp. IV) 2107 note and 3315-3324. Section 101 of the Act directs the Administrator of General Services to obtain and retain possession and control of all of the presidential historical materials and tape recordings from appellant's administration. Appellant's agreement with GSA is abrogated (Section 101(b)). Section 102(b) provides that these materials and recordings shall be made available for use in any judicial proceeding, "subject to any rights, defenses, or privileges which the Federal Government or any person may invoke \* \* \*." Section 102(c) and (d) provides that appellant (or his designate) and the Executive Branch shall have access to the materials, subject to the Administrator's regulations.



Section 103 requires the Administrator to issue regulations to govern custody of and access to the materials. Section 104 requires the Administrator to issue regulations providing "public access" to the materials; these regulations must "take into account" seven factors (Section 104<sup>(c)</sup>a):

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

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

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

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

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

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

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

Section 104(b) requires the Administrator to submit the "public access" regulations and any subsequent changes in them to both Houses of Congress and provides that the regulations or changes (can be) disapproved by a resolution of either House within 90 legislative days of submission. Section 105 provides

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/ The Administrator has submitted to Congress three sets of "public access" regulations. The first set was disapproved by the Senate. S. Res. 244, 94th Cong., 1st Sess. (1975); 121 Cong. Rec. S15803-S15808 (daily ed. September 11, 1975). The Administrator has not sought to enforce these regulations, and no party to this litigation claims any rights under them. See page and note , infra. The second set was withdrawn; ~~but~~ the Senate disapproved seven provisions of those regulations, believing that the Administrator lacked power to withdraw them. S. Res. 428, 94th Cong., 2d Sess. (1976);



for "just compensation" to any individual who may have been deprived of private property by the Act.

Title II of the Act establishes a National Study Commission to study and recommend procedures regarding the control, disposition, and preservation of the records of all federal executive, judicial, and legislative officers. The National Study Commission has been appointed but has not yet submitted its report; it is not involved in this litigation.

One day after the Act became effective appellant commenced this action for declaratory and injunctive relief. The complaint sought the convening of a three-judge district court. The district court declined to rule upon the request; it proceeded to file an opinion in the consolidated cases growing out of appellant's agreement with GSA. Nixon v. Sampson, 389 F. Supp. 107 (D.D.C.). The Court of Appeals for the District of Columbia Circuit stayed entry of judgment in the consolidated cases to enable a three-judge district court to determine whether priority should be accorded to the present action (J.S. App. 139a-202a). A three-judge court was convened and allowed the other parties to the consolidated cases, who were not originally parties to this case, to intervene. The Special Prosecutor intervened and subsequently withdraw (see J.S. App. 16a-18a). Protected by the court of appeals' stay from any res judicata or collateral estoppel effects of the single judge's opinion in Nixon v. Sampson, supra, the three-judge district court independently considered appellant's arguments.

The three-judge district court rejected appellant's

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122 Cong. Rec. S5290-S5291 (daily ed. April 8, 1976). The third set was submitted on April 13, 1976, and is pending.

Regulations implementing Sections 102 and 103 of the Act are not required to be submitted to Congress. These regulations were published on January 14, 1975. 40 Fed. Reg. 2669; 41 C.F.R. 105-63. The district court has enjoined the effectiveness of those regulations pending disposition of this appeal (J.S. App. 107a-108a).

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challenges to the facial constitutionality of the Act (J.S. App. 1a-106a). Noting that the regulations to implement the Act are not yet effective and that any challenge to the implementation of the Act is premature, the court limited its inquiry to the taking of the materials into the government's custody and their screening by government archivists (J.S. App. 3a-4a, 18a-31a). The court carefully considered and rejected each of the arguments appellant makes here.

