The original documents are located in Box 31, folder "Nixon - Papers Legislation (1)" of the Philip Buchen Files at the Gerald R. Ford Presidential Library.

Nixon papers:

Legislation re

Presidential papers

THE WHITE HOUSE
WASHINGTON

Attached is the Senate bill Barry brought over

For filing in "Nixon Tapes & Documents & legislation"

[COMMITTEE PRINT NO. 1]

SEPTEMBER 24, 1974

Calendar No.

93D CONGRESS
2D SESSION

S. 4016

[Report No. 93–]

IN THE SENATE OF THE UNITED STATES

SEPTEMBER 18, 1974

Mr. NELSON (for himself, Mr. ERVIN, Mr. JAVITS, Mr. MUSKIE, Mr. HATFIELD, Mr. DOLE, Mr. MONTOYA, and Mr. STEVENSON) introduced the following bill; which was read twice and referred to the Committee on Government Operations

SEPTEMBER , 1974

Reported by Mr. ----------, with an amendment

[Strike out all after the enacting clause and insert the part printed in italic]

A BILL

To protect and preserve tape recordings of conversations involving former President Richard M. Nixon and made during his tenure as President, and for other purposes.

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 "Presidential Recordings Preservation Act".~~

~~SEC. 2. Notwithstanding any other agreement or understanding made pursuant to section 2107 of title 44, United States Code, or any other law, the Administrator of General Services shall obtain, or, as the case may be, retain, complete possession and control of all tape recordings of conversations which—~~

~~(a) involve former President Richard M. Nixon and/or other individuals who, at the time of the conversation, were employed by the Federal Government;~~

~~(b) were recorded in the White House or the Executive Office Building located in Washington, District of Columbia; and~~

~~(c) were recorded between January 20, 1969, and August 9, 1974, inclusive.~~

~~SEC. 3. None of the tape recordings referred to in section 2 above shall be destroyed except as may be provided by Congress.~~

~~SEC. 4. If a Federal court of competent jurisdiction should decide that the provisions of this Act have deprived any individual of private property without just compensation, then the Administrator is authorized to provide such compensation, from funds in the Federal treasury, as may be adjudged just by a Federal court of competent jurisdiction.~~

~~SEC. 5. The Administrator shall issue such reasonable regulations as may be necessary to assure the protection of the tape recordings referred to in section 2 above from loss, destruction, or access to unauthorized persons.~~

~~SEC. 6. The Administrator shall issue reasonable regulations governing public access to the tape recordings referred to in section 2 above. In issuing these regulations, the Administrator shall—~~

~~(a) provide that information relating to the Nation's security shall not be disclosed, except pursuant to subsection (b) below;~~

~~(b) provide that all tape recordings may be subject to court subpena or other legal process;~~

~~(c) provide that there shall be no disclosure of or access to the tape recordings, except pursuant to subsection (b) above, until the completion of all judicial proceedings wherein (i) the tape recordings may be used as evidence or (ii) an individual's right to a fair and impartial trial may be prejudiced by such disclosure or access; and~~

~~(d) provide that Richard M. Nixon, or any person(s) whom he may designate in writing, shall at all times have unrestricted access to the tape recordings for copying or any other purpose: *Provided,* That such access shall be consistent with such regulations as the Administrator may issue pursuant to section 5 above.~~

~~SEC. 7. There are authorized to be appropriated such sums as may be necessary to carry out the provisions of this Act.~~

That this Act may be cited as the "Presidential Recordings and Materials Preservation Act".

SEC. 2. (a) Notwithstanding any other agreement or understanding made pursuant to section 2107 of title 44, United

States Code, or any other law, the Administrator of General Services shall obtain, or, as the case may be, retain, complete possession and control of all tape recordings of conversations which were recorded or caused to be recorded by any officer or employee of the Federal Government and which—

(1) involve former President Richard M. Nixon and/or other individuals who, at the time of the conversation, were employed by the Federal Government;

(2) were recorded in the White House or the Executive Office Building located in Washington, District of Columbia; Camp David, Maryland; Key Biscayne, Florida; San Clemente, California; or any other place; and

(3) were recorded between January 20, 1969, and August 9, 1974, inclusive.

(b) Notwithstanding any other agreement or understanding made pursuant to section 2107 of title 44, United States Code, or any other law, the Administrator of General Services shall obtain, or as the case may be, retain, complete possession and control of all papers, documents, memorandums, and transcripts which constitute the Presidential historical materials of Richard M. Nixon as defined in section 2101 of title 44, United States Code, covering the period between January 20, 1969, and August 9, 1974, inclusive.

SEC. 3. (a) None of the tape recordings, or other mate-

rials, referred to in section 2 above shall be destroyed except as may be provided by Congress.

(b) Notwithstanding any other provision of this Act, or any other law, or any agreement or understanding made pursuant to section 2107 of title 44, United States Code, the tape recordings and materials referred to in section 2 of this Act shall, immediately upon the date of enactment of this Act, be made available for use in any judicial proceeding or otherwise subject to court subpena or other legal process: Provided, That any request by the Office of Watergate Special Prosecution Force, whether by court subpena, or other lawful process, for access to the tape recordings and materials, referred to in section 2 of this Act, shall at all times have priority over any other request for such tapes or materials.

SEC. 4. If a Federal court of competent jurisdiction should decide that the provisions of this Act have deprived any individual of private property without just compensation, then the Administrator is authorized to provide such compensation, from funds in the Federal Treasury, as may be adjudged just by a Federal court of competent jurisdiction.

SEC. 5. The Administrator shall issue such reasonable regulations as may be necessary to assure the protection of the tape recordings, and other materials, referred to in section 2 above, from loss, destruction, or access to by unauthorized persons. Custody of such tape recordings and

other materials shall be maintained in Washington, District of Columbia, except as may otherwise be necessary to carry out the provisions of this Act.

SEC. 6. The Administrator shall issue reasonable regulations governing access to the tape recordings referred to in section 2 above. In issuing these regulations, the Administrator shall—

(1) provide that information relating to the Nation's security shall not be disclosed, except pursuant to paragraph (2) below;

(2) provide that all tape recordings, and other materials, shall be made available for use in any judicial proceeding or otherwise subject to court subpena or other legal process;

(3) provide that there shall be access to the tape recordings, in addition to that provided for in paragraph (2) of this section, unless either (A) the Office of Watergate Special Prosecution Force certifies in writing that such disclosure or access is likely to impair or prejudice an individual's right to a fair and impartial trial; or (B) if a court of competent jurisdiction determines that such disclosure or access is likely to impair an individual's right to a fair and impartial trial; and

(4) provide that Richard M. Nixon, or any person whom he may designate in writing, shall at all times

have access to the tape recordings for copying or any other purpose: Provided, That such access shall be consistent with such regulations as the Administrator may issue pursuant to section 5 above.

