The original documents are located in Box 32, folder "Nixon - Papers Saxbe Opinion re Ownership" of the Philip Buchen Files at the Gerald R. Ford Presidential Library.

THE WHITE HOUSE

Re Pardon

For Mr. Buchen

Originals mostly!

9/4/74 Jaworski ltr to Buchen re length of delay (see Jaworski file)

9/6/74 Ltr to Sampson signed by Nixon
Acceptance by Sampson

Orig 9/6/74 Ltr to Pres. from atty Gen Saxbe attaching opinion

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.

PWB copy

Draft/8/29/74

DRAFT OF PROPOSED LETTER FOR PRESIDENT
TO SEND ATTORNEY GENERAL

Dear Mr. Attorney General:

By this letter, I am requesting your legal opinion concerning papers and other historical materials prepared and maintained in the White House office during the Administration of former President Richard M. Nixon and still located in the Executive Office Building or in the White House.

We have been advised that certain of the items involved are required by former President Nixon in order that he may complete the task of complying with the subpoena directed to him in connection with the pending case of United States v. Mitchell, et al, which is presently set for trial on September 30, 1974. We are further advised that certain items will be needed by former President Nixon for other purposes relating to that case, wherein he has been subpoenaed as a witness, and for other litigation now pending or in contemplation.

I would like your advice concerning the ownership of these materials; the obligation of the Government to deliver

them to former President Nixon at his request; [the right of the Government to examine them for evidence of criminal wrongdoing;] and the obligations of the Government with respect to subpoenas or court orders heretofore or hereafter issued pertaining to them.

Sincerely,

I. Ownership of the Materials.

Beginning with George Washington, every President of the United States has regarded all the papers and historical materials—/ which accumulated in the White House during his administration, of a private or official nature, as his own property.—/ In Folsom v. Marsh, 9 Fed. Case 342, 2 Story 100, 108-109 (D.C. D. Mass 1841), Mr. Justice Story, while sitting in circuit, held that President Washington's letters, including his official correspondence,—/ were his private property which he could bequeath, which his estate could alienate, and in which the purchaser could acquire a copyright.

—/The term "historical materials" is used here as it is defined in 44 U.S.C. 2101 to cover:

> "books, correspondence, documents, papers, pamphlets, works of art, models, pictures, photographs, plats, maps, films, motion pictures, sound recordings, and other objects or materials having historical or commemorative value."

—/Statement of Dr. Grover, Archivist of the United States, during the House Hearings on the Joint Resolution of August 12, 1955, supra, To Provide for the Acceptance and Maintenance of Presidential Libraries, and for Other Purposes. Hearing before a Special Subcommittee of the Committee on Government Operations, House of Representatives, 84th Cong., 1st Sess., on H.J. Res. 330, H.J. Res. 331, and H.J. Res. 332 (hereafter referrred to as 1955 Hearings), pp. 28, 45.

—/The official documents involved in that case were:

Letters addressed by Washington, as commander-in-chief, to the President of Congress.

Official letters to governors of States and speakers of legislative bodies.

Circular letters.

General orders.

Communications (official) addressed as President to his Cabinet.

Letter accepting the command of the army, on the expected war with France. 2 Story, at 104-105.

A classic exposition and explanation of the status of Presidential papers, private and official, was set forth by President Taft in a lecture presented several years after he had left the White House:

> "The office of the President is not a recording office. The vast amount of correspondence that goes through it, signed either by the President or his secretaries, does not become the property or a record of the government unless it goes on to the official files of the department to which it may be addressed. The President takes with him all the correspondence, original and copies, carried on during his administration. Taft, The Presidency, pp. 30-31 (1914). [Emphasis supplied.]

It is true that section 507 of the Federal Records Act of 1950, 64 Stat. 587, the predecessor to the Joint Resolution of August 12, 1955, 69 Stat. 695 (now codified in 44 U.S.C. 2101, 2107 and 2108) seemed to distinguish between official and personal papers of a President (compare subsection (a) dealing with the records of an agency with subsection (e) relating to the personal papers of a President). A memorandum prepared in the Office of the Assistant Solicitor General (now Office of Legal Counsel) on April 6, 1951, on the subject of the President's papers, indicated that such a distinction was inconsistent with historic precedents, and that the dichotomy would be difficult if not impossible to effectuate.

In any case, the 1955 Joint Resolution, which serves as the permanent basis of the Presidential Library system, clearly rejects the distinction and proceeds on the premise that a President has title to all the documents and historical materials--whether personal or official--which accumulate in the White House during his incumbency.

This appears first from the omission of the word "personal" from 44 U.S.C. 2107(a), the equivalent to section 507(e) of the 1950 Federal Records Act of 1950. Thus, the current law covers the deposit of all Presidential papers, not only personal ones. Second, during the debate on the Joint Resolution on the floor of the House, Congressman Moss, who was in charge of the bill, expressly stated:

> "Four. Finally, it should be remembered that presidential papers belong to the President, and that they have increased tremendously in volume in the past 25 or 30 years. It is no longer possible for a President to take his papers home with him and care for them properly. It is no accident that the last three Presidents--Hoover, F.D. Roosevelt, and Harry Truman--have had to make special provisions through the means of the presidential library to take care of their papers." 101 Cong. Rec. 9935. [Emphasis supplied.]

So far as we are aware, no members of Congress disagreed.

Finally, the hearings on the Joint Resolution before a Special Subcommittee of the House Committee on Government Operations indicate full congressional awareness that all Presidential papers are the private property of the President. 1955 Hearings, pp. 12, 20, 28, 32, 52, 54, 58.

The most recent discussion concerning ownership of Presidential papers appears in the report prepared by the staff of the Joint Committee on Internal Revenue Taxation involving the examination of President Nixon's tax returns. H.Rept. 93-966. The report pointed to the practice of Presidents since Washington of treating their papers, both private and official, as their personal property; and to the congressional ratification of the practice in the 1955 library legislation. It concluded that the historical precedents, taken together with the provisions of the Presidential

Libraries Act, indicated that the papers of President Nixon should be considered his personal property.

II. Disposition of Materials Subject to Court Orders and Subpoenas.

Even though the government is merely the custodian and not the owner of the subject materials, it can properly be subjected to court directives relating to them. The Federal Rules of Criminal Procedure authorize the courts, upon motion of a defendant, to order the Government to permit access to papers and other objects "which are within the possession, custody or control of of the government . . . . " Fed. R. Crim. P. 16(b). A similar provision is applicable with regard to discovery in civil cases involving material within the "possession, custody or control" of a party (including the Government). Fed. R. Civ. P. 34(a). In addition, in both criminal and civil cases, a subpoena may be issued directing a person to produce documents or objects which are within his possession, but which belong to another person. Fed. R. Crim. P. 17(c); Fed. R. Civ. P. 45(b). See, e.g., Couch v. United States, 409 U.S. 322 (1973); Schwimmer v. United States, 232 F.2d 855, 860 (8th Cir., 1956), cert. denied, 352 U.S. 833; United States v. Re, 313 F.Supp. 442, 449 (S.D. N.Y.1970).

The question arises as to the status of court orders or subpoenas issued before former President Nixon resigned his position. With respect to those directed against the United States there is no question of continued applicability, since

the United States remains in custody of the materials in question. [With respect to the subpoena that issued in United States v. Nixon, ___ U.S. ___, if any portions of that subpoena remain uncomplied with the answer is far less clear. Prior to the adoption of Fed. R. Civ. P _____, the rule was that a law suit against a government official would not continue in effect against his successor in office, and that a substitution of parties would be necessary (cite of cases). There is no such curative statute with respect to subpoenas, which are presumably no less personal than party status in a law suit. On the other hand, we are aware of no case law on the subject, and it is possible that ruling on the precise issue in modern times without restrictive case precedent a court might reach the contrary conclusion. This is particularly the case with respect to a subpoena as well publicized as one directed to the President of the United States. On balance, we are inclined to believe that the old subpoena would not be effective, but until the matter is definitively resolved it would be wise to assure the retention of materials responsive to that earlier subpoena. (During the period of such retention, former President Nixon and his representatives would have to be allowed access to the materials, with appropriate safeguards against removal.)]

We conclude, therefore, that those portions of the documents and materials in question which are the subject of court orders or subpoenas issued before August 9 and addressed to the United States or to Richard M. Nixon, President of the United States, must be treated and disposed of in accordance with the terms of those orders or subpoenas. Such obligation would supersede any demand by President Nixon for return of the materials subject to those orders or subpoenas, though he would, of course, be able to petition the appropriate courts to substitute orders and subpoenas directed to him, so that the materials might be returned to his control. He would also be able to challenge the validity of these orders and subpoenas on constitutional or other grounds. See, e.g., Schwimmer v. United States, supra, 232 F.2d at 861.

Keep

Optional Paragraph, end of PART II.

The foregoing conclusions would be altered if the Government were not the custodian of the materials in question. This would be the case if the materials were contained in offices provided to the former President pursuant to the Presidential Transition Act of 1963. In that event, the United States in our view would be no more subject to court orders or subpoenas with respect to the documents in question than would the owner of an office building be subject to a subpoena with respect to materials contained in the premises of one of his tenants. We do not understand, however, that the materials are preserved in premises that are subject to the exclusive and unrestricted use of the former President, which in our view makes it clear that the Presidential Transition Act is not the basis of the present arrangement.

Go back to Part I

III. Disposition of Materials not Subject to Court Orders or Subpoenas.

Those portions of the materials which are not subject to court order or subpoena, being the property of former President Nixon, should generally speaking be disposed of according to his instructions. These materials are, however, affected by public interest which may justify subjecting the absolute ownership rights of the ex-President to certain limitations directly related to the character of the documents as records of government activity. Thus, in Folsom v. Marsh, supra, Mr. Justice Story stated the following:

> "In respect to official letters, addressed to the government, or any of its departments, by public officers, so far as the right of the government extends, from principles of public policy, to withhold them from publication, or to give them publicity, there may be a just ground of distinction. It may be doubtful, whether any public officer is at liberty to publish them, at least, in the same age, when secrecy may be required by the public exigencies, without the sanction of the government. On the other hand, from the nature of the public service, or the character of the documents, embracing historical, military, or diplomatic information, it may be the right, and even the duty, of the government, to give them publicity, even against the will of the writers."

It was recognition of this limitation on private use of private papers containing government information which caused President Truman to omit "certain material" from his memoirs on the grounds of national security. Harry S. Truman, Memoirs, Vol. I, Year of Decisions, p. x. Upon the death of Franklin D. Roosevelt during the closing months of World War II, despite the accepted view that all White House papers belonged

to the President and evolved to his estate, some of the papers dealing with prosecution of the War (theso-called "Map Room Papers") were kept by President Truman in "protective custody" for security reasons until December 1946. Matter of Roosevelt, 190 Misc. 34, 344, 73 N.Y.S. 821, 825 (1947), Eighth Annual Report of the Archivist of the United States as to the Franklin D. Roosevelt Library (1947), p. 1. Because of these historical precedents, and almost from the necessity of the matter, we would conclude that there might be withheld from immediate possession of former President Nixon any materials currently needed for operation of the Government and any materials which the President might deem it essential to preserve in federal custody for national security reasons.

Beyond possible limitations of this sort upon the property right of the ex-President, limitations deriving from the very nature of the documents as records of government activitiy, it is our opinion that the Government has no right to examine the documents without court order, or to withhold them from the former President against his wishes. More specifically, it would not in our view be proper for the Government to search the materials without court authorization for evidence of a crime. While the United States may make custodial or caretaking inspections of the property of another temporarily in its custody, Harris v. United States, 390 U.S. 234 (1968), Cady v. Dombrowski, 413 U.S. 433 (1972), it may not undertake a search for evidence of a crime without a warrant unless the property was seized or otherwise acquired in the course of a criminal investigation, Preston v. United States, 376 U.S. 364 (1946). To the extent that the

materials in question may be relevant to further criminal investigation, they may, of course, be subjected to further subpoenas by the Special Prosecutor.

