The original documents are located in Box 24, folder "Justice - Opinions Requested (1)" of the Philip Buchen Files at the Gerald R. Ford Presidential Library.

THE WHITE HOUSE

WASHINGTON

MEMORANDUM ON PRESIDENTIAL POWER TO GRANT REPRIEVES AND PARDONS

The President's power to grant reprieves and pardons is provided in Article II, Section 2, Clause 1 of the Constitution. It extends to all offenses against the United States except in cases of impeachment.

The pardon power is exclusively that of the chief executive, Bozel v. United States, 139 F.2d 153 (1943) (cert. denied, 321 U.S. 800) and is not subject to legislative control. Yelvington v. Presidential Pardon and Parole Attorneys, 211 F.2d 642, 94 U.S. App. D.C. 2.

The pardon power may be exercised at any time after the commission of an offense, either before legal proceedings are taken, or during their pendancy, or after conviction and judgment. Ex Parte Garland, 71 U.S. 366 (1867), Brown v. Walker, 161 U.S. (1896). The power extends to cases of criminal contempt. Ex Parte Grossman, 267 U.S. 87 (1925).

5-91

THE WHITE HOUSE

WASHINGTON

August 22, 1974

Dear Mr. Attorney General:

By this letter I am requesting your legal opinion concerning papers and other historical materials retained by the White House during the administration of former President Richard M. Nixon and now in the possession of the United States or its officials. Some such materials were left in the Executive Office Building or in the White House at the time of former President Nixon's departure; others had previously been deposited with the Administrator of General Services.

I would like your advice concerning ownership of these materials and the obligations of the government with respect to subpoenas or court orders issued against the government or its officials pertaining to them.

Sincerely,

Gerald R. Ford

Gerald R. Ford

The Honorable William B. Saxbe
The Attorney General
Washington, D. C.

August 22, 1974

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The Attorney General
Washington, D. C.

PWBuchen:ed

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PWBuchen:ed

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The Attorney General
Washington, D. C.

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Sincerely,

Gerald R. Ford

The Honorable William B. Saxbe
The Attorney General
Washington, D. C.

PWBuchen:cd

9/6/74

To: Larry Silberman

From: Phil Buchen

As we discussed.

September 6, 1974

MEMORANDUM FOR

The Honorable Laurence H. Silberman
Deputy Attorney General
Department of Justice

Attached is the request of President Ford for your legal opinion concerning papers and other historical materials retained by the White House during the administration of former President Richard M. Nixon and now in the possession of the United States or its officials. Also attached is the subpoena served on H. S. Knight, Director of the United States Secret Service, on September 4, 1974.

Philip W. Buchen
Counsel for the President

Attachments

cc: Gen. Haig
Mr. Buzhardt

THE WHITE HOUSE

WASHINGTON

August 22, 1974

Dear Mr. Attorney General:

By this letter I am requesting your legal opinion concerning papers and other historical materials retained by the White House during the administration of former President Richard M. Nixon and now in the possession of the United States or its officials. Some such materials were left in the Executive Office Building or in the White House at the time of former President Nixon's departure; others had previously been deposited with the Administrator of General Services.

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Sincerely,

Gerald R. Ford

Gerald R. Ford

The Honorable William B. Saxbe
The Attorney General
Washington, D. C.

THE WHITE HOUSE

WASHINGTON

August 24, 1974

MEMORANDUM FOR

The Honorable Laurence H. Silberman
Deputy Attorney General
Department of Justice

Subject: Matters related to subjects of opinion requested August 22 from the Attorney General

Attached are copies of the following:

(1) Case pending in Charlotte, North Carolina, which arises from incidents during Billy Graham Day on October 15, 1971:

(a) Copy of memorandum from William Henkel, Jr., to Dudley H. Chapman dated August 22, 1974, with attachment.

(b) Memorandum between same parties dated August 23, 1974.

(2) Cases of U. S. v. Means & Banks ('Wounded Knee'):

(a) Memorandum from Skip Williams to me dated August 19, 1974, with attachment (please note that this attachment relates to the order of August 13, 1974, when there has since been a supplemental order of August 15, 1974, of which we need a copy).

(b) Copy of memorandum dated August 13, 1974, from U. S. Attorney Earl Kaplan to Roger Cubbage in your Department.

(3) Case of U. S. v. John B. Connally: copy of letter to J. Fred Buzhardt of August 15, 1974, from the Watergate Special Prosecution Force.

(4) Case of U. S. v. Mitchell, et al., Criminal No. 74-110, which is set for trial in the District starting September 30, 1974:

(a) Three items of correspondence dated August 16, August 19, and August 21, respectively.

(b) Copy of my memorandum to H. S. McKnight, dated August 23, 1974.

(5) Case of H. Spencer Oliver v. Committee for Re-Election of the President, et al., Civil Action No. 1207-73, in the U. S. District Court for the District of Columbia: copies of documents served on me August 23, 1974.

(6) Case of Democratic National Committee, et al. v. James W. McCord, Jr., Civil Action No. 1233-72 in the District Court for the District of Columbia: copies of documents served on me August 23, 1974.

(7) Case of Allnutt v. Wilson, Civil Action No. 874-72, pending in the United States District Court for the District of Columbia, and other similar cases: copy of letter dated August 20, 1974, from James H. Heller of Hydeman, Mason & Goodell to me.

(8) Copy of S. 2951 introduced by Senator Bayh in February. (I have had a call on August 20 from Bill Heckman of the Senate Judiciary Committee saying that Senator Bayh wants to know whether the Administration would be able to move forward on this bill during the current session of Congress.)

Also called to my attention recently has been the material appearing in the report by the staff of the Joint Committee on Internal Revenue Taxation dealing with the examination of former President Nixon's tax returns from 1969-72 (House Report No. 93-966), at pages 28 and 29 and in Exhibit I-3, starting at page 16 of the Memorandum of Law prepared by Attorneys Kenneth W. Gemill and H. Chapman Rose in behalf of the then President Richard M. Nixon.

P.W.B.

Philip W. Buchen
Counsel to the President

Attachments

THE WHITE HOUSE

WASHINGTON

August 23, 1974

MEMORANDUM FOR: DUDLEY H. CHAPMAN

FROM: WILLIAM HENKEL, JR.

REGARDING: REQUEST FOR WHITE HOUSE DOCUMENTS

In my memorandum yesterday, I concluded that Mr. George S. Daly, Jr., the attorney for the plaintiffs, would pursue the matter of my not submitting White House documents pertaining to Billy Graham Day. Mr. James D. Monteith, the Department of Justice appointed attorney defending me, informed me yesterday afternoon that Mr. Daly filed a motion with U.S. District Judge James B. McMillan requesting that an order be issued requiring me to hold all papers in safekeeping and not relinquish possession and further that I be held in contempt.

As soon as I receive a copy of the motion, I will send it to you. However, my attorney recommends that prior to returning to Charlotte on September 5th or sooner if Judge McMillan requests immediate action that the Department of Justice and the White House provide me with documentation and justification for my inability on August 21st and, at present, to produce the requested documents. Until a policy decision on the overall issue of possession of the former President's papers is promulgated, it is my understanding, that I cannot do anything on this matter.

THE WHITE HOUSE

WASHINGTON

August 22, 1974
1:45 pm

MEMORANDUM FOR: DUDLEY H. CHAPMAN

FROM: WILLIAM HENKEL, JR

SUBJECT: REQUEST FOR WHITE HOUSE DOCUMENTS

Yesterday, I appeared in Charlotte, North Carolina, for a deposition in the civil suit resulting from President Nixon's attendance at Billy Graham Day on October 15, 1971.

As we discussed, I was ordered to produce, for inspection and copying, any and all documents made or received during the period from September 1, 1971, through April 1, 1972, regarding the subject event. I, personally, do not have any documents in my possession, however the Advance Office has a file on Billy Graham Day. Based on your earlier guidance and my attorney's interpretation of the 9 August 1974 memorandum (attached) regarding the files of the White House Office belonging to President Nixon's Administration and recent decisions on the subject by the White House Counsel's Office; I did not produce the requested documents.

It is reasonable to conclude that Mr. George S. Daly, Jr., the attorney for the plaintiffs, will approach United States District Judge for the Western District of North Carolina, James B. McMillan, on the subject and request further action.

Would you please apprise me at your earliest convenience as to what steps or actions I should take on this matter. By mutual consent, I will return to Charlotte on September 5th to complete my deposition, which was begun yesterday.

THE WHITE HOUSE

WASHINGTON

August 9, 1974

MEMORANDUM FOR THE WHITE HOUSE STAFF:

By custom and tradition, the files of the White House Office belong to the President in whose Administration they are accumulated. It has been the invariable practice, at the end of an Administration, for the outgoing President or his estate to authorize the depository or disposition to be made of such files.

President Taft in his book "Our Chief Magistrate and his Powers," made the following reference to this practice:

> "The retiring President takes with him all the correspondence, original and copies, which he carried on during his Administration. . . ."

In the interest of continuing this practice, it has been directed that, so long as President Nixon's files remain in the White House Office, there is to be no intermingling of the files of the two Administrations. This applies of course both to the Central Files and the files in the offices of the various members of the staff.

Papers of the White House Office at the time of President Nixon's resignation as well as those enroute at that time and intended for him shall be considered as belonging to the Nixon Administration files. Of course, some Nixon Administration files may be needed for future reference. These files should be duplicated and placed with all other papers accumulated after noon today which constitute a new set of files for President Ford.

Specifically, please expedite the return of all withdrawals you have made from Central Files. On Monday, August 12, archivists under the supervision of John R. Nesbitt, Office of Presidential Papers, will be available to assist in the collection and segregation of President Nixon's papers for shipment. Meanwhile, please read the attached instructions.

Jerry H. Jones

Jerry H. Jones

Special Assistant to the President

By custom and tradition, all White House Office papers are regarded as the personal property of the President and subject to such control and disposition as he may determine. At the close of the Administration, the entire collection of papers now being created may be expected to be deposited in a Presidential library similar to the libraries that preserve the papers of the last six Presidents. To provide the President with a complete and accurate record of his tenure in office, the White House staff must oversee the preservation of the papers it generates.

The procedures set forth in this document represent the collective thinking of many members of the staff as to how best to preserve papers and documents for the President. Compliance with these procedures is an expression of loyalty by the staff to the President. For these procedures to be effective, it will require cooperation and assistance of every staff member.

The security classification of each document prepared in the White House is determined by the individual staff member writing it in accordance with Executive Order 10501—or other applicable Executive Orders. He is responsible for insuring that the classification assigned to his work reflects the sensitivity of the material concerned, and also for making certain that this classification is not excessively restrictive.

White House Office Papers: Filing with Central Files

1. *It is requested that the maximum possible use be made of Central Files, and the procedures listed below be followed.* This will aid in the faster and more complete retrieval of current information, eliminate unnecessary duplication of files, prevent excessive xeroxing, and maximize preservation of White House papers.

2. *Each staff member shall maintain his personal files separate from any working files he may keep on official business and clearly designate them as such.* Personal files include correspondence unrelated to any official duties performed by the staff member; personal books, pamphlets and periodicals; daily appointment books or log books; folders of newspapers or magazine clippings; and copies of records of a personnel nature relating to a person's employment or service. Personal files should not include any copies, drafts or working papers that relate to official business or any documents or records, whether or not adopted, made or received in the course of official business.

3. *Each staff office shall forward regularly to Central Files three copies of all outgoing official business consisting of correspondence and memoranda. One copy of all other outgoing related materials should also be filed.*

4. *Each staff office shall forward regularly to Central Files any incoming official business from sources other than White House staff offices after action, if any, has been taken.* Each staff office, if it so desires, may keep a copy of such incoming official business for its own working files.

5. *Each staff office shall forward regularly to Central Files any originals of incoming official business from other White House staff offices after action, if any, has been taken and if such originals were not intended to be returned to the sender.* If desired, a copy may be kept for the staff's working files.

6. *Each staff office shall forward to Central Files at such times as it determines to be appropriate all working files of official business which are inactive and no longer needed.* These files will be stored by office as well as listed by subject matter. They will, of course, always be available for later reference.

7. *Each staff office at its own discretion may segregate any materials that it believes to be particularly sensitive and which should not be filed by subject matter.* Such sensitive materials should be forwarded to the Staff Secretary on the same basis as outlined in paragraphs 3 through 6 in an envelope marked SENSITIVE RECORDS FOR STORAGE with the office or individual from which they are sent marked on the outside and (as appropriate) a list of inventory in general terms attached. This list of inventory should also be sent to Central Files so that notations can be made in subject files that certain material is missing from the file. These materials will be filed in locked containers and will only be made available to the in-

dividual or office from whom they were received.

8. *No defense material classified under Executive Order No. 10501 with a classification of TOP SECRET or Restricted Data under the Atomic Energy Act of 1954 should be forwarded to Central Files.* All such material should be forwarded to the Staff Secretary for storage.

9. *No exceptions to the above shall be made without the express consent of the Counsel to the President.* Additional advice on the operation of Central Files may be obtained from Frank Matthews, Chief of Central Files (Ext. 2240).