SEC. 7. (a) The Federal District Court for the District of Columbia shall have exclusive jurisdiction to hear challenges to the legal or constitutional validity of any provision of this Act or of any regulation issued under the authority granted by this Act. Such challenge shall be heard by a three-judge court constituted under the procedures delineated in section 2284, title 28 of the United States Code, with the right of direct appeal to the United States Supreme Court. Any such challenge shall be treated by the three-judge court and the Supreme Court as a priority matter requiring immediate consideration and resolution.

(b) If, under the procedures delineated in subsection (a) above, a judicial decision is rendered that a particular provision of this Act, or a particular regulation issued under the authority granted by this Act, is unconstitutional or otherwise invalid, such decision shall not affect in any way the validity or enforcement of any other provision or regulation.

SEC. 8. There are authorized to be appropriated such sums as may be necessary to carry out the provisions of this Act.

[COMMITTEE PRINT NO. 1]

SEPTEMBER 24, 1974

Calendar No.

93D CONGRESS
2D SESSION

S. 4016

[Report No. 93–]

A BILL

To protect and preserve tape recordings of conversations involving former President Richard M. Nixon and made during his tenure as President, and for other purposes.

By Mr. NELSON, Mr. ERVIN, Mr. JAVITS, Mr. MUSKIE, Mr. HATFIELD, Mr. DOLE, Mr. MONTOYA, and Mr. STEVENSON

SEPTEMBER 18, 1974

Read twice and referred to the Committee on Government Operations

SEPTEMBER , 1974

Reported with an amendment

Tuesday 8/20/74

2:00 Bill Heckman called from the Senate Judiciary Cmte. 225-3018
on the subject of a bill pending on ownership of Presidential documents, which was introduced by Senator Bayh (S. 2951) in February.

The Senator asked him to call and see if we can get a reading on whether the administration would be able to move forward on this this fall.

Called Tom Jones in White House Records 2226
and they sent up the attached bill.

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

THE WHITE HOUSE

WASHINGTON

September 24, 1974

MEMORANDUM FOR: BILL TIMMONS

FROM: PHILLIP AREEDA PA

S. 4016 has at least the following flaws.

1. The "condemnation procedure" is of questionable constitutional validity. This issue would have to be researched at the Department of Justice.

2. To the extent that Richard Nixon has any constitutional privilege against disclosure, Congress cannot lawfully deprive him of it.

3. It is unfair to single out Nixon tapes for this procedure. The only justification for doing so is the pendency of various legal proceedings. No legislation, however, is necessary for this purpose. The legal process can adequately protect itself under existing law.

4. In no event is there any justification for general access to the Nixon tapes for all purposes. No one would propose such treatment for all papers and documents of former Presidents or of present Senators and Congressmen. It might be thought that tape recordings are unique to Nixon, but perhaps they are not. In any event, unauthorized recordings of innocent third party conversations deserve more not less protection than papers and documents generally. Unless, therefore, Congress is willing to require general access to their own documents or to those of former Presidents, it is unfair and unreasonable to enact S. 4016.

5. The bill is ambiguous as to the standard governing access for judicial purposes. The bill speaks of access through subpoena but does not indicate whether conventional standards for the issuance of compulsory process should apply.

6. The bill seems to require the disclosure to and through a court of sensitive national security information.

THE WHITE HOUSE

WASHINGTON

September 23, 1974

MEMORANDUM FOR: PHIL BUCHEN

FROM: WILLIAM E. TIMMONS BT

SUBJECT: Presidential Records

Attached is a bill, S. 4016, introduced by Senators Nelson and Ervin, relating to the disposition of the Nixon tapes and documents. I'm told this version has the best chance of approval by the committee and Senate.

Perhaps we should have some good talking points to give our friends so they can better understand the President's position, both legal and moral.

93d CONGRESS
2d SESSION

(NOTE.—Fill in all blank lines except those provided for the date, number, and reference of bill.)

S. 4016

IN THE SENATE OF THE UNITED STATES

Mr. NELSON, for himself and Mr. Ervin

introduced the following bill; which was read twice and referred to the Committee on

A BILL

(Insert title of bill here)

To protect and preserve tape recordings of conversations involving former President Richard M. Nixon and made during his tenure as President, and for other purposes.

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 "Presidential Recordings Preservation Act."

Sec. 2. Notwithstanding any other agreement or understanding made pursuant to section 2107 of title 44, United States Code, or any other law, the Administrator of General Services shall obtain, or, as the case may be, retain, complete possession and control of all tape recordings of conversations which

(a) involve former President Richard M. Nixon and/or other individuals who, at the time of the conversation, were employed by the federal government;

(b) were recorded in the White House or the Executive Office Building

September 24, 1974

Dear Mr. Chairman:

The President has asked me to reply to your second letter to him of September 17, 1974, which concerns the disposition of tapes and documents compiled by former President Nixon and currently within the custody of the Federal Government.

These materials, as you know, are the subjects of various subpoenas and court orders and of requests for disclosure by the Office of the Special Prosecutor. As a result, no further action is being taken to affect the disposition of such materials until after the issues raised by the pendency of the subpoenas, court orders, and Special Prosecutor's requests are resolved. The period of time involved in resolving such issues will of itself operate to assure adherence to the request in the second paragraph of your letter.

I shall, of course, keep you informed, if you desire, of any later developments which could lead to a change in the present situation.

Sincerely yours,

Philip W. Buchen
Counsel to the President

The Honorable William L. Hungate
Chairman, Subcommittee on Criminal Justice
Committee on the Judiciary
House of Representatives
Washington, D. C. 20515

cc: John Marsh
William Timmons

Congress of the United States
Committee on the Judiciary
House of Representatives
Washington, D.C. 20515

September 17, 1974

BT

President Gerald R. Ford
The White House
Washington, D. C.

Dear Mr. President:

As I mentioned in my letter of September 17, 1974, the Subcommittee on Criminal Justice, of which I am Chairman, has pending before it H. Res. 1367 relating to the pardon of former President Richard M. Nixon. In addition, the Subcommittee has pending before it a variety of proposals relating to the disposition of tapes and documents compiled by former President Nixon and currently within the custody of the Federal Government.

Under the circumstances, I respectfully urge that no further action be taken affecting the disposition of such materials until Congress has had sufficient time to thoroughly consider the issue.

Respectfully,

William L. Hungate

WILLIAM L. HUNGATE
Chairman
Subcommittee on Criminal Justice

WLH:rtd

September 24, 1974

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The President has asked me to reply to your second letter to him of September 17, 1974, which concerns the disposition of tapes and documents compiled by former President Nixon and currently within the custody of the Federal Government.

These materials, as you know, are the subjects of various subpoenas and court orders and of requests for disclosure by the Office of the Special Prosecutor. As a result, no further action is being taken to affect the disposition of such materials until after the issues raised by the pendency of the subpoenas, court orders, and Special Prosecutor's requests are resolved. The period of time involved in resolving such issues will of itself operate to assure adherance to the request in the second paragraph of your letter.

I shall, of course, keep you informed, if you desire, of any later developments which could lead to a change in the present situation.

