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THE WHITE HOUSE
WASHINGTON

December 13, 1974

MEMORANDUM FOR THE PRESIDENT

FROM: PHILIP BUCHEN *P.W.B.*

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

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

Title I

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

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

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

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

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

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

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

Title II

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

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

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

Discussion

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

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

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

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

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

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

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

Action

1. S. 4016 should be enacted into law.

Approve _____

Disapprove _____

2. The bill should be signed.

Approve MR 4

Disapprove _____

3. A public statement should be issued.

Approve MR 4

Disapprove _____

4. The statement should follow the format noted above.

Approve MR 4

Disapprove _____

See Me _____