White House Office Papers: Disposition of Papers Upon Leaving Staff

1. *Upon termination of employment with the staff, each staff member will turn over his entire files to Central Files with the exception of any personal files he might have maintained.*

2. *Personal files include:* correspondence unrelated to any official duties performed by the staff member; personal books, pamphlets and periodicals; daily appointment books or log books; folders of newspaper or magazine clippings; and copies of records of a personal nature relating to a person's employment or service. Personal files should not include any copies, drafts, or working papers that relate to official business; or any documents or records, whether or not adopted, made or received in the course of official business. The White House Office of Presidential Papers, staffed by representatives of the National Archives, is available to assist staff members in the determination of what are personal files. Any question in this regard should be resolved with their assistance by contacting John Nesbitt, supervisory archivist of the Office of Presidential Papers (Ext. 2545).

3. *A staff member, upon termination of employment, may at his discretion make copies for his personal use of a carefully chosen selection of the following types of documents within his files:*

(A) *Documents which embody original intellectual thought contributed by the staff member,* such as research work and draftsmanship of speeches and legislation.

(B) *Documents which might be needed in future related work by the individual.*

4. *No staff members shall make copies as permitted in paragraph three of any documents which contain defense material classified as CONFIDENTIAL, SECRET OR TOP SECRET under Executive Order No. 10501, Restricted Data under the Atomic Energy Act of 1954, or information supplied to the government under statutes which make the disclosure of such information a crime.*

5. *Each staff member who decides to make copies of such documents described in paragraph three shall leave a list of all such documents copied with Central Files.* This will enable retrieval of a document in the event that all other copies of it and the original should be later lost.

6. *The discretionary authority granted in paragraph three is expected to be exercised sparingly and not abused.* All White House Office papers, including copies thereof, are the personal property of the President and should be respected as such. Any copies retained by a staff member should be stored in a secure manner and maintained confidentially.

7. All confidential and sensitive materials will be protected from premature disclosure by specific provisions of the Presidential Libraries Act of 1955 (44 U.S.C. 2108).

August 19, 1974

MEMORANDUM FOR: PHILIP BUCHEN

FROM: SKIP WILLIAMS

SUBJECT: Subpoena for Tapes in Wounded Knee Trial

Attached hereto for your information is a copy of an order issued August 13, 1974 in connection with the "Wounded Knee" trial in St. Paul. The judge has ordered that the "prosecution and the Executive Office of the White House" provide information under oath concerning the existence of taped conversations of Richard Nixon relating to Wounded Knee.

The scope of the subpoena has been narrowed to a sixteen day period (March 11-18 and March 26 - April 2, 1973).

The order also seeks access to any logs, indexes or transcripts indicating the existence of taped conversations involving Wounded Knee.

A draft affidavit for Fred Buzhardt's signature is also attached.

You should also be aware that an order has been issued by the judge in this proceeding directing the Executive Office of the President to preserve the materials demanded by the subpoena.

DRAFT AFFIDAVIT

J. Fred Buzhardt, having served as Counsel to the President under Richard Nixon, deposes and says:

1. I have read the order entered August 13, 1974, in this proceeding.

2. I am unable to state whether or not any tape recordings or transcripts thereof exist for conversations in which Richard Nixon was a party to a discussion in which the subject of Wounded Knewrw was mentioned during the period March 11-18 and March 26 - April 2, 1973. In order to confirm or deny the existence of such recorded conversations one would have to listen to all recorded conversations which occurred during the above - described period.

3. There are no logs, indexes or other materials which would indicate whether or not such a conversation took place and was recorded during the period in question.

UNITED STATES GOVERNMENT DEPARTMENT OF JUSTICE

Memorandum

(6)

TO : Roger Cubbage, Dept. of Justice
Room 402 Fed. Triangle Bldg.
315 9th St., N. W.
Washington, D.C. 20530

DATE: August 13, 1974

FROM : Earl Kaplan
U.S.Attorney's Office (for S.Dak.)
681 Fed. Bldg., 316 N. Robert St.
St. Paul, Minn. 55101

EK

SUBJECT: Re: U. S. v. Means & Banks

Enclosed is order signed by Judge Nichol dated August 13, 1974, dealing with the so-called White House tapes. It is requested that you forward this order to the White House so that they may respond in affidavit form.

I have already talked to Skip Williams in the White House with regard to this order. He advises me that the only logs that they have in the White House deal with meetings or conversations or telephone conversations. The logs of such conversations deal only with the time and duration of the meeting and who was there. The logs do not contain the subject matter of any conversations.

In regard to the tapes, Mr. Williams advises that there are no logs of the tapes. The only time that they would review tapes would be in response to a specific subpoena involving a specific date, a specific conversation, and specific participants. Therefore, he has no knowledge, nor is he aware of anyone else who has knowledge of any logs concerning the subject matter of Wounded Knee as it pertains to the tapes.

The information supplied to me should be the subject of an affidavit and should satisfy the enclosed order. I would appreciate receiving this affidavit as soon as possible.

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

United States of America,

Plaintiff,

vs

Dennis Banks,

Defendant.

CR73-5034
CR73-5062

United States of America,

Plaintiff,

vs

Russell Means,

Defendant.

CR73-5035
CR73-5063

ORDER

Upon the motion of the government to quash the subpoena of Richard M. Nixon or his authorized resresentative commanding the production of certain tape recordings in his possession or under his control relative to events at Wounded Knee, South Dakota, between February 27 and May 9, 1973, defendants' motion for the issuance of an amended subpoena similarly directed, and all the proceedings heretofore had herein, it is ordered that the prosecution and the Executive Office of the White House (1) disclose under oath whether any such tape recordings and transcripts thereof exist, and (2) if so, furnish (a) to the Court and the defendants any logs, indexes, lists or other records of such recordings and transcripts as well as any logs,

indexes, lists or other records indicating the existence and nature of any communication, conversations or meetings relative to the subject matters specified in said subpoenas and (b) to the Court in camera any tape recordings and transcripts thereof for the dates March 11-18, and March 26-April 2, 1973.

Dated: August 13, 1974

Judge of the U. S. District Court

ATTEST:
William O. Smith
Clerk
By [illegible]
deputy

WATERGATE SPECIAL PROSECUTION FORCE
United States Department of Justice
1425 K Street, N.W.
Washington, D.C. 20005
August 15, 1974

J. Fred Buzhardt, Esq.
Counsel to the President
The White House
Washington, D. C.

Re: United States v. John B. Connally

Dear Mr. Buzhardt:

In connection with the above-captioned criminal prosecution, the attorneys for John B. Connally have requested that the Special Prosecutor's office make available, among other things, "White House tapes not yet turned over to anyone." Their position is that appropriate means must be found to see that such tapes are turned over to the Court for determination of which portions are relevant and therefore available to the defendant under Rule 16(a)(1) of the Federal Rules of Criminal Procedure. The Special Prosecutor's office has no knowledge of whether there are in fact any such tapes.

We recognize that you have concluded that these materials are the personal property of the former President, but we request that, to whatever extent you have any tapes falling within this request, they be retained pending further developments in the case.

Thank you very much.

Sincerely,

Philip A. Lacovara
Counsel to the Special
Prosecutor

cc: Edward Bennett Williams, Esq.
Williams, Connolly & Califano
839 Seventeenth Street, N. W.
Washington, D. C.

LAW OFFICES
ARENT, FOX, KINTNER, PLOTKIN & KAHN
FEDERAL BAR BUILDING
1815 H STREET, N. W.
WASHINGTON, D. C. 20006
CABLE: ARFOX, WESTERN UNION TELEX: 892672
202 347-8500

August 16, 1974

Jack McCahill, Esq.
The White House
Washington, D. C.

Re: Gordon Strachan

Dear Mr. McCahill:

In view of the resignations of President Nixon, Mr. St. Clair and Mr. Buzhardt, I would like to inquire whether the White House policy has changed with respect to restrictions on obtaining access to and copies of documents, notes and memoranda written by or to my client, Gordon Strachan.

On July 31, while Mr. Strachan was in town for a pre-trial hearing in United States v. Mitchell, et al. (D.D.C. No. 74-110), he called Mr. St. Clair's office to inquire whether he could review his files with counsel present and was advised that the current policy prohibited his doing so. In the event that policy has been relaxed, I would appreciate your letting me know. I would also appreciate your advising me whether it is possible for me to come alone to review his files since Mr. Strachan lives in Salt Lake City and would have to make a special trip here to review the files.

I will await your response.

Sincerely,

John M. Bray

John M. Bray

ROGER J. WHITEFORD 1886-1965
RINGGOLD HART 1886-1965
JOHN J. CARMODY 1901-1972
JOHN J. WILSON
HARRY L. RYAN, JR.
JO V. MORGAN, JR.
FRANK H. STRICKLER
WILLIAM E. ROLLOW
CHARLES J. STEELE
JOHN J. CARMODY, JR.
JAMES EDWARD ABLARD
KEVIN W. CARMODY

COUNSEL
DONALD L. HERSKOVITZ

LAW OFFICES
WHITEFORD, HART, CARMODY & WILSON
815 FIFTEENTH STREET, NORTHWEST
WASHINGTON, D. C. 20005
202-638-0465
CABLE ADDRESS
WHITEHART WASHINGTON

MARYLAND OFFICE
7401 WISCONSIN AVENUE
BETHESDA, MARYLAND 20014
301-656-5700

JO V. MORGAN, JR.
FRANK H. STRICKLER
WILLIAM E. ROLLOW
CHARLES J. STEELE

August 19, 1974

Philip W. Buchen, Esq.
Counsel to the President
White House
Washington, D.C.

Re: U.S. v. Mitchell, et al.
Criminal No. 74-110

Dear Mr. Buchen:

We are the attorneys for Mr. H.R. Haldeman, one of the defendants in the above entitled proceeding. This morning Judge Sirica denied motions of the defendants for a postponement. Thus, we are facing a trial which is scheduled, as heretofore announced, for Monday, September 9.

The problem which I wish to present is urgent, and I hope may have immediate consideration. I should like to come over and discuss this matter with you, if possible, today or tomorrow.

In the past the rule of the Nixon-White-House was that Mr. Haldeman would be permitted to have unlimited access to the room in the Executive Office Building in which his files are kept, and that he could examine anything and everything in those files, but a Secret Service man has always been present who would log him in and out, would permit him to have access to whatever he chose in his files, but he could neither have copies nor make copies of portions, nor even to make any notes at all. The awkward procedure was followed with the knowledge of the Secret Service that Mr. Haldeman would examine a document, memorize portions or points thereof, excuse himself from the room and make cryptic notes in the hallway, and then was permitted to come back and repeat this process as many times as he chose. The urgent

problem arises that in this transition period he is not permitted even to do this, thus preventing him from pursuing even the preparation for trial heretofore afforded him.

I would like to present this matter in its full context to you personally, and I hope that you will be able to see me promptly.

Thanking you in anticipation of your immediate consideration of our problem, and looking forward to the opportunity to meet you personally, I am

Sincerely yours,

JOHN J. WILSON

JJW/bps

LAW OFFICES

FRATES FLOYD PEARSON STEWART PROENZA & RICHMAN

PROFESSIONAL ASSOCIATION

TWELFTH FLOOR CONCORD BUILDING

MIAMI, FLORIDA 33130

AREA CODE 305

TELEPHONE 377-0241

BROWARD LINE 523-4297

WM. SNOW FRATES
ROBERT L. FLOYD
RAY H. PEARSON
LARRY S. STEWART
MORRIS C. PROENZA
GERALD F. RICHMAN
JAMES D. LITTLE
ALAN G. GREER
KENNETH J. WEIL
BERTHA CLAIRE LEE
ANDREW C. HALL
JOHN M. BRUMBAUGH
IRA H. LEESFIELD
STEPHEN N. ZACK
SHERRYLL MARTENS DUNAJ
WM. BRUCE HARPER, JR.
MARVIN E. CHAVIS
DENNIS L. WEBB
GEORGE E. SCHULZ, JR.
DONALD R. THOMPSON
PHILLIP E. WALKER
BILLIE J. SPENCER

August 21, 1974

Philip W. Buchen
Counsel to the President
Executive Office Building
Washington, D.C.

Re: United States v. Mitchell, Case No. 74-110
United States District Court for the District
of Columbia

Dear Mr. Buchen:

Yesterday I spoke with you to advise you that my client, John D. Ehrlichman, a defendant in the above styled cause, was in Washington and to request that he be permitted to examine his papers now stored in the Presidential Archives of the White House. I further conveyed to you the request that the previous procedure followed during the Nixon Administration be amplified to allow Mr. Ehrlichman to have the effective assistance of counsel during this examination by allowing defense counsel or any one of them to examine these papers with Mr. Ehrlichman. To each of these requests you replied that since the Ford Administration had just come to the White House, my request could not be honored at this time but that you would employ your best efforts to obtain a decision in the next few days. There is one additional fact which should be conveyed. Trial in this major criminal prosecution is now set for September 9, 1974. Motions for a continuance haved been denied by the trial judge, John Sirica. Consequently, there is a very limited amount of time available in which the defendants, including my client, can prepare for trial. Each day that passes greatly predjudices their rights. Consequently, I urge you to permit inspection as quickly as possible in order to avoid a grave injustice which will occur if inspection is not permitted or is permitted at a late date.

