The original documents are located in Box 33, folder "Nixon Pardon - Hungate Subcommittee: Donald Santarelli Memo" of the Philip Buchen Files at the Gerald R. Ford Presidential Library.

LEAA FORM 1331/8 (8-72)

UNITED STATES GOVERNMENT

Memorandum

DEPARTMENT OF JUSTICE
LAW ENFORCEMENT ASSISTANCE ADMINISTRATION

TO : Philip Buchen
Counsel to the President

DATE: **DRAFT**

FROM : Donald E. Santarelli

SUBJECT: President Ford's Testimony on the Nixon Pardon Before the House Subcommittee

In accordance with our meeting yesterday, I am suggesting the following format and language for the President's statement before the Congress.

The statement should begin with an introduction in which the President thanks the Committee for the opportunity to appear and explains that he is happy to be given this forum to better articulate his reasons for pardoning former President Nixon and to inform the Congress and the public of why and how he reached the decision.

I would suggest that within that introduction, before he addresses any of the specific questions posed by Representatives Abzug and Conyers, President Ford then discuss the nature of the presidential pardon power emanating from the Constitution. He should emphasize that this power invokes a process which is an exception to the normal order of criminal prosecution and further that it is to be used

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in exceptional cases and that this was an exceptional case. I would suggest that he end his introduction by stating that he exercised the pardon power in this case as a matter of conscience and in his mind, a stand taken for the healing of the country, the significance of which extends far beyond one individual, Richard M. Nixon. Finally, the introduction should terminate with a statement to the effect that "I, Gerald Ford, have taken this responsibility on my shoulders in the belief that my actions were and are what is best for the country".

The President should then turn to specific questions with respect to the pardon.

He might begin by stating:

> Before turning to the specific questions posed to me by this committee, first I want to state that there was no deal, contract, or negotiated agreement which resulted in Mr. Nixon's being granted a pardon. On August 28 (?) following my press conference in which the question was raised again and again whether or not Mr. Nixon would be granted a pardon and in which I stated that it was my intention to let the criminal process run its normal course, I began an intensive self examination as to what my course of action might be. These led me to the conclusion that not withstanding any statements I had made previously if Mr. Nixon were

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to be pardoned it should be done prior to the initiation of formal judicial process against him.. It was and is my reasoning that it would have been improper for me to inject myself into the process after the Grand Jury returned an indictment against the former president but before a formal judgement was reached and if he had been found guilty, a sentence was passed. I also felt and was informed by the special prosecutor, that a fair trial for Mr. Nixon could not be held and completed in less than a years time. Further, it seemed apparent that there was a substantial possibility that the former president could not physically withstand this long and drawn out process Therefore, I determined that it would be in the best interest of the United States and all of its people that this matter be brought to an end, that the spectacle of the former president still on trial one year from now would aggravate the Watergate wounds in our society and would further divide and polarize the American people. If the former president had a break-down or died in the course of a prosecution for which he might have been found innocent, this country would be wounded in a manner from which it would not recover for decades.

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Thus, I decided to assume the burden of pardoning Richard Nixon prior to any indictment and trial. Specifically, 1) neither I nor my representatives had knowledge of any formal criminal charges pending against Richard Nixon prior to the issuance of the pardon; 2) I have no knowledge that Alexander Haig referred to or discussed a pardon for Mr. Nixon with him or his representatives during the week of August 4, 1974 or subsequently; 3). . . 8) I did not myself or through my representatives request Mr. Nixon to make a confession of statement of criminal guilt as a condition of the pardon. I did request through my representatives that Mr. Nixon formally accept the pardon and make an appropriate statement of contrition at the time of acceptance because I did not want to be placed in the position of granting a pardon to a person who was publically proclaiming his innocence and demanding a trial. There was no suggested or requested language by the White House regarding Mr. Nixon's statement; however, as a courtesy, the statement was sent prior to its issuance to members of my staff for their perusal It was not approved or passed on by the White House in any way; 9) At the time I made the decision to pardon Mr. Nixon and up to the time of the issuance of the pardon, the White House had received no psychiatric or medical

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reports concerning Mr. Nixon Let me emphasize that any consideration given to Mr. Nixon's state of health were done so on the basis that he might not withstand a long trial and on the observations of him by myself and members of my staff in the period including the termination of the Nixon Presidency and the granting of the pardon. Let me make it clear that it was my decision to pardon the former president, that my decision is based on the facts of his case alone and was made as it should be without respect to any other pending cases against any other persons and was done completely as a matter of conscience in what I believe is in the best interest of this country. I have no comments to make with regard to any other cases in which there are still pending criminal proceedings as I feel it may have an improper influence on the trial of the potential defendants.