As to the place of custody of the materials: Pending a request by former President Nixon for their return, the materials may be kept in their present location. They may also be removed to other safe locations subject to Government control, unless a condition of the custody of which we have not been advised would require their retention in their present locations. In the latter event, removal to new locations could still be achieved by advising former President Nixon of the Government's unwillingness to continue custody unless this is permitted.

Some question exists as to the ability of the Government to continue its custody with the permission of former President Nixon indefinitely, without any appropriations for that purpose under the Presidential Transition Act, _____, and without any donation of the materials or expression of intention to donate the materials under the Presidential Archives Act, 44 U.S.C. § 2101-08. The public interest in the documents alluded to above, however, would seem to justify dedication of government facilities to this purpose for a reasonable period.

Draft/8/29/74

DRAFT OF PROPOSED LETTER FOR PRESIDENT
TO SEND ATTORNEY GENERAL

Dear Mr. Attorney General:

By this letter, I am requesting your legal opinion concerning papers and other historical materials prepared and maintained in the White House office during the Administration of former President Richard M. Nixon and still located in the Executive Office Building or in the White House.

We have been advised that certain of the items involved are required by former President Nixon in order that he may complete the task of complying with the subpoena directed to him in connection with the pending case of United States v. Mitchell, et al, which is presently set for trial on September 30, 1974. We are further advised that certain items will be needed by former President Nixon for other purposes relating to that case, wherein he has been subpoenaed as a witness, and for other litigation now pending or in contemplation.

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them to former President Nixon at his request; [the right of the Government to examine them for evidence of criminal wrongdoing;] and the obligations of the Government with respect to subpoenas or court orders heretofore or hereafter issued pertaining to them.

Sincerely,

I. Ownership of the Materials.

Beginning with George Washington, every President of the United States has regarded all the papers and historical materials[1] which accumulated in the White House during his administration, of a private or official nature, as his own property.[2] In Folsom v. Marsh, 9 Fed. Case 342, 2 Story 100, 108-109 (D.C. D. Mass 1841), Mr. Justice Story, while sitting in circuit, held that President Washington's letters, including his official correspondence,[3] were his private property which he could bequeath, which his estate could alienate, and in which the purchaser could acquire a copyright.

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[2] Statement of Dr. Grover, Archivist of the United States, during the House Hearings on the Joint Resolution of August 12, 1955, supra, To Provide for the Acceptance and Maintenance of Presidential Libraries, and for Other Purposes. Hearing before a Special Subcommittee of the Committee on Government Operations, House of Representatives, 84th Cong., 1st Sess., on H.J. Res. 330, H.J. Res. 331, and H.J. Res. 332 (hereafter referrred to as 1955 Hearings), pp. 28, 45.

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> "Four. Finally, it should be remembered that presidential papers belong to the President, and that they have increased tremendously in volume in the past 25 or 30 years. It is no longer possible for a President to take his papers home with him and care for them properly. It is no accident that the last three Presidents--Hoover, F.D. Roosevelt, and Harry Truman--have had to make special provisions through the means of the presidential library to take care of their papers." 101 Cong. Rec. 9935. [Emphasis supplied.]

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Libraries Act, indicated that the papers of President Nixon should be considered his personal property.

II. Disposition of Materials Subject to Court Orders and Subpoenas.

Even though the government is merely the custodian and not the owner of the subject materials, it can properly be subjected to court directives relating to them. The Federal Rules of Criminal Procedure authorize the courts, upon motion of a defendant, to order the Government to permit access to papers and other objects "which are within the possession, custody or control of of the government . . . . " Fed. R. Crim. P. 16(b). A similar provision is applicable with regard to discovery in civil cases involving material within the "possession, custody or control" of a party (including the Government). Fed. R. Civ. P. 34(a). In addition, in both criminal and civil cases, a subpoena may be issued directing a person to produce documents or objects which are within his possession, but which belong to another person. Fed. R. Crim. P. 17(c); Fed. R. Civ. P. 45(b). See, e.g., Couch v. United States, 409 U.S. 322 (1973); Schwimmer v. United States, 232 F.2d 855, 860 (8th Cir., 1956), cert. denied, 352 U.S. 833; United States v. Re, 313 F.Supp. 442, 449 (S.D. N.Y.1970).

The question arises as to the status of court orders or subpoenas issued before former President Nixon resigned his position. With respect to those directed against the United States there is no question of continued applicability, since

the United States remains in custody of the materials in question. With respect to the subpoena that issued in United States v. Nixon, ___ U.S. ___, if any portions of that subpoena remain uncomplied with the answer is far less clear. Prior to the adoption of Fed. R. Civ. P _____, the rule was that a law suit against a government official would not continue in effect against his successor in office, and that a substitution of parties would be necessary (cite of cases). There is no such curative statute with respect to subpoenas, which are presumably no less personal than party status in a law suit. On the other hand, we are aware of no case law on the subject, and it is possible that ruling on the precise issue in modern times without restrictive case precedent a court might reach the contrary conclusion. This is particularly the case with respect to a subpoena as well publicized as one directed to the President of the United States. On balance, we are inclined to believe that the old subpoena would not be effective, but until the matter is definitively resolved it would be wise to assure the retention of materials responsive to that earlier subpoena. (During the period of such retention, former President Nixon and his representatives would have to be allowed access to the materials, with appropriate safeguards against removal.)

We conclude, therefore, that those portions of the documents and materials in question which are the subject of court orders or subpoenas issued before August 9 and addressed to the United States or to Richard M. Nixon, President of the United States, must be treated and disposed of in accordance with the terms of those orders or subpoenas. Such obligation would supersede any demand by President Nixon for return of the materials subject to those orders or subpoenas, though he would, of course, be able to petition the appropriate courts to substitute orders and subpoenas directed to him, so that the materials might be returned to his control. He would also be able to challenge the validity of these orders and subpoenas on constitutional or other grounds. See, e.g., Schwimmer v. United States, supra, 232 F.2d at 861.

Optional Paragraph, end of PART II.

The foregoing conclusions would be altered if the Government were not the custodian of the materials in question. This would be the case if the materials were contained in offices provided to the former President pursuant to the Presidential Transition Act of 1963. In that event, the United States in our view would be no more subject to court orders or subpoenas with respect to the documents in question than would the owner of an office building be subject to a subpoena with respect to materials contained in the premises of one of his tenants. We do not understand, however, that the materials are preserved in premises that are subject to the exclusive and unrestricted use of the former President, which in our view makes it clear that the Presidential Transition Act is not the basis of the present arrangement.

III. Disposition of Materials not Subject to Court Orders or Subpoenas.

Those portions of the materials which are not subject to court order or subpoena, being the property of former President Nixon, should generally speaking be disposed of according to his instructions. These materials are, however, affected by public interest which may justify subjecting the absolute ownership rights of the ex-President to certain limitations directly related to the character of the documents as records of government activity. Thus, in Folsom v. Marsh, supra, Mr. Justice Story stated the following:

> "In respect to official letters, addressed to the government, or any of its departments, by public officers, so far as the right of the government extends, from principles of public policy, to withhold them from publication, or to give them publicity, there may be a just ground of distinction. It may be doubtful, whether any public officer is at liberty to publish them, at least, in the same age, when secrecy may be required by the public exigencies, without the sanction of the government. On the other hand, from the nature of the public service, or the character of the documents, embracing historical, military, or diplomatic information, it may be the right, and even the duty, of the government, to give them publicity, even against the will of the writers."

It was recognition of this limitation on private use of private papers containing government information which caused President Truman to omit "certain material" from his memoirs on the grounds of national security. Harry S. Truman, Memoirs, Vol. I, Year of Decisions, p. x. Upon the death of Franklin D. Roosevelt during the closing months of World War II, despite the accepted view that all White House papers belonged

to the President and evolved to his estate, some of the papers dealing with prosecution of the War (theso-called "Map Room Papers") were kept by President Truman in "protective custody" for security reasons until December 1946. Matter of Roosevelt, 190 Misc. 34, 344, 73 N.Y.S. 821, 825 (1947), Eighth Annual Report of the Archivist of the United States as to the Franklin D. Roosevelt Library (1947), p. 1. Because of these historical precedents, and almost from the necessity of the matter, we would conclude that there might be withheld from immediate possession of former President Nixon any materials currently needed for operation of the Government and any materials which the President might deem it essential to preserve in federal custody for national security reasons.

Beyond possible limitations of this sort upon the property right of the ex-President, limitations deriving from the very nature of the documents as records of government activitiy, it is our opinion that the Government has no right to examine the documents without court order, or to withhold them from the former President against his wishes. More specifically, it would not in our view be proper for the Government to search the materials without court authorization for evidence of a crime. While the United States may make custodial or caretaking inspections of the property of another temporarily in its custody, Harris v. United States, 390 U.S. 234 (1968), Cady v. Dombrowski, 413 U.S. 433 (1972), it may not undertake a search for evidence of a crime without a warrant unless the property was seized or otherwise acquired in the course of a criminal investigation, Preston v. United States, 376 U.S. 364 (1946). To the extent that the

materials in question may be relevant to further criminal investigation, they may, of course, be subjected to further subpoenas by the Special Prosecutor.

As to the place of custody of the materials: Pending a request by former President Nixon for their return, the materials may be kept in their present location. They may also be removed to other safe locations subject to Government control, unless a condition of the custody of which we have not been advised would require their retention in their present locations. In the latter event, removal to new locations could still be achieved by advising former President Nixon of the Government's unwillingness to continue custody unless this is permitted.

Some question exists as to the ability of the Government to continue its custody with the permission of former President Nixon indefinitely, without any appropriations for that purpose under the Presidential Transition Act, _____, and without any donation of the materials or expression of intention to donate the materials under the Presidential Archives Act, 44 U.S.C. § 2101-08. The public interest in the documents alluded to above, however, would seem to justify dedication of government facilities to this purpose for a reasonable period.

REDRAFT/AS/dp
8/31/74

Dear Mr. President:

You have requested my opinion concerning those papers and other historical materials prepared in or transmitted to theWhite House Office during the administration of former President Richard M. Nixon and still located in the Executive Office Building or in the White House. You have inquired concerning the ownership of such materials and the obligations of the Government with respect to subpoenas and court orders addressed to the United States or its officers pertaining to them.

To conclude that such materials are not the property of former President Nixon would be to reverse the almost unvaried understanding of all three branches of the Government since the beginning of the Republic, and to call into question the practices of our Presidents since the earliest times. According to testimony of the Archivist of the United States in 1955, every President of the United States beginning with George Washington had regarded all the papers and historical materials which accumulated in the White House during his administration, whether of a private or official nature, as his own property.1/

1/ Statement of Dr. Wayne C. Grover, Archivist of the United States, during the House Hearings on the Joint Resolution of August 12, 1955, 69 Stat. 695, To Provide for the Acceptance and Maintenance of Presidential Libraries, and for Other Purposes (now codified in 44 U.S.C. 2101, 2107 and 2108; hereinafter referred to as the "Presidential Libraries Act"). Hearing before a Special Subcommittee of the Committee on Government Operations, House of Representatives, 84th Cong., 1st Sess., on H.J. Res. 330, H.J. Res. 331, and H.J.Res. 332 (hereafter referred to as 1955 Hearings), pp. 28, 45.

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A classic exposition and explanation of the status of Presidential papers, private and official, was set forth by President Taft in a lecture presented several years after he had left the White House:

> "The office of the President is not a recording office. The vast amount of correspondence that goes through it, signed either by the President or his secretaries, does not become the property or a record of the government unless it goes on to the official files of the department to which it may be addressed. The President takes with him all the correspondence, original and copies, carried on during his administration. Taft, The Presidency, pp. 30-31 (1914).

It is true that section 507 of the Federal Records Act of 1950, 64 Stat. 587, the predecessor to the Presidential

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> Circular letters.
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> Letter accepting the command of the army, on our expected war with France." 2 Story at 104-105.