Sincerely,

ANDREW C. HALL

THE WHITE HOUSE

WASHINGTON

August 23, 1974

MEMORANDUM FOR: H. S. Knight
Director, United States Secret Service

SUBJECT: Protection of White House Files

This memorandum will continue in effect the standing instructions issued to you by J. Fred Buzhardt in his memorandum dated May 23, 1973, and by General Alexander Haig in his memorandum dated June 21, 1974, regarding access to all of the files located in Room 522 and the files located in Room 84 of the Old Executive Office Building, which files are under the protection of the United States Secret Service, subject to the following clarifying amendments:

Strike all of the names listed in the first paragraph of the memorandum dated May 23, 1973, and insert in lieu thereof the names listed in Exhibit 1, attached hereto.

Strike the first sentence of numbered paragraph 3 of the memorandum dated May 23, 1973.

Strike the name of Geoffrey C. Shepard wherever it appears in the memorandum dated June 21, 1974, and insert in lieu thereof the name of William E. Casselman II.

This memorandum will remain in effect until amended or revoked by memorandum from the Counsel to the President to the Director of the United States Secret Service. The continued access to Room 522 and Room 84 under the terms of the May 23, 1973, and June 21, 1974, memorandum is being undertaken by me with the concurrence of Richard M. Nixon.

Philip W. Buchen

Philip W. Buchen
Counsel to the President

Enclosure

cc: General Alexander M. Haig, Jr.

EXHIBIT 1

Patrick J. Buchanan
John J. Caulfield
Dwight Chapin
Charles Colson
John W. Dean III
Frank DeMarco
John D. Erhlichman
H. R. Haldeman
Larry Higby
Tom Huston
E. Howard Hunt
Herb Kalmbach
Kenneth Khachigian
Egil Krogh
Fred LaRue
G. Gordon Liddy
Jeb Stewart Magruder
John M. Mitchell
Richard Moore
Robert G. Odle
Bart Porter
Robert Reisner
Maurice Stans
Hugh Sloan
Gordon Strachan
David Young

CIVIL SUBPOENA

United States District Court

for the

District of Columbia

R. SPENCER OLIVER
Plaintiff.

vs.

THE COMMITTEE FOR THE RE-ELECTION OF THE PRESIDENT, et al
Defendant.

CIVIL ACTION NO. 1207-73

To: Philip W. Buchen, Esquire, Counsel to the President

1600 Pennsylvania Avenue, N. W., Washington, D. C.

YOU ARE HEREBY COMMANDED to appear in ~~this court~~ (the office of Joseph H. Koonz, Jr., Esquire, 925-15th Street, N. W., Washington, D. C. (Fifth Floor)) to give testimony in the above-entitled cause on the 12th day of September, 1974, at 2:00 o'clock p. m. (and bring with you) all tapes, and transcripts of tapes, of conversations of Richard M. Nixon and/or his Aides recorded in the White House for the period from May 26 through June 21, 1972.

and do not depart without leave.

JAMES F. DAVEY, Clerk

By _____
Deputy Clerk.

Date August 23, 1974

Joseph H. Koonz, Jr.

Attorney for { *Plaintiff.* ~~Defendant~~

RETURN ON SERVICE

Summoned the above-named witness by delivering a copy to h____ and tendering to h____ the fees for one day's attendance and mileage allowed by law, on the _____ day of _____, 19____, at _____

Dated _____

_____

Subscribed and sworn to before me, a _____ this _____ day of _____, 19____

_____

NOTE.—Affidavit required only if service is made by a person other than a U. S. Marshal or his deputy.

ASHCRAFT & GEREL
ATTORNEYS AT LAW
WASHINGTON, D. C. 20005

1039

August 23 1974 15-52/540

PAY TO THE ORDER OF Philip W. Buchen, Esq. $ 20.80

Twenty and 80/100---------- DOLLARS

NS/T NATIONAL SAVINGS & TRUST COMPANY
WASHINGTON, D.C.

FOR Witness Fee

Joseph L. Gerel

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

R. SPENCER OLIVER :

Plaintiff :

CIVIL ACTION

v. :

NO. 1207-73

THE COMMITTEE FOR THE RE-ELECTION :
OF THE PRESIDENT, et al

:

Defendants

NOTICE OF TAKING DEPOSITION

Please take notice that on Thursday, September 12, 1974, at 2:00 P.M., in the office of Joseph H. Koonz, Jr., Esquire, 925-15th Street, N. W., Washington, D. C., before a Notary Public of Friedli, Wolff and Pastore, or any other authorized Notary Public, the plaintiff, through his attorney, will take the deposition of Philip W. Buchen, Esquire, Counsel to the President, by oral examination, pursuant to the provisions of the Rules of Civil Procedure.

Joseph H. Koonz, Jr.
925-15th Street, N. W.
Washington, D. C. 20005
Attorney for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Notice of Taking Deposition was mailed, postage prepaid, this 23rd day of August, 1974, to Richard W. Galiher, Esquire, 1215-19th Street, N. W., Washington, D. C. 20036; James R. Stoner, Esquire, 1000 Connecticut Avenue, N. W., Washington, D. C. 20006; Daniel E. Schultz, Esquire, 1990 M Street, N. W. Washington, D. C. 20036; Bernard Fensterwald, Esquire, 910-16th Street,

LAW OFFICES
HCRAFT AND GEREL
13TH STREET, N. W.
SHINGTON, D. C. 20005
783-6400
SUITE 201
30 CAMERON STREET
ER SPRING, MD. 20910
588-1818
SUITE 220
0 KENMORE AVENUE
EXANDRIA, VA. 22304
751-7400

N. W., Washington, D. C. 20006; Fred M. Vinson, Jr., Esquire, 800-17th Street, N. W., Washington, D. C. 20006; William A. Snyder, Jr., Esquire, 1600 Maryland National Bank Building, Baltimore, Maryland 21202; Peter L. Maroulis, Esquire, 11 Cannon Street, Poughkeepsie, New York 12601; James J. Bierbower, Esquire, 1625 K Street, N. W., Washington, D. C. 20006; Walter J. Bonner, Esquire, 1001 Connecticut Avenue, N. W., Washington, D. C. 20036; Charles B. Murray, Esquire, 1025-15th Street, N. W., Washington, D. C. 20005; William G. Hundley, Esquire, 839-17th Street, N. W., Washington, D. C. 20006; and John J. Wilson, Esquire, 815-15th Street, N. W., Washington, D. C. 20005.

Joseph H. Koonz, Jr.

LAW OFFICES
HCRAFT AND GEREL
5 15TH STREET, N. W.
ASHINGTON, D. C. 20005
783-6400
SUITE 201
330 CAMERON STREET
LVER SPRING, MD. 20910
589-1818
SUITE 220
350 KENMORE AVENUE
LEXANDRIA, VA. 22304
751-7400

CIVIL SUBPOENA

United States District Court

for the

District of Columbia

~~Democratic National Committee, et al.~~
Plaintiff.

vs. CIVIL ACTION NO. ~~1233/72~~

~~James W. McCord, Jr.~~
Defendant.

To: ~~Philip W. Buchen, Esquire, Counsel to the President,~~
~~1600 Pennsylvania Avenue, N.W., Washington, D.C.~~

YOU ARE HEREBY COMMANDED to appear in (~~this court~~) (the office of ~~Bernard Fensterwald, Jr., Esquire, 910 16th Street, N.W., Washington, D.C.~~) ~~to give testimony in the above entitled cause~~ on the ~~17th~~ day of ~~September~~, 19~~74~~, at ~~10:00~~ o'clock ~~a~~ m. (and bring with you) ~~all tapes, and transcript of tapes, of conversations of Richard M. Nixon and/or his aides recorded in the White House for the period from January 1, 1973 to January 31, 1973, inclusive.~~

and do not depart without leave.

James F. Davey, Clerk

By Robert L. Lee
Deputy Clerk.

Date ~~August 23, 1974~~

~~Bernard Fensterwald, Jr.~~
Attorney for { *Plaintiff.* / *Defendant.* }

RETURN ON SERVICE

Summoned the above-named witness by delivering a copy to h____ and tendering to h____ the fees for one day's attendance and mileage allowed by law, on the ____ day of ____, 19____, at ____

Dated ____

Subscribed and sworn to before me, a ____ this ____ day of ____, 19____

NOTE.—Affidavit required only if service is made by a person other than a U. S. Marshal or his deputy.

FENSTERWALD AND OHLHAUSEN, ATTORNEYS

NUMBER 2681

DATE Aug 23 1974 15-3/540

PAY TO THE ORDER OF Philip W. Buchen, Counsel to the President $ 21.00

twenty one + ——— 00/100 DOLLARS

The RIGGS NATIONAL BANK of WASHINGTON, D. C.
FEDERAL OFFICE
1750 PENNSYLVANIA AVENUE, N. W.

FENSTERWALD AND OHLHAUSEN, ATTORNEYS

B. Fensterwald Jr. AUTH. SIG.

HYDEMAN, MASON & GOODELL
1225 NINETEENTH STREET, N.W.
WASHINGTON, D.C. 20036

ARTHUR K. MASON
LEE M. HYDEMAN
HAROLD E. MESIROW
JOHN M. BURZIO
JAMES T. LLOYD
JAMES H. HELLER
CHARLES E. GOODELL

OF COUNSEL
ALGER B. CHAPMAN
ALEXANDER M. LANKLER

TELEPHONE
202 659-3650

CABLE ADDRESS
HASTEN

August 20, 1974

Mr. Phillip W. Buchen
Counsel to the President
The White House
Washington, D.C.

Dear Mr. Buchen:

It was gratifying to learn that upon your appointment as Counsel to President Ford you immediately undertook reconsideration of the decision of your predecessor that the tapes of conversations between President Nixon and others, apart from those already ordered produced in criminal matters, would be deemed the property of Mr. Nixon and turned over to him.

I write you with some concern about this question because there is a dimension which may not have been fully considered. That is the possible relevance and evidentiary or discovery value of these tapes in pending civil litigation to vindicate fundamental civil liberties.

It appears altogether likely that if the tapes are in fact returned to Mr. Nixon they will either be destroyed within a short period of time or will at least be put beyond the reasonable reach of persons who may have need for those tapes in the course of such litigation.

I am volunteer counsel for the plaintiffs in one such class action filed by the American Civil Liberties Union. That suit, Allnutt v. Wilson, Civil Action No. 874-72 pending in the United States District Court for the District of Columbia, is a damage action brought on behalf of more than 3200 persons who were arrested during the course of the so-called "Mayday" demonstrations on Tuesday, May 4, 1971 next to the Justice Department building here in Washington. To my knowledge there are at least three other class actions pending which involve the so-called Mayday demonstrations. While I have some general familiarity with those other suits, I can speak most specifically with respect to the Allnutt case and the possible relevance of taped Presidential conversations.

The May 4, 1971 arrests on 10th Street, N.W. between Constitution Avenue and Pennsylvania Avenue alongside the Justice Department occurred in the most suspicious manner and circumstances. I think it is fair to say that almost every one of the more than 3200 persons arrested in that spot

on that date believed they were peacefully demonstrating with the permission of the Police Department until shortly before the time they were actually arrested. A very large proportion of all of those persons had previously congregated in Franklin Park in northwest Washington and had been peacefully escorted by the police under Chief Wilson down through the streets of Washington to the point alongside the Justice Department where they were gathered when the arrests began. We have on file numerous affidavits indicating that people were either caught by surprise when the warning to disperse within five minutes was suddenly given, or didn't even hear the warning, that they were either given no time to pass through the police lines or were intimidated and in some cases even beaten when they sought to leave the area. The entire block was walled off by policemen. During the course of the arrests some FBI agents sortied from the Justice Department and arrested selected leaders of the demonstration. As far as we know, no more than a few demonstrators were actually able to leave the police cordons and avoid the arrests, although many wished to do so. You may also recall newspaper photographs of Attorney General Mitchell watching the arrests from a Justice Department balcony.

Thus, the situation immediately preceding the arrests and the arrests themselves (ultimately thrown out of court) had the look of a police encirclement and trap. It is of course possible that this is not true. It is also possible that, if it is true, it was entirely conceived and carried out by the Metropolitan Police of the District of Columbia themselves. However, we do know that during the preceding evening after the Monday demonstrations, Chief Wilson conferred with high Justice Department officials and there is at least a plausible inference that the tactics used on Tuesday May 4, namely the lulling of the demonstrators into a false sense of security, their encirclement, and their arrest en masse, were part of a conceived plan.

We also know from the testimony of Mr. Mitchell and Mr. John Dean during the Senate "Watergate" Committee hearings that President Nixon and at least some of his advisors had an almost paranoid concern with political demonstrations and demonstrators, and indeed that the Liddy plan, thrice presented to Attorney General Mitchell and finally partly carried out, originally had to do in Mr. Mitchell's mind with that very question, namely how to deter and sabotage demonstrations.

In the Allnutt litigation we desire to know whether there were any conversations in which the President was a participant which either directly or indirectly led to White House orders to accomplish the encirclement and arrests of May 4, 1971.

The tapes which are to be returned to Mr. Nixon if you do not reverse the opinion of your predecessor, Mr. Buzhardt, may or may not contain evidence that this suspicious mass arrest on May 4, 1971 was in fact ordered in the White House. We do not know, but at the very least we would like to

have our day in court while the tapes are still in government hands and to have access to any taped conversations relating to those demonstrations. We have a long enough record of concealment and false statements on the part of former Nixon Administration officials that we may never discover this fact if the tapes themselves are not available.