Sincerely yours,

Philip W. Buchen
Counsel to the President

The Honorable William L. Hungate
Chairman, Subcommittee on Criminal Justice
Committee on the Judiciary
House of Representatives
Washington, D. C. 20515

cc: John Marsh
William Timmons

Congress of the United States
Committee on the Judiciary
House of Representatives
Washington, D.C. 20515

September 17, 1974

BT

President Gerald R. Ford
The White House
Washington, D. C.

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Under the circumstances, I respectfully urge that no further action be taken affecting the disposition of such materials until Congress has had sufficient time to thoroughly consider the issue.

Respectfully,

William L. Hungate

WILLIAM L. HUNGATE
Chairman
Subcommittee on Criminal Justice

WLH:rtd

THE WHITE HOUSE

WASHINGTON

September 30, 1974

MEMORANDUM FOR: PHIL BUCHEN

FROM: KEN LAZARUS KL

SUBJECT: S. 4016, a bill to preserve and provide access to former President Nixon's tapes and papers.

Attached are copies of: (1) Memorandum dated September 24, 1974, from Phil Areeda to Bill Timmons raising certain issues presented by the subject bill; (2) Memorandum dated September 27, 1974, to Ken Lazarus from Tom Korologos with a follow-up request; and (3) Memorandum dated September 30, 1974, from Ken Lazarus to Tom Korologos with attachments.

The upshot of all this is that we have provided the legislative affairs people with a brief in opposition to the subject bill which raises a number of constitutional issues, chief of which is the scope of Executive Privilege.

This material, which was requested by Minority Leader Scott, will be used in the Senate in an attempt to defeat the measure when it comes to the floor this week.

It is important that the President move quickly to formulate a policy on the doctrine of Executive Privilege. I have reviewed the material submitted to you in this regard and would be pleased to undertake the project.

cc: Phil Areeda
Bill Casselman

THE WHITE HOUSE

WASHINGTON

September 24, 1974

MEMORANDUM FOR: BILL TIMMONS

FROM: PHILLIP AREEDA PA

S. 4016 has at least the following flaws.

1. The "condemnation procedure" is of questionable constitutional validity. This issue would have to be researched at the Department of Justice.

2. To the extent that Richard Nixon has any constitutional privilege against disclosure, Congress cannot lawfully deprive him of it.

3. It is unfair to single out Nixon tapes for this procedure. The only justification for doing so is the pendency of various legal proceedings. No legislation, however, is necessary for this purpose. The legal process can adequately protect itself under existing law.

4. In no event is there any justification for general access to the Nixon tapes for all purposes. No one would propose such treatment for all papers and documents of former Presidents or of present Senators and Congressmen. It might be thought that tape recordings are unique to Nixon, but perhaps they are not. In any event, unauthorized recordings of innocent third party conversations deserve more not less protection than papers and documents generally. Unless, therefore, Congress is willing to require general access to their own documents or to those of former Presidents, it is unfair and unreasonable to enact S. 4016.

5. The bill is ambiguous as to the standard governing access for judicial purposes. The bill speaks of access through subpoena but does not indicate whether conventional standards for the issuance of compulsory process should apply.

6. The bill seems to require the disclosure to and through [illegible] of sensitive national security information.

THE WHITE HOUSE

WASHINGTON

September 27, 1974

MEMORANDUM FOR: KEN LAZARUS

FROM: TOM C. KOROLOGOS TK

SUBJECT: Material to Fight Tapes Bills

Attached is a list of "flaws" Areeda found with S. 4016. This is good, however, I need a fairly scholarly five page speech for Senator Hugh Scott; outlining the ex-post facto aspects of this legislation and bringing in the Nixon tapes decision from the Supreme Court of a couple months back.

I will also need a speech (different) for Senator Griffin. Any left-over material you dig out can be given to Hruska and others willing to make a fight on this.

Thanks mucho, Ken.

cc: William E. Timmons

THE WHITE HOUSE

WASHINGTON

September 30, 1974

MEMORANDUM FOR: TOM KOROLOGOS

FROM: KEN LAZARUS

SUBJECT: Material in Opposition to S. 4016

In response to your request of September 27, attached are prepared remarks for Senators Scott and Griffin and a supporting Staff Memorandum in opposition to S. 4016. The Staff Memorandum, which is a detailed brief in opposition to the subject bill, is intended for insertion in the Record as a supplement to Senator Scott's remarks. Someone from Senator Scott's staff could be identified as the author if one is needed.

It is my understanding that Senator Hruska is introducing a bill to call the hand of the proponents of S. 4016. The bill will require public access to the official documents of any elected Federal official, including Senators, and would serve only as a walking horse to refer S. 4016 to Judiciary.

I'm having another twenty copies of the memo made up. Let me know if you need any more help.

cc: William E. Timmons

S. 4016: SIX CONSTITUTIONAL ISSUES

MR. SCOTT (Pa.) Mr. President, it is anticipated that the Senate will soon proceed to a consideration of S. 4016 which was reported out of the Committee on Government Operations this past week.

S. 4016 is an apparent reaction to the agreement between the Administrator of General Services and former President Nixon regarding the title, custody, and disposition of the "historical materials" of the Nixon Administration, as defined by 44 U.S.C. §2101. Whatever one's disapprobation with the results of that agreement, any attempt to reach a different result by statute must be carefully considered, especially in light of the many and complex constitutional issues which are bound up in this area.

S. 4016 would condemn all the papers and materials which constitute the Presidential historical material of Richard Nixon as well as all tape recordings of all conversations which were caused to be recorded by a Federal officer or employee and which involve either Richard Nixon or any Federal employee between January 20, 1969 and August 9, 1974.

This bill has been conceived and processed in haste within the Government Operations Committee following the pardon of Mr. [illegible]

for all Federal crimes and his resignation in the face of probable impeachment.

There is no doubt that most of the sponsors of S. 4016 feel a sense of frustration in seeing the former President go unpunished. When the GSA-Nixon agreement as to the Presidential materials was made public, this frustration boiled over and S. 4016 is the result.

I take this opportunity not to question the sincerity or motives of my colleagues who support this measure but to raise for the consideration by all Senators of the six rather fundamental issues posed by S. 4016 which have gone unaired to date.

The first problem posed by this bill relates to the novel type of eminent domain which it contemplates. While Congress might be justified in obtaining by eminent domain those particular materials which are necessary for specific reasons of public interest, S. 4016 would authorize a wholesale taking of literary property, personal papers and the most personal of possessions of Richard Nixon as he expressed or recorded them. Included would be not only official papers, but Christmas cards, personal letters, diaries and the like. This view of eminent domain is without precedent and contemplates an unparalleled invasion of privacy.

The second issue which we must face involves one of the bob-goblins of government in recent times -- Executive Privilege.

However, in United States v. Nixon, decided on July 24th of this year, the Supreme Court recognized the existence of a constitutionally-based privilege to which we in the Congress must adhere. Unfortunately, S. 4016 does not abide by the Court's teaching in the Nixon case with respect to judicial demands for presidential materials and with respect to its provision for general public access to all the materials except national security information. In these respects, the bill appears to be designed to cater only to the gross curiosity of the public rather than Constitutional tenets.