The clear holding on the property point (Id. at 108-09) is arguably later converted to dictum by Justice Story's indication, in connection with another issue that copyright violation with respect to the official documents did not have to be established in order to maintain the suit (Id. at 114).

Libraries Act seemed to distinguish between official and private papers of a President (compare subsection (a), dealing with the records of an agency, with subsection (e), relating to the "personal" papers of a President).[3/] A memorandum prepared in the Office of the Assistant Solicitor General (now Office of Legal Counsel) on April 6, 1951, on the subject of the President's papers, indicated that such a distinction was inconsistent with historic precedents, and that the dichotomy would be difficult if not impossible to maintain.

In any case, the 1955 Presidential Libraries Act, which serves as the permanent basis of the Presidential Library system, clearly rejects the distinction and must reasonably be regarded to proceed on the premise that a President has title to all the documents and historical materials--whether personal or official--which accumulate in the White House during his incumbency. This appears first from the omission of the word "personal" from 44 U.S.C. 2107(1), the equivalent to section 507(e) of the Federal Records Act of 1950. Thus, the current law covers the deposit of all Presidential materials, not only personal ones. During the debate on the Joint

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3/ The conclusion that this language is intended to make such a distinction seems preferable but is perhaps not inevitable. The Staff Report prepared by the Joint Committee on Internal Revenue Taxation concerning former President Nixon's tax returns draws precisely the opposite conclusion, citing the 1950 Act as evidence of Presidential ownership of all White House materials. H. Rept. 93-966, pp. 28-29. This interpretation evidently assumes that the word ~~"found"~~ "personal" was prefixed to the phrase "Presidential papers" not as a qualifier but merely to emphasize Presidential ownership.

Resolution on the floor of the House, Congressman Moss, who was in charge of the bill, expressly stated:

> "Four. Finally, it should be remembered that presidential papers belong to the President, and that they have increased tremendously in volume in the past 25 or 30 years. It is no longer possible for a President to take his papers home with him and care for them properly. It is no accident that the last three Presidents--Hoover, F. D. Roosevelt, and Harry Truman--have had to make special provisions through the means of the presidential library to take care of their papers." 101 Cong. Rec. 9935.

NO ¶ ← The legislative history of the Act reflects no disagreement with this position on the part of any member of the Congress. The hearings before a Special Subcommittee of the House Committee on Government Operations indicate full congressional awareness of the Act's assumption that all Presidential papers are the private property of the President. 1955 Hearings, pp. 12, 20, 28, 32, 52, 54, 58.

The most recent discussion concerning ownership of Presidential materials appears in the report prepared by the staff of the Joint Committee on Internal Revenue Taxation involving the examination of President Nixon's tax returns. H. Rept. 93-966. The report pointed to the practice of Presidents since Washington of treating their papers, both private and official, as their personal property; and to the congressional ratification of the practice in the 1955 library legislation. It concluded (pp. 28-29) that "the historical precedents taken together with the provisions of the Presidential Libraries Act, suggest that the papers of President Nixon are considered his personal property rather than public property."

One of the objections sometimes raised to Presidential ownership of all White House materials is Article II, section 1, clause 7 of the Constitution, which provides:

> "The President shall, at stated times, receive for his services a compensation, which shall neither be increased nor diminished during the period for which he shall have been elected, and he shall not receive within that period any other emolument from the United States, or any of them."

An objection based upon this provision is circular, except insofar as it applies to the blank typing paper and materials upon which the Presidential records are inscribed. For the records themselves are given to the President as an "emolument" only if one assumes that they are not the property of the President from the very moment of their creation. As to the blank typing paper and materials, their value is of course negligible. In any event, the Constitutional provision can simply not be interpreted with the degree of literalness that the argument requires. An eminent authority on the subject, Edward S. Corwin, states the following:

> "As a matter of fact the President enjoys many more 'emoluments' from the United States than the 'compensation' which he receives at 'stated times'-- at least, what most people would reckon to be emoluments." Corwin, The President, note 53, p. 348.

He gives as examples of such additional emoluments provided by the Congress the use of personal secretaries and the right to reside in the White House. Id. at 348-49.

Another common objection to Presidential ownership of the materials in question is based upon their character as public documents, often secret and sometimes necessary for the continued operation of government. Without speaking to

the desirability of the established property rule (and there is presently pending in the Congress legislation which would apparently alter it--S. 2951, "A Bill to Provide for Public Ownership of Certain Documents of Elected Public Officials"), I may point out that accommodation of such concerns can be achieved whether or not ownership of the materials in question rests with the former President. It has consistently been acknowledged that Presidential materials are peculiarly affected by a public interest which may justify subjecting the absolute ownership rights of the ex-President to certain limitations directly related to the character of the documents as records of government activity. Thus, in Folsom v. Marsh, supra, Mr. Justice Story stated the following:

> "In respect to official letters, addressed to the government, or any of its departments, by public officers, so far as the right of the government extends, from principles of public policy, to withhold them from publication, or to give them publicity, there may be a just ground of distinction. It may be doubtful, whether any public officer is at liberty to publish them, at least, in the same age, when secrecy may be required by the public exigencies, without the sanction of the government. On the other hand, from the nature of the public service, or the character of the documents, embracing historical, military, or diplomatic information, it may be the right, and even the duty, of the government, to give them publicity, even against the will of the writers."

That portion of the Criminal Code dealing with the transmission or loss of nation security information, 18 U.S.C. § 793, obviously applies to Presidential papers even when they are within the possession of the former President.[4/]

[4/] Section 11 of Executive Order 11652 makes explicit provision for declassification of Presidential material that has been deposited in the Archives.

09 ← Upon the death of Franklin D. Roosevelt during the closing months of World War II, with full acceptance of the traditional view that all White House papers belonged to the President and devolved to his estate, some of the papers dealing with prosecution of the War (the so-called "Map Room Papers") were retained by President Truman under a theory of "protective custody" until December 1946. Matter of Roosevelt, 190 Misc. 34, 344, 73 N.Y.S. 821, 825 (1947), Eighth Annual Report of the Archivist of the United States as to the Franklin D. Roosevelt Library (1947), p. 1. Thus, regardless of whether this is the best way to approach the problem, both precedent and logic demonstrate that the governmental interests arising because of the peculiar nature of these materials, (notably, any need to protect national security information and any need for continued use of certain documents in the process of government) can be protected in full conformity with the theory of ownership on the part of the ex-President.

Because the principle of Presidential ownership of White House materials has been acknowledged by all three branches of the Government from the earliest times; because that principle does not violate any provision of the Constitution or contravene any existing statute; and because that principle is not inconsistent with adequate protection of the interests of the United States; I conclude that the papers and materials in question were the property of Richard M. Nixon when his term of office ended. Any inference that the former President abandoned his ownership by leaving the materials in the White House and the Executive Office Building is eliminated by a memorandum to the White House staff from Jerry H. Jones, Special Assistant to President Nixon, dated the day of his resignation, asserting that "the files of the White House Office belong to the President in whose Administration they were accumulated," and setting forth instructions with respect to the treatment of such materials until they can be collected and disposed of according to the ex-President's wishes.

I conclude, therefore, that these materials are the property of former President Nixon, in your personal custody; in my view, it is lawful and appropriate, because of the special governmental interest in these materials, to accept such custody for a reasonable time. You may, of course, delegate custody to a responsible subordinate officer in the White House. You may also transfer custody to the Administrator of General Services, pursuant to 44 U.S.C. § 2107. This provision clearly contemplates the deposit of

papers and other historical materials without an accompanying transfer of title to the United States. Compare section 2107 ("the Administrator of General Services . . . may accept for deposit . . . papers and other historical materials of a President or former President") with section 2108 ("the Administrator of General Services . . . may accept . . . land, buildings, and equipment offered as a gift . . . and take title"). See also H.Rep. No. 998, 84th Cong., 1st Sess., p. 4. I would also advise that any transfer to the custody of an individual not a part of the White House staff, or to any location outside of the White House and Executive Office Building, should not be effected without the consent of former President Nixon.

Finally, as to the obligations of the Government with respect to subpoenas and court orders, heretofore or hereafter directed to the Government or its officials with respect to the subject materials: Even though the Government is merely the custodian and not the owner, it can properly be subjected to court directives relating to the materials. The Federal Rules of Criminal Procedure authorize the courts, upon motion of a defendant, to order the Government to permit access to papers and other objects "which are within the possession, custody or control of the government . . . . " Fed. R. Crim. P. 16(b). A similar provision is applicable with regard to discovery in civil cases involving material within the"possession, custody or control" of a party (including the Government). Fed. R. Civ. P. 34(a). In addition, in both criminal and civil cases, a subpoena may be issued directing a person to

produce documents or objects which are within his possession, but which belong to another person. Fed. R. Crim. P. 17(c); Fed. R. Civ. P. 45(b). See, e.g., Couch v. United States, 409 U.S. 322 (1973); Schwimmer v. United States, 232 F.2d 855, 860 (8th Cir., 1956), cert. denied, 352 U.S. 833; United States v. Re, 313 F.Supp. 442, 449 (S.D. N.Y. 1970). I advise you, therefore, that documents heretofore or hereafter subpoenaed from the Government or its custodial officials included within the subject materials must be produced; and that none of the materials can be moved or otherwise disposed of contrary to the provisions of any court order against the Government or its custodial officials pertaining to them.

The foregoing advise is subject, of course, to any timely defense or objection effectively raised by either the owner of the materials or the Government against the subpoena or order

REDRAFT/AS/dp
8/31/74

Dear Mr. President:

You have requested my opinion concerning those papers and other historical materials prepared in or transmitted to theWhite House Office during the administration of former President Richard M. Nixon and still located in the Executive Office Building or in the White House. You have inquired concerning the ownership of such materials and the obligations of the Government with respect to subpoenas and court orders addressed to the United States or its officers pertaining to them.

To conclude that such materials are not the property of former President Nixon would be to reverse the almost unvaried understanding of all three branches of the Government since the beginning of the Republic, and to call into question the practices of our Presidents since the earliest times. According to testimony of the Archivist of the United States in 1955, every President of the United States beginning with George Washington had regarded all the papers and historical materials which accumulated in the White House during his administration, whether of a private or official nature, as his own property.1/

1/Statement of Dr. Wayne C. Grover, Archivist of the United States, during the House Hearings on the Joint Resolution of August 12, 1955, 69 Stat. 695, To Provide for the Acceptance and Maintenance of Presidential Libraries, and for Other Purposes (now codified in 44 U.S.C. 2101, 2107 and 2108; hereinafter referred to as the "Presidential Libraries Act"). Hearing before a Special Subcommittee of the Committee on Government Operations, House of Representatives, 84th Cong., 1st Sess., on H.J. Res. 330, H.J. Res. 331, and H.J.Res. 332 (hereafter referred to as 1955 Hearings), pp. 28, 45.

In Folsom v. Marsh, 9 Fed Case 342, 2 Story 100, 108-109 (D.C. D. Mass 1841), Mr. Justice Story, while sitting in circuit, found that President Washington's letters, including his official correspondence,[2] were his private property which he could bequeath, which his estate could alienate, and in which the purchaser could acquire a copyright.

A classic exposition and explanation of the status of Presidential papers, private and official, was set forth by President Taft in a lecture presented several years after he had left the White House:

> "The office of the President is not a recording office. The vast amount of correspondence that goes through it, signed either by the President or his secretaries, does not become the property or a record of the government unless it goes on to the official files of the department to which it may be addressed. The President takes with him all the correspondence, original and copies, carried on during his administration. Taft, The Presidency, pp. 30-31 (1914).

It is true that section 507 of the Federal Records Act of 1950, 64 Stat. 587, the predecessor to the Presidential

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[2] The official documents involved in the case were:

> "Letters addressed by Washington, as commander-in chief, to the President of Congress.
> Official letters to governors of States and speakers of legislative bodies.
> Circular letters.
> General orders.
> Communications (officially addressed as President to his Cabinet).
> Letter accepting the command of the army, on our expected war with France." 2 Story at 104-105.