#### ARGUMENT

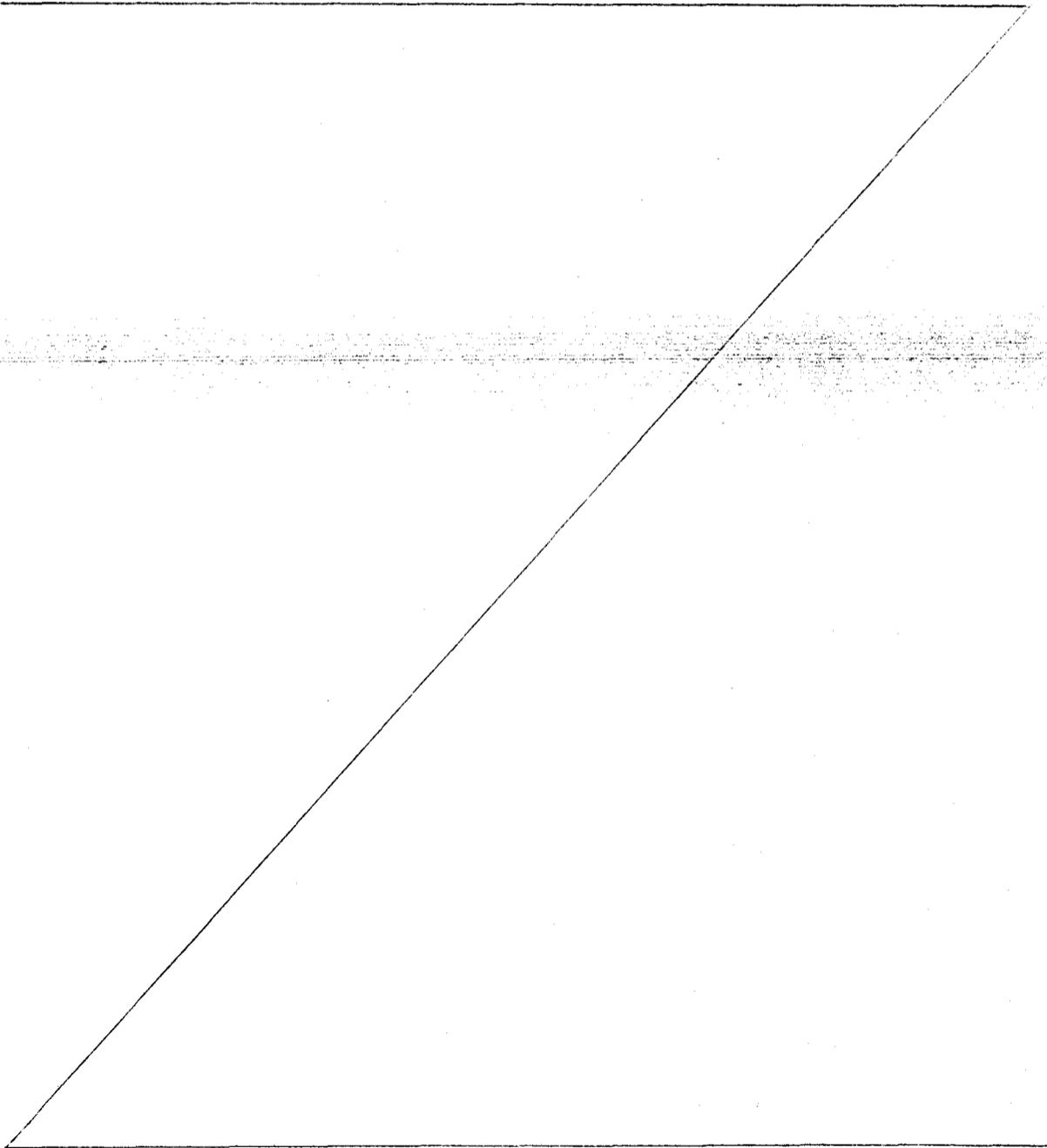
Appellant seeks to raise a number of constitutional issues of central concern to the way power is allocated among the departments of our government and to the ability of the Executive Branch to formulate and carry out policies. For almost two centuries these issues, and others like them, have been left to be accommodated by the ebb and flow of political forces. Those issues, however, are not yet so squarely presented that definitive resolution by this Court is necessary or appropriate.