In the next few days I expect to file in court a request for production of any tapes bearing on this question. It is a matter of great urgency from our viewpoint that the Presidential tapes be preserved as property of the Federal government at least until it is clearly shown that they no longer have any public usefulness. I myself do not understand the notion that they could possibly be private property. It is of course true that they may be privileged, although I do not read the Supreme Court decision in United States v. Nixon to deal with this question in the context of civil litigation undertaken to vindicate constitutional rights.

However, we are much more interested in possible orders given by or in the name of the President than in advice given to him by his advisors. It is hard to understand how anyone could say a priori that these tapes are merely the private property of Mr. Nixon when they may contain the only record of decisions he made as President which may in the future be of concern to both the Congress and the courts of this country.

Thank you very much for your consideration of this letter.

Sincerely,

James H. Heller

93D CONGRESS
2D SESSION

S. 2951

IN THE SENATE OF THE UNITED STATES

FEBRUARY 4, 1974

Mr. BAYH introduced the following bill; which was read twice and referred to the Committee on Government Operations

A BILL

To provide for public ownership of certain documents of elected public officials.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Public Documents Act".

SEC. 2. (a) Title 44, United States Code, is amended by adding at the end thereof the following new chapter:

"Chapter 39—PUBLIC DOCUMENTS OF ELECTED OFFICIALS

"§ 3901. Definitions

"For purposes of this chapter—

"(1) 'elected official of the United States' means the President, Vice President, Senator, and Member of (or Resident Commissioner or Delegate to) the House of Representatives, including any individual holding such office for any period by reason of appointment to such office or succession to such office; and

"(2) 'public documents' means, with respect to an elected official of the United States, the books, correspondence, documents, papers, pamphlets, models, pictures, photographs, plats, maps, films, motion pictures, sound recordings, and other objects or materials which shall have been retained by an individual holding elective office under the United States and which were prepared for or originated by such individual in connection with the transaction of public business during the period when such individual held elective office and which would not have been prepared if that individual had not held such office; except that copies of public documents preserved only for convenience of reference, and stocks of publications and of public documents previously processed under this title are not included.

"§ 3902. Papers of elected officials

"Within one hundred and eighty days after an elected official of the United States ceases to hold his office, the Administrator of General Services shall obtain any objects or materials of that elected official which the Administrator determines to be public documents within the meaning of section 3901 (2) of this title, and such elected official shall transmit such documents to the Administrator.

"§ 3903. Preservation of public documents

"The Administrator of General Services shall deposit in the National Archives of the United States the public documents of each elected official of the United States obtained under section 3902 of this title. Sections 2101–2113 of this title shall apply to all public documents accepted under this section.

"§ 3904. Judicial review

"A decision by the Administrator of General Services that any object or material is a public document of an elected official of the United States within the meaning of section 3901 (2) of this title shall be a final agency decision within the meaning of section 702 of title 5.".

(b) The table of chapters, preceding chapter 1 of such title 44, is amended by adding at the end thereof the following:

"39. Public Documents of Elected Officials..... 3901".

93D CONGRESS
2D SESSION

S. 2951

A BILL

To provide for public ownership of certain documents of elected public officials.

By Mr. BAYH

FEBRUARY 4, 1974

Read twice and referred to the Committee on Government Operations

notation

Bcc to

Fred Burhardt

MEMORANDUM OF CALL

TO:

☐ YOU WERE CALLED BY— ☐ YOU WERE VISITED BY—

OF (*Organization*)

☐ PLEASE CALL ⟶ PHONE NO. CODE/EXT. _____

☐ WILL CALL AGAIN ☐ IS WAITING TO SEE YOU

☐ RETURNED YOUR CALL ☐ WISHES AN APPOINTMENT

MESSAGE

RECEIVED BY	DATE	TIME

STANDARD FORM 63
REVISED AUGUST 1967
GSA FPMR (41 CFR) 101-11.6

GPO : 1969—o48—16—60341-1 332-389

63-108

THE WHITE HOUSE

WASHINGTON

August 24, 1974

MEMORANDUM FOR

The Honorable Laurence H. Silberman
Deputy Attorney General
Department of Justice

Subject: Matters related to subjects of opinion requested August 22 from the Attorney General

Attached are copies of the following:

(1) Case pending in Charlotte, North Carolina, which arises from incidents during Billy Graham Day on October 15, 1971:

(a) Copy of memorandum from William Henkel, Jr., to Dudley H. Chapman dated August 22, 1974, with attachment.

(b) Memorandum between same parties dated August 23, 1974.

(2) Cases of U. S. v. Means & Banks ("Wounded Knee"):

(a) Memorandum from Skip Williams to me dated August 19, 1974, with attachment (please note that this attachment relates to the order of August 13, 1974, when there has since been a supplemental order of August 15, 1974, of which we need a copy).

(b) Copy of memorandum dated August 13, 1974, from U. S. Attorney Earl Kaplan to Roger Cubbage in your Department.

(3) Case of U. S. v. John B. Connally: copy of letter to J. Fred Buzhardt of August 15, 1974, from the Watergate Special Prosecution Force.

(4) Case of U. S. v. Mitchell, et al., Criminal No. 74-110, which is set for trial in the District starting September 30, 1974:

(a) Three items of correspondence dated August 16, August 19, and August 21, respectively.

(b) Copy of my memorandum to H. S. McKnight, dated August 23, 1974.

(5) Case of H. Spencer Oliver v. Committee for Re-Election of the President, et al., Civil Action No. 1207-73, in the U. S. District Court for the District of Columbia: copies of documents served on me August 23, 1974.

(6) Case of Democratic National Committee, et al. v. James W. McCord, Jr., Civil Action No. 1233-72 in the District Court for the District of Columbia: copies of documents served on me August 23, 1974.

(7) Case of Allnutt v. Wilson, Civil Action No. 874-72, pending in the United States District Court for the District of Columbia, and other similar cases: copy of letter dated August 20, 1974, from James H. Heller of Hydeman, Mason & Goodell to me.

(8) Copy of S. 2951 introduced by Senator Bayh in February. (I have had a call on August 20 from Bill Heckman of the Senate Judiciary Committee saying that Senator Bayh wants to know whether the Administration would be able to move forward on this bill during the current session of Congress.)

Also called to my attention recently has been the material appearing in the report by the staff of the Joint Committee on Internal Revenue Taxation dealing with the examination of former President Nixon's tax returns from 1969-72 (House Report No. 93-966), at pages 28 and 29 and in Exhibit I-3, starting at page 16 of the Memorandum of Law prepared by Attorneys Kenneth W. Gemill and H. Chapman Rose in behalf of the then President Richard M. Nixon.

P.W.B.

Philip W. Buchen
Counsel to the President

Attachments

August 24, 1974

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The Honorable Laurence H. Silberman
Deputy Attorney General
Department of Justice

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Philip W. Buchen
Counsel to the President

Attachments
PWBuchen:ed

August 24, 1974

MEMORANDUM FOR

The Honorable Laurence H. Silberman
Deputy Attorney General
Department of Justice

Subject: Matters related to subjects of opinion requested August 22 from the Attorney General

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Philip W. Buchen
Counsel to the President

Attachments
PWBuchen:ed

August 24, 1974

MEMORANDUM FOR

The Honorable Laurence H. Silberman
Deputy Attorney General
Department of Justice

Subject: Matters related to subjects of opinion requested August 22 from the Attorney General

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Philip W. Buchen
Counsel to the President

Attachments
PWBuchen:ed

August 27, 1974

MEMORANDUM FOR

The Honorable Laurence H. Silberman
Deputy Attorney General
Department of Justice

Subject: Matters related to subjects of opinion requested August 22 from the Attorney General

Attached are copies of the following:

(1) Case pending in Charlotte, North Carolina, which arises from incidents during Billy Graham Day on October 15, 1971:

(a) Copy of memorandum from William Henkel, Jr., to Dudley H. Chapman dated August 22, 1974, with attachment.

(b) Memorandum between same parties dated August 23, 1974.

(2) Cases of U. S. v. Means & Banks (Wounded Knee"):

(a) Memorandum from Skip Williams to me dated August 19, 1974, with attachment (please note that this attachment relates to the order of August 13, 1974, when there has since been a supplemental order of August 15, 1974, of which we need a copy).

(b) Copy of memorandum dated August 13, 1974, from U. S. Attorney Earl Kaplan to Roger Cubbage in your Department.

(3) Case of U. S. v. John B. Connally: copy of letter to J. Fred Buzhardt of August 15, 1974, from the Watergate Special Prosecution Force.

(4) Case of U. S. v. Mitchell, et al., Criminal No. 74-110, which is set for trial in the District starting September 30, 1974:

(a) Three items of correspondence dated August 16, August 19, and August 21, respectively.

(b) Copy of my memorandum to H. S. McKnight, dated August 23, 1974.

(5) Case of H. Spencer Oliver v. Committee for Re-Election of the President, et al., Civil Action No. 1207-73, in the U. S. District Court for the District of Columbia: copies of documents served on me August 23, 1974.

(6) Case of Democratic National Committee, et al. v. James W. McCord, Jr., Civil Action No. 1233-72 in the District Court for the District of Columbia: copies of documents served on me August 23, 1974.

(7) Case of Allnutt v. Wilson, Civil Action No. 874-72, pending in the United States District Court for the District of Columbia, and other similar cases: copy of letter dated August 20, 1974, from James H. Heller of Hydeman, Mason & Goodell to me.

(8) Copy of S. 2951 introduced by Senator Bayh in February. (I have had a call on August 20 from Bill Heckman of the Senate Judiciary Committee saying that Senator Bayh wants to know whether the Administration would be able to move forward on this bill during the current session of Congress.)

Also called to my attention recently has been the material appearing in the report by the staff of the Joint Committee on Internal Revenue Taxation dealing with the examination of former President Nixon's tax returns from 1969-72 (House Report No. 93-966), at pages 28 and 29 and in Exhibit I-3, starting at page 16 of the Memorandum of Law prepared by Attorneys Kenneth W. Gemill and H. Chapman Rose in behalf of the then President Richard M. Nixon.

Philip W. Buchen
Counsel to the President

Attachments
PWBuchen:ed

August 27, 1974

MEMORANDUM FOR

The Honorable Laurence H. Silberman
Deputy Attorney General
Department of Justice

Subject: Matters related to subjects of opinion requested August 22 from the Attorney General

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Philip W. Buchen
Counsel to the President

Attachments
PWBuchen:ed

to, Mr. Buchen

room, _____ date, 9/6/74

Department of the Treasury
Office of the General Counsel

Attached is a copy of the subpoena served on September 4 on Mr. Knight, the Director of the Secret Service, at the request of the attorneys for Mr. Ehrlichman.

R.R.A.

General Counsel
Richard R. Albrecht
room 3000
ext. 2093

CO-296
NEW 12/71

Subpoena to Produce Document or Object — Cr. Form No. 21 (Rev. 10-51)

United States District Court

FOR THE

DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA

v.

JOHN M. MITCHELL, et al,

No. 74-110

To H. S. KNIGHT, Director, United States Secret Service,
as Custodian of Presidential Papers (White House Files),
The White House
Washington, D. C.

You are hereby commanded to appear in the United States District Court for the District of Columbia at John Marshall and Constitution in the city of Washington, D. C. on the 16th day of September 1974 at 10:00 o'clock A. M. to testify in the case of United States v. Mitchell, et al and bring with you

(SEE ATTACHED)

This subpoena is issued upon application of the[1] Defendant, Ehrlichman.

August 29, 1974.

ANDREW C. HALL
Attorney for John D. Ehrlichman
66 W. Flagler Street
Miami, Florida 33130

JAMES F. DAVEY, Clerk.
By Robert L. Lange, *Deputy Clerk.*

[1] Insert "United States," or "defendant" as the case may be.

RETURN

Received this subpoena at on and on at served it on the within named by delivering a copy to h and tendering to h the fee for one day's attendance and the mileage allowed by law.[2]

Dated: ,

, 19 By ,

Service Fees
Travel $
Services
Total $

[2] Fees and mileage need not be tendered to the witness upon service of a subpoena issued in behalf of the United States or an officer or agency thereof. 28 USC 1825.

FPI—LK—8-14-62—120M—998

ACH:ch

ATTACHMENT TO SUBPOENA TO PRODUCE

1. Notes of Presidential conversations of John D. Ehrlichman from June 17, 1972 to and including May 1, 1973, which are stored in reddish-brown binders.

2. The chronological file of correspondence and memoranda of John D. Ehrlichman from June 17, 1972 to and including May 1, 1973.

3. All personal papers of John D. Ehrlichman prepared or received from June 17, 1972 to and including May 1, 1973 which refer to or relate to the following:

   (a) The Watergate burglary.

   (b) The proposal for the development of and the implementation of intelligence gathering activities for the Committee for the Re-election of the President.

   (c) The activities of Donald Segretti.

   (d) The investigation and activities in connection therewith of the "Watergate affair".

   (e) All tape recordings of Presidential conversations involving a discussion of the "Watergate matter".

   (f) The logs of telephone calls received or placed by Richard M. Nixon from June 17, 1972 to and including May 1, 1973.

   (g) The logs of telephone calls received or placed by H. R. Haldeman from June 17, 1972 to and including May 1, 1973.

   (h) The logs of telephone calls received or placed by John D. Ehrlichman from June 17, 1972 to and including May 1, 1973.