The clear holding on the property point (Id. at 108-09) is arguably subsequently converted to dictum by Justice Story's later indication, in connection with another issue that copyright violation with respect to the official documents did not have to be established in order to maintain the suit (Id. at 114).

Libraries Act seemed to distinguish between official and private papers of a President (compare subsection (a), dealing with the records of an agency, with subsection (e), relating to the "personal" papers of a President).[3/] A memorandum prepared in the Office of the Assistant Solicitor General (now Office of Legal Counsel) on April 6, 1951, on the subject of the President's papers, indicated that such a distinction was inconsistent with historic precedents, and that the dichotomy would be difficult if not impossible to maintain.

In any case, the 1955 Presidential Libraries Act, which serves as the permanent basis of the Presidential Library system, clearly rejects the distinction and must reasonably be regarded to proceed on the premise that a President has title to all the documents and historical materials--whether personal or official--which accumulate in the White House during his incumbency. This appears first from the omission of the word "personal" from 44 U.S.C. 2107(1), the equivalent to section 507(e) of the Federal Records Act of 1950. Thus, the current law covers the deposit of all Presidential materials, not only personal ones. During the debate on the Joint

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Resolution on the floor of the House, Congressman Moss, who was in charge of the bill, expressly stated:

> "Four. Finally, it should be remembered that presidential papers belong to the President, and that they have increased tremendously in volume in the past 25 or 30 years. It is no longer possible for a President to take his papers home with him and care for them properly. It is no accident that the last three Presidents--Hoover, F. D. Roosevelt, and Harry Truman--have had to make special provisions through the means of the presidential library to take care of their papers." 101 Cong. Rec. 9935.

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> "As a matter of fact the President enjoys many more 'emoluments' from the United States than the 'compensation' which he receives at 'stated times'-- at least, what most people would reckon to be emoluments." Corwin, The President, note 53, p. 348.

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Another common objection to Presidential ownership of the materials in question is based upon their character as public documents, often secret and sometimes necessary for the continued operation of government. Without speaking to

the desirability of the established property rule (and there is presently pending in the Congress legislation which would apparently alter it--S. 2951, "A Bill to Provide for Public Ownership of Certain Documents of Elected Public Officials"), I may point out that accommodation of such concerns can be achieved whether or not ownership of the materials in question rests with the former President. It has consistently been acknowledged that Presidential materials are peculiarly affected by a public interest which may justify subjecting the absolute ownership rights of the ex-President to certain limitations directly related to the character of the documents as records of government activity. Thus, in Folsom v. Marsh, supra, Mr. Justice Story stated the following:

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[4/] Section 11 of Executive Order 11652 makes explicit provision for declassification of Presidential material that has been deposited in the Archives.

Upon the death of Franklin D. Roosevelt during the closing months of World War II, with full acceptance of the traditional view that all White House papers belonged to the President and devolved to his estate, some of the papers dealing with prosecution of the War (the so-called "Map Room Papers") were retained by President Truman under a theory of "protective custody" until December 1946. Matter of Roosevelt, 190 Misc. 34, 344, 73 N.Y.S. 821, 825 (1947), Eighth Annual Report of the Archivist of the United States as to the Franklin D. Roosevelt Library (1947), p. 1. Thus, regardless of whether this is the best way to approach the problem, both precedent and logic demonstrate that the governmental interests arising because of the peculiar nature of these materials (notably, any need to protect national security information and any need for continued use of certain documents in the process of government) can be protected in full conformity with the theory of ownership on the part of the ex-President.

Because the principle of Presidential ownership of White House materials has been acknowledged by all three branches of the Government from the earliest times; because that principle does not violate any provision of the Constitution or contravene any existing statute; and because that principle is not inconsistent with adequate protection of the interests of the United States; I conclude that the papers and materials in question were the property of Richard M. Nixon when his term of office ended. Any inference that the former President abandoned his ownership by leaving the materials in the White House and the Executive Office Building is eliminated by a memorandum to the White House staff from Jerry H. Jones, Special Assistant to President Nixon, dated the day of his resignation, asserting that "the files of the White House Office belong to the President in whose Administration they were accumulated," and setting forth instructions with respect to the treatment of such materials until they can be collected and disposed of according to the ex-President's wishes.

I conclude, therefore, that these materials are the property of former President Nixon, in your personal custody; in my view, it is lawful and appropriate, because of the special governmental interest in these materials, to accept such custody for a reasonable time. You may, of course, delegate custody to a responsible subordinate officer in the White House. You may also transfer custody to the Administrator of General Services, pursuant to 44 U.S.C. § 2107. This provision clearly contemplates the deposit of

papers and other historical materials without an accompanying transfer of title to the United States. Compare section 2107 ("the Administrator of General Services . . . may accept for deposit . . . papers and other historical materials of a President or former President") with section 2108 ("the Administrator of General Services . . . may accept . . . land, buildings, and equipment offered as a gift . . . and take title"). See also H.Rep. No. 998, 84th Cong., 1st Sess., p. 4. I would also advise that any transfer to the custody of an individual not a part of the White House staff, or to any location outside of the White House and Executive Office Building, should not be effected without the consent of former President Nixon.

Finally, as to the obligations of the Government with respect to subpoenas and court orders, heretofore or hereafter directed to the Government or its officials with respect to the subject materials: Even though the Government is merely the custodian and not the owner, it can properly be subjected to court directives relating to the materials. The Federal Rules of Criminal Procedure authorize the courts, upon motion of a defendant, to order the Government to permit access to papers and other objects "which are within the possession, custody or control of the government . . . . " Fed. R. Crim. P. 16(b). A similar provision is applicable with regard to discovery in civil cases involving material within the"possession, custody or control" of a party (including the Government). Fed. R. Civ. P. 34(a). In addition, in both criminal and civil cases, a subpoena may be issued directing a person to

produce documents or objects which are within his possession, but which belong to another person. Fed. R. Crim. P. 17(c); Fed. R. Civ. P. 45(b). See, e.g., Couch v. United States, 409 U.S. 322 (1973); Schwimmer v. United States, 232 F.2d 855, 860 (8th Cir., 1956), cert. denied, 352 U.S. 833; United States v. Re, 313 F.Supp. 442, 449 (S.D. N.Y. 1970). I advise you, therefore, that documents heretofore or hereafter subpoenaed from the Government or its custodial officials included within the subject materials must be produced; and that none of the materials can be moved or otherwise disposed of contrary to the provisions of any court order against the Government or its custodial officials pertaining to them.

The foregoing advise is subject, of course, to any timely defense or objection effectively raised by either the owner of the materials or the Government against the subpoena or order

Form DJ-96a
(Rev. 6-22-66)

DEPARTMENT OF JUSTICE

ROUTING SLIP

TO: NAME	DIVISION	BUILDING	ROOM
1. Deputy Attorney General			
2.			
3.			
4.			

☐ SIGNATURE
☐ APPROVAL
☐ SEE ME
☐ RECOMMENDATION
☐ ANSWER OR ACKNOWLEDGE ON OR BEFORE.....
☐ PREPARE REPLY FOR THE SIGNATURE OF.....
☐ COMMENT
☐ NECESSARY ACTION
☐ NOTE AND RETURN
☐ CALL ME
☐ PER CONVERSATION
☐ AS REQUESTED
☐ NOTE AND FILE
☐ YOUR INFORMATION

REMARKS

Copies contain typos which have not yet been corrected.

FROM: NAME	BUILDING & ROOM	EXT.	DATE
Antonin Scalia			9/3

The President,

The White House.

Dear Mr. President:

You have requested my opinion concerning papers and other historical materials retained by the White House Office 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. You have inquired concerning the ownership of such materials and the obligations of the Government with respect to subpoenas and court orders addressed to the United States or its officials pertaining to them.

To conclude that such materials are not the property of former President Nixon would be to reverse what has apparently been the almost unvaried understanding of all

three branches of the Government since the beginning of the Republic, and to call into question the practices of our Presidents since the earliest times. In Folsom v. Marsh, 9 F. Cas. 342 (No. 4901), 2 Story 100, 108-109 (C.C.D. Mass. 1841), Mr. Justice Story, while sitting in circuit, found that President Washington's letters, including his official correspondence,[1/] were his private property which he could bequeath, which his estate could alienate, and in which the purchaser could acquire a copyright. According to testimony of the Archivist of the United States in 1955, every President of the United

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1/ The official documents involved in the case were:
Letters addressed by Washington, as commander-in-chief, to the President of Congress.
Official letters to governors of States and speakers of legislative bodies.
Circular letters.
General orders.
Communications (official) addressed as President to his Cabinet.
Letter accepting the command of the army, on our expected war with France. 2 Story at 104-105.
The clear holding on the property point (Id. at 108-09) is arguably converted to dictum by Justice Story's later indication, in connection with another issue, that copyright violation with respect to the official documents did not have to be established in order to maintain the suit. (Id. at 114).

States beginning with George Washington regarded all the papers and historical materials which accumulated in the White House during his administration, whether of a private or official nature, as his own property.[2] A classic exposition of this Presidential view was set forth by President Taft in a lecturepresented several years after he had left the White House:

> The office of the President is not a recording office. The vast amount of correspondence that goes through it, signed either by the President or his secretaries, does not become the property or a record of the government unless it goes on to the official files of the department to which it may be addressed. The President takes with him all the correspondence, original and copies, carried on during his administration. Taft, The Presidency 30-31 (1916).

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[2] Statement of Dr. Wayne C. Grover, Archivist of the United States, during the House Hearings on the Joint Resolution of August 12, 1955, 69 Stat. 695, To provide for the acceptance and maintenance of Presidential libraries, and for other purposes (now codified in 44 U.S.C. 2101, 2107 and 2108; hereinafter referred to as the "Presidential Libraries Act"). Hearing before a Special Subcommittee of the Committee on Government Operations, House of Representatives, 84th Cong., 1st Sess., on H.J. Res. 330, H.J. Res. 331, and H.J. Res. 332 (hereafter referred to as "1955 Hearings"), pp. 28, 45.

Past Congressional recognition of the President's title is evidenced by the various statutes providing for Government purchase of the official and private papers of many of our early Presidents, including Washington, Jefferson, Madison, Monroe and Jackson. See 1955 Hearings at 28, 39-42.

Even if there were no recent statutory sanction of Presidential ownership, a consistent history such as that described above might well be determinative. As the Supreme Court said in United States v. Midwest Oil Co., 236 U.S. 459 (1915):

> [G]overment is a practical affair intended for practical men. Both officers, law-makers and citizens naturally adjust themselves to any long-continued action of the Executive Department--on the presumption that unauthorized acts would not have been allowed to be so often repeated as to crystallize into a regular practice. That presumption is not reasoning in a circle but the basis of a wise and quieting rule that in determining the meaning of a statute or the existence of a power, weight shall be given to the usage itself--even when the validity of the practice is the subject of investigation. Id. at 472-73.
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> . . .
>
> [W]hile no . . . express authority has been granted [by Congress], there is nothing in the nature of the power exercised which prevents Congress from granting it by implication just as could be done by any other owner of property under similar conditions. Id. at 474.

Moreover, with respect to the practice at issue here, there is recent statutory sanction. The 1955 Presidential Libraries Act, which serves as the permanent basis of the Presidential Library system, constitutes clear legislative acknowledgement that a President has title to all the documents and historical materials--whether personal or official--which accumulate in the White House during his incumbency. This appears first from the omission of the word "personal" from 44 U.S.C. 2107(1), which replaced section 507(e) of the Federal Records Act of 1950, 64 Stat. 587. Use of that word in the earlier provision was evidently intended to distinguish between the private and official papers of a President.[3/] The current law, however, covers the deposit of all Presidential materials, not only personal ones. During the House debate on the Presidential Libraries

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3/ Compare Section 507(a), dealing with the records of an agency, with Section 507(e), relating to the "personal" papers of a President. A memorandum prepared in the Office of the Assistant Solicitor General (now Office of Legal Counsel) on April 6, 1951, on the subject of the President's papers, indicated that the statutory distinction was inconsistent with historic precedents, and that the dichotomy would be difficult if not impossible to maintain.