Under the Act, release of presidential materials to any person outside the Executive Branch cannot occur until after "public access" regulations become effective establishing the rules under which any materials will be released. Appellant's complaints are addressed primarily to the possibility that "public access" regulations may be adopted that will not be sufficiently sensitive to his legitimate interests, and that, even if adequate regulations are adopted, their administration will adversely affect his legitimate interests. But the stark issues of constitutional doctrine that appellant presents are more theoretical than real. His concerns are not yet ready for judicial resolution. Since such regulations had not been promulgated at the time of the district court's consideration of this case, the only issue considered by the court, and available for review here, concerns the facial validity of the Act.



Because this litigation does not involve the regulations or any decisions made under them, appellant is limited to the argument that it is not possible to draft any constitutionally permissible set of "public access" regulations under the Act. The district court carefully considered that argument and correctly rejected it. There is no need for plenary review. Further judicial consideration of the underlying issues appellant seeks to raise should appropriately await issuance of final regulations.

1. a. The district court correctly rejected appellant's argument that the Act is an unconstitutional encroachment by



Congress on powers reserved to the Executive Branch (J.S. App. 31a-35a). Far from invading the autonomy of the Executive Branch, the Act places the materials in the custody of the Administrator, an executive official responsible to the President, and provides that Executive Branch employees have access to the materials "for lawful Government use subject to the [Administrator's] regulations" (Section 102(d)). See 41 C.F.R. 105-63.205, 105-63.206<sup>(and)</sup> 105-63.302.

~~To be sure,~~ the Act also provides that the materials are to be made available ~~to~~ judicial proceedings, but such availability is expressly subject ~~to~~<sup>(to)</sup> any rights, defenses, or privileges which any person may invoke. ~~And~~ although the Act contemplates public access to some of the materials of historical value, it also recognizes the need "to protect any party's opportunity to assert any legally or constitutionally based right or privilege" (Section 104(a)(5)) and to return other materials to appellant (Section 104(a)(7)). The Act thus ensures that there will be no disclosure of the materials to persons outside the Executive Branch in violation of any defenses or privileges asserted by appellant or the Executive Branch. Cf. United States v. Nixon, 418 U.S. 683. Accordingly, the Act on its face does not violate the principle of separation of powers.

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<sup>(daily ed.)</sup> / Section 105-63.401-2 of the Administrator's proposed public access regulations provides that the Senior Archival Panel of Executive Branch employees processing the materials shall, in limited circumstances, submit specific materials to a Presidential Materials Review Board for a determination whether the materials relate to abuses of Government power or otherwise have general historical significance. Cf. 122 Cong. Rec. S5291 (April 8, 1976). Two of the four members of this Board (the Librarian of Congress and a nominee of the Council of the Society of American Archivists) are not Executive Branch officials. If this provision becomes effective, however, Section 105 expressly authorizes a judicial action to determine whether this minimal possible screening of materials by personnel outside the Executive Branch will offend the Constitution. There is no need for this Court to render an advisory opinion on that issue.

b. Notwithstanding the Act's express protection of any rights and defenses of appellant and the Executive Branch, appellant argues that Congress lacks any power regarding the control, review, and disclosure of presidential materials (J.S. 16-17).