The third issue which must be aired during the course of our deliberations on S. 4016 is its potential for inadvertent abridgement of the constitutionally guaranteed right of privacy of all persons whose conversations were the subject of the tape recordings to be condemned and made public by the bill. My reading of section 6 of the bill leads me to the conclusion that the broad delegation of authority to the Administrator of General Services to release presidential tapes provides absolutely no protection for privacy rights and thus violates the requirements for legislation in this area.

Three more issues of constitutional dimension must also be considered in responsible fashion prior to any final action on this measure. How does the bill impact upon the First Amendment right

to unfettered speech? Is it violative of former President Nixon's Fifth Amendment privilege against self-incrimination? Does the measure constitute a Bill of Attainder expressly prohibited by Article I, section 9, clause 3 of the Constitution?

For the benefit of my colleagues on both sides of the aisle who are interested in pursuing these six core issues presented by S. 4016, I submit for inclusion at this point in the Record a Staff Memorandum which discusses each of them in some detail and concludes that the subject bill simply does not pass constitutional muster.

S. 4016: "The Presidential Recordings and Materials Preservation Act."

MR. GRIFFIN. Mr. President, I share the reservations of the distinguished Minority Leader as to the questionable Constitutional footing of S. 4016.

Given the obvious and substantial issues raised by this measure, I am at a loss to comprehend the almost cavalier fashion in which this bill came to rest on the Senate calendar. Reported out of committee one week after introduction as an amendment in the nature of a substitute without the benefit of any hearings whatsoever, this measure is sure to generate far more heat than light when it is taken up for consideration on the floor of this chamber.

Surprisingly, the committee report accompanying the subject bill does not even identify any issue of constitutional dimension. Although reasonable men may disagree as to the constitutionality of various sections of S. 4016, no one ought pretend that the issues do not exist.

I for one intend to review the memorandum which my friend from Pennsylvania (Mr. Scott) has filed with some seriousness of purpose. I trust that my colleagues will do likewise. Moreover, I would hope that the proponents of S. 4016 will come forward in response to the serious issues which have been raised by the Minority Leader.

Although the floor of the Senate is not the ideal forum for initial consideration of issues of such a fundamental nature, the rush to action by the proponents of S. 4016 leaves us no alternative at the moment.

STAFF MEMORANDUM

RE: S. 4016, a bill to protect and preserve tape recordings of conversations involving former President Richard M. Nixon and made during his tenure as President, and for other purposes.

Set forth below is an analysis of the fundamental Constitutional issues raised by the above-noted bill.

I. EMINENT DOMAIN

S. 4016 would condemn all the papers and materials which constitute the Presidential historical material of Richard Nixon as defined by Title 44, U.S.C. § 2101 as well as all tape recordings of all conversations which were caused to be recorded by a Federal officer or employee and which involve either Richard Nixon or any Federal employee between January 20, 1969 and August 9, 1974.

The power of eminent domain is said to exist as an attribute of sovereignty separate from any written constitution. Boom Co. v. Patterson, 98 U.S. 403, 406 (1878). The Federal power of eminent domain, however, is limited by the grants of power in the Constitution, so that property may be taken only for the effectuation of a granted power. United States v. Gettysburg Electric Ry. Co., 160 U.S. 668, 679 (1896). This is but a recognition that the Federal government is a government of limited powers, and for property to be taken for "public use" by the Federal government, that public use must be one

within the enumerated powers of the Federal government.

Admittedly, the interpretation of "public use" for purposes of Federal condemnation has been broadly construed, United States ex rel. TVA v. Welch, 327 U.S. 546, 552 (1946), but this is only to give effect to the Necessary and Proper Clause. See Corwin, The Constitution 336 (1973). While certain "Presidential historical materials" might be justifiedly obtained by eminent domain because of a peculiarly public interest, e.g., materials necessary for the on-going functions of government, material relating to the national security, etc., S. 4016 does not attempt to distinguish between such necessary materials and other unnecessary materials. Yet the power of eminent domain as a sovereign attribute only extends to that property which is necessary to advance the government's legitimate public interest. See United States v. Lynah, 188 U.S. 445, 465 (1903).

Clearly the most personal papers of former President Nixon would not be necessary for any legitimate public use, for Presidential "historical material," as defined by 44 U.S.C. § 2101, would include not only official papers, but Christmas cards, personal letters, personal diaries, etc. Therefore, because all tapes and all Presidential historical materials are condemned by S. 4016, it would seem that the power of eminent domain is being used here, at least in part, for other than a public use. This threatens the constitutionality of the whole

bill despite the fact that the proposal contains the customary severability clause. To cure this deficiency it would appear that the condemnation of Presidential materials and tapes must be limited to those particular materials which are necessary for some specific reason.

This exercise of eminent domain in S. 4016, moreover, is of a novel type -- extending to literary property, personal papers, and the most personal of possessions, indeed the innermost thoughts of Richard Nixon as he expressed or recorded them. Not only is the subject matter of the condemnation novel, but the extent of it is unique -- extending to every scrap of paper produced in the White House, personal or official, whether existing there as a home or office, for over five years. This is without precedent and contemplates an invasion of privacy unparalleled in Congressional history.

In stark contrast to the wholesale condemnation proposed by S. 4016 is the approach used by Public Law 89-318, 79 Stat. 1185 (1965). There evidence accumulated by the Warren Commission was to be considered by the Attorney General in order to determine which particular items of evidence were necessary for the United States to retain. The items so determined were condemned, and provision was made for just compensation. This exercise of eminent domain

demonstrates a responsible and constitutional approach of condemning only that property necessary for the public use.

II. EXECUTIVE PRIVILEGE

A. Executive Privilege as a Constitutional Right.

In United States v. Nixon, ____ U.S. ____ (1974) 42 U.S.L.W. 5237, 5244 (decided July 24, 1974), the Supreme Court unanimously recognized the existence of a constitutionally based Executive Privilege.

Executive privilege may be considered to have three aspects -- first, with reference to a judicial demand for information or materials; second, with reference to a Congressional demand; and third, with reference to the public at large. Further, the judicial demand aspect may be separated into cases where the demand is for evidence relevant to a criminal trial, e.g., United States v. Nixon, supra, and cases where the demand is merely for discovery material in a civil case, e.g., Committee for Nuclear Responsibility, Inc. v. Seaborg, 463 F. 2d 788 (D.C. Cir. 1971); Nader v. Butz, 60 F.R.D. 381 (D.D.C. 1973), appeal pending. The thrust of Nixon was that in a criminal case if the evidence was indeed determined to be relevant after in camera inspection, then the privilege would be defeated. In Seaborg, however, a civil case,

the in camera inspection was merely to determine if the privilege was rightfully claimed, in which case the material would remain confidential and the privilege would be upheld.

