The original documents are located in Box C26, folder "Presidential Handwriting, 8/25/1975 (2)" of the Presidential Handwriting File at the Gerald R. Ford Presidential Library.

THE PRESIDENT HAS SEEN....

THE WHITE HOUSE

WASHINGTON

August 25, 1975

ADMINISTRATIVELY CONFIDENTIAL

MEMORANDUM FOR THE PRESIDENT

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

SUBJECT: Developments Regarding the Nixon Presidential Materials

Following are brief summaries for your information of developments regarding Presidential materials of the Nixon administration.

1. Background.

(a) September 6, 1974 -- original agreement made by former President (RMN) with GSA for deposit and protection of materials in GSA warehouse near San Clemente, in effort to relieve White House from the burdens of custody and from the responsibilities of responding to subpoenas for particular materials.

(b) September 6 - October 20, 1974 -- initial period of negotiations with Special Prosecutor to satisfy his demands for speed and convenience of access to materials greater than the September 6th agreement allowed. These negotiations could have resulted in relieving White House of substantial volumes of the materials if RMN's counsel had been more reasonable, although during this period letters came to the White House from Congress insisting that September 6 agreement not be implemented even in part while Congress considered legislation on the subject.

(c) October 20, 1974 -- RMN started suit to recover the materials in their entirety, and this provoked intervention in the case by the Special Prosecutor, by Jack Anderson, and by various professional and "public interest" committees. The trial court granted a temporary restraining order which has remained in effect ever since and which has prevented removing most of the materials and has restricted access except for certain limited purposes under tightly controlled conditions.

(d) December 1974 -- Congress passed and you signed the Presidential Recordings and Materials Preservation Act.

(e) In a subsequent action RMN challenged the Constitutionality of the Act and asked for a three-judge panel to determine the question. This action is now pending, and the original suit for recovery of the materials is held in abeyance as a result of an order by the Circuit Court of Appeals after Trial Judge Richey had issued an opinion holding the Nixon materials to be the property of the government. The Appeals Court determined that the Richey opinion was to have no present effect because the suit challenging Constitutionality of the Act should have been given precedence.

(f) In the meantime the interests of the Special Prosecutor in the RMN materials have been largely satisfied, and he is planning to withdraw from the case. Searching for the evidence sought by the Special Prosecutor required the services of 15 archivists, supervisors, and security personnel from February 24, 1975, through most of the month of May. They located a total of 1,710 relevant documentary items for copying, of which 1,400 were cleared by RMN's counsel, reviewed by Bill Casselman, and then delivered to the Special Prosecutor. In addition, RMN's counsel and Bill Casselman located and furnished to the Special Prosecutor copies of 15 separate tape-recorded conversations. Each step in this lengthy process was tightly controlled and has been fully documented through numerous separate authorizations signed by me and detailed logs kept by the persons working under such authorizations. The people who did the actual searching were put under a "Grand Jury type" commitment of secrecy, and although they discovered much disturbing information, none has breached his or her commitments as far as I know.

2. <u>The Nixon deposition</u>.

The 170-page transcript of the deposition taken July 25, 1975, is now a matter of court record in the case involving the Constitutionality of the Act. Its contents have been fully publicized in the papers as you have read, and various commentaries have appeared largely ridiculing the deponent for his "father knows best" how the materials should be maintained, used, and disclosed and for self-flattering and "revisionist" statements about his Presidency.

I have read the complete transcript and must say that, except for instances of being pompous and windy, RMN responded very capably to the questioning by adversary lawyers. Moreover, he made valid points about the need of a President to control the disclosure of materials arising from his activities in office as the only effective way to assure the candor of documented advice and information that he depends on while in office. His justification for having installed an automatic secret taping system is that Don Kendall said it was LBJ's recommendation as a desirable component eventually of a Presidential library and as an aid in preparing accurate memoirs. However, RMN was not really challenged by the questioning to defend propriety of recording conversations without the knowledge or consent of all parties involved.

3. The Nixon brief in support of his Constitutional challenge to validity of the Act.

The Plaintiff's brief for the three-judge panel is 209 pages long. Apart from its counter-productive length, the brief makes in my opinion a very effective argument. If the Act were to be upheld, the precedent created could have a serious impact on the control of any President over the advice and information on which he relies, and it would give Congress a significant additional advantage in its many attempts to encroach on functions of the Executive.

Defendant's brief is due on September 8, and I will consult with the DOJ lawyers to see that defense of the Act is based, so far as possible, on grounds peculiar to the Nixon situation in order to avoid arguing for what could become a wide-reaching and dangerous precedent.