An Act of Congress does not invade the "autonomy" of the Executive Branch simply because it requires the Executive Branch to act in specified ways. The Constitution, which commands the President to "take Care that the Laws be faithfully executed" (Article II, Section 3), makes the President a servant of laws passed within the scope of a grant of power to Congress. Congress has frequently enacted measures providing for disclosure of documents in the possession of the Executive Branch. The Freedom of Information Act, 5 U.S.C. (Supp. IV) 552, the Privacy Act of 1974, 5 U.S.C. (Supp. IV) 552a, the Federal Records Act, 44 U.S.C. 2101 et seq., and the statutes regarding census data, 13 U.S.C. 8-9, and tax returns, 26 U.S.C. 6103, are a few of many such acts. Legislation of this sort has never been considered a facially invalid "invasion of the autonomy of the Executive Branch" (J.S. 16). Cf. Environmental Protection Agency v. Mink, 410 U.S. 73; Administrator, Federal Aviation Administration v. Robertson, 422 U.S. 255.

Like the documents governed by these statutes, presidential materials are an appropriate subject for legislation. Since Folsom v. Marsh, 9 Fed. Cas. 342 (Story, J.), it has been recognized that regardless of where legal title lies, the

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/ Appellant's analogy of presidential materials to judicial drafts (J.S. 17) is not convincing. Each case reaching this Court is a separate event, and only the opinion of the Court is a precedent. But the conduct of the Nation's affairs by the Executive Branch is a continuous process, in which unpublished documents may hold the key to understanding and success. Procedures suitable for the records of Justices may be quite intolerable if applied to Presidents.



government's interest in disclosure or nondisclosure of presidential materials can take precedence over the desires of the authors.

Legislation regarding the materials from appellant's term as President is supported by the strong need for access by government officials to the materials as well as for general historical purposes. For example, in carrying out their duties, current officials have found it necessary to review portions of the materials concerning SALT negotiations with the Soviet Union, our relations with the People's Republic of China, the Vietnamese negotiations concluded in 1973, and negotiations regarding the Middle East situation (affidavit of Jeanne W. Davis, dated July 25, 1975). Some important documents, such as memoranda of conversations between appellant and foreign leaders, can be found only in the materials at issue here (affidavit of Jeanne W. Davis, supra; deposition of Jeanne W. Davis, taken July 30, 1975, pp. 64-69).

These presidential materials, which by and large were produced by public employees at public expense, were affected at their creation by a public interest (Folsom v. Marsh, supra) that gives the Nation important rights to them, even against the claims of appellant. The Act operates to enforce those rights pursuant to Congress' power under the Property Clause (Article IV, Section 3) to "make all needful Rules and Regulations respecting \* \* \* Property belonging to the United States." Moreover, as a regulation of property affected by the public interest, the Act is constitutional without regard to whether appellant has a valid claim of ownership to the

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/ "[D]eterminations under the Property Clause are entrusted primarily to the judgment of Congress" (Kleppe v. New Mexico, No. 74-1488, decided June 17, 1976, slip op. 6), and this Court has repeatedly given the Property Clause an "expansive reading" (id. at 9-10). See also J.S. App. 63a-66a n. 49.



materials. To the extent that some of the materials may be determined to be the personal property of appellant, Congress has exercised its power of eminent domain and provided for whatever compensation may be constitutionally necessary.

Use of the eminent domain power to acquire and preserve the historical record is proper. Berman v. Parker, 348 U.S. 26, 32; United States v. Gettysburg Electric Ry., 160 U.S. 668. Once the materials have been so acquired, the Property Clause confers ample authority for their disposition under the Act.

We would have greater pause if the Act hindered the Executive Branch in carrying out its functions under Article II of the Constitution. The Executive Branch has a right to "autonomy" in the sense that Congress cannot so hamstring its operations that its ability to function is frustrated. Thus the Act would be open to question if it so threw open the process of decision-making in the Executive Branch that it became difficult for the President to obtain candid advice from the other Executive Branch officials, or for those officials to speak frankly to each other. Cf. United States v. Nixon, *supra*, 418 U.S. at 705-706, 715; National Labor Relations

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*In light of the public interest that inhered in the material at their creation,*  
/ We do not concede that the Act would be a "taking" even if appellant could establish private ownership. The Act preserves appellant's access to the materials. Although it may diminish their monetary value to appellant, that is not always enough to constitute a "taking." Goldblatt v. Town of Hempstead, 369 U.S. 590.