Congressional demands for material also may fall into two categories. The first would be a normal committee request, demand, or subpoena for material which may be rejected on the basis of Executive Privilege where it is deemed by the President that the production of such material would be detrimental to the functioning of the Executive Branch. This at least has been the consistent practice by practically every administration and acceded to by Congress. This should be contrasted with a demand for material pursuant to an impeachment inquiry, which some presidents have acknowledged would require production of any and all executive material. See e. g., Washington's statement, 5 Annals of Congress 710-12 (1796). Finally, there is the demand by statute for general public access to information. This last is the situation presented by S. 4016.

The analysis of the different situations in which Executive Privilege may be invoked and its differing weight and treatment is instructive, for it, not surprisingly, reveals that the more particularized and the more compelling the demand for material is, the less weight Executive Privilege has. Thus, in Nixon, the Court acknowledged that

a general claim of privilege depends "on the broad, undifferentiated claim of public interest in the confidentiality of such conversations. . .," 42 U.S.L.W. at 5244, and it was for that reason that the privilege would fail against a showing of particularized need in a criminal trial. The importance of that public interest in confidentiality, nevertheless, was emphasized. "The privilege is fundamental to the operation of government and inextricably rooted in the separation of powers under the Constitution. /citing cases/." Id. at 5245. The conclusion, therefore, is clear that absent such a particularized need for evidence in a criminal trial, the public interest in fostering free and frank discussion, by protecting it with confidentiality, would serve to sustain a claim of Executive Privilege. The device of in camera inspection reflects this understanding. Yet S. 4016 would jettison this acknowledged public interest and authorize general public access to all presidential conversations without any showing of need for that access, particularized or otherwise.

B. Disclosure of Privileged Material.

S. 4016 contemplates that former President Nixon's presidential tapes and materials shall be made available "for use in any judicial proceeding or otherwise subject to court subpoena or other legal process." (Section 3(b)). Moreover, Section 6 of the Bill directs the

Administrator to issue regulations governing access to the tapes so as to authorize him to allow general public access to each and every Presidential conversation recorded between 1969 and 1974 with but three restrictions -- if national security is involved, if the Special Prosecutor determines that an individual's right to a fair and impartial trial will be prejudiced, or if a court determines that a person's right to a fair and impartial trial would be prejudiced.

The scheme envisaged by S. 4016, therefore, would in effect reverse both United States v. Nixon, supra, and Committee for Nuclear Responsibility, Inc. v. Seaborg, supra. This is so first because Section 3(b) directs that materials simply "shall . . . be made available for use in any judicial proceeding. . . . " No provision is made for in camera inspection which the Court required in both Nixon and Seaborg. In fact the clear intent of the language is to do away with that judicially derived requirement. The decision in Nixon, however, is constitutionally based, and the requirement of an in camera inspection is the result of a careful balancing of competing constitutional interests. 42 U.S.L.W. at 5244-45. This careful balancing is destroyed by S. 4016, and instead all material subpoenaed or otherwise shall be made available. Not only does S. 4016 eliminate the constitutional balancing the Supreme Court required in criminal cases, but it also repudiates the decision in Seaborg, a civil case.

In Seaborg the District of Columbia Circuit acknowledged the importance of confidentiality in contributing substantially to the effectiveness of government decision-making. 463 F. 2d at 792. Thus, a demand for materials in discovery proceedings would not defeat Executive Privilege, rather the court would inspect the material to see if the privilege was rightfully invoked. If it was, then the material would not be produced, even if relevant. See Committee for Nuclear Responsibility, Inc. v. Seaborg, 463 F. 2d 796, 799 (D. C. Cir. 1971). Thus, S. 4016 not only eliminates the need for in camera inspection, but more importantly it overrules the holding that material for which Executive Privilege is rightfully claimed is indeed privileged from production in a civil case. Again S. 4016 attempts to overrule a judicial, constitutional decision by statute.

What S. 4016 does to violate Executive Privilege vis-a-vis judicial demands for presidential materials, however, is minor compared to its provision for general public access to all the materials except national security information. To give authority to the Administrator to allow general public access would be to negate Executive Pribilege altogether with no concomitant public interest being served in its stead, rather catering only to the gross curiosity

of the public. To open all the most personal aspects of any person's life to the public for no legitimate reason is a violation of privacy if nothing else, but when that person is also a President it is a most virulent attack on the Separation of Powers.

In United States v. Nixon, supra, the Supreme Court unanimously held that presidential communications are "presumptively privileged."

* * *

> "The expectation of a President to the confidentiality of his conversations and correspondence, like the claim of confidentiality of judicial deliberations, for example, has all the values to which we accord deference for the privacy of all citizens and added to those values the necessity for protection of the public interest in candid, objective, and even blunt or harsh opinions in presidential decision-making. A President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately. These are the considerations justifying a presumptive privilege for presidential communications. 42 U.S.L.W. at 5245.

* * *

The effect of the presumption is to give the privilege effect until it is challenged by a particularized demand for certain materials. Only then is the presumption overcome. S. 4016's general authority for public access, however, ignores the presumption and provides no opportunity for the invocation of the privilege. In short, the

constitutionally based privilege, acknowledged by the Supreme Court and given effect by lower courts, is to be eliminated by a mere statute. Because executive privilege is constitutionally based, however, it is not subject to repeal or restriction by statutes. Rather statutes must themselves conform to the constitutional right of Executive Privilege.

Even commentators who have expressed a very circumscribed view of Executive Privilege, for example, Raoul Berger, have never suggested that Congress has the power to make each and every presidential paper and conversation public, willy-nilly without regard to the confidences upon which many such conversations and papers were based. Rather, these commentators have merely expressed the opinion that calls by Congress for particular materials necessary for its consideration of legislation or by the judiciary for relevant evidence have a higher public interest than the executive's generalized need for confidential communications. This weighing of the conflicting public interests is precisely the approach that was utilized in Senate Select Committee v. Nixon, 370 F. Supp. 521, 522 (D. D. C. 1974). See also Nixon v. Sirica, 487 F. 2d 700, 716-18 (D. C. Cir. 1973). And it was recognized in Senate Select Committee v. Nixon, 370 F. Supp. at 524, that even Congress' right to demand information by subpoena is limited

to proceedings in aid of its legislative function. The conclusion to be drawn, therefore, from both the cases and the commentators is that there is no authority for Congress to require the publication of all presidential papers and conversations. Such an action would violate the Doctrine of Separation of Powers and render the President but a servant of Congress.

The United States Court of Appeals for the District of Columbia circuit recognized this full well in Nixon v. Sirica, 487 F. 2d at 715;

* * *

> We acknowledge that wholesale public access to Executive deliberations and documents would cripple the Executive as a co-equal branch.

* * *

Such could be the result of S. 4016, and for that reason it is of extremely dubious Constitutional validity.