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Proposed insert in prepared statement in response to inquiries 3 and 4 of H. Res. 1367 and inquiries 1 and 4 of H. Res. 1370.

A series of questions raised by the resolutions of inquiry before this committee attempt to probe any possible discussions which might have been had between my predecessor and myself or members of our respective staffs relative to my pardon of the former President.

Prior to my treatment of these questions, I should take this opportunity to place them in some perspective.

Few people would quarrel with the principle that judges, Congressmen, Senators, and the officials of the Executive Branch of our government are entitled to some degree of confidentiality in internal communications with staff members. Thus, Justice Brennan has written that Supreme Court conferences are held in "absolute secrecy for obvious reasons" /Brennan, Working at Justice, in An Autobiography of the Supreme Court, 300 (Westin ed. 1963)/. Congress, too, has seen the wisdom of making it imperative that members be permitted to work under conditions of confidentiality -- indeed, earlier this year the United States Senate passed a resolution which read in part that:

* * *

". . . no evidence under the control and in the possession of the Senate of the United States can, by the mandate of process of

the ordinary courts of justice, be taken from such control or possession, but by its permission." (S. Res. 338, passed June 12, 1974)

* * *

Earlier this year, in United States v. Nixon, _____ U. S. _____ (1974), 42 U. S. L. W. 5237, 5244 (decided July 24, 1974), the Supreme Court unanimously recognized the existence of a similar constitutionally based sphere of confidentiality within the Executive.

As I have stated in the past, my own view of this concept of confidentiality within the Executive is rather circumscribed and should be asserted only for those truly candid views and recommendations that should be protected in all cases. I intend to follow these views and will protect only the most intimate of Presidential communications.

In the context of several of the inquiries raised by the pending resolutions, however, the question may be raised whether a former President has the authority to draw a screen of confidentiality across communications which were made during his presidency. The rationale behind this concept and the interest it serves would seem to indicate that a former President may indeed invoke it in the same manner as a sitting President. This is so because the public interest in the confidentiality of executive discussions may require that those discussions remain confidential indefinitely, not to be publicized as soon as the

President leaves office, for if these discussions were to become public after the President leaves office, future discussions with future Presidents could ever after be chilled by the knowledge that within a matter of years those discussions could be public. Viewed another way, the invocation of confidentiality is not so much to protect the content of the particular discussions demanded as it is to protect the expectation of confidentiality which enables future discussions to be free and frank.

I believe my presence here today lends credence to the sincerity of my own statements on the appropriate scope of confidentiality within the Executive Branch. However, in order to properly observe any claim of the former President in this respect, it is essential that I draw distinctions within the contours of your questions to the extent they relate to confidential Presidential communications occuring during my predecessor's service as President as opposed to my own term of office.

With these distinctions noted, I shall proceed to the substance of inquiries 3 and 4 of H. Res. 1367 and inquiries 1 and 4 of H. Res. 1370. On August 1, and again on August 2, of this year, I was briefed on certain viable options with respect to the future of then President Nixon. These briefings were all in a series of such briefings with members of the leadership in Congress and at least one member of the House Committee on the Judiciary. As the former President may want to

litigate his possible claim that these briefings are subject to an assertion of confidentiality on his part, I do not believe it just to go into the matter in any detail.

I will state, however, that these briefings involved no negotiations with respect to the possibility of a pardon, no plea for a pardon, no indication on the part of myself or a member of my staff of any inclinations in this regard and no other express or implied agreement or understanding as to the possibility of a pardon should the President resign or be impeached. Indeed, I cut off all conversation on the subject almost at the instant it was raised. My sensitivities in this area must have been manifest as I was not approached with the subject again.

Upon assuming the Presidency on August 9, I was of the view which I expressed publicly on August ____, that judicial processes should go forward prior to any consideration of a pardon of Richard Nixon. However, shortly after the issuance of this public statement, I began to entertain certain misgivings with respect to the utility of such a course of action with a view toward the necessity of uniting Americans with a national sense of community in the wake of the "Watergate" scandals.

In my own private thoughts, I began to weigh the alternatives I faced. Visions of the former President of the United States being exposed to unbearable pressures plagued me. The possibility that these

pressures could have serious adverse effects on his physical and mental health were, in my opinion, realistic and this raised the spectre of yet another division within the country. By August _____, I had reached the tentative conclusion that the only way to prevent this division was to stop the judicial process before it started.

There simply were no "negotiations" between myself and the former President or between the members of our respective staffs. Such discussions as were necessary only to effect delivery of the pardon and my request for a statement of contrition by the former President were had between my counsel Mr. Philip W. Buchen, who was assisted by Benton Becker, and Mr. Jack Miller, Counsel to Mr. Nixon, on _____.

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Proposed insert in prepared statement in response to inquiries 5, 6 and 7 of H. Res. 1367.