/ For that reason we believe that the one-house veto contained in Section 104(b) of the Act, which is an attempt by Congress to participate in the detailed administration of the Act, is unconstitutional. See also Article I, Section 7, Clause 3. The position of the Executive Branch concerning one-house vetoes in general is explained in the testimony of Assistant Attorney General Scalia in Hearings on H.R. 3658 and H.R. 8321 before the Subcommittee on Administrative Law and Government Relations of the House Committee on the Judiciary, 94th Cong., 1st Sess. 373 (1975). See also Watson, Congress Steps Out: A Look at Congressional Control of the Executive, 63 Cal. L. Rev. 983 (1975); Ginnane, The Control of Federal Administration by Congressional Resolutions and Committees, 66 Harv. L. Rev. 569 (1953). Cf. Buckley v. Valeo, No. 75-436,



Board v. Sears, Roebuck & Co., 421 U.S. 132, 149-155. The Act does not create this sort of hazard, however; because it recognizes the importance of privacy and preserves existing privileges, and because the Executive Branch, acting through the Administrator, is entrusted with control of the day-to-day administration of the materials, we submit that the Act does not create such dangers of widespread breach of confidence that it is unconstitutional on its face.

2. The district court properly rejected appellant's claim (J.S. 20-25) that the Act violates the qualified privilege for presidential communications, which, as this Court recognized in United States v. Nixon, supra, 418 U.S. at 715, is founded upon "the singularly unique role under Art. II of a President's communications and activities, related to the performance of duties under that Article."

That privilege is based upon the harm that could be done to the decision-making process by public disclosure of the materials. As such, it does not pertain to all presidential materials (although an incumbent President may have other privileges with respect to other presidential materials), and it does not pertain to disclosure to incumbent officials of the Executive Branch. See Folsom v. Marsh, supra. The business of government requires that the President and executive officials have access to the papers of his predecessors,

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decided January 30, 1976, slip op. 113-117, 131-136, n. 176.

But the provision for a one-house veto is not in issue here; the district court did not pass upon it. Although appellant challenged the Act on that ground in the district court (see J.S. App. 25a-26a n. 17) he does not press that challenge here, nor does he claim any right under the disapproved regulations.



and we submit that no claim of privilege can hinder this access. -/

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/ The district court expressed doubt (J.S. App. 39a-40a) whether a former President may assert a presidential privilege in litigation against private parties. We do not share this doubt; we believe that a former President's materials concerning the communications, submissions and deliberations essential to the conduct of his office are presumptively privileged. The privilege inheres in the documents. It is for the benefit of the republic, the President, and his advisers alike, and it does not dissipate upon a change of Presidents or even the death of an ex-President. The confidentiality necessary to ensure uninhibited discussion must be measured in decades. It cannot be limited to the term of office of a particular President. Such a privilege should be recognized by a court if asserted by a former President, and a court should recognize a privilege of this sort even if no individual asserts it.



Only appellant, officials of the Executive Branch in the conduct of their official duties, and archivists who, pursuant to regulations not yet effective, will screen and classify the materials, have access to the materials. No "public access" is <sup>to</sup> imminent. Access by the archivists is not meaningfully different from screening by a court in camera; it poses no realistic danger of breach of confidence or inhibition of discussions among executive officials. See United States v. Nixon, supra, 418 U.S. at 706, 714-716. That being so, the Act does not on its face infringe the presidential privilege that appellant is entitled to assert. <sup>It</sup> Difficult questions still may arise concerning particular screening techniques and eventual public access, but consideration of them is premature until the regulations have become effective. The opinion of the district court ~~suggests~~ <sup>manifests</sup> great solicitude for appellant's rights. It observes that in some cases access even by executive officials to certain types of documents may be forbidden (J.S. App. 26a-27a n. 18) <sup>and</sup> that concern for appellant's rights must be "paramount" (id. at 22a); ~~and~~ it suggests ways in which screening of the materials can be accomplished with a minimum of intrusion (id. at 29a-31a). There is no support for appellant's apparent belief that his legitimate interests will be overlooked when he seeks judicial review of the regulations ultimately promulgated.