C. Former Presidents' Rights to Invoke Executive Privilege.

The question may be raised whether a former President has the authority to invoke Executive Privilege for materials generated during his presidency, but the rationale behind Executive Privilege and the interest it serves compels the answer that a former President may indeed invoke Executive Privilege in the same manner as a sitting

President. This is so because the public interest in the confidentiality of executive discussions requires that those discussions remain confidential indefinitely, not to be publicized as soon as the President leaves office, for if these discussions were to become public after the President leaves office, future discussions with future Presidents would ever after be chilled by the knowledge that within at least eight years those discussions could be public. Viewed another way, the invocation of Executive Privilege is not so much to protect the content of the particular discussions demanded as it is to protect the expectation of confidentiality which enables future discussions to be free and frank. That expectation of confidentiality would be destroyed, and the public interest which it serves with it, if the mere leaving of office would destroy that confidentiality. As early as 1846 this principle was recognized and honored by President Polk. Richardson, Messages and Papers of the Presidents, Vol. IV, 433-34.

Harry S. Truman in 1953, having returned to private life, was subpoenaed by a House committee to testify concerning matters that transpired while he was in office. Refusing by letter, he explained that to subject former Presidents to inquiries into their acts while President would violate the separation of powers.

* * *

> It must be obvious to you that if the doctrine of separation of powers and the independence of the Presidency is to have any validity at all, it must be equally applicable to a President after his term of office has expired when he is sought to be examined with respect to any acts occuring while he is President.
>
> The doctrine would be shattered, and the President, contrary to our fundamental theory of constitutional government, would become a mere arm of the Legislative Branch of the Government if he would feel during his term of office that his every act might be subject to official inquiry and possible distortion for political purposes.

* * *

The House committee accepted the letter and did not attempt to enforce the subpoena, indicating perhaps its concurrence with President Truman's claim of privilege.

D. Custody as an Element of the Privilege.

The above discussion has dealt with the constitutional violation of Executive Privilege committed by the disclosure provisions of S. 4016. In addition, however, serious constitutional questions are raised by the mere custody provisions set forth in the bill. That is, while it is clear that Executive Privilege limits the ability of Congress or courts to <u>disclose</u> presidential materials, it may also be that Executive Privilege extends to attempts merely to wrest custody of privileged materials from a President or former President even with supposed safeguards against their disclosure.

There are no cases on point or examples of similar actions to answer this question, but the policy considerations are telling to support a claim that privileged materials cannot even be wrested from the custody of the President unless and until a court has determined that they may at least be examined in camera.

The policy served by Executive Privilege is advanced most effectively by maintaining the custody of the privileged materials in the person entrusted with the right of asserting that privilege, for without custody he is unable to insure that attempts to gain access to privileged material will be resisted or tested by the courts. Thus, separation of custody from the person responsible for safeguarding the confidentiality of the materials separates the function from the responsibility for it in violation of the most elementary laws of management efficiency. The President or former President is the one individual with the interest in assuring continuing confidentiality; the Administrator has no such interest and therefore is not the proper person to maintain custody. Moreover, the President is the person with the knowledge of what needs to be maintained as confidential and what not.

All these considerations suggest that the President or former President should retain custody of the privileged materials, and that

a statute which wrests this privileged material completely from his control violates the Separation of Powers by removing executive material from the executive and by undermining the privilege by separating the custodian of the materials from the defender of the privilege.

III. RIGHT OF PRIVACY

Section 6 of S. 4016 presents another constitutional issue. It would result in an abridgement of the constitutionally guaranteed right of privacy with respect to all persons whose conversations were the subject of the tape recordings to be condemned and made public by the bill.

Section 6 of the bill gives to the Administrator authority to release the tape recordings to the public subject to only three restrictions. These restrictions are: (1) "information relating to the Nation's security shall not be disclosed" (section 6(1)); (2) there shall be no release if "the Office of Watergate Special Prosecution Force certifies in writing that such disclosure or access is likely to impair or prejudice an individual's right to a fair and impartial trial" (section 6(3)(A)); and (3) there shall be no release "if a court of competent jurisdiction determines that such disclosure or access is likely to impair an individual's right to a fair and impartial trial" (section 6(3)(B)).

None of these restrictions serves to protect the right to privacy. Thus, we have virtually unchecked authority in the Administrator to release the tapes. As discussed below, (1) there is a privacy interest in the tapes which is recognized by the courts as constitutionally protected; (2) when Congress legislates so that such a fundamental constitutional right may be affected, it must utilize the narrowest of means to achieve its objectives and cannot leave the protection of the rights to the unrestricted discretion of others; and (3) this bill represents a broad and unchecked grant of authority affecting a fundamental right and therefore is constitutionally impermissible.

A. Right to Privacy -- a constitutional right.

There is a right to privacy which has been recognized by the courts in many contexts. Thus, it has been found in the First Amendment, NAACP v. Alabama, 357 U.S. 449 (1958), in the Fourth Amendment, Weeks v. United States, 232 U.S. 383 (1914); Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920); Katz v. United States, 389 U.S.347 (1967), in the Fourth and Fifth Amendments, Boyd v. United States, 116 U.S. 616 (1886), in the Ninth Amendment, Griswold v. Connecticut, 381 U.S. 479 (1965). (Goldberg, J., concurring), and under a penumbra of the First, Third, Fourth and Fifth Amendments, Griswold v. Connecticut, 391 U.S. 479 (1965). See, generally, Roe v. Wade, 310 U.S. 113, 152-53 (1973).

Concerning the specific material covered by Section 6 of the bill -- the tapes -- it is clear from the language of the Supreme Court that the conversations of the persons recorded on the tapes are the type of material encompassed by the right of privacy. In Katz, supra, the Court stressed that the expectations of persons define the limits of the protection afforded by the Fourth Amendment.

* * *

> "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. . . . But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." Katz v. United States, 389 U.S. at 351-52 (citations omitted).

* * *

It is clear that all persons whose conversations were recorded expected that their conversations would not be made public. Most of those who discussed matters in the executive office were actually unaware that their conversations were being recorded, and as to those who were aware, even they believed that the recordings would be protected from public exposure.

In Boyd v. United States, supra, the Court gave a sweeping definition of the protection afforded under the combined coverage of the Fourth and Fifth Amendments which it derived from the discussion by Lord Camden in Entick v. Carrington and Three Other King's Messengers, 19 Howell's State Trials 1029 (1765).

* * *

"The principles laid down in this opinion affect the very essence of constitutional liberty and security. They reach farther than the concrete form of the case there before the court with its adventitious circumstances; they apply to all invasions on the part of the government and its employes of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty and private property, where that right has not been forfeited by his conviction of some public offense, -- it is the invasion of his sacred right which underlies and constitutes the essence of Lord Camden's judgment. Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods, is within the condemnation of that judgement. In this regard the Fourth and Fifth Amendments run almost into each other." 116 U.S. at 630 (emphasis added).

* * *

The making public of the taped conversations of men who believed their confidences were secure would also be a "forcible and compulsory extortion of a man's own testimony", and equally abhorrent to the principles of the Fourth and Fifth Amendments.