4. Subpoenas for Nixon materials by the Church Committee.

My attempts were not successful to divert this Committee into seeking on its own a Court remedy for allowing access to specified Nixon materials if they were really that important to the Committee. Actually we were still in a "negotiating posture" when the Committee without forewarning issued its subpoenas for materials on the 1970 covert activities in Chile and on the Huston report to be produced on August 25th. In doing so, the Committee made itself look somewhat foolish even to the point that the Washington Post in an editorial defended our refusal to provide Nixon materials without Court modification of the present restraining order and stated that the Committee should have applied to the court. (See Tab A.)

We have good reason not to want a court to open up the Nixon materials, while they are in possession of the White House, to Congressional subpoenas. Virtually any committee of Congress will be able to think of some reason for wanting materials out of the Nixon collection, and we are likely to be besieged with demands, each of which may require many man-hours of searching as did the requests from the Special Prosecutor. Then when we locate materials responsive to requests or subpoenas, we or the former President may still want to resist furnishing them on grounds of confidentiality or national security, and troublesome disputes with the Congress will inevitably arise.

Once I became subjected to the Church Committee subpoena, I had to run for legal cover. Then I learned from the DOJ that there is no sure way to get a court ruling on a Congressional subpoena in advance of the time the House of Congress from whence the subpoena had issued asks a U.S. District Attorney to prosecute for failure of the subpoenaed witness to comply with the subpoena served upon him (the Federal statutes make failure of compliance a crime) and the case is tried. DOJ therefore advised that I act to get authority from the trial court in the Nixon case where I am a defendant to permit my access to the Nixon materials covered by this particular subpoena. Because the Court of Appeals had taken partial jurisdiction of the case when it put in abeyance Judge Richey's premature opinion, my first motion had to be to that Court for permission to allow the trial judge to revise his original restraining order. The Appeals Court ruled late Friday, August 22, that I could seek access authority from the trial court, and a motion for that purpose is being filed today. If it is granted, I will be able to have a search conducted for the subpoenaed materials, but once they are located and examined, it will still be possible to resist the subpoena on other grounds, although at the risk again of having the Senate vote to seek prosecution for non-compliance. However, I expect RMN's attorney will strongly oppose my motion and it may not be granted.

Before my motion is granted and I do comply with the Church Committee subpoena, or if the motion is not granted, I may remain "under the gun" of the subpoena which the Senate could by its vote at any time seek to enforce against me. However, the Committee will meet on Tuesday, August 26, to decide whether to relieve me of obligations under the subpoena at least until after my motion before the trial court in the Nixon case is disposed of.

Attachment

Page 24 The Washington Post Date

The Senate Subpoena and the Nixon Tapes

A SENATE INVESTIGATIVE panel has subpoenaed former President Nixon's tapes and papers on some covert operations: the White House has refused to comply. From that outline, the case sounds all too reminiscent of the great legislative-executive confrontations of the Nixon years. But that is precisely the wrong way to interpret the Ford administration's refusal to give the Senate intelligence committee Mr. Nixon's records on CIA covert operations in Chile and on the 1970 Huston plan and related domestic intelligence matters. For it is not at all demonstrable that presidential counsel Philip W. Buchen and the General Services Administration are deliberately trying to obstruct the work of Sen. Frank Church's panel. They have not, for example, invoked "executive privilege" or "national security" as their reason for not furnishing this material. Rather, they argue—quite reasonably, it seems to us—that, while the Nixon materials are indeed in their custody, access to those papers and tapes is governed by federal court order as a result of the pending litigation over the ownership and control of Mr. Nixon's presidential files. Thus the committee, the White House maintains, should take its request to the court.

The administration is standing on firm legal ground. The court has placed the Nixon records in escrow, in effect, until the many-sided litigation has run its course. The order controlling access to the materials does not specify whether they may be made available to congressional committees without Mr. Nixon's consent. It would be improper for Mr. Buchen and GSA, who are parties to the litigation, to make independent judgments on this point, just as it would be wrong for them to give up the materials to Mr. Nixon, or for that matter to destroy anything. Indeed, the purpose of the court order—as of the act passed by Congress last year—is to forestall any such exercises of discretion by the White House, and to impose legal controls over the voluminous record of the Nixon years.

This does not mean that the Church committee should be denied important information about covert operations and domestic intelligence that may be in the Nixon files. The point is simply that this request, unlike others made by the intelligence panel recently, cannot be settled by negotiations between the White House and the senators. The court, however, could clarify or modify its order so as to give the committee access to relevant materials under appropriate controls. Though a large volume of information would have to be searched, the methods devised for dealing with the Special Prosecutor's requests suggest that this problem can be surmounted if all parties cooperate.

Rather than heckling the White House, the Church committee should go directly to the court. The administration should join in a request to clarify the order, in keeping with its general attitude of cooperation with the Senate inquiry. By this route the procedural barriers could be surmounted with a minimum of fuss, thus dispelling any impression that a clash between Congress and the White House, in any way comparable to the confrontations in the Nixon days, has developed in this case.

Jim

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