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THE WHITE HOUSE

WASHINGTON

June 10, 1976

ADMINISTRATIVELY CONFIDENTIAL

MEMORANDUM FOR: PHILIP BUCHEN

FROM: JIM CONNOR JEC

SUBJECT: Dellums v. Powell, D.D.C.
Appeal of Richard M. Nixon

The President reviewed your memorandum of June 8 concerning the above case and approved the recommendation made by the Solicitor General and supported by yourself:

> "Do not appear as amicus curiae in the court of appeals to argue the issue of executive privilege."

Please follow-up with appropriate action.

cc: Dick Cheney

THE WHITE HOUSE
WASHINGTON

June 9, 1976

MR PRESIDENT:

Jack Marsh also supports Bob Bork's recommendation.

Jim Connor

THE PRESIDENT HAS SEEN....

THE WHITE HOUSE

WASHINGTON

June 8, 1976

MEMORANDUM FOR: THE PRESIDENT

FROM: PHILIP BUCHEN

Pending in the Circuit Court of Appeals for the District of Columbia is an appeal by former President Nixon from the District Court order which requires delivery to the Court for in camera inspection of certain tapes covering Presidential conversations. The case is one brought by Congressman Dellums to collect civil damages against John Mitchell and others growing out of the mass arrests of demonstrators in Washington, D.C., during May 1971.

The plaintiff claims that the tapes will probably reveal conversations in which John Mitchell and others conspired to cause the allegedly unlawful arrests. However, plaintiff has been unable to identify the times and places of such conversations and, at our request, the Justice Department opposed the subpoena because of the undue burden on us of having to search many hours of tapings in order to find relevant conversations, if any.

The former President's Counsel took the further position that in a civil action of this sort, no court is entitled to order even in camera inspection over a former President's claim of executive privilege. The prior Supreme Court decision in the Nixon case, involving tapes of conversations sought by the Special Prosecutor, related only to criminal cases. The Court left open the question of whether in civil cases there could be the same public interest in disclosure that overrides a claim of executive privilege by a President.

The situation is further explained in the attached memorandum to me from Bob Bork. In this memo, Bob also states the factors which bear on whether the Justice

Department should take a position in the case at this time to support the position of Nixon's attorney or whether we should await the decision of the Supreme Court of Appeals and then support that position, if necessary, before the Supreme Court.

RECOMMENDATION

I concur in Bob Bork's recommendation.

APPROVE BORK'S RECOMMENDATION _____

DISAPPROVE BORK'S RECOMMENDATION _____

Attachment

Office of the Solicitor General
Washington, D.C. 20530

June 3, 1976

MEMORANDUM TO PHILIP BUCHEN

FROM: ROBERT H. BORK RHB
SOLICITOR GENERAL

RE: Dellums v. Powell, D.D.C.; appeal of Richard M. Nixon

The question is whether the United States should enter this lawsuit as amicus curiae at the court of appeals level in order to support former President Nixon's claim of executive privilege with respect to tapes of White House conversations.

The district court has required you to turn over to the court, for in camera inspection, certain tapes of Presidential conversations. The court proposes to listen to the tapes to determine whether any of them are relevant to a civil suit against John Mitchell and others growing out of the mass arrests of demonstrators in Washington, D.C., in May 1971. Plaintiffs already have been awarded a substantial money judgment against District officials. In this portion of the litigation they contend that they are entitled to a money judgment against Mr. Mitchell as well, whom they contend was the head of a conspiracy to deprive them of their civil rights.

Mr. Nixon interposed a defense of executive privilege to the subpoena requesting you to surrender the tapes. The Civil Division lawyers representing you did not interpose such a defense, but they did argue that the subpoena is burdensome.

Important issues are at stake and there are arguments for and against participation on the privilege issue at this time. The major argument in favor of filing a brief as amicus curiae in support of the claim of executive privilege is that the decision by the Court of Appeals for the District of Columbia Circuit may have substantial importance as a precedent. A decision against the privilege could pose a threat to the integrity of the decisional processes of the Presidency.

It is contended, for example, that the privilege may never be asserted by a former President but only by an incumbent. Should that position become the law, the privilege would lose much of its value, for it would shield discussions only for a few years or months. Participants in decision-making could have no assurance that the succeeding President would invoke the privilege to protect the confidentiality of their discussions.

Indeed, a succeeding President might welcome the embarrassment of his predecessor's administration.

The contention that the privilege may be defeated in a private damage action is also troublesome. It will be necessary to find a line so that confidentiality can be the general rule.

Important as these issues are, however, there are several factors militating against our participation in the case at the court of appeals level. These are listed below.

1. Our brief would be very late even if we filed at once. The real problem, however, is that we have inadequate time to work out a theory for this troublesome field of law. That problem is acute since we must simultaneously file papers in the Supreme Court in another Nixon Tapes case that presents a problem of consistency.

2. Many of the issues presented in this case overlap issues presented in Nixon v. Administrator of General Services, jurisdictional statement pending, No. 75-1605, the case concerning Congress' attempt to claim Mr. Nixon's tapes and papers for the public at large. Mr. Nixon has claimed in that case, among other things, that the statute is unconstitutional as a violation of his executive privilege because it allows GSA to read the papers and listen to the tapes for the purpose of drawing regulations controlling access to those materials. The Civil Division defended that suit in the district court and sought to minimize the extent to which a former President can control his tapes and papers. That argument prevailed, although the district court's opinion went beyond the arguments presented in several respects.

In the Dellums case, if we entered amicus curiae, we would do so in order to argue that a former President has some degree of control over his papers and tapes. Clearly, there is a good deal of tension between our objectives of upholding the constitutionality of the Presidential Recordings and Materials Preservation Act in the GSA case and protecting the integrity of presidential decision-making processes in Dellums.

The GSA case has just reached my office and I think we must take the time to work out a fully coherent legal position before filing anything further. This strongly argues against going into Dellums at the court of appeals stage since that would have to be done immediately.

3. Dellums is an unfortunate case on its facts. There are strong pressures that will drive the court of appeals to decide the case against Mr. Nixon, and if we attempt to make this a pivotal case, the precedential cost of a defeat may be enhanced.

a. Written minutes of meetings, in the hand of Assistant Attorney General Wood, indicate that Mr. Nixon was involved in making the decisions in question. Confidentiality has thus already been breached, and, to a substantial extent, the tapes would simply confirm or deny reports already in evidence.

b. The Presidential conversations in question probably are essential to plaintiffs' case. They are more than mere evidence. They may be part of the conspiracy itself; the conversations may themselves conceivably be criminal acts. What is more, the court of appeals may well feel obliged to assume that a criminal conspiracy has taken place, in light of the jury's verdict and the judgment in related proceedings against the District.

c. There is no reason to believe that it will be difficult for the district court to review the tapes in camera and exclude non-germane materials. The only issue open at this stage is whether even that limited judicial review is forbidden. If, after hearing the tapes, the court proposes to turn over to plaintiffs what we believe to be sensitive materials, an objection could be interposed then and litigated on a solid factual basis.

4. There is not much to lose by waiting. If the court of appeals takes a position adverse to the position we take in Administrator of General Services, or if it otherwise writes an opinion that is unfortunate, we can make our views known to the Supreme Court, since whichever side loses in the court of appeals is virtually certain to petition for a writ of certiorari. By then we will have worked out our legal strategy and will not risk taking positions we may later regret, a risk that would be considerable if we hurriedly filed a brief in Dellums at this time.

In light of all of these factors, I think we ought not appear as amicus curiae in the court of appeals to argue the issue of executive privilege.