In any event, only a small portion of the 42 million pages of documents and 880 reels of tape in issue could be subject to a legitimate claim of privilege by appellant. The privilege would not attach to materials unrelated to the performance of executive duties. United States v. Nixon, supra, 418 U.S.

Some materials unrelated to appellant's presidential duties may be subject to another privilege, such as attorney-client or husband-wife. But few of the documents would be subject to such privileges, and it is impossible to determine which these will be until the archivists have examined them.



at 703-714. Appellant estimates that he personally prepared or reviewed only 200,000 of the documents. Even some of those materials are not privileged; the privilege applies only to communications originating in confidence and not yet disclosed to the public. Some of the materials have become matters of public record through appellant's voluntary disclosures and are no longer privileged. Most of the material therefore falls outside the scope of any recognizable privilege.

Finally, appellant cannot claim that the materials were created with the expectation that they would be kept privileged or private in perpetuity. Every President since Hoover has deposited most of his presidential materials in a library pursuant to the Presidential Libraries Act, 44 U.S.C. 2101, 2107 and 2108 (see J.S. App. 43a). Only a ~~very~~ few presidential materials are withheld. Each President has allowed professional archivists to screen the materials and to suggest appropriate restrictions upon access; appellant had planned to follow a similar course, ~~with his own materials.~~ The sheer bulk of the materials would make any other course infeasible (J.S. App. 72a, 83a n. 59). With or without the Act, then, eyes other than appellant's would screen most of the materials, ~~at issue.~~ ~~The Act is constitutional on its face. Problems that may arise in implementation can be litigated when the regulations concerning screening and public access become final.~~

3. The district court correctly rejected (J.S. App. 67a-89a) appellant's claim that the Act unconstitutionally invades his personal privacy (J.S. 22-25).

~~It is not clear that appellant has a "privacy" interest in the materials that is different from his claim of presidential privilege. To reject one is to reject the other.~~

Appellant was, for the term of his Presidency, the quintessential "public figure." Cf. Monitor Patriot Co. v. Roy, 401 U.S. 265;



Kelley v. Johnson, No. 74-1269, decided April 5, 1976. His voluntary decision to seek the Presidency relinquished any "privacy" interest in the way he conducted that office and administered the public trust. Uniformed Sanitation Men v. Sanitation Commissioner, 392 U.S. 280, 284.

~~Even if~~ a former President <sup>(may have)</sup> has a "privacy" interest in <sup>(some)</sup> ~~any~~ of his documents, <sup>but</sup> that interest would pertain to <sup>only a</sup> ~~but a~~ few of the materials in issue here. Most of the papers were prepared or seen by others; many were circulated widely within the government. Cf. United States v. Miller, No. 74-1179, decided April 21, 1976. Appellant himself prepared or reviewed relatively few of the documents. Portions of some of them have been disclosed or discussed in public and therefore are no longer private. United States v. Dionisio, 410 U.S. 1, 14; Katz v. United States, 389 U.S. 347, 351. Appellant expected to donate most of his materials to a presidential library, where they would be read by others. ~~The primary reason~~ <sup>vs</sup> appellant ~~made~~ the tape recordings was to preserve the conversations for historical purposes (Deposition of Richard M. Nixon, taken July 25, 1975, pp. 72-73), <sup>a purpose that could only be satisfied by</sup> ~~which presupposes that~~ <sup>to</sup> individuals other than appellant ~~would~~ have access to them.