The bill's forced disclosure of the tapes dictates another "invasion on the part of the government" into "the privacies of life." The essence of the passage quoted above is that the Fourth and Fifth

Amendments protect privacy, and it is the unwarranted interference with that privacy which constitutes the gravamen of the offense, not the particular manner in which the invasion is accomplished or the form in which the privacy interest appears. It would be equally abhorrent for the Congress to order a general invasion of the privacy of the conversations of persons in the executive offices as it was for the King's Messengers, utilizing a general warrant, to invade the privacy of a man's home.

B. Limits on Congressional Regulation of Constitutionally Protected Freedom.

As is demonstrated above, the right to privacy is a constitutionally protected freedom. From that follows certain consequences when Congress proposes to take action that may affect that freedom.

* * *

> "When certain 'fundamental rights' are involved, the Court held that regulation limiting these rights may be justified only by a 'compelling state interest,' . . . and that legislative enactments must be narrowly drawn to express only legitimate state interests at stake." Roe v. Wade, 410 U.S. 113, 155 (1973) (citations omitted).

* * *

Although the Court speaks of "state" interests, this applies equally to Congress legislating in the federal area. Aptheker v. Secretary of State, 378 U.S. 500, 507-09 (1964).

It should be noted that whether the right of privacy derives from the First Amendment, United States v. Robel, 389 U.S. 258 (1967); NAACP v. Alabama, 377 U.S. 288 (1964); NAACP v. Button, 371 U.S. 415 (1963); the Fourth Amendment, Sanford v. Texas, 379 U.S. 476 (1965); Weeks v. United States, 232 U.S. 383 (1914); the Fifth Amendment, Aptheker v. Secretary of State, 378 U.S. 500 (1964); the Ninth Amendment or a penumbra of the Amendments, Roe v. Wade, 410 U.S. 113 (1973); Griswold v. Connecticut, 381 U.S. 479 (1965); the result is the same -- it must be carefully protected against overbroad assertions of authority.

The limitation imposed may be expressed as a restriction of Congressional action to "narrowly drawn" statutes, Roe v. Wade, supra, or it may be an attack on unfettered discretion bestowed on others. Kunz v. New York, 340 U.S. 290 (1951); Cantwell v. Connecticut, 310 U.S. 296 (1940). Cf. Stanford v. Texas, 379 U.S. 476 (1965); Weeks v. United States, 232 U.S. 383 (1914).

The lesson of all these cases is clear. Fundamental rights are too precious to have their protection left to the unfettered discretion of public officials. The emphasis placed on this rule is illustrated by Katz v. United States, 389 U.S. 347 (1967), where a search (electronic listening device attached to telephone booth) by law

enforcement officers was held improper because there was no judicial restraint imposed, even though the conduct did not exceed that which would have been permitted under judicial authorization.

C. Section 6 of S. 4016 is Constitutionally Infirm.

From part A of this discussion we see that there is a constitutionally protected privacy interest in the tapes. In part B it was shown that where such a constitutionally protected interest is present, there are certain limitations imposed on legislation. Thus, there may be interference with the privacy right only in the case of a "compelling interest," and the statute must be drawn in the narrowest manner that will further that interest. Delegations of authority must be carefully circumscribed so that the protection of the right is not left to the mercy of the unfettered discretion of a public official. Section 6 fails to meet any of these requirements.

There is first the question of what "compelling" interest is asserted to justify this intrusion into the privacy of the subjects of the tapes. No interest is asserted in the bill. If the interest is that of increasing public knowledge of the events that transpired in the executive offices, then that would not suffice to overcome the privacy interest. See E. P. A. v. Mink, 410 U. S. 73, 87 (1973), and cases cited therein, regarding the protection of executive discussions.

This brings us to the second point, that whatever valid interests

are to be served can be achieved only by a statute that has a narrower focus. Thus if there are valid needs for the information, for example, as evidence in a criminal proceeding, a valid statute could be drawn with that limitation. In fact, it would appear that release in that case would be available regardless of the existence of a statute. See United States v. Nixon, ____ U. S. ____ (1974), 42 U. S. L. W. 5237 (decided July 24, 1974); Nixon v. Sirica, 487 F. 2d 700 (D. C. Cir. 1973). If public information is the goal of the statute then there is already a more narrowly drawn statute on the books. See The Freedom of Information Act, 5 U. S. C. § 552.

Finally, is the requirement of a carefully circumscribed range of discretion. However, the bill as it is written vests almost completely unbridled discretion in the Administrator of General Services to release the tapes. This delegation of authority provides absolutely no protection for privacy rights and thus violates the final requirement for legislation in this area.

IV. FIRST AMENDMENT RIGHTS

It is submitted that the right to unfettered speech is not lost as a consequence of election to high government office. No one would deny a President's right to speak freely in public debate.

Equally as crucial to the principle of free speech as public advocacy is the private formulation of political thought and perspective. This is a process of experiment and development. It is a process of trial and error, in the course of which discussion with intimates and friends often plays an integral part. See United States v. Nixon, 42 U.S.L.W. at 5245 & n. 17.

It has been long recognized that enforced public exposure of such inherently private aspects of "free speech" has a stifling effect. Courts have not ruled on a First Amendment challenge to forced revelation of the unedited stream of individual's comments, public and private for an extended period of time. They have, however, dealt with what must be considered the less severe intrusion of an attempt to discover a simple list of the persons who belong to a political organization. In doing so, they have found the privacy of political association indispensable to the viability of the system of free thought and speech established under our Constitution. NAACP v. Alabama, 375 U.S. 449 (1958).

* * *

> "It is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute as effective a restraint on freedom of association as the forms of governmental action upon the particular constitutional rights there involved. This Court has recognized the vital relationship between freedom to associate and privacy in one's association. " /375 U.S. at 462/ See also Shelton v. Tucker, 364 U.S. 479 (1960).

* * *

As stated by Justice Brennan, ". . . inhibition as well as prohibition against the exercise of precious First Amendment rights is a power denied to government." Lamont v. Postmaster General, 381 U.S. 301, 309 (1965). The same principle must be applied to legislative attempts to monitor any man's daily political expression. Cf. Eastern Railroad Presidents Conf. v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961). The "chilling effect" of the knowledge that every political utterance or writing, whether tentative or experimental, will be exposed to public scrutiny would be an intolerable inhibition upon any man's thought and political development.

Yet this would be precisely the effect of S. 4016. It seeks to obtain and make available to the public the voluntarily-kept, daily record of a man's tenure in the Presidency. Were the subject anyone other than the former President, were the times any other than these, the extent to which such a scheme undermines the free thought and speech protected by the First Amendment would be obvious.

While the theory that every thought of the man occupying the White House is legitimate public business has initial appeal, it is at war with the fact that development of presidential political thought develops no differently from that of any man and is inhibited by the same factors.

The electorate has the right, and indeed the political duty, to monitor the conduct of public officials. It is a duty, however, to monitor the decision made, not the option considered. There is nothing in the Constitution, or in the political theory which it embodies, which argues that officialdom must live in a goldfish bowl. Cf. E.P.A. v. Mink, 410 U.S. 73 (1973); Carl Zeiss Stiftung. v. V.E.B. Carl Zeiss, Jena, 40 F.R.D. 318 (D.D.C. 1966). Rather it is anticipated that those elected to public office will develop and modify their political beliefs and understandings in the same manner as private citizens, that is, through both public debate and private conference.