Act, Congressman Moss, who was in charge of the bill, expressly stated:

> Four. Finally, it should be remembered that presidential papers belong to the President, and that they have increased tremendously in volume in the past 25 or 30 years. It is no longer possible for a President to take his papers home with him and care for them properly. It is no accident that the last three Presidents--Hoover, F. D. Roosevelt, and Harry Truman--have had to make special provisions through the means of the presidential library to take care of their papers. 101 Cong. Rec. 9935 (1955).

The legislative history of the Act reflects no disagreement with this position on the part of any member of the Congress. The hearings before a Special Subcommittee of the House Committee on Government Operations indicate full congressional awareness of the Act's assumption that all Presidential papers are the private property of the President. 1955 Hearings at 12, 20, 28, 32, 52, 54, 58.

A recent discussion concerning ownership of Presidential materials appears in the report prepared by the staff of the Joint Committee on Internal Revenue Taxation involving the examination of President Nixon's tax returns. H. Rept. 93-966, 93d Cong., 2d Sess. (1974). The report points to the practice of Presidents since Washington of treating their papers, both private and official, as their

personal property; and to the congressional ratification of the practice in the 1955 library legislation. It concludes that "the historical precedents taken together with the provisions set forth in the Presidential Libraries Act, suggest that the papers of President Nixon are considered his personal property rather than public property." Id. at 28-29.

An apparent obstacle to Presidential ownership of all White House materials is Article II, section 1, clause 7 of the Constitution, which provides:

> "The President shall, at stated times, receive for his services a compensation, which shall neither be increased nor diminished during the period for which he shall have been elected, and he shall not receive within that period any other emolument from the United States, or any of them."

But objection based upon this provision is circular in its reasoning, except insofar as it applies to the blank typing paper and materials upon which the Presidential records are inscribed. For the records themselves are given to the President as an "emolument" only if one assumes that they are not the property of the President from the very moment of their creation. As for the blank typing paper and materials, which are of course of negligible

value, they can be regarded as consumables, like electricity or telephone service, provided for the conduct of Presidential business. In any event, the Constitutional provision can simply not be interpreted in such a fashion as to preclude the conferral of anything of value, beyond his salary upon the President. An eminent authority on the subject states the following:

> As a matter of fact the President enjoys many more "emoluments" from the United States than the "compensation" which he receives "at stated times" --at least, what most people would reckon to be emoluments. Corwin, The President 348 n. 53.

He gives as examples of such additional emoluments provided by the Congress the use of personal secretaries and the right to reside in the White House. Id. at 348-49.

Another obstacle to Presidential ownership of the materials in question is their character as public documents, often secret and sometimes necessary for the continued operation of government. However, without speaking to the desirability of the established property rule (and there is pending in the Congress legislation which would apparently alter it--S. 2951, 93d Cong., 2d Sess., a bill "[t]o provide for public ownership of certain documents of elected public officials"), it must

be conceded that accommodation of such concerns can be achieved whether or not ownership of the materials in question rests with the former President. Historically, there has been consistent acknowledgement that Presidential materials are peculiarly affected by a public interest which may justify subjecting the absolute ownership rights of the ex-President to certain limitations directly related to the character of the documents as records of government activity. Thus, in Folsom v. Marsh, supra, Mr. Justice Story stated the following:

> In respect to official letters, addressed to the government, or any of its departments, by public officers, so far as the right of the government extends, from principles of public policy, to withhold them from publication, or to give them publicity, there may be a just ground of distinction. It may be doubtful, whether any public officer is at liberty to publish them, at least, in the same age, when secrecy may be required by the public exigencies, without the sanction of the government. On the other hand, from the nature of the public service, or the character of the documents, embracing historical, military, or diplomatic information, it may be the right, and even the duty, of the government, to give them publicity, even against the will of the writers. 2 Story at 113.

That portion of the Criminal Code dealing with the transmission or loss of national security information, 18 U.S.C. § 793, obviously applies to Presidential papers even when

they are within the possession of the former President.[4/] Upon the death of Franklin D. Roosevelt during the closing months of World War II, with full acceptance of the tranditional view that all White House papers belonged to the President and devolved to his estate, some of the papers dealing with prosecution of the War (the so-called "Map Room Papers") were retained by President Truman under a theory of "protective custody" until December 1946. Matter of Roosevelt, 190 Misc. 341, 344, 73 N.Y.S. 821, 825 (Sur. Ct. 1947); Eighth Annual Report of the Archivist of the United States as to the Franklin D. Roosevelt Library (1947) p. 1. Thus, regardless of whether this is the best way to approach the problem, precedent demonstrates that the governmental interests arising because of the peculiar nature of these materials (notably, any need to protect national security information and any need for continued use of certain documents in the process of government) can be protected in full conformity with the theory of ownership on the part of the ex-President.

4/ Section 11 of Executive Order 11652 makes explicit provision for declassification of Presidential material that has been deposited in the Archives.

Because the principle of Presidential ownership of White House materials has been acknowledged by all three branches of the Government from the earliest times; because that principle does not violate any provision of the Constitution or contravene any existing statute; and because that principle is not inconsistent with adequate protection of the interests of the United States; I conclude that the papers and materials in question were the property of Richard M. Nixon when his term of office ended. Any inference that the former President abandoned his ownership of the materials he left in the White House and the Executive Office Building is eliminated by a memorandum to the White House staff from Jerry H. Jones, Special Assistant to President Nixon, dated the day of his resignation, asserting that "the files of the White House Office belong to the President in whose Administration they were accumulated," and setting forth instructions with respect to the treatment of such materials until they can be collected and disposed of according to the ex-President's wishes. We are advised that the documents previously deposited with the Administrator of General Services were likewise transmitted and received with the understanding

of continuing Presidential ownership.

As to the obligations of the Government with respect to subpoenas and court orders directed to the United States or its officials with respect to the subject materials: Even though the Government is merely the custodian and not the owner, it can properly be subjected to court directives relating to the materials. The Federal Rules of Criminal Procedure authorize the courts, upon motion of a defendant, to order the Government to permit access to papers and other objects "which are within the possession, custody or control of the government. . . ." Fed. R. Crim. P. 16(b). A similar provision is applicable with regard to discovery in civil cases involving material within the "possession, custody or control" of a party (including the Government). Fed. R. Civ. P. 34(a). In addition, in both criminal and civil cases, a subpoena may be issued directing a person to produce documents or objects which are within his possession, but which belong to another person. Fed. R. Crim. P. 17(c); Fed. R. Civ. P. 45(b). See, e.g., Couch v. United States, 409 U.S. 322 (1973); Schwimmer v. United States, 232 F. 2d 855, 860 (8th Cir., 1956), cert. denied, 352 U.S. 833; United States v. Re, 313 F. Supp. 442, 449 (S.D.N.Y. 1970).

I advise you, therefore, that items included within the subject materials properly subpoenaed from the Government or its officials must be produced; and that none of the materials can be moved or otherwise disposed of contrary to the provisions of any duly issued court order against the Government or its officials pertaining to them. Of course both the former President and the Government can seek modification of such subpoenas and orders, and can challenge their validity on Constitutional or other grounds.

Respectfully,

Attorney General

Copy with original
of Sampson signature

THE WHITE HOUSE
WASHINGTON

Originals
of all
except
Proclamation

September 6, 1974

Honorable Arthur F. Sampson
Administrator
General Services Administration
Washington, D. C.

Dear Mr. Sampson:

In keeping with the tradition established by other former Presidents, it is my desire to donate to the United States, at a future date, a substantial portion of my Presidential materials which are of historical value to our Country. In donating these Presidential materials to the United States, it will be my desire that they be made available, with appropriate restrictions, for research and study.

In the interim, so that my materials may be preserved, I offer to transfer to the Administrator of General Services (the "Administrator"), for deposit, pursuant to 44 U.S.C. Section 2101, et seq., all of my Presidential historical materials as defined in 44 U.S.C. Section 2101 (hereinafter "Materials"), which are located within the metropolitan area of the District of Columbia, subject to the following:

1. The Administrator agrees to accept solely for the purpose of deposit the transfer of the Materials, and in so accepting the Materials agrees to abide by each of the terms and conditions contained herein.

2. In the event of my death prior to the expiration of the three-year time period established in paragraph 7A hereof, the terms and conditions contained herein shall be binding upon and inure to the benefit of the executor of my estate for the duration of said period.

3. I retain all legal and equitable title to the Materials, including all literary property rights.

4. The Materials shall, upon acceptance of this offer by the Administrator, be deposited temporarily in an existing facility belonging to the United States, located within the State of California near my present residence. The Materials shall remain deposited in the temporary California facility until such time as there may be established, with my approval, a permanent Presidential archival depository as provided for in 44 U.S.C. Section 2108.

5. The Administrator shall provide in such temporary depository and in any permanent Presidential archival depository reasonable office space for my personal use in accordance with 44 U.S.C. Section 2108 (f). The Materials in their entirety shall be deposited within such office space in the manner described in paragraph 6 hereof.

6. Within both the temporary and any permanent Presidential archival depository, all of the Materials shall be placed within secure storage areas to which access can be gained only by use of two keys. One key, essential for access, shall be given to me alone as custodian of the Materials. The other key may be duplicated and entrusted by you to the Archivist of the United States or to members of his staff.

7. Access to the Materials within the secure areas, with the exception of recordings of conversations in the White House and the Executive Office Building which are governed by paragraphs 8 and 9 hereof, shall be as follows:

A. For a period of three years from the date of this instrument, I agree not to withdraw from deposit any originals of the Materials, except as provided in subparagraph B below and paragraph 10 herein. During said three-year period, I may make reproductions of any of the originals of the Materials and withdraw from deposit such reproductions for any use I may deem appropriate. Except as provided in subparagraph B below, access to the Materials shall be limited to myself, and to such persons as I may authorize from time to time in writing, the scope of such access to be set forth by me in each said written authorization. Any request for access to the Materials made to the Administrator, the Archivist of the United States or any member of their staffs shall be referred to me. After three years I shall have the right to withdraw from deposit without formality any or all of the Materials to which this paragraph applies and to retain such withdrawn Materials for any purpose or use I may deem appropriate, including but not limited to reproduction, examination, publication or display by myself or by anyone else I may approve.

B. In the event that production of the Materials or any portion thereof is demanded by a subpoena or other order directed to any official or employee of the United States, the recipient of the subpoena or order shall immediately notify me so that I may respond thereto, as the owner and custodian of the Materials, with sole right and power of access thereto and, if appropriate, assert any privilege or defense I may have. Prior to any such production, I shall inform the United States so it may inspect the subpoenaed materials and determine whether to object to its production on grounds of national security or any other privilege.

8. The tape recordings of conversations in the White House and Executive Office Building which will be deposited pursuant to this instrument shall remain on deposit until September 1, 1979. I intend to and do hereby donate to the United States, such gift to be effective September 1, 1979, all of the tape recordings of conversations in the White House and Executive Office Building conditioned however on my continuing right of access as specified in paragraph 9 hereof and on the further condition that such tapes shall be destroyed at the time of my death or on September 1, 1984, whichever event shall first occur. Subsequent to September 1, 1979 the Administrator shall destroy such tapes as I may direct. I impose this restriction as other Presidents have before me to guard against the possibility of the tapes being used to injure, embarrass, or harass any person and properly to safeguard the interests of the United States.

9. Access to recordings of conversations in the White House and Executive Office Building within the secure areas shall be restricted as follows:

A. I agree not to withdraw from deposit any originals of the Materials, except as provided in subparagraph B and paragraph 10 below, and no reproductions shall be made unless there is mutual agreement. Access to the tapes shall be limited to myself, and to such persons as I may authorize from time to time in writing, the scope of such access to be set forth by me in each said written authorization. No person may listen to such tapes without my written prior approval. I reserve to myself such literary use of the information on the tapes.