Whatever "privacy" interest appellant may have in the remaining materials is outweighed by the strong public interest

/ The district court believed that appellant's "privacy" interest in the materials is established and protected by the Fourth Amendment. That is not necessarily so. The materials were left in the government's possession when appellant resigned and have not been "seized" within the meaning of the Fourth Amendment. Couch v. United States, 409 U.S. 322, 335-336; Burdeau v. McDowell, 256 U.S. 465. The review of the documents may be a "search," but in light of the governmental interest in the documents and the fact that they were generated by governmental personnel, the ordinary standards of "reasonableness" would not pertain. There should be no need to establish "reasonableness" (let alone to obtain a warrant) before personnel of the Executive Branch may examine documents created by the Executive Branch itself. Although the source of the "privacy" interest in the materials therefore is elusive, we ~~will~~ <sup>will</sup> assume arguendo in the following discussion that some constitutionally-generated or protected privacy interest exists. But cf. Paul v. Davis, No. 74-891, decided March 23, 1976, slip op. 19-20.



in their preservation. We have already discussed the need of officials of the Executive Branch to have access to the materials in order to conduct the affairs of state. The Act also ensures that materials of historical significance will be preserved and professionally processed in order to make available an accurate historical record (J.S. App. 49a-52a), and it ensures that materials will be preserved for use in judicial proceedings (Section 104(b)). Congress reasonably perceived that these and other legitimate public interests would be jeopardized if appellant had the sole right to screen the materials and to separate the "private" from the "public."/

Even when all of this is taken into account some ~~irreducible~~ <sup>irreducible</sup> residuum of ~~invasion of~~ <sup>may be invaded.</sup> privacy ~~is sure to occur.~~

Congress took pains to establish a mechanism to mitigate the problems caused by this invasion. The Act acknowledges the need to give appellant "sole custody and use" of all materials not related to the abuses of power known as "Watergate" and not of general historical significance (Section 104(a)(7)). The initial screening will be conducted by disinterested archivists; screening of this sort, like submission of materials to a court in camera, does not create a significant invasion of privacy. Department of the Air Force v. Rose, No. 74-489, decided April 21, 1976. To the extent screening by the archivists is itself an invasion of privacy, the intrusion <sup>is</sup> ~~was~~

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/ For example, during the time appellant had custody of the tape recordings an unexplained 18 1/2 minute erasure was made in one tape sought by the Special Prosecutor. 9 Weekly Comp. of Pres. Docs. 1370, 1372 (1973); H.R. Rep. No. 93-1305, 93d Cong., 2d Sess. 127 (1974). During the hearings on the proposed articles of impeachment appellant issued transcripts of what he represented were the taped conversations. 10 Weekly Comp. of Pres. Docs. 450-458 (1974). After the House Judiciary Committee obtained the recordings it concluded that appellant's transcripts have "proven to be untrustworthy" and contained "significant omissions, misattributions of statements, additions, paraphrases, and other signs of editorial intervention \* \* \*" (H.R. Rep. No. 93-1305, supra, at 205, 129). Congress perceived these and other discrepancies as raising questions about appellant's reliability as a custodian. That doubt further supports Congress' decision to entrust the task of screening to disinterested archivists.

attributable in part to appellant's practice of commingling public and private documents (see J.S. App. 63a). He could have established a separate file for truly personal matters, but did not; he should not now be entitled to claim that the statute is unconstitutional on its face because the archivists, "whose record for discretion in handling confidential material is unblemished" (id. at 45a), will be required to sift through private documents. Finally, as is the case with appellant's other arguments, more particularized claims can be made once the regulations have become effective.

"Objections [appellant] now presses might be mooted by regulations that protect the very rights whose infringement he now alleges; hypothetical horrors paraded before us as abstract possibilities might never come to pass \* \* \*" (J.S. App. 21a).