   (i) The visitors' logs and/or appointment logs of Richard M. Nixon from June 17, 1972 to and including May 1, 1973.

   (j) The visitors' logs and/or appointment logs of H. R. Haldeman from June 17, 1972 to and including May 1, 1973.

   (k) The visitors logs and/or appointment logs of John D. Ehrlichman from June 17, 1972 to and including May 1, 1973.

   (l) Any and all records of any person, maintained at the White House, which refer to or relate to the "Watergate matter" from June 17, 1972 to and including May 1, 1973.

Justice
Opinions

THE WHITE HOUSE

WASHINGTON

March 10, 1975

Dear Mr. Walker:

On behalf of the President, I would like to reply to your letter of February 13 urging the President to assist you in obtaining an opinion of the Attorney General.

Assistant Attorney General Pottinger has correctly responded to your initial inquiry that such legal opinions are only given upon request of the President and of the heads of the Executive Departments. Furthermore, if you misunderstood this reply to mean that the President might request a legal opinion for you, then I would like to correct this impression.

Opinions of the Attorney General are merely advisory, and they are based on the statutory role of the Attorney General, who serves in the cabinet, in relation to, and for the benefit of the President and the heads of Executive Departments. It would, therefore, be inappropriate for the Attorney General to advise other officials. Also, I would like to point out such a legal opinion could not prevent a law suit, as you suggest in your letter, because the opinion of the Attorney General does not have the force of law.

You may be assured that your inquiry was appreciated, and I am sorry that it is not possible to be of more assistance to you.

Sincerely,

Philip W. Buchen

Philip W. Buchen
Counsel to the President

Honorable Joe H. Walker
County Attorney
Roane County, Tennessee 37748

THE WHITE HOUSE

WASHINGTON

Justice — Opinions

March 27, 1975

MEMORANDUM FOR: Philip W. Buchen

FROM: L. William Seidman LWS

SUBJECT: Legal opinion on Section 232 of the Trade Expansion Act of 1962 and Section 301 of the Trade Act of 1974

At yesterday afternoon's meeting with the President on options available to provide relief for the U.S. tanker industry, the President expressed a desire that we obtain a legal opinion from the Department of Justice regarding the legality of using Section 232 of the Trade Expansion Act of 1962, as amended by the Trade Act of 1974 (the national security provision), and/or Section 301 of the Trade Act of 1974 (retaliation against unjustifiable or unreasonable restriction on access to raw materials) to encourage use of U.S.-flag tankers in the transportation of foreign petroleum to the United States.

The President requested that this legal opinion be obtained as rapidly as possible. I would appreciate very much your transmitting this request to the appropriate individuals at the Department of Justice.

Attached is a memorandum to the Secretary of Commerce from his General Counsel on the issue which I received yesterday.

Attached also is the options paper considered by the President.

Att.

THE WHITE HOUSE

WASHINGTON

Phil Buchen
For your information only.
Should not be sent to Department of Justice.

ACTION

MEMORANDUM FOR: THE PRESIDENT

FROM: L. WILLIAM SEIDMAN

SUBJECT: U.S. Tanker Industry Problems

Due to decreased oil movements and rapid growth in tanker capacity, both the worldwide and U.S. tanker industries are in a depressed condition. As indicated in a meeting with the President on March 7, both labor and management representatives from the ship construction and ship operations industry believe that government action to assist the industry is necessary. These representatives proposed that the Administration require oil importers to use American vessels first. The industry representatives further recommended that an exemption from oil import fees be allowed to importers using U.S.-built, U.S.-flag tankers.

The Economic Policy Board has examined the problems facing the U.S. tanker industry, and has considered several options for responding to the problem. These options, and the positions of the interested agencies, are discussed below.

General Considerations Regarding The Options

Options 1(a), 2 and 3, are intended to be implemented by executive order. There must be a sound legal basis for such implementation. Although other legal authorities have been mentioned, it is the President's authority under Section 232 of the Trade Expansion Act of 1962, as amended (19 U.S.C. 1862) that is most frequently referred to as a possible statutory basis for Executive action on options 1-3. A number of agencies have indicated that they doubt that Section 232 is an adequate authority for imposing a "Use American Vessels First" policy or a partial import fee exemption. Accordingly, any final decision on any of these three options should be based on a legal determination by the Justice Department.

Prior to a final decision, it should be definitely established that implementation of any of the options involving action would be acceptable to the tanker industry and the maritime unions as a substitute for enactment of oil cargo preference legislation. Assurances should be obtained from these interests that further efforts to pursue cargo preference legislation will not be undertaken.

Option 1(a): Require Use of American Vessels First, By Executive Order

This option, which is similar to oil cargo preference enacted by the Congress in late 1974, would require oil importers, as a condition in granting an import license, to use U.S.-flag vessels, provided such vessels are available at fair and reasonable rates. These fair and reasonable rates would cover the cost, including cost of capital, of ships built in the United States and registered under the U.S.-flag.

The limited cargo preference provided under this option may be less undesirable than the cargo preference bill passed by the 93rd Congress, and reintroduced this year, for the following reasons:

- It would apply only to existing ships under 25 years of age and to ships already under contract for construction as of its effective date. Thus it would not entail the legislation's disadvantages of providing support for the oldest, most inefficient ships, and of encouraging the construction of unneeded tankers, with concomitant inflationary pressures on the shipyards and potential conflict with Navy shipbuilding programs.

- It may be possible to make the preference temporary, for two years or so, although it may be very difficult to terminate the preference once it is initiated.

This option, however, has several of the same problems as the vetoed oil cargo preference legislation:

- It would increase the cost of oil to consumers by a total of over $300 million a year.

- It would undoubtedly result in protests by certain foreign nations as contrary to the principle of free trade, and in violation of treaties of commerce. The Commerce Department believes that the objections may be counteracted somewhat by the recent actual and defacto cargo preference actions by some foreign countries, including the OPEC nations.

- It would reduce or remove incentives to the tanker industry to improve their productivity, because of a lack of effective competition.

Option 1(b): Agree to Accept Legislation Requiring Use of American Vessels First

This option would be the same as option 1(a), except that it would avoid problems of using existing authorities, and give Congress the initiative. It may be very difficult to contrain such legislation to limit it only to certain existing tankers.

Option 2: Temporary Partial Exemption From Oil Import License Fees

Partial exemptions from oil import license fees would be granted to importers who use U.S.-flag tankers constructed in the United States. The amount of fee exemption would be equal to the difference between the fair and reasonable charter rates for U.S.-flag tankers, constructed in the United States, and world rates. The fee exemption amounts would be adjusted periodically to reflect changes in U.S. costs and in world rates. When world rates reached levels that were reasonably compensatory, the fee exemption would expire.

It is not certain that importers would use U.S. tankers under this option, but the fee exemption should make the cost of U.S. flag tankers at least equal to foreign flag tankers. If the fee exemption results in the use of U.S. tankers, it would cost about $300 million a year in lost revenues.

This option would not increase the cost of oil to consumers, but it would have many of the other undesirable features of oil cargo preference. It would subsidize inefficient ships, and it would likely provoke strong objections from foreign nations.

FEA opposes exemption from the import fee for the benefit of any industry. It feels that an exemption in this case would establish an undesirable precedent. If the import fee were raised to $2.00 a barrel, however, partial exemptions from the incremental dollar for the tanker industry, may not be objectionable.

Option 3: Use American Vessels First, With A Temporary Partial Remission of Oil Import License Fees

This option was presented by the industry to the President on March 7. Oil importers would be required, as a condition in granting an import license, to use U.S.-flag vessels prior to using foreign vessels,

provided U.S. vessels are available at fair and reasonable rates. These fair and reasonable rates would cover the cost, including the cost of capital, of ships built in the United States and registered under the U.S.-flag. The industry further recommended an exemption from import fees to importers using U.S. built U.S.-flag tankers.

Although not included in the industry proposal, it is recommended that this option only be considered as applying to existing tankers under 25 years of age and those contracted for construction as of the effective date. Fee exemptions should be limited to amounts equal to the added cost of U.S. tankers. The measure should be reviewed after two years and lifted whenever world rates return to compensatory levels.

This option would cost about $300 million a year in lost revenues, but it may result in only a small increase in cost of oil imports. It otherwise has the same undesirable features of option 1 and 2.

Option 4(a): Rate Subsidy For U.S.-Flag Tankers in Foreign Trade

This option would provide federal subsidy payments to operators of U.S.-flag tankers employed in U.S. foreign commerce equal to the difference between competitive world charter rates and "fair and reasonable" U.S.-flag costs.

It should bring U.S. tankers that would otherwise remain in layup into operation even though charter rates for foreign-flag tankers continued to be significantly below their operating costs. It would be explicitly limited to tankers currently existing or on order and would not apply when world rates were sufficiently high to allow reasonable profits for U.S.-flag tankers.

This option would require legislation. It would cost about $300 million a year in direct appropriations. It would provide a subsidy to all U.S. flag ships employed in U.S. foreign commerce, even though the majority of those ships would continue to operate without a subsidy.

Option 4(b): Rate Subsidy For Selected U.S.-Flag Tankers in Foreign Trade

This option would be the same as 4(a) except the subsidy would be legislatively limited to only selected ships, e.g., no subsidy would be provided to tankers owned or operated by major oil companies.

It may be possible to focus the subsidy on the independent operators, which are the ones impacted by the current problems, although there may be difficult problems in discriminating against certain ship owners. This option could cost substantially less than option 4(a), depending on how selectively it were applied.

Option 5: Increase Government Preference Agricultural Cargoes

Increasing the share of U.S.-flag participation in carrying P.L. 480 cargoes to 75 percent from the current 50 percent might provide an additional 10 voyages for U.S. tankers by June 30, 1975. This would provide employment for some 400 merchant seamen. The added U.S. cost would be $5.4 million for these tanker shipments and $4.7 million for other cargoes. This total cost of $10.1 million would be borne principally by USDA and AID.

It may be difficult or impossible to implement this in FY 1975 because written agreements with foreign countries would require renegotiation in some cases. It is expected that there would be complaints by recipient countries which use their national flag ships to carry P.L. 480 cargoes.

Option 6: Take No Action

Failure to take effective action by the Administration may provoke labor troubles and upset the favorable labor-management relations that have been fostered during the past several years. A strike by seagoing labor, which might be supported by longshore labor, could have a serious impact on U.S. economy. The labor reaction to inaction by the Administration might also be directed against Soviet maritime activity and could result in a major set-back in U.S./U.S.S.R. commercial relations.

No action also may increase the chances of Congressional action on oil cargo preference legislation.

At this time, it is not clear that the problem in the industry warrants the cost of the options discussed above. Also, it is not clear that any of the options for action would avoid the potential union and Congressional actions.

Agency Positions

Commerce - Option 3.

Defense - Option 3.

Labor - Option 1(a) or 1(b), if the Administration could get enough in return in terms of commitments from unions and industry; otherwise, option 6.

State - Option 6, but should consider other options such as increased unemployment benefits for unemployed seamen.

Agriculture - Opposes option 5.

CEA - Option 6; CEA believes that the available facts do not support any action.

OMB - Option 6; if action is determined to be necessary, recommend option 4(b) to focus assistance on the independent operators.

Treasury - Opposes options 1, 2 and 3; favors option 4, if action is necessary.

CIEP - Option 4(b); opposes options 1, 2 and 3.

AID - Opposes option 5.

Decision

_____ Option 1(a): Require use of American vessels first, by executive order.

_____ Option 1(b): Agree to accept legislation requiring use of American vessels first.

_____ Option 2: Temporary partial exemption from oil import license fees.

_____ Option 3: Use American vessels first, with a partial remission of oil import license fees.

_____ Option 4(a): Rate subsidy for all U.S.-flag tankers.

_____ Option 4(b): Rate subsidy for selected U.S. flag tankers.

_____ Option 5: Increase government preference agricultural cargoes.

_____ Option 6: Take no action.

GENERAL COUNSEL OF THE
DEPARTMENT OF COMMERCE
Washington, D.C. 20230

MEMORANDUM TO THE SECRETARY

FROM : Karl E. Bakke KEB
General Counsel

SUBJECT: Options Available to Encourage Use of United States Flag Tankers in the Transportation of Foreign Petroleum to the United States

You have requested my thoughts concerning use of section 232 of the Trade Expansion Act of 1962, as amended by the Trade Act of 1974, or section 301(a)(4) of the latter Act, to encourage use of United States flag tankers in the transportation of foreign petroleum to the United States. These options, together with other statutory authorities that have been or could be advanced by proponents of such action, are discussed below, together with the principal pros and cons of each.

I. Section 232 of the Trade Expansion Act of 1962, as amended by the Trade Act of 1974 (The National Security Provision)

Under section 232, whenever the President determines that an article is being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security, he is authorized "to adjust the imports of such article and its derivatives so that such imports will not so threaten to impair the national security." This authority, as you know, was recently invoked by President Ford to impose a $1 per barrel fee on imports of foreign crude oil to the United States. It has now been suggested that the President use the authority of section 232 to modify his previous action by waiving the oil import fee for oil transported on U.S. flag tankers.