B. In the event that production of the Materials or any portion thereof is demanded by a subpoena or other order directed to any official or employee of the United States,

the recipient of the subpoena or order shall immediately notify me so that I may respond thereto, as the owner and custodian of the Materials, with sole right and power of access thereto and, if appropriate, assert any privilege or defense I may have. Prior to any such production, I shall inform the United States so it may inspect the subpoenaed materials and determine whether to object to its production on grounds of national security or any other privilege.

10. The Administrator shall arrange and be responsible for the reasonable protection of the Materials from loss, destruction or access by unauthorized persons, and may upon receipt of an appropriate written authorization from the Counsel to the President provide for a temporary re-deposit of certain of the Materials to a location other than the existing facility described in paragraph 4 herein, provided however that no dimunition of the Administrator's responsibility to protect and secure the Materials from loss, destruction, unauthorized copying or access by unauthorized persons is affected by said temporary re-deposit.

11. From time to time as I deem appropriate, I intend to donate to the United States certain portions of the Materials deposited with the Administrator pursuant to this agreement, such donations to be accompanied by appropriate restrictions as authorized by 44 U.S.C. Section 2107. However, prior to such donation, it will be necessary to review the Materials to determine which of them should be subject to restriction, and the nature of the restrictions to be imposed. This review will require a meticulous, thorough, time-consuming analysis. If necessary to fulfill this task, I will request that you designate certain members of the Archivist's staff to assist in this review under my direction.

If you determine that the terms and conditions set forth above are acceptable for the purpose of governing the establishment and maintenance of a depository of the Materials pursuant to 44 U.S.C. Section 2101 and for accepting the irrevocable gift of recordings of conversations after the specified five year period for purposes as contained in paragraph 8 herein, please indicate your acceptance by signing the enclosed copy of this letter and returning it to me. Upon your acceptance we both shall be bound by the terms of this agreement.

Sincerely,

Accepted by: Arthur F. Sampson 9/7/74
Administrator
General Services Administration

Office of the Attorney General
Washington, D. C.

September 6, 1974

The President,

The White House.

Dear Mr. President:

If you approve, I should like to have published, in accordance with 28 U.S.C. 521, my opinion to you concerning ownership of papers and other historical materials retained by the White House Office during the administration of former President Richard M. Nixon and now in the possession of the United States or its officials.

Please let me know whether you have any objections to the publication.

Respectfully,

Wm B Saxbe

Attorney General

Office of the Attorney General
Washington, D. C.

September 6, 1974

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The White House.

Dear Mr. President:

You have requested my opinion concerning papers and other historical materials retained by the White House Office 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. You have inquired concerning the ownership of such materials and the obligations of the Government with respect to subpoenas and court orders addressed to the United States or its officials pertaining to them.

To conclude that such materials are not the property of former President Nixon would be to reverse what has apparently been the almost unvaried understanding of all

three branches of the Government since the beginning of the Republic, and to call into question the practices of our Presidents since the earliest times. In Folsom v. Marsh, 9 F. Cas. 342 (No. 4901), 2 Story 100, 108-109 (C.C.D. Mass. 1841), Mr. Justice Story, while sitting in circuit, found that President Washington's letters, including his official correspondence,[1/] were his private property which he could bequeath, which his estate could alienate, and in which the purchaser could acquire a copyright. According to testimony of the Archivist of the United States in 1955, every President of the United

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1/ The official documents involved in the case were:
Letters addressed by Washington, as commander-in-chief, to the President of Congress.
Official letters to governors of States and speakers of legislative bodies.
Circular letters.
General orders.
Communications (official) addressed as President to his Cabinet.
Letter accepting the command of the army, on our expected war with France. 2 Story at 104-105.
The clear holding on the property point (Id. at 108-09) is arguably converted to dictum by Justice Story's later indication, in connection with another issue, that copyright violation with respect to the official documents did not have to be established in order to maintain the suit. (Id. at 114).

States beginning with George Washington regarded all the papers and historical materials which accumulated in the White House during his administration, whether of a private or official nature, as his own property.[2/] A classic exposition of this Presidential view was set forth by President Taft in a lecture presented several years after he had left the White House:

> The office of the President is not a recording office. The vast amount of correspondence that goes through it, signed either by the President or his secretaries, does not become the property or a record of the government unless it goes on to the official files of the department to which it may be addressed. The President takes with him all the correspondence, original and copies, carried on during his administration. Taft, The Presidency 30-31 (1916).

2/ Statement of Dr. Wayne C. Grover, Archivist of the United States, during the House Hearings on the Joint Resolution of August 12, 1955, 69 Stat. 695, To provide for the acceptance and maintenance of Presidential libraries, and for other purposes (now codified in 44 U.S.C. 2101, 2107 and 2108; hereinafter referred to as the "Presidential Libraries Act"), Hearing before a Special Subcommittee of the Committee on Government Operations, House of Representatives, 84th Cong., 1st Sess., on H.J. Res. 330, H.J. Res. 331, and H.J. Res. 332 (hereafter referred to as "1955 Hearings"), pp. 28, 45.

Past Congressional recognition of the President's title is evidenced by the various statutes providing for Government purchase of the official and private papers of many of our early Presidents, including Washington, Jefferson, Madison, Monroe and Jackson. See 1955 Hearings at 28, 39-42.

Even if there were no recent statutory sanction of Presidential ownership, a consistent history such as that described above might well be determinative. As the Supreme Court said in United States v. Midwest Oil Co., 236 U.S. 459 (1915):

> [G]overment is a practical affair intended for practical men. Both officers, law-makers and citizens naturally adjust themselves to any long-continued action of the Executive Department--on the presumption that unauthorized acts would not have been allowed to be so often repeated as to crystallize into a regular practice. That presumption is not reasoning in a circle but the basis of a wise and quieting rule that in determining the meaning of a statute or the existence of a power, weight shall be given to the usage itself--even when the validity of the practice is the subject of investigation. Id. at 472-73.
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> [W]hile no . . . express authority has been granted [by Congress], there is nothing in the nature of the power exercised which prevents Congress from granting it by implication just as could be done by any other owner of property under similar conditions. Id. at 474.

Moreover, with respect to the practice at issue here, there is recent statutory sanction. The 1955 Presidential Libraries Act, which serves as the permanent basis of the Presidential Library system, constitutes clear legislative acknowledgement that a President has title to all the documents and historical materials--whether personal or official--which accumulate in the White House Office during his incumbency. The Federal Records Act of 1950, 64 Stat. 587, which was the predecessor of the Presidential Libraries Act, authorized the Administrator of General Services to accept for deposit "the personal papers and other personal historical documentary materials of the present President of the United States." Section 507(e), 64 Stat. 588. The word "personal" might have been read as intended to distinguish between the private and official papers of the President.[3/] The corresponding provision of the current law, however, 44 U.S.C. 2107(1), avoids the ambiguity. It envisions the President's deposit of all Presidential materials, not only personal ones. During

3/ Compare Section 507(e) with Section 507(a), dealing with the records of an agency. A memorandum prepared in the Office of the Assistant Solicitor General (now Office of Legal Counsel) on July 24, 1951 indicated that such a distinction between private and official Presidential papers would be inconsistent with historic precedents, and difficult if not impossible to maintain. It accordingly regarded the Records Act's use of the term "personal" as intended merely to exclude the permanent files of the Chief Executive Clerk discussed at page 12 below.

the House debate on the Presidential Libraries Act, Congressman Moss, who was in charge of the bill, expressly stated:

> Four. Finally, it should be remembered that Presidential papers belong to the President, and that they have increased tremendously in volume in the past 25 or 30 years. It is no longer possible for a President to take his papers home with him and care for them properly. It is no accident that the last three Presidents--Hoover, F. D. Roosevelt, and Harry Truman--have had to make special provisions through the means of the presidential library to take care of their papers. 101 Cong. Rec. 9935 (1955).

The legislative history of the Act reflects no disagreement with this position on the part of any member of the Congress. The hearings before a Special Subcommittee of the House Committee on Government Operations indicate congressional awareness of the Act's assumption that all Presidential papers are the private property of the President. 1955 Hearings at 12, 20, 28, 32, 52, 54, 58.

A recent discussion concerning ownership of Presidential materials appears in the report prepared by the staff of the Joint Committee on Internal Revenue Taxation involving the examination of President Nixon's tax returns. H. Rept. 93-966, 93d Cong., 2d Sess. (1974). The report points to the practice of Presidents since Washington of treating their papers, both private and official, as their

personal property; and to the congressional ratification of the practice in the 1955 library legislation. It concludes that "the historical precedents taken together with the provisions set forth in the Presidential Libraries Act, suggest that the papers of President Nixon are considered his personal property rather than public property." Id. at 28-29.

An apparent obstacle to Presidential ownership of all White House materials is Article II, section 1, clause 7 of the Constitution, which provides:

> "The President shall, at stated times, receive for his services a compensation, which shall neither be increased nor diminished during the period for which he shall have been elected, and he shall not receive within that period any other emolument from the United States, or any of them."

But objection based upon this provision is circular in its reasoning, except insofar as it applies to the blank typing paper and materials upon which the Presidential records are inscribed. For the records themselves are given to the President as an "emolument" only if one assumes that they are not the property of the President from the very moment of their creation. As for the blank typing paper and materials, which are of course of negligible

value, they can be regarded as consumables, like electricity or telephone service, provided for the conduct of Presidential business. In any event, the Constitutional provision can simply not be interpreted in such a fashion as to preclude the conferral of anything of value, beyond his salary, upon the President. An eminent authority on the subject states the following:

> As a matter of fact the President enjoys many more "emoluments" from the United States than the "compensation" which he receives "at stated times" --at least, what most people would reckon to be emoluments. Corwin, The President 348 n. 53.

He gives as examples of such additional emoluments provided by the Congress the use of personal secretaries and the right to reside in the White House. Id. at 348-49.

Another obstacle to Presidential ownership of the materials in question is their character as public documents, often secret and sometimes necessary for the continued operation of government. However, without speaking to the desirability of the established property rule (and there is pending in the Congress legislation which would apparently alter it--S. 2951, 93d Cong., 2d Sess., a bill "[t]o provide for public ownership of certain documents of elected public officials"), it must

be conceded that accommodation of such concerns can be achieved whether or not ownership of the materials in question rests with the former President. Historically, there has been consistent acknowledgement that Presidential materials are peculiarly affected by a public interest which may justify subjecting the absolute ownership rights of the ex-President to certain limitations directly related to the character of the documents as records of government activity. Thus, in Folsom v. Marsh, supra, Mr. Justice Story stated the following:

> In respect to official letters, addressed to the government, or any of its departments, by public officers, so far as the right of the government extends, from principles of public policy, to withhold them from publication, or to give them publicity, there may be a just ground of distinction. It may be doubtful, whether any public officer is at liberty to publish them, at least, in the same age, when secrecy may be required by the public exigencies, without the sanction of the government. On the other hand, from the nature of the public service, or the character of the documents, embracing historical, military, or diplomatic information, it may be the right, and even the duty, of the government, to give them publicity, even against the will of the writers. 2 Story at 113.

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they are within the possession of the former President.[4/] Upon the death of Franklin D. Roosevelt during the closing months of World War II, with full acceptance of the traditional view that all White House papers belonged to the President and devolved to his estate, some of the papers dealing with prosecution of the War (the so-called "Map Room Papers") were retained by President Truman under a theory of "protective custody" until December 1946. Matter of Roosevelt, 190 Misc. 341, 344, 73 N.Y.S. 821, 825 (Sur. Ct. 1947); Eighth Annual Report of the Archivist of the United States as to the Franklin D. Roosevelt Library (1947) p. 1. Thus, regardless of whether this is the best way to approach the problem, precedent demonstrates that the governmental interests arising because of the peculiar nature of these materials (notably, any need to protect national security information and any need for continued use of certain documents in the process of government) can be protected in full conformity with the theory of ownership on the part of the ex-President.

4/ Section 11 of Executive Order 11652 makes explicit provision for declassification of Presidential material that has been deposited in the Archives.