Inquiries 5, 6 and 7 of H. Res. 1367 refer to any counsel which I might have received from various people prior to the grant of the pardon.

During the course of my personal deliberations on the pardon issue, I consulted with two long-time friends and confidants -- Mr. Buchen and Mr. John Marsh, both of whom were serving on the White House staff at the time. On several occasions, Mr. Buchen was assisted by Mr. Becker.

Although I did not personally seek the counsel of Special Prosecutor Leon Jaworski, I did on August _____ request Mr. Buchen to contact his office to inquire into the possibility of criminal charges being brought against Mr. Nixon and the amount of time that would be involved in bringing any such action to a conclusion. Mr. Buchen's inquiry was responded to in the form of a memorandum dated _____ from Mr. Henry Ruth, principal deputy to Mr. Jaworski. I have made this memorandum available to each member of this subcommittee. In general, the memo sets forth some _____ avenues of inquiry to be explored by the Special Prosecutor and relates that any possible trial of the former President would involve a period of at least nine (9)

months. This time factor was, of course, also central to my decision as it pointed to a long-range continuation of this festering sore called "Watergate".

I did not at any time consult the Vice Presidential nominee, Nelson Rockefellor, or Attorney General Saxbe, before making my decision on the pardon. They were, however, advised of the decision shortly in advance of its public announcement.

This is, I believe, a full and frank statement with respect to your questions all consultations that were had on this issue prior to the grant of the pardon.

My legal authority to grant the pardon is firmly grounded in Article II, Sec. 2, Clause 1 of the Constitution which, in pertinent part, provides that "The President . . . shall have Power to grant Reprieves and Pardons for Offences against the Unites States, except in cases of impeachment." In the words of former Chief Justice Marshall in the first case decided concerning the pardoning power, " . . . a pardon . . . /proceeds/ from the power entrusted /to the President/ for the execution of the laws which exempts the individual on whom it is bestowed from the punishment the law inflicts for a crime he has committed . . ." /United States v. Wilson, 7 Pet. 150, 160-161 (1833)/.

I chose to execute this power. I believed that I was correct in the decision when I made it and I continue in that belief to this day.

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With respect to the issues raised by inquiry No. 10 of H. Res. 1367 and inquiry No. 2 of H. Res. 1370, let me say that although I received no formal report from a psychiatrist or other physician concerning the health of Mr. Nixon, I did observe the former President at close hand on a number of occasions and also heard a number of informal comments in the press and from associates and friends regarding his helath. I am unable to catalogue these comments for you in any way but I can assure you that no one, including any member of the former President's family, attempted to exert any influence on me in regard to this aspect of my deliberations on the pardon.

Who talked to me? Did someone talk me into it? Who was I listening to when making this decision? A number of persons may have discussed the possibility with me. It is not important to recall precisely whom they may have been because they had no effect. When I made the decision to pardon Richard M. Nixon, I was listening to a very different set of voices. I was listening to the voices out of the American past, to the voices of a compassionate people who again and again forgave their former enemies and then helped them, to voices that again and again showed infinite mercy, and finally, I listened to the voice of my own conscience and to that of my God whom I have always been taught has been all-merciful and all-forgiving. I listened to those voices and did their bidding.

LEAA FORM 1331/8 (8-72)

UNITED STAT GOVERNMENT

Memorandum

DEPARTMENT OF JUSTICE

LAW ENFORCEMENT ASSISTANCE ADMINISTRATION

TO : Donald E. Santarelli

DATE:

FROM : Robert Alan Jones

SUBJECT: The Use of Legislative Privalege in the Case of the United States vs. William L. Calley, Jr., as a Parallel to Assertion of Executive Privalege

On September 25, 1974, the United States District Judge J. Robert Elliot ordered Lt. William L. Calley, Jr., U.S. Army, released from custody. Calley had petitioned the court that his trial by court-martial was not accorded due process of law. In sustaining Calley's petition, the District Court ruled intr alia that the petitioner was denied his right to inspect and have available certain statements made against him by prosecution witnesses to a Congressional subcommittee.

A number of witnesses testified before the subcommittee investigating the MyLai incident; however the Congress declined to honor three separate subpoenas for the statements and evidence concerning the subject of the prosecution which were given to them by the prosecution witnesses. The Court ruled: (1) the material sought was relevant, material, and necessary for proper defense of the case; (2) the Congress is intitled to assert a legislative privalege to protect its legislative process; however, (3) if the Congress declined to furnish the material the prosecution must be dismissed. Further, the Court noted that page 104 that the duty of the disclosure of evidence obtained by Congress is to be governed by the same rules as applied to the other branches of government and at 105, that the doctrine of separation of powers has no applicability where a criminal prosecution is involved. Finally, the Court stated that Congressional privilege is a limited one almost exactly paralleling Executive Privilege ad delimited by United States vs. Nixon.