ARGUMENTS PRO

- A corollary of the national security objectives sought to be achieved by imposition of the fee (i.e., encouraging energy self-sufficiency by development of domestic petroleum resources) is the need to develop or maintain a U.S. owned and operated tanker fleet that can assure prompt and dependable delivery of domestically-produced oil when and where needed. Since imposition of the import fee and consequent reduction in the volume of foreign crude moving to the U.S., there is a world-wide glut of tanker capacity. This, in turn, has led U.S. oil companies, which own a substantial share of the world's "flag of convenience" tankers, to use their own bottoms whenever possible, to the detriment of the "non-captive" U.S. flag tankers. This situation threatens the national security because if it persists, the U.S. flag tanker fleet will suffer an attrition that will seriously impair dependability and promptness of oil carriage via non-foreign bottoms. Therefore, waiver of the import fee for foreign crude delivered by U.S.-flag tankers is consistent with the President's objectives in imposing the fee in the first instance and is, therefore, merely a logical refinement of his original action.

ARGUMENTS CON

- The rationale underlying imposition of the oil import fee was that the national security of the United States requires the fullest development of our domestic sources of supply and refinery capacity, which cannot be achieved as long as imports of foreign crude are permitted to enter in unlimited quantities. The national security considerations underlying assurance of a viable U.S.-flag tanker fleet are, while valid, different from (even though related to) the national security considerations involved in developing our domestic sources of supply and our refinery capacity. Therefore, at the very least, it would appear necessary for the President to make a second and separate national security finding before he could

invoke section 232 to waive the import fee in the manner described above. However, a more serious problem is that granting an exemption to oil carried on U.S. tankers would, in effect, change the character of the oil import fee to a tax or fee on the use of foreign shipping. In my view, that result is beyond the President's authority under section 232. Further, assuming the need for a separate national security determination, waiver of the fee would not constitute, within the meaning of section 232, the "adjustment of imports of an article," since the net effect of this exemption would not necessarily be to increase or decrease in any way the quantity of petroleum imported, but rather merely to shift the transportation of such imports to United States-flag vessels. As noted above, such a result is beyond the authority of Section 232.

- On the international side, the use of Section 232 to exempt United States flag vessels from the import fee could well be challenged by major shipping nations as a discrimination against the use of their vessels in violation of our bilateral treaties of Friendship, Commerce and Navigation (FCN) with most of these nations. These bilateral treaties generally contain a provision requiring the U.S. to give "national treatment" to foreign shipping, i.e., non-discrimination between U.S. and foreign flag vessels in the entry of such vessels and their cargo. In hearings on the U.S. cargo preference bills during the last session of Congress, the State Department took the view that such cargo preference would be in violation of our FCN treaty commitments and, in fact, the State Department has protested such cargo preference practices by some other nations. The fact that our FCN treaties provide an exception on grounds of national security to national treatment for foreign shipping was intended to preserve "essential security interests" rather than to provide an economic advantage to U.S. flag vessels. Aside from legal considerations, this preferential treatment for imports on U.S. bottoms would also be ill-timed in view of the forthcoming multilateral trade negotiations.

II. Section 301 of the Trade Act of 1974 (Retaliation Against Unjustifiable or Unreasonable Restrictions on Access to Raw Materials)

Section 301, which deals generally with retaliation against specified foreign unfair trade practices, contains a provision which did not appear in earlier trade legislation. This provision (Section 301(a)(4)) was added by the Senate to authorize the President to retaliate against countries which impose unjustifiable or unreasonable (albeit not illegal) restrictions on U.S. access to their raw materials. It is quite clear from the legislative history that the Senate had in mind such actions as the embargo on exports of oil to the United States imposed last year by certain OPEC countries. It is not clear whether Congress considered that the maintenance of unreasonably high prices by the foreign suppliers would also constitute an "unjustifiable or unreasonable restriction" justifying retaliation. However, the legislative history does contemplate that certain actions would be unjustifiable even though these did not involve the imposition of a quota or embargo by the foreign suppliers. Assuming that the President is authorized to retaliate because the conditions of Section 301(a)(4) are met by the present pricing policies of the OPEC countries, Section 301 authorizes the President, inter alia, to "impose fees or restrictions on the services [e.g., shipping] of such foreign country." In addition, the President may impose such fees or restrictions on a non-discriminatory treatment basis, i.e., make the fee or restriction applicable across-the-board to the ships of all foreign nations, including those countries which have not in any way participated in the unjustifiable action which was the basis for the retaliation. Thus, waiver of the import fee for U.S.-bottomed oil imports would, in effect, result in the consequences intended by Section 301.

ARGUMENTS PRO

- By invoking 301(a)(4) to accomplish the fee waiver for U.S.-bottomed oil imports, the President could argue that he has used new authority which the Congress specifically tailored to deal with the immediate problem.

ARGUMENTS CON

- Although a finding that the pricing policy of the OPEC countries is unjustifiable or unreasonable could probably be supported, it is very difficult to justify as a reasonable means of retaliation the imposition of a fee on oil transported by all foreign vessels. The impact of this retaliation would not significantly affect the OPEC countries, since ships under their flags currently transport only 0.43% of the petroleum imported into the United States. Thus, the "retaliation" would affect principally the major shipping nations, which are innocent of any wrong doing. The practical consequence (and intent) of such action would, therefore be to "subsidize" United States flag tankers in competition with tankers of other countries, a result that could well be found by a court to go beyond a reasonable exercise of this authority.

- On the international side, relying on the authority of Section 301 to effect a waiver for oil carried on U.S. bottoms would raise the same difficulties in terms of our commitments under FCN treaties as discussed above in connection with the use of section 232.

III. Trading With The Enemy Act (Section 5(b))

Section 5(b) of the Trading With the Enemy Act gives the President broad authority to control domestic and international financial transactions in time of war or declared national emergency, and has been used as the basis for a number of emergency programs throughout the years.

Although enacted in 1917 as a war power, this Act has been used primarily in times of economic crisis and emergencies. In 1933 President Roosevelt relied on Section 5(b) as authority for his proclamation which closed all banks for five days.

Another declaration of national emergency under the Act was made by President Truman in 1950 during the Korean War. Because the state of emergency declared by President Truman has never been terminated, his proclamation has continued to

serve as the basis for invocation of powers under the Act. Most notably, President Johnson in 1968 used Section 5(b) as authority for imposing controls over transfers of private capital to foreign countries (the "OFDI" program), In 1971, President Nixon declared a national emergency concerning the country's declining worldwide economic position and imposed an import surcharge pursuant to his authorities under the Tariff Act of 1930 and the Trade Expansion Act. More recently, in 1972 upon the expiration of the Export Administration Act, President Nixon invoked Section 5(b) as authority for continuing to restrict exports of certain commodities until Congress took action to extend the expiration date of that Act two months later. On that occasion, President Nixon cited the continued existence of the national emergencies declared in 1950 and 1971.

Based on the historical use of Section 5(b), and the declared national emergencies still in effect, the President could rely on that authority to issue an Executive Order prohibiting the importation of oil into the U.S. on foreign flag vessels except where the cost of using U.S. flag vessels exceeds the cost of using foreign flag vessels by more than X%, or where it could be demonstrated that U.S. flag vessels are not available for that purpose. This action would, in effect, amount merely to an extension of existing U.S. cargo preference requirements beyond their present applicability to shipment of publicly-financed cargoes.

ARGUMENTS PRO

- Section 5(b) is sufficiently broad to minimize the likelihood of challenges as to adequate statutory authority for this discriminatory action, particularly if the President were to forward concurrently proposed legislation to deal expressly with the "national emergency" here involved (not because of any doubt as to his authority under Section 5(b), but rather to give the Congress a participatory role in this controversial and political issue). Moreover, this authority would permit prompt administrative action by the President by eliminating the need for time-consuming hearings required under Sections 232 and 301.

- The imposition of U.S. cargo preference requirements, whether by enactment of express legislation or through executive action under the Trading with the Enemy Act, is (I understand) the approach preferred by the Maritime industry.

ARGUMENTS CON

- It should be obvious that the President would be imposing a U.S. cargo preference program which goes beyond the authority specifically provided by Congress in the present statutory cargo preference provisions. Thus, there could be challenge of his authority to use the broad authority of the Trading With the Enemy Act in order to circumvent the limitations of existing specific legislation. As noted before, however, this risk could be minimized if the President, at the time he acted under the Trading With the Enemy Act, simultaneously submitted to Congress a bill to amend the U.S. cargo preference laws to authorize expressly the emergency action taken.

- The Trading with the Enemy Act is so broad in scope that frequent use could lead to its repeal. In fact, a bill which passed the Senate last session contemplated the repeal of various emergency statutes and, although the Trading with the Enemy Act was not included in the Senate's final list of emergency statutes to be repealed, there was a clear indication that Congress had not foreclosed this possibility at some later stage.

- For the President now to propose legislation extending U.S. cargo preference programs to oil would undoubtedly resurrect the acrimony that followed veto of the cargo preference legislation last session. This reaction might, however, be countered by pointing out that the vetoed bill contained many features that were objectionable to the President, and that administrative action under other statutory authority affords him the opportunity to tailor the action to avoid such objectionable features.

- On the international side, this action would raise the same difficulties, in terms of our commitments under FCN treaties, as discussed above in connection with the use of Section 232.

- U.S. oil companies operate a large portion of their "captive" tanker fleets under foreign flags of convenience (Panama, Honduras and Liberia). The imposition of mandatory U.S. cargo preference requirements for the shipment of oil to the United States would significantly diminish their ability to use these vessels for that purpose. The result could well be a Hobson's choice between carrying these unproductive assets at great expense or, on the other hand, of putting some or all of their foreign flag vessels on the block to minimize adverse effects on current cash flow but, at the same time, at the cost of serious capital losses in view of the current depressed market for tankers worldwide.

IV. Subsidies to U.S. Flag Tankers

U.S. flag tankers are currently given operational and maintenance cost subsidies under Title 6 of the Merchant Marine Act, designed to assure cost parity with comparable foreign tankers. Such subsidies, however, do not influence decisions by U.S. importers whether or not to use U.S. flag tankers. The U.S. oil companies (which own a sizable number of tankers under foreign flags of convenience) prefer, when faced with approximately equal cost considerations, to use their own vessels to import foreign oil to the United States thereby having greater control from the standpoint of sailing schedules and itineraries. Furthermore, from the standpoint of U.S. oil importers who do not have captive fleets, as long as the cost of shipping by U.S. flag tankers is not significantly below the cost of shipping by foreign flag there is no particular incentive to use U.S. flag tankers. Thus, significant cost incentive for the use of U.S. flag tankers through a subsidy program would require amendment of Title 6 of the Merchant

Marine Act to authorize subsidy of U.S. flag tankers in excess of parity, together with requirements that the resulting economic advantages be passed on in the form of lower rates to the United States importers.

ARGUMENTS PRO

- This is the most honest and direct method of achieving the objective of encouraging use of U.S. flag tankers.
- Since the new legislation would be tailored for this purpose, it would avoid any challenge as to the legality of the action taken.
- On the international side, this would minimize international objections and certainly could not be alleged by our foreign trading partners to constitute a violation of our FCN treaties.
- Direct subsidies would allow the government to have close control over the cost of the program and if such subsidies were limited to tankers of recent vintage, it could force the sale or scrapping of inefficient, obsolete vessels and construction of more viable replacements.
- In contrast to a cargo preference program where the cost is eventually borne by the domestic oil consumer, the cost of the subsidy program would be spread evenly among all taxpayers, thereby avoiding the possibility that certain geographic areas of the United States would bear a disproportionate burden.
- From the standpoint of the President's image, it would avoid the embarrassment of appearing to have acted improvidently in vetoing the cargo preference bill last session.

ARGUMENTS CON

- The program would require new legislation with the ensuing time delay. Although the attitude of Congress would

probably not be hostile, the Maritime industry would probably find this approach less attractive than a statutory mandate of preference for U.S.-flag tankers.

- The program would require a substantial appropriation outlay, further exacerbating the already colossal budgetary deficit that is in prospect for the near term.

CONCLUSION

In assessing the relative merits of the four above options, it is clear from a legal standpoint that options I and II (waiver of import fee under Section 232 and Section 301) raise considerable legal problems. Options III and IV (U.S. Cargo preference under the Trading With the Enemy Act and Maritime subsidies to give U.S. tankers an advantage over foreign tankers) are both legally defensible, with the latter being clearly preferable from a legal standpoint. From a practical standpoint options I and II are of minimal effectiveness in that the waiver of the oil import fee may prove insufficient as an incentive for importers to use U.S. flag tankers in long haul shipments such as those originating from the Persian Gulf. Also, legal challenges could impair the viability of such a waiver and subject the President to Congressional criticism for having exceeded his statutory authority. In assessing the merits of Options III and IV, practical considerations as well as legal considerations militate in favor of option IV. The latter option allows the oil companies to make a business decision whether or not to ship on flags of convenience. Moreover, the cost of shipping on U.S. flag would be borne equally by all U.S. taxpayers rather than by U.S. oil consumers located in particular geographic areas of the United States. For these reasons, I would recommend option IV as the preferable course of action to provide relief to the U.S. tanker fleet.

Wednesday 3/26/75

5:55 Bill Seidman said they need an opinion from the Justice Department with respect to certain parts of the Trade Act.

He wants to know if it should be submitted by your office or should they do it directly?

Confirm with his office that questions should be sent to us.

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Explain with this office that questions should be sent to me.

Dudley

Justice
Weinberger v.
Wiesenfeld

April 30, 1975

To: Jay

From: Eva

As we discussed.