Because the principle of Presidential ownership of White House materials has been acknowledged by all three branches of the Government from the earliest times; because that principle does not violate any provision of the Constitution or contravene any existing statute; and because that principle is not inconsistent with adequate protection of the interests of the United States; I conclude that the papers and materials in question were the property of Richard M. Nixon when his term of office ended. Any inference that the former President abandoned his ownership of the materials he left in the White House and the Executive Office Building is eliminated by a memorandum to the White House staff from Jerry H. Jones, Special Assistant to President Nixon, dated the day of his resignation, asserting that "the files of the White House Office belong to the President in whose Administration they were accumulated," and setting forth instructions with respect to the treatment of such materials until they can be collected and disposed of according to the ex-President's wishes. We are advised that the materials previously deposited with the Administrator of General Services were likewise transmitted and received with the understanding

of continuing Presidential ownership.

I must, however, exclude one category of documents from the scope of this opinion concerning ownership and advise you that their status cannot be definitively determined on the basis of presently available information. Although the fact is not recorded in the published materials we have examined, our inquiry indicates that at least in recent memory certain "permanent files" have been retained by the Chief Executive Clerk of the White House from administration to administration. These include White House budget and personnel material, and records or copies of some Presidential actions useful to the Clerk's office for such purposes as keeping track of the terms of Presidential appointments and providing models or precedents for future Presidential action. Retention of these materials by the Chief Executive Clerk is of course not necessarily inconsistent with initial Presidential ownership. In light of the otherwise uniform practice with respect to much more important official documents, relinquishment of these materials may reasonably be regarded as a voluntary act of courtesy on the part of the outgoing Chief Executive. I cannot, however, make an adequately informed judgment concerning these files without

more extensive factual and historical inquiry, which your need for this opinion does not permit. Of course, even if such inquiry should show that these particular documents have been regarded as Government property, that conclusion would not support a generalization of Government ownership with respect to the much more extensive other material covered by this opinion, as to which the Presidential practice and congressional acquiesence are clear.

As to the obligations of the Government with respect to subpoenas and court orders directed to the United States or its officials pertaining to the subject materials: Even though the Government is merely the custodian and not the owner, it can properly be subjected to court directives relating to the materials. The Federal Rules of Criminal Procedure authorize the courts, upon motion of a defendant, to order the Government to permit access to papers and other objects "which are within the possession, custody or control of the government. . . ." Fed. R. Crim. P. 16(b). A similar provision is applicable with regard to discovery in civil cases involving material within the "possession, custody or control" of a party (including the Government),

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Attorney General

Office of the Attorney General
Washington, D. C.

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> [W]hile no . . . express authority has been granted [by Congress], there is nothing in the nature of the power exercised which prevents Congress from granting it by implication just as could be done by any other owner of property under similar conditions. Id. at 474.

Moreover, with respect to the practice at issue here, there is recent statutory sanction. The 1955 Presidential Libraries Act, which serves as the permanent basis of the Presidential Library system, constitutes clear legislative acknowledgement that a President has title to all the documents and historical materials--whether personal or official--which accumulate in the White House Office during his incumbency. The Federal Records Act of 1950, 64 Stat. 587, which was the predecessor of the Presidential Libraries Act, authorized the Administrator of General Services to accept for deposit "the personal papers and other personal historical documentary materials of the present President of the United States." Section 507(e), 64 Stat. 588. The word "personal" might have been read as intended to distinguish between the private and official papers of the President.[3/] The corresponding provision of the current law, however, 44 U.S.C. 2107(1), avoids the ambiguity. It envisions the President's deposit of all Presidential materials, not only personal ones. During

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> Four. Finally, it should be remembered that Presidential papers belong to the President, and that they have increased tremendously in volume in the past 25 or 30 years. It is no longer possible for a President to take his papers home with him and care for them properly. It is no accident that the last three Presidents--Hoover, F. D. Roosevelt, and Harry Truman--have had to make special provisions through the means of the presidential library to take care of their papers. 101 Cong. Rec. 9935 (1955).

The legislative history of the Act reflects no disagreement with this position on the part of any member of the Congress. The hearings before a Special Subcommittee of the House Committee on Government Operations indicate congressional awareness of the Act's assumption that all Presidential papers are the private property of the President. 1955 Hearings at 12, 20, 28, 32, 52, 54, 58.

A recent discussion concerning ownership of Presidential materials appears in the report prepared by the staff of the Joint Committee on Internal Revenue Taxation involving the examination of President Nixon's tax returns. H. Rept. 93-966, 93d Cong., 2d Sess. (1974). The report points to the practice of Presidents since Washington of treating their papers, both private and official, as their

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An apparent obstacle to Presidential ownership of all White House materials is Article II, section 1, clause 7 of the Constitution, which provides:

> "The President shall, at stated times, receive for his services a compensation, which shall neither be increased nor diminished during the period for which he shall have been elected, and he shall not receive within that period any other emolument from the United States, or any of them."

But objection based upon this provision is circular in its reasoning, except insofar as it applies to the blank typing paper and materials upon which the Presidential records are inscribed. For the records themselves are given to the President as an "emolument" only if one assumes that they are not the property of the President from the very moment of their creation. As for the blank typing paper and materials, which are of course of negligible

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> As a matter of fact the President enjoys many more "emoluments" from the United States than the "compensation" which he receives "at stated times" --at least, what most people would reckon to be emoluments. Corwin, The President 348 n. 53.

He gives as examples of such additional emoluments provided by the Congress the use of personal secretaries and the right to reside in the White House. Id. at 348-49.

Another obstacle to Presidential ownership of the materials in question is their character as public documents, often secret and sometimes necessary for the continued operation of government. However, without speaking to the desirability of the established property rule (and there is pending in the Congress legislation which would apparently alter it--S. 2951, 93d Cong., 2d Sess., a bill "[t]o provide for public ownership of certain documents of elected public officials"), it must

be conceded that accommodation of such concerns can be achieved whether or not ownership of the materials in question rests with the former President. Historically, there has been consistent acknowledgement that Presidential materials are peculiarly affected by a public interest which may justify subjecting the absolute ownership rights of the ex-President to certain limitations directly related to the character of the documents as records of government activity. Thus, in Folsom v. Marsh, supra, Mr. Justice Story stated the following:

> In respect to official letters, addressed to the government, or any of its departments, by public officers, so far as the right of the government extends, from principles of public policy, to withhold them from publication, or to give them publicity, there may be a just ground of distinction. It may be doubtful, whether any public officer is at liberty to publish them, at least, in the same age, when secrecy may be required by the public exigencies, without the sanction of the government. On the other hand, from the nature of the public service, or the character of the documents, embracing historical, military, or diplomatic information, it may be the right, and even the duty, of the government, to give them publicity, even against the will of the writers. 2 Story at 113.

That portion of the Criminal Code dealing with the transmission or loss of national security information, 18 U.S.C. § 793, obviously applies to Presidential papers even when

they are within the possession of the former President.[4/] Upon the death of Franklin D. Roosevelt during the closing months of World War II, with full acceptance of the traditional view that all White House papers belonged to the President and devolved to his estate, some of the papers dealing with prosecution of the War (the so-called "Map Room Papers") were retained by President Truman under a theory of "protective custody" until December 1946. Matter of Roosevelt, 190 Misc. 341, 344, 73 N.Y.S. 821, 825 (Sur. Ct. 1947); Eighth Annual Report of the Archivist of the United States as to the Franklin D. Roosevelt Library (1947) p. 1. Thus, regardless of whether this is the best way to approach the problem, precedent demonstrates that the governmental interests arising because of the peculiar nature of these materials (notably, any need to protect national security information and any need for continued use of certain documents in the process of government) can be protected in full conformity with the theory of ownership on the part of the ex-President.

4/ Section 11 of Executive Order 11652 makes explicit provision for declassification of Presidential material that has been deposited in the Archives.

Because the principle of Presidential ownership of White House materials has been acknowledged by all three branches of the Government from the earliest times; because that principle does not violate any provision of the Constitution or contravene any existing statute; and because that principle is not inconsistent with adequate protection of the interests of the United States; I conclude that the papers and materials in question were the property of Richard M. Nixon when his term of office ended. Any inference that the former President abandoned his ownership of the materials he left in the White House and the Executive Office Building is eliminated by a memorandum to the White House staff from Jerry H. Jones, Special Assistant to President Nixon, dated the day of his resignation, asserting that "the files of the White House Office belong to the President in whose Administration they were accumulated," and setting forth instructions with respect to the treatment of such materials until they can be collected and disposed of according to the ex-President's wishes. We are advised that the materials previously deposited with the Administrator of General Services were likewise transmitted and received with the understanding

of continuing Presidential ownership.

I must, however, exclude one category of documents from the scope of this opinion concerning ownership and advise you that their status cannot be definitively determined on the basis of presently available information. Although the fact is not recorded in the published materials we have examined, our inquiry indicates that at least in recent memory certain "permanent files" have been retained by the Chief Executive Clerk of the White House from administration to administration. These include White House budget and personnel material, and records or copies of some Presidential actions useful to the Clerk's office for such purposes as keeping track of the terms of Presidential appointments and providing models or precedents for future Presidential action. Retention of these materials by the Chief Executive Clerk is of course not necessarily inconsistent with initial Presidential ownership. In light of the otherwise uniform practice with respect to much more important official documents, relinquishment of these materials may reasonably be regarded as a voluntary act of courtesy on the part of the outgoing Chief Executive. I cannot, however, make an adequately informed judgment concerning these files without

more extensive factual and historical inquiry, which your need for this opinion does not permit. Of course, even if such inquiry should show that these particular documents have been regarded as Government property, that conclusion would not support a generalization of Government ownership with respect to the much more extensive other material covered by this opinion, as to which the Presidential practice and congressional acquiesence are clear.

As to the obligations of the Government with respect to subpoenas and court orders directed to the United States or its officials pertaining to the subject materials: Even though the Government is merely the custodian and not the owner, it can properly be subjected to court directives relating to the materials. The Federal Rules of Criminal Procedure authorize the courts, upon motion of a defendant, to order the Government to permit access to papers and other objects "which are within the possession, custody or control of the government. . . ." Fed. R. Crim. P. 16(b). A similar provision is applicable with regard to discovery in civil cases involving material within the "possession, custody or control" of a party (including the Government).

Fed. R. Civ. P. 34(a). In addition, in both criminal and civil cases, a subpoena may be issued directing a person to produce documents or objects which are within his possession, but which belong to another person. Fed. R. Crim. P. 17(c); Fed. R. Civ. P. 45(b). See, e.g., Couch v. United States, 409 U.S. 322 (1973); Schwimmer v. United States, 232 F.2d 855, 860 (8th Cir., 1956), cert. denied, 352 U.S. 833; United States v. Re, 313 F. Supp. 442, 449 (S.D.N.Y. 1970). I advise you, therefore, that items included within the subject materials properly subpoenaed from the Government or its officials must be produced; and that none of the materials can be moved or otherwise disposed of contrary to the provisions of any duly issued court order against the Government or its officials pertaining to them. Of course both the former President and the Government can seek modification of such subpoenas and orders, and can challenge their validity on Constitutional or other grounds.

Respectfully,

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Attorney General

Office of the Attorney General
Washington, D. C.

September 6, 1974

The President,

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Dear Mr. President:

If you approve, I should like to have published, in accordance with 28 U.S.C. 521, my opinion to you concerning ownership of papers and other historical materials retained by the White House Office during the administration of former President Richard M. Nixon and now in the possession of the United States or its officials.

Please let me know whether you have any objections to the publication.