Although in the case of executive officials the constitutional interest guaranteed by the First Amendment is similar to that encompassed by the term "Executive Privilege," and the two in this context are complementary, it is separable in both root and application. While Executive Privilege has its foundation in practical necessity, behind it rests the more general personal right of the chief executive

as an individual to think and talk freely among his intimates. Knowledge that notes and tape recordings made for personal use can, by whatever means, be condemned and published will inevitably stunt this process. A President as much as any man is guaranteed freedom from such constraint. As stated by Judge Learned Hand,

* * *

> /The First Amendment/ presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have stated upon it our all. United States v. Associated Press (52 F. Supp. 362, 372 (S. D. N. Y., 1943).

* * *

To the extent that evidence of criminal wrongdoing is suspected, the Constitution provides formal judicial mechanisms for the discovery of relevant material. United States v. Nixon, supra. If legislative investigation is in order, relevant material can there too be obtained. But the wholesale acquisition of a man's tape recordings and notes, for the simple satisfaction of public curiosity, however great, is inimical to the First Amendment's guarantees. While the material sought is of unusual interest to the public, it is not, and was not when compiled, public property. If it can be taken from any man for the purposes of public dissemination, it can be taken from every man. If it can be taken from a former President, our system

of political development through free expression is stifled at precisely the point at which it is supposed to culminate.

V. FIFTH AMENDMENT

Although President Ford pardoned Richard Nixon for all crimes committed during Mr. Nixon's tenure as President, the President's pardon power under Art. II, § 2 runs only to "offenses against the United States." Thus, Mr. Nixon remains subject to state criminal prosecution for any crime committed during his tenure as President. For example, allegations have been publically aired, although they are as yet unsubstantiated, that the former President was involved in criminal conspiracy and tax evasion punishable under California law.

To the extent that the publication of information involuntarily obtained under the proposed bill will place in the hands of state officials evidence which might tend to incriminate the former President, severe Fifth Amendment questions are raised.

"Whenever the Court is confronted with the question of a compelled disclosure that has an incriminating potential, the judicial scrutiny in invariably a close one." California v. Byers, 402 U.S. 424, 427 (1971). Since the Fifth Amendment protects an individual not only against compelled self-incriminatory testimony but also against compelled disclosure of potentially incriminatory private papers,

Boyd v. United States, 116 U S. 616 (1886), those questions are raised here.

The Supreme Court has held unconstitutional requirements that individuals report potentially incriminating information to the government. Marchetti v. United States, 390 U.S. 47 (1968); Grosso v. United States, 390 U.S. 62 (1968); Haynes v. United States, 390 U.S. 85 (1968). The government, of course, has various legitimate needs for private information, and it can, under proper circumstances, require its submission. Constitutionality under the Fifth Amendment, however, requires that the reporting or disclosure requirement not be aimed at a "highly selective group inherently suspect of criminal activities." California v. Byers, supra, at 430. See also Albertson v. SACB, 382 U.S. 70 (1965). The mechanism the government chooses for attaining involuntary disclosure is, of course, essentially irrelevant to the Fifth Amendment interest involved, so the fact that S. 4016 contemplates condemnation and then public disclosure as opposed to the means used in the cited cases is not important.

With regard to S. 4016, the bill could not be more narrowly confined in terms of selectively. It is aimed at and solely applicable to one man -- Richard Nixon.

While most of the cases cited above have involved narrow requests for specific information within certain defined areas, the constitutional infirmity of such statutes is surely not removed by

providing that the information forcibly obtained by the government be all encompassing. The problems with such a bill addressed to a single "suspect" individual are augmented rather than decreased.

The extreme breadth of the information sought by S. 4016 renders this bill the type of government fishing expedition which the Fifth Amendment privilege against self-incrimination was originally designed to protect against.

VI. BILL OF ATTAINDER

Article I, Section 9, clause 3, of the Constitution states that no bills of attainder shall be passed. This express prohibition on the power of the federal government to enact statutes has been broadly interpreted by the courts. Thus, in Ex parte Garland, 4 Wall. (71 U.S.) 33 (1867), the Supreme Court struck down a statute which required that attorneys take an oath that they had taken no part in the Confederate rebellion against the United States before they could practice in federal courts. The Court found that "exclusion from any of the professions or any of the ordinary avocations of life for past conduct can be regarded in no other light than as punishment for such conduct." Id. at 377. In United States v. Lovett, 328 U.S. 303 (1946), the Court struck down a rider to an appropriations act which forbade

the payment of any compensation to three named persons then holding office by executive appointment.

What these cases have in common with each other and with S. 4016 is the use of law-making powers to punish without a trial an individual or small groups of individuals for certain conduct. What constitutes punishment is to be liberally interpreted to effect the remedial purpose of the bill of attainder clause in the Constitution. Thus, denying the ability to practice law before federal courts was punishment, as was withholding person's salaries.

On its face, S. 4016 may not demonstrate a punishing purpose, but such was also true of the statute in Garland. Yet no one can deny the punishing effect of S. 4016. The punishment meted out is the baring of Mr. Nixon's most personal papers and conversations to public scrutiny and ridicule. Indeed, in terms of the suffering it will cause, the effect of such punishment seems much greater than that of merely forbidding a lawyer from practicing law before the federal courts, forcing federal employees to find a new job, or forbidding Communists from holding union office, see United States v. Brown, 381 U.S. 437 (1965). In any case, the damage to reputation and earning capacity is a cognizable effect of the punishment, and are acknowledged as evidence of punishment by the Court. United States v. Lovett, 328 U.S. at 314.

No doubt the sponsors of S. 4016 are able to recite supposed legitimate bases for the bill, but again each of the laws struck down by the Supreme Court as bills of attainder were defended on the basis that they were exercises of legitimate regulatory powers and not bills of attainder. The Court, however, looked beyond the self-serving justifications for the laws to the motive and underlying purpose of Congress. In each case the Court found an environment where legislation was conceived with specific persons or groups in mind, which persons were felt both to have committed horrible acts, and who had escaped punishment for such acts.

The fact that this treatment is visited solely upon former President Nixon, where whatever justification for the publication of his papers exists as to him exists equally as to other public officials, including Congressmen, is evidence of its individual, punitive aspect. Indeed, specifically designating an individual as an object of supposedly regulatory legislation is one of the indications of a bill of attainder. See United States v. Brown, 381 U.S. at 447.

Thus, the passage of S. 4016 in this climate would raise serious questions as to its legitimate purpose and would instead subject it to attack as a bill of attainder.

VII. CONCLUSION

S. 4016, which was conceived and developed in haste following the pardon of Mr. Nixon, is fraught with a number of substantial Constitutional infirmities. The bill is of extremely dubious validity.