Who talked to me? Did someone talk me into it? Who was I listening to when making this decision? A number of persons may have discussed the possibility with me. It is not important to recall precisely whom they may have been because they had no effect. When I made the decision to pardon Richard M. Nixon, I was listening to a very different set of voices. I was listening to the voices out of the American past, to the voices of a compassionate people who again and again forgave their former enemies and then helped them, to voices that again and again showed infinite mercy, and finally, I listened to the voice of my own conscience and to that of my God whom I have always been taught has been all-merciful and all-forgiving. I listened to those voices and did their bidding.

Santarelli

MEMORANDUM

TO: Philip Buchen

FROM: Donald E. Santarelli

RE: Presidential Testimony Before House Judiciary re Presidential Pardon

Not having the benefit of knowing what others on this subject have done, what discussions have occurred or what research might have been previously undertaken on such matters as:

1. Negotiations with Judiciary and other members of Congress
2. The President's inclination on this matter as well as his personal knowledge;

the following matters occur to me to be discussed:

1. Scope of testimony:

   Clearly limited to the questions contained in House Resolutions 1367 and 1370.

   These questions are actually quite broad. They contain requests for information, facts, knowledge and lawyers as well as counselors work products.

2. Substance:

   The primary defense in the area of substance is executive privilege.* However difficult privilege is

* Some precedent attached.

to assert, it should be carefully considered.

A. First Option: The Congress should be persuaded to recognize the perimeters of legitimate executive privilege. Hungate, who may be backed up by Rodino sitting ex-officio, as well as Smith with Hutchinson in a similar role should be negotiated with on this subject.

B. Second Option: The President could set the executive privilege type ground rules (scope) in an opening statement.

C. Third Option: The President says nothing about executive privilege but responds to the questions with the concept clearly in mind as his perimeter.

Discussion: Following the political debacle surrounding the assertion of executive privilege in the Watergate case, it seems to me that the President can have little or nothing to say about it, it will not be to his detriment. Therefore, it seems clear that while we understand the great importance of the privilege, that the Congress be persuaded to recognize it and help the President in maintaining some semblance of it without ever talking about it before the cameras. In the event that that cannot be accomplished I would recommend against the President making any statement about it but following mentally in his response to the questions.

The most important consideration here is that the judgment with respect to the President's performance and the impression left following it will be made by the people. We shall never satisfy the

press or our opponents no matter how brilliant our responses. The President must keep in mind the people. His responses should play to his strengths. The President's strengths are in the area of the Christian gentleman with an open character, non-legalistic, non-technical approach and with charity, compassion and a sincere desire to bring the country together and to get on with the business of dealing with our serious problems. Thus, he should continue throughout the hearing on this Christian-ethical high road without getting involved in technical areas and lengthy discussions of details. Let the members of the Committee appear to be harassing him and appear to be technical, lawyer-like shylocks and the dynamics will redound to the President's benefit. It seems to me that the people are not interested in a blow-by-blow of who said what to whom on any given day. The President should keep in mind some morally high tone statements and phrases that are commensurate with his style.

One principle rule in all legislative appearances it to say as little as possible and to get it overwith.

The fact that the President appeared, the fact that he made himself available and was open and friendly is really all the impression the public wants. He can then lay the matter to rest by having offered everything he can, himself for scrutiny in an unprecedented fashion. The issue is then his. Let the carpers carp, and the press rail but the public should be reasonably satisfied.

Addendum

Precedence of legislative privilege. If it can be argued to the Congress that the Congress itself has exercise legislative privelge in the fashion parellel to or similar to that sought by the President in this case the leverage on them to respect that concept in the President's testimony will be all the greater.

Precedent to be considered occurs recently in the Calley case and in the Reinecke case. In both cases the Congress seems to have recognized that its own deliberations and information gathered by it as background for those deliberations have a privelege not to be released even when demand is made for them through the judicial process of the subpeona.

The distinction between the U.S. v. Nixon and this instant case is clear. In U. S. v. Nixon the Supreme Court recognized executive privilege but created an exception for it when the evidence being sought clearly indicated possible crimes. There is no such allegation in this case. In fact, the kind of counsel received by the President here fits the classic definition of executive privilege. Any breach of the privilege in this case would render the President's advice and counsel-seeking function substantially harmed. Free dialogue and discussion of ideas would be inhibited and the country would be the poorer for it. Attached you will find a letter from Jimmy Eastland asserting the privilege in the ~~Calley case and an analysis~~ Reinecke case and an analysis

OF The courts view of the Federal District court's view of the privilege in the Calley case when it was exercised by the Senate Armed Services Committee.

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