4. For many of these reasons, the court below also properly rejected (J.S. App. 89a-93a) appellant's First Amendment claim (J.S. 25-27). "[C]ompelled disclosure, in itself, can seriously infringe upon privacy of association and belief guaranteed by the First Amendment." Buckley v. Valeo, supra, slip op. 58. This Court has recognized, however, that "particularly when the 'free functioning of our national institutions' is involved," the need for disclosure may outweigh the First Amendment interests. Id. at 60-61, quoting Communist Party v. Subversive Activities Control Board, 367 U.S. 1, 97. As we have discussed, the Act will allow public access only to those materials related to "Watergate" or having general historical significance. The initial screening of all the materials by \_\_\_\_\_



disinterested archivists does not infringe appellant's First Amendment rights. The private knowledge of the archivists will not deter appellant from expressing himself in the future concerning public issues; it will not prevent other individuals from associating with appellant (J.S. App. 92a-93a). ~~Although the Act may affect the speech and association of other individuals, and conceivably of future Presidents, none of them is a party here, and appellant cannot vicariously assert their rights.~~

5. Appellant contends that the Act violates the equal protection component of the Due Process Clause of the Fifth Amendment because Title I applies only to the materials from his Presidency (J.S. 28). There is nothing to this claim. Appellant is the only President to resign; this alone distinguishes him. And as the district court observed (J.S. App. 93a-94a), the presidential materials of all other recent past Presidents already are available in presidential libraries, the incumbent President needs his papers to carry out his duties, and the papers of future Presidents pose no immediate problem with which Congress must grapple. The classification established by Congress is rational and responds to the nature of the problem presented. Cf. City of New Orleans v. Dukes, No. 74-775, decided June 25, 1976; Williamson v. Lee Optical Co., 348 U.S. 483, 489.

6. The Act is not a bill of attainder or of pains and penalties. It is hard to imagine how an Act of Congress expressly providing for "just compensation" for any property interest taken can be thought to be an imposition of "penalties." However that may be, there is no evidence that Congress acted with a punitive intent.

The question in each case where unpleasant consequences are brought to bear upon an individual for prior conduct, is whether the legislative aim was to



punish that individual for past activity, or whether the restriction of the individual comes about as a relevant incident to a regulation of a present situation \* \* \*.

Fleming v. Nestor, 363 U.S. 603, 614, quoting De Veau v. Braisted, 363 U.S. 144, 160 (plurality opinion). The district court found ample evidence that Congress acted to protect the public interest by ensuring the preservation and processing of the materials (J.S. App. 100a-101a). Moreover, as the court below also noted, the Act's specific protections of appellant's right to purely personal materials negates the claim that the Act is a bill of pains and penalties (J.S. App. 102a). See United States v. Brown, 381 U.S. 437, 441-446.

CONCLUSION

The judgment of the district court should be affirmed.  
Respectfully submitted.

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JULY 1976.



THE WHITE HOUSE

WASHINGTON

October 4, 1976

MEMORANDUM FOR: PHIL BUCHEN  
FROM: BARRY ROTH *BK*  
SUBJECT: Nixon Papers

The Supreme Court did not announce today, as had been anticipated, whether it would hear the appeal of former President Nixon concerning the ownership of his Presidential papers. Stan Mortenson advises that the case is listed for discussion by the Court on Friday. Accordingly, no announcement of the decision on the appeal is likely prior to next Tuesday.



THE WHITE HOUSE

WASHINGTON

October 18, 1976

MEMORANDUM FOR: PHIL BUCHEN  
FROM: BARRY ROTH *BR*  
SUBJECT: Nixon Papers

I spoke with Stan Mortenson today who indicates that the Supreme Court has recessed until November 1 and thus no announcement on whether they will take the appeal in Nixon v. Administrator of General Services is expected before that date.



# HIGH COURT TO HEAR CHALLENGE BY NIXON

*NY TIMES 11/30/76*

He Contests Law Giving U.S. Control  
Over His Presidential Papers

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Special to The New York Times

WASHINGTON, Nov. 29—The Supreme Court agreed today to hear former Presi-

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