APR 28 1975

MEMORANDUM FOR HONORABLE PHILIP W. BUCHEN
Counsel to the President

Re: Weinberger v. Wiesenfeld.

This is in response to your memorandum to me of March 21, 1975.

We have checked with the Office of the Assistant General Counsel, Social Security, of the Department of Health, Education, and Welfare and are informed that the intent of the Social Security Administration is to notify its field offices to pay from the date of the Supreme Court decision all surviving male spouses who would but for their sex qualify for benefits under Section 202(g) of the Social Security Act of 1935, ch. 531, title II, 49 Stat. 623, as amended (42 U.S.C. § 402(g)). It is further intended that this would be followed by regulations formalizing this practice. It is the belief of the Assistant General Counsel's Office, concurred in by the Justice Department, that such action would be authorized and lawful absent any change in the statute. Nevertheless, the section should be amended so as to read in a constitutionally non-objectionable manner.

The minimum change necessary to give effect to the order of the district court, affirmed by the Supreme Court in Weinberger v. Wiesenfeld, 43 USLW 4393 (Mar. 19, 1975), is to be found at Attachment A. It should be noted, however, that this change, while extending coverage to surviving fathers, does not provide benefits to surviving divorced fathers, although the section does provide for surviving divorced mothers. Neither the district court nor the Supreme Court discussed the provision for surviving divorced mothers, but the rationale of the Supreme Court, focusing on the choice to be afforded the parent--to stay with the child or to work--suggests that the limitation of benefits to surviving divorced mothers would unconstitutionally discriminate

on the basis of gender. Changes necessary to extend benefits both to surviving fathers and surviving divorced fathers are included at Attachment B.

Your memorandum also requested an opinion as to whether any other sections of the Social Security Act should be amended in light of the Supreme Court's opinion in Weinberger v. Wiesenfeld.

The Social Security Act encompasses a wide variety of programs including Old-Age, Survivors, and Disability Insurance (OASDI); Unemployment Insurance; Aid to Families with Dependent Children (AFDC); Supplemental Security Income for Aged, Blind, and Disabled (SSI); and Medicare. Most of the gender-based discrimination, however, is found in the OASDI subchapter. These instances of discrimination are discussed in the Reports of the Advisory Council on Social Security (1975) at pages 35-44, 171-202. See Attachment C.

Section 202(c)(1)(C), (f)(1)(D) of the Act, as amended (42 U.S.C. § 402(c)(1)(C), (f)(1)(D)), requires applicants for husband's or widower's benefits to demonstrate that they were receiving at least one-half of their support from their wives. No such requirement is made of applicants for widow's or wife's benefits. They are presumed to be dependent on their husbands. Such a requirement imposed on men but not on women is almost exactly equivalent to the requirement struck down in Frontiero v. Richardson, 411 U.S. 677 (1973). There, to receive dependent fringe benefits, wives of servicemen were presumed dependent while husbands of female members of the military had to be actually dependent for over one-half of their support, see 37 U.S.C. § 401, 10 U.S.C. § 1072(2). Although there was no majority opinion, the Court held 8-1 that the requirement constituted discrimination violating the due process clause. There seems to be virtually no way to distinguish the OASDI provisions from the military provisions; and, indeed, the OASDI provisions are currently under attack in several district courts. The Advisory Council has recommended the elimination of the dependency requirement for men. It considered the possibility of requiring a dependency showing by women, but this was rejected. See Reports (1975), supra, at 39-40, 185-187.

Section 202(b)(1), (e)(1) of the Act, as amended (42 U.S.C. § 402(b)(1), (e)(1)), provides benefits not only to wives and widows, but also to divorced wives and surviving divorced wives, as defined in Section 216(d) of the Act, as amended (42 U.S.C. § 416(d)). There is no comparable provision for divorced and surviving divorced husbands. In 1971 the Advisory Council on Social Security considered extending benefits to divorced husbands and surviving divorced husbands. In deciding not so to extend the benefits, the Council stated:

> "The Council noted that the intent of the provision for paying benefits to divorced wives and widows, as expressed in the report of the Committee on Ways and Means of the House of Representatives, is to:
>
> > '. . . provide protection mainly for women who have spent their lives in marriage that are dissolved when they are far along in years--especially housewives who have not been able to work and earn social security benefit protection of their own --from loss of benefit rights.' [Citation omitted]
>
> "The Council believes it extremely unlikely that a man who is divorced would be left without any social security benefit protection, since in all likelihood he will not have been staying at home and keeping house but rather will have been working and earning his own benefit protection through his work and earnings."

Reports on the Old-Age, Survivors, and Disability Insurance and Medicare Programs, 30 (1971). In 1975, however, the Council recommended the extension of coverage to divorced and surviving divorced husbands without substantial discussion. See Reports (1975), supra, at 39. While there are distinctions between the classification here and those discussed above, it

is uncertain to what extent those distinctions would be considered legally significant. In light of this, the 1975 Advisory Council's conclusion that it would affect a negligible number of men, together with the general desire to evidence equity in the Act, might counsel inclusion of divorced husbands and surviving divorced husbands.

Section 202(e)(1)(A) of the Act, as amended (42 U.S.C. § 402(e)(1)(A)), disqualifies a widow from receiving widow's benefits if she "is . . . married." A widower, on the other hand, is disqualified if he "has . . . remarried." See 42 U.S.C. § 402(f)(1)(A). Thus, a widow may have remarried since the death of the insured individual, but so long as she is not actually married (as a result of death or divorce) at the time she applies for widow's benefits, she will qualify. If the widower ever remarries, however, he is disqualified from receiving benefits based on his first wife's earnings. It is not clear what rational purpose this classification serves, and absent one it would be unconstitutional.

As just indicated, the OASDI provisions generally provide for termination of a dependent's or dependent survivor's benefits upon the marriage of the recipient. See 42 U.S.C. § 402(b)(1)(H), (d)(1)(D), (e)(1), (f)(1), (g)(1), (h)(1). Presumably, this is based upon the assumption that the new spouse will support the recipient. An exception is generally provided, however, when one social security recipient marries another, again presumably, because it is assumed that neither will be able to support the other. See, e.g., 42 U.S.C. § 402(b)(3), (d)(5), (e)(3), (g)(3), (h)(4). Thus, when a childhood disability beneficiary marries another social security beneficiary, neither's benefits are terminated. 42 U.S.C. § 402(b)(3)(B), (d)(5)(B), (e)(3)(B), (g)(3)(B), (h)(4)(B). If, however, the childhood disability beneficiary loses his disability and thus his benefits, the spouse's benefits will be continued or terminated solely on the basis of sex. That is, if the childhood disability beneficiary were a man, the termination of his benefits would likewise terminate the benefits of his spouse, but if the recipient

of the childhood disability benefits were a woman, the loss of her disability and benefits would not affect her spouse's benefits. See 42 U.S.C. § 402(d)(5), (h)(4). Compare 42 U.S.C. § 402(b)(3), (e)(3), (g)(3) with 42 U.S.C. § 402(f)(4). This apparently is based on the presumption that if the man is no longer disabled he will be able to support the wife, whereas the fact that the wife is no longer disabled does not necessarily mean she will be able to support him.

This classification seems close to that upheld in Kahn v. Shevin, 416 U.S. 351 (1974), where the Court took notice of the reduced earning capabilities of women in finding a Florida property tax exemption for widows but not for widowers reasonable. Here the presumption underlying the differing treatment of men and women is the same as in Kahn--the general inability of women without experience in the job market to be able to earn a decent salary. This may distinguish this classification from that in Wiesenfeld which was struck down. Nevertheless, it cannotbe said with any certainty that the classification would withstand attack. The Advisory Council apparently would eliminate the distinction, see Reports (1975) at 37, 195, and a court might focus the question differently, as the Supreme Court did in Wiesenfeld in rejecting the Kahn analogy, see 43 USLW at 4397.

A gender-based classification almost the same as that just discussed involves the treatment of persons receiving social security benefits who are spouses of persons receiving disability insurance benefits pursuant to 42 U.S.C. § 423 (as opposed to disabled children's benefits). As above, if disability abates so as to eliminate the disability benefits, the spouse's benefits will terminate if the disabled person was a man but will continue in two cases if the disabled person was a woman. See 42 U S.C. § 402(d)(5), (g)(3). While the rationale here is presumably the same as above discussed, the justification in terms of the Kahn decision is undercut because the once disabled, now no longer disabled, woman has

an employment history (or else she would not have qualified for diability insurance in the first place.) In light of that history, her earnings capability may well be much better than that of the widows in Kahn or the disabled women without any employment history mentioned above. In fact, a woman with a former employment history may, with the loss of her disability, be in a better position to support her husband than the man who had been disabled sincechildhood and had no employment history. Yet his wife loses her benefits, see 42 U.S.C. § 402(b)(3), (d)(5), (e)(3), (g)(3), (h)(4) and discussion, supra, while the husband of the woman with the employment history retains his benefits. Thus, this classification on the basis of gender with regard to disability insurance is much less justified than the same classification with regard to childhood disability benefits.

The AFDC program also contains instances of sex discrimination. Section 407 of the Act, as amended (42 U.S.C. § 607), includes within the definition of a "dependent child" a needy child who has been deprived of parental support or care "by reason of the unemployment . . . of his father. . . ." AFDC is otherwise available to needy children deprived of parental support due to the death, disability, or desertion of a parent. See 42 U.S.C. § 606(a). The effect of granting AFDC benefits to a child of an "intact" family (a family where neither parent is disabled, dead, or absent from the home) only when the father is unemployed is to deny the family the choice of who shall be the breadwinner. The section is apparently grounded on the presumption that the husband would be the primary breadwinner and his unemployment would result in a deprivation of parental care. While as a general rule the presumption may be accurate, it is certainly not universally true as the facts in Wiesenfeld illustrate. Moreover, even though the husband may be the primary breadwinner, a large percentage of families today rely on the incomes of both parents to survive, and the loss of employment by the wife may as well result in a deprivation of parental support or care of the child. In addition, the extension of benefits to an intact family only when the father is unemployed leads to irrational results: one family, where the husband

is employed at a low paying job and the wife is unemployed, will be deprived of benefits, while another family with more income, from a working wife, may qualify because the husband is unemployed. Inasmuch as the purpose of AFDC is to provide for the welfare of the child, see, e.g., King v. Smith, 392 U.S. 309 (1968), it is both irrational and contrary to the purposes of the program to deny benefits to a child because the mother is the primary breadwinner. Seen in this light, Section 407 would appear to discriminate on the basis of gender in the same manner as Section 202(g), a discrimination found unconstitutional in Wiesenfeld. Equity would be achieved by rewriting the section to make the standard of eligibility one of need rather than the sex of the unemployed parent.

The Work Incentive (WIN) Program, see 42 U.S.C. §§ 602(a)(19), 630-644, contains certain discrimination on the basis of gender, again resulting from the presumption that men will be the primary breadwinners. Certain provisions, because of their relation to the unemployed fathers provision discussed above, also reflect the discrimination present in that section.

Section 433(a) of the Act, as amended (42 U.S.C. § 633(a)), establishes a priority system for allocating places in the WIN Program. The first priority is for unemployed fathers; the second priority is for mothers who volunteer for participation in the Program. The result of this classification is that men and women identically situated, e.g., an unemployed parent whose spouse is dead, disabled, or deserted, will be treated differently. The man will receive first priority for placement in the WIN Program and the woman second priority. The distinction does not appear to have any rational purpose and is not consistent with the Congressional statement of purpose, see 42 U.S.C. § 630. This priority system has in fact been declared unconstitutional by a district court, Thorn v. Richardson, 1 CCH Poverty L. Rep. ¶1405.55 (W.D. Wash. Nov. 23, 1971), but the WIN Program is still administered in accordance with the priority system.

Section 402(a)(19)(A)(vi) of the Act, as amended (42 U.S.C. § 602(a)(19)(A)(vi)), exempts mothers from the requirement of registering for the WIN Program when the family is intact and the father is registered. There is no comparable provision exempting a father from the requirement of registering if the mother is registered. So long as the AFDC benefits can only be paid to an intact family when the father is unemployed, see discussion supra with relation to Section 407 of the Act, this subsection is rational. If, however, Section 407 of the Act should be opened up to unemployed mothers as well, then this subsection would lose its rationality and should be changed.

These are apparently all the provisions in the Social Security Act which on their face discriminate on the basis of sex. Each of them is, in our opinion, vulnerable to attack on constitutional grounds if not patently unconstitutional. These provisions should, moreover, be the only ones vulnerable to attack on the grounds of sex discrimination. That is, while certain classifications which do not facially discriminate on the basis of sex do have greater impact on one sex or another, these classifications appear rationally based. While some commentators have objected to these classifications, their arguments at this point must be considered to raise issues of policy rather than law. See, e.g., Walker, Sex Discrimination in Government Benefit Programs, 23 Hastings L.J. 277 (1971); Reports (1975), supra, at 42-43.

Finally, you requested this Office to consider whether there are any other inequities in the Act which in light of the Court's decision in Wiesenfeld might be considered unconstitutional. It is our opinion that Wiesenfeld is a "sex discrimination" case, and that its opinion is directed at that type of inequity. To expand its reasoning beyond the field of sex discrimination would, we feel, be both speculative and premature. This is not to say, however, that there are not classifications in the Act which would be subject to attack on traditional grounds of equal protection. See, e.g., Reports (1975), supra, at 40-41, 179-181,

188-189. In order to respond to your other requests within a reasonable period of time, however, we have not attempted to research the other possible inequities in the Act.

Antonin Scalia
Assistant Attorney General
Office of Legal Counsel

Attachment A
(Added language underlined)

Section 202

(g) Mother's and Father's insurance benefits.

(1) The widow, widower, and every surviving divorced mother (as defined in section 416(d) of this title) of an individual who died a fully or currently insured individual, if such widow, widower, or surviving divorced mother --

(A) is not married,

(B) is not entitled to a widow's or widower's insurance benefit,

(C) is not entitled to old-age insurance benefits, or is entitled to old-age insurance benefits each of which is less than three-fourths of the primary insurance amount of such individual,

(D) has filed application for mother's and father's insurance benefits, or was entitled to wife's or husband's insurance benefits on the basis of the wages and self-employment income of such individual for the month preceding the month in which he or she died,

(E) at the time of filing such application has in his or her care a child of such individual entitled to a child's insurance benefit, and

(F) in the case of a surviving divorced mother --

(i) at the time of such individual's death (or, if such individual had a period of disability which did not end before the month in which he died, at the time such period began or at the time of such death) --

(I) she was receiving at least one-half of her support, as determined in accordance with regulations prescribed by the Secretary, from such individual, or

(II) she was receiving substantial contributions from such individual (pursuant to a written agreement), or

(III) there was a court order for substantial contributions to her support from such individual,

(ii) the child referred to in subparagraph (E) is her son, daughter, or legally adopted child, and

(iii) the benefits referred to in such subparagraph are payable on the basis of such individual's wages and self-employment income,

shall (subject to subsection (s) of this section) be entitled to a mother's and father's insurance benefits for each month, beginning with the first month after August 1950 in which he or she becomes so entitled to such insurance benefits and ending with the month preceding the first month in which any of the following occurs: no child of such deceased individual is entitled to a child's insurance benefit, such widow, widower, or surviving divorced mother becomes entitled to an old-age insurance benefit equal to or exceeding three-fourths of the primary insurance amount of such deceased individual, he or she becomes entitled to a widow's or widower's insurance benefit, he or she remarries, or he or she dies. Entitlement to such benefits shall also end, in the case of a surviving divorced mother, with the month immediately preceding the first month in which

no son, daughter, or legally adopted child of such surviving divorced mother is entitled to a child's insurance benefit on the basis of the wages and self-employment income of such deceased individual.

(2) Such mother's and father's insurance benefit for each month shall be equal to three-fourths of the primary insurance amount of such deceased individual.

(3) In the case of a widow, widower, or surviving divorced mother who marries --

(A) an individual entitled to benefits under subsection (a), (e), (f), (g), or (h) of this section, or under section 423(a) of this title, or

(B) an individual who has attained the age of eighteen and is entitled to benefits under subsection (d) of this section,

the entitlement of such widow, widower, or surviving divorced mother to benefits under this subsection shall, notwithstanding the provisions of paragraph (1) of this subsection but subject to subsection (s) of this section, not be terminated by reason of such marriage; except that, in the case of such a marriage to an individual entitled to benefits

under section 423(a) of this title or subsection (d) of this section, the preceding provisions of this paragraph shall not apply with respect to benefits for months after the last month for which such individual is entitled to such benefits under section 423(a) of this title or subsection (d) of this section unless (i) he or she ceases to be so entitled by reason of his or her death, or (ii) in the case of an individual who was entitled to benefits under section 423(a) of this title, he or she is entitled, for the month following such last month, to benefits under subsection (a) of this section.

Attachment B
(Added language underlined; deleted language lined out)

Section 202

(g) Mother's and Father's insurance benefits.

(1) the widow, widower, and every surviving divorced mother spouse (as defined in section 416(d) of this title) of an individual who died a fully or currently insured individual, if such widow, widower, or surviving divorced mother spouse --

(A) is not married,

(B) is not entitled to a widow or widower's insurance benefit,

(C) is not entitled to old-age insurance benefits, or is entitled to old-age insurance benefits each of which is less than three-fourths of the primary insurance amount of such individual,

(D) has filed application for mother's and father's insurance benefits, or was entitled to wife's or husband's insurance benefits on the basis of the wages and self-employment income of such individual for the month preceding the month in which he or she died,

(E) at the time of filing such application has in his or her care a child of such individual entitled to a child's insurance benefit, and

(F) in the case of a surviving divorced mother spouse --

(i) at the time of such individual's death (or, if such individual had a period of disability which did not end before the month in which he or she died, at the time such period began or at the time of such death)--

(I) he or she was receiving at least one-half of his or her support, as determined in accordance with regulations prescribed by the Secretary, from such individual, or

(II) he or she was receiving substantial contributions from such individual (pursuant to a written agreement), or

(III) there was a court order for substantial contributions to his or her support from such individual,

(ii) the child referred to in subparagraph (E) is his or her son, daughter, or legally adopted child, and

(iii) the benefits referred to in such subparagraph are payable on the basis of such individual's wages and self-employment income,

shall (subject to subsection (s) of this section) be entitled to a mother's and father's insurance benefit for each month, beginning with the first month after August 1950 in which he or she becomes so entitled to such insurance benefits and ending with the month preceding the first month in which any of the following occurs: no child of such deceased individual is entitled to a child's insurance benefit, such widow, widower, or surviving divorced mother spouse becomes entitled to an old-age insurance benefit equal to or exceeding three-fourths of the primary insurance amount of such deceased individual, he or she becomes entitled to a widow's or widower's insurance benefit, he or she remarries, or he or she dies. Entitlement to such benefits shall also end, in the case of a surviving divorced mother spouse, with

the month immediately preceding the first month in which no son, daughter, or legally adopted child of such surviving divorced mother spouse is entitled to a child's insurance benefit on the basis of the wages and self-employment income of such deceased individual.

(2) Such mother's and father's insurance benefit for each month shall be equal to three-fourths of the primary insurance amount of such deceased individual.

(3) In the case of a widow, widower, or surviving divorced mother spouse who marries --

(A) an individual entitled to benefits under subsection (a), (e), (f), (g), or (h) of this section, or under section 423(a) of this title, or

(B) an individual who has attained the age of eighteen and is entitled to benefits under subsection (d) of this section,

the entitlement of such widow, widower, or surviving divorced mother spouse to benefits under this subsection shall, notwithstanding the provisions of paragraph (1) of this subsection but subject to subsection (s) of this section, not be terminated by reason of such marriage; except that, in the case of such a

marriage to an individual entitled to benefits under section 423(a) of this title or subsection (d) of this section, the preceding provisions of this paragraph shall not apply with respect to benefits for months after the last month for which such individual is entitled to such benefits under section 423(a) of this title or subsection (d) of this section unless (i) he or she ceases to be so entitled by reason of his or her death, or (ii) in the case of an individual who was entitled to benefits under section 423(a) of this title, he or she is entitled, for the month following such last month, to benefits under subsection (a) of this section.

Section 416

(d) Divorced wives spouses; divorce.

(3) The term "surviving divorced mother spouse" means a woman person divorced from an individual who has died, but only if (A) she the person is the mother parent of his the individual's son or daughter, (B) she the person legally adopted his the individual's son or daughter while she the person was married to him the individual and while such son or daughter was under the age of 18, (C) he the individual legally adopted

her the person's son or dauther while she the person was married to him the individual and while such son or daughter was under the age of 18, or (D) she the person was married to him the individual at the time both of them legally adopted a child under the age of 18.

Justice
Weinberger
Wiesenfeld

THE WHITE HOUSE

WASHINGTON

March 21, 1975

reply
4/28
rec'd 4/30

MEMORANDUM FOR

The Honorable Antonin Scalia
Assistant Attorney General
Office of Legal Counsel
Department of Justice

SUBJECT: WEINBERGER v. WIESENFELD
_____U.S._____(March 19, 1975).

Would you please review the Social Security Act to determine whether in light of the above-referenced decision section 402(g) of title 42 of the U.S. Code must be amended. If an amendment is required, would your office draft the proper language.

Also, should any other sections of the Social Security Act be amended so that the entire Act will conform with the language of the Court's holding that unjustified gender-based discrimination violates the Due Process Clause of the Fifth Amendment.

Finally, would you consider whether there are any other inequities inherent in the Act which might be considered unconstitutional in light of this opinion of the Court. If there are such inequities, would you discuss any action which would remove them.

P.W.B.
Philip W. Buchen
Counsel to the President

flag carrier
flag tanker

Assistant Attorney General

Department of Justice
Washington, D.C. 20530

APR 30 1975

MEMORANDUM FOR HONORABLE PHILIP W. BUCHEN
Counsel to the President

Re: Legal Opinion on Section 232 of the Trade Expansion Act of 1962 and Section 301 of the Trade Act of 1974.

This is in response to your request for an opinion as to the possible use of Section 232 of the Trade Expansion Act of 1962, as amended (19 U.S.C. § 1862) or of Section 301 of the Trade Act of 1974, to encourage the use of American-flag tankers in the transportation of foreign petroleum to the United States.

Section 301 can be disposed of summarily. Its applicability requires (in subsection (a)(4)) "unjustifiable or unreasonable restrictions on access to supplies of . . . raw materials . . . which burden or restrict United States commerce." Even assuming that high prices (the only conceivable present restriction) could in some situations qualify under this language, to assert that they do so at present would involve the President in an obvious contradiction, for his recent actions in Proclamation 3279, as amended, pursuant to Section 232 of the Trade Expansion Act of 1962, as amended, are predicated on the finding that too much foreign petroleum is coming into the United States. To simultaneously determine that our access to foreign petroleum is unreasonably being restricted would seem impossible. Our conclusion, therefore, is that there is no legal basis for using Section 301 to encourage the use of American-flag tankers in the transportation of foreign oil.

Section 232(b) of the Trade Expansion Act of 1962, as amended (19 U.S.C. § 1862(b)), empowers the President, after determining that an article is being imported in such quantities or under such circumstances as to threaten the national security, to "take such action, and for such time

as he deems necessary to adjust the imports of such article . . . so that such imports will not so threaten the national security." While the President's powers are broad, they are limited to actions which in his view are "necessary to adjust the imports of such article." This suggests that actions not deemed necessary for that purpose are not authorized by this section. It is surely difficult to assert that the use of American-flag tankers is necessary to adjust the imports of petroleum.

Despite this limitation on the President's power under Section 232(b), it has been accepted Presidential practice, in adjusting imports of petroleum, to attack related social or political problems through the medium of the import restrictions. Thus, for example, Proclamation 3279 provided for the fair and equitable allocation of petroleum imported into the United States long before Congress passed the Emergency Petroleum Allocation Act, Pub. L. No. 93-159, Nov. 27, 1973, 87 Stat. 628 (15 U S.C. § 751 et seq.). The allocation system did not itself limit the flow of petroleum imports, which was achieved first by quotas and now by fees, but rather was used to soften the impact of such limitation upon the economy at large. Similarly, regulations encouraging the use of American-flag tankers might be justified as a means of softening the impact on the American merchant marine of the reduction in petroleum shipping revenues attributable to the import restrictions.

Moreover, even if the strict language of Section 232(b) were not interpreted to give the President power to take affirmative action for any purpose other than the adjustment of imports, it in no way prevents him, in determining how that adjustment is to be designed, from taking into account other social or political considerations. For example, Proclamation 3279, as amended, allows the Administrator to exempt, from some of the fees, petroleum which is applicable to "new, expanded, or reactivated refinery capacity." Section 4(b)(1). Thus, in effect, the President is simply not taking action with respect to certain imports under Section 232 in order to foster the creation of new refinery capacity. Even a

strict reading of the statute permits such exceptions to be made. It seems likely that a provision of this sort--amounting to Presidential nonaction rather than the use of Section 232 powers--could be designed with respect to petroleum carried on U.S. tankers. In fact, a closely comparable provision already exists in Section 3(a)(2) of Proclamation 3279, as amended, which reduces fees on finished products from Samoa, Guam, the Virgin Islands or a foreign trade zone if they are transported to the Customs territory of the United States by American-flag vessels.

We conclude, therefore, that it may be permissible to take affirmative action under Section 232 for the purpose of softening the impact of reduced petroleum importation upon American shipping; and that it is clearly permissible under the terms of that section to withhold Presidential action (by exempting from fees) for that purpose. We must note, nonetheless, that the scope of the powers conferred by Section 232 has always been regarded within the Executive branch as vulnerable to constitutional attack. The Executive has sought to use those powers in as narrow a fashion as possible in order to reduce the risk of court decisions that might invalidate the section entirely or limit its scope by interpretation to avoid the constitutional issue. Cf. Yoshida International, Inc. v. United States, 378 F. Supp. 1155 (Cust. Ct. 1974), appeal filed. Obviously, when Section 232 is used in significant degree--whether by positive Presidential action or by a scheme of exemptions--to achieve social policies apart from the mere restriction of imports, the risk is greatly increased. It seems to us this is particularly the case when the social policy relates to a matter on which attempted legislation has recently been defeated. See H.R. 8193, the U.S. Tanker Preference Bill, vetoed by the President on December 30, 1974, 11 Weekly Compilation of Presidential Documents 5-6 (1975).

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