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To conclude that such materials are not the property of former President Nixon would be to reverse what has apparently been the almost unvaried understanding of all

three branches of the Government since the beginning of the Republic, and to call into question the practices of our Presidents since the earliest times. In Folsom v. Marsh, 9 F. Cas. 342 (No. 4901), 2 Story 100, 108-109 (C.C.D. Mass. 1841), Mr. Justice Story, while sitting in circuit, found that President Washington's letters, including his official correspondence,[1/] were his private property which he could bequeath, which his estate could alienate, and in which the purchaser could acquire a copyright. According to testimony of the Archivist of the United States in 1955, every President of the United

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1/ The official documents involved in the case were:
Letters addressed by Washington, as commander-in-chief, to the President of Congress.
Official letters to governors of States and speakers of legislative bodies.
Circular letters.
General orders.
Communications (official) addressed as President to his Cabinet.
Letter accepting the command of the army, on our expected war with France. 2 Story at 104-105.
The clear holding on the property point (Id. at 108-09) is arguably converted to dictum by Justice Story's later indication, in connection with another issue, that copyright violation with respect to the official documents did not have to be established in order to maintain the suit. (Id. at 114).

States beginning with George Washington regarded all the papers and historical materials which accumulated in the White House during his administration, whether of a private or official nature, as his own property.[2/] A classic exposition of this Presidential view was set forth by President Taft in a lecture presented several years after he had left the White House:

> The office of the President is not a recording office. The vast amount of correspondence that goes through it, signed either by the President or his secretaries, does not become the property or a record of the government unless it goes on to the official files of the department to which it may be addressed. The President takes with him all the correspondence, original and copies, carried on during his administration. Taft, The Presidency 30-31 (1916).

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Past Congressional recognition of the President's title is evidenced by the various statutes providing for Government purchase of the official and private papers of many of our early Presidents, including Washington, Jefferson, Madison, Monroe and Jackson. See 1955 Hearings at 28, 39-42.

Even if there were no recent statutory sanction of Presidential ownership, a consistent history such as that described above might well be determinative. As the Supreme Court said in United States v. Midwest Oil Co., 236 U.S. 459 (1915):

> [G]overment is a practical affair intended for practical men. Both officers, law-makers and citizens naturally adjust themselves to any long-continued action of the Executive Department--on the presumption that unauthorized acts would not have been allowed to be so often repeated as to crystallize into a regular practice. That presumption is not reasoning in a circle but the basis of a wise and quieting rule that in determining the meaning of a statute or the existence of a power, weight shall be given to the usage itself--even when the validity of the practice is the subject of investigation. Id. at 472-73.
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the House debate on the Presidential Libraries Act, Congressman Moss, who was in charge of the bill, expressly stated:

> Four. Finally, it should be remembered that Presidential papers belong to the President, and that they have increased tremendously in volume in the past 25 or 30 years. It is no longer possible for a President to take his papers home with him and care for them properly. It is no accident that the last three Presidents--Hoover, F. D. Roosevelt, and Harry Truman--have had to make special provisions through the means of the presidential library to take care of their papers. 101 Cong. Rec. 9935 (1955).

The legislative history of the Act reflects no disagreement with this position on the part of any member of the Congress. The hearings before a Special Subcommittee of the House Committee on Government Operations indicate congressional awareness of the Act's assumption that all Presidential papers are the private property of the President. 1955 Hearings at 12, 20, 28, 32, 52, 54, 58.

A recent discussion concerning ownership of Presidential materials appears in the report prepared by the staff of the Joint Committee on Internal Revenue Taxation involving the examination of President Nixon's tax returns. H. Rept. 93-966, 93d Cong., 2d Sess. (1974). The report points to the practice of Presidents since Washington of treating their papers, both private and official, as their

personal property; and to the congressional ratification of the practice in the 1955 library legislation. It concludes that "the historical precedents taken together with the provisions set forth in the Presidential Libraries Act, suggest that the papers of President Nixon are considered his personal property rather than public property." Id. at 28-29.

An apparent obstacle to Presidential ownership of all White House materials is Article II, section 1, clause 7 of the Constitution, which provides:

> "The President shall, at stated times, receive for his services a compensation, which shall neither be increased nor diminished during the period for which he shall have been elected, and he shall not receive within that period any other emolument from the United States, or any of them."

But objection based upon this provision is circular in its reasoning, except insofar as it applies to the blank typing paper and materials upon which the Presidential records are inscribed. For the records themselves are given to the President as an "emolument" only if one assumes that they are not the property of the President from the very moment of their creation. As for the blank typing paper and materials, which are of course of negligible

value, they can be regarded as consumables, like electricity or telephone service, provided for the conduct of Presidential business. In any event, the Constitutional provision can simply not be interpreted in such a fashion as to preclude the conferral of anything of value, beyond his salary, upon the President. An eminent authority on the subject states the following:

> As a matter of fact the President enjoys many more "emoluments" from the United States than the "compensation" which he receives "at stated times" --at least, what most people would reckon to be emoluments. Corwin, The President 348 n. 53.

He gives as examples of such additional emoluments provided by the Congress the use of personal secretaries and the right to reside in the White House. Id. at 348-49.

Another obstacle to Presidential ownership of the materials in question is their character as public documents, often secret and sometimes necessary for the continued operation of government. However, without speaking to the desirability of the established property rule (and there is pending in the Congress legislation which would apparently alter it--S. 2951, 93d Cong., 2d Sess., a bill "[t]o provide for public ownership of certain documents of elected public officials"), it must

be conceded that accommodation of such concerns can be achieved whether or not ownership of the materials in question rests with the former President. Historically, there has been consistent acknowledgement that Presidential materials are peculiarly affected by a public interest which may justify subjecting the absolute ownership rights of the ex-President to certain limitations directly related to the character of the documents as records of government activity. Thus, in Folsom v. Marsh, supra, Mr. Justice Story stated the following:

> In respect to official letters, addressed to the government, or any of its departments, by public officers, so far as the right of the government extends, from principles of public policy, to withhold them from publication, or to give them publicity, there may be a just ground of distinction. It may be doubtful, whether any public officer is at liberty to publish them, at least, in the same age, when secrecy may be required by the public exigencies, without the sanction of the government. On the other hand, from the nature of the public service, or the character of the documents, embracing historical, military, or diplomatic information, it may be the right, and even the duty, of the government, to give them publicity, even against the will of the writers. 2 Story at 113.

That portion of the Criminal Code dealing with the transmission or loss of national security information, 18 U.S.C. § 793, obviously applies to Presidential papers even when

they are within the possession of the former President.[4/] Upon the death of Franklin D. Roosevelt during the closing months of World War II, with full acceptance of the traditional view that all White House papers belonged to the President and devolved to his estate, some of the papers dealing with prosecution of the War (the so-called "Map Room Papers") were retained by President Truman under a theory of "protective custody" until December 1946. Matter of Roosevelt, 190 Misc. 341, 344, 73 N.Y.S. 821, 825 (Sur. Ct. 1947); Eighth Annual Report of the Archivist of the United States as to the Franklin D. Roosevelt Library (1947) p. 1. Thus, regardless of whether this is the best way to approach the problem, precedent demonstrates that the governmental interests arising because of the peculiar nature of these materials (notably, any need to protect national security information and any need for continued use of certain documents in the process of government) can be protected in full conformity with the theory of ownership on the part of the ex-President.

4/ Section 11 of Executive Order 11652 makes explicit provision for declassification of Presidential material that has been deposited in the Archives.

Because the principle of Presidential ownership of White House materials has been acknowledged by all three branches of the Government from the earliest times; because that principle does not violate any provision of the Constitution or contravene any existing statute; and because that principle is not inconsistent with adequate protection of the interests of the United States; I conclude that the papers and materials in question were the property of Richard M. Nixon when his term of office ended. Any inference that the former President abandoned his ownership of the materials he left in the White House and the Executive Office Building is eliminated by a memorandum to the White House staff from Jerry H. Jones, Special Assistant to President Nixon, dated the day of his resignation, asserting that "the files of the White House Office belong to the President in whose Administration they were accumulated," and setting forth instructions with respect to the treatment of such materials until they can be collected and disposed of according to the ex-President's wishes. We are advised that the materials previously deposited with the Administrator of General Services were likewise transmitted and received with the understanding

of continuing Presidential ownership.

I must, however, exclude one category of documents from the scope of this opinion concerning ownership and advise you that their status cannot be definitively determined on the basis of presently available information. Although the fact is not recorded in the published materials we have examined, our inquiry indicates that at least in recent memory certain "permanent files" have been retained by the Chief Executive Clerk of the White House from administration to administration. These include White House budget and personnel material, and records or copies of some Presidential actions useful to the Clerk's office for such purposes as keeping track of the terms of Presidential appointments and providing models or precedents for future Presidential action. Retention of these materials by the Chief Executive Clerk is of course not necessarily inconsistent with initial Presidential ownership. In light of the otherwise uniform practice with respect to much more important official documents, relinquishment of these materials may reasonably be regarded as a voluntary act of courtesy on the part of the outgoing Chief Executive. I cannot, however, make an adequately informed judgment concerning these files without

more extensive factual and historical inquiry, which your need for this opinion does not permit. Of course, even if such inquiry should show that these particular documents have been regarded as Government property, that conclusion would not support a generalization of Government ownership with respect to the much more extensive other material covered by this opinion, as to which the Presidential practice and congressional acquiesence are clear.

As to the obligations of the Government with respect to subpoenas and court orders directed to the United States or its officials pertaining to the subject materials: Even though the Government is merely the custodian and not the owner, it can properly be subjected to court directives relating to the materials. The Federal Rules of Criminal Procedure authorize the courts, upon motion of a defendant, to order the Government to permit access to papers and other objects "which are within the possession, custody or control of the government. . . ." Fed. R. Crim. P. 16(b). A similar provision is applicable with regard to discovery in civil cases involving material within the "possession, custody or control" of a party (including the Government),

Fed. R. Civ. P. 34(a). In addition, in both criminal and civil cases, a subpoena may be issued directing a person to produce documents or objects which are within his possession, but which belong to another person. Fed. R. Crim. P. 17(c); Fed. R. Civ. P. 45(b). See, e.g., Couch v. United States, 409 U.S. 322 (1973); Schwimmer v. United States, 232 F.2d 855, 860 (8th Cir., 1956), cert. denied, 352 U.S. 833; United States v. Re, 313 F. Supp. 442, 449 (S.D.N.Y. 1970). I advise you, therefore, that items included within the subject materials properly subpoenaed from the Government or its officials must be produced; and that none of the materials can be moved or otherwise disposed of contrary to the provisions of any duly issued court order against the Government or its officials pertaining to them. Of course both the former President and the Government can seek modification of such subpoenas and orders, and can challenge their validity on Constitutional or other grounds.

Respectfully,

Wm B Saxbe

Attorney General

Office of the Attorney General
Washington, D. C.

September 6, 1974

The President,

The White House.

Dear Mr. President:

If you approve, I should like to have published, in accordance with 28 U.S.C. 521, my opinion to you concerning ownership of papers and other historical materials retained by the White House Office during the administration of former President Richard M. Nixon and now in the possession of the United States or its officials.

Please let me know whether you have any objections to the publication.

Respectfully,

Wm B Saxbe

Attorney General

Office of the Attorney General
Washington, D. C.

September 6, 1974

The President,

The White House.

Dear Mr. President:

You have requested my opinion concerning papers and other historical materials retained by the White House Office 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. You have inquired concerning the ownership of such materials and the obligations of the Government with respect to subpoenas and court orders addressed to the United States or its officials pertaining to them.

To conclude that such materials are not the property of former President Nixon would be to reverse what has apparently been the almost unvaried understanding of all

three branches of the Government since the beginning of the Republic, and to call into question the practices of our Presidents since the earliest times. In Folsom v. Marsh, 9 F. Cas. 342 (No. 4901), 2 Story 100, 108-109 (C.C.D. Mass. 1841), Mr. Justice Story, while sitting in circuit, found that President Washington's letters, including his official correspondence,[1/] were his private property which he could bequeath, which his estate could alienate, and in which the purchaser could acquire a copyright. According to testimony of the Archivist of the United States in 1955, every President of the United

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1/ The official documents involved in the case were:
Letters addressed by Washington, as commander-in-chief, to the President of Congress.
Official letters to governors of States and speakers of legislative bodies.
Circular letters.
General orders.
Communications (official) addressed as President to his Cabinet.
Letter accepting the command of the army, on our expected war with France. 2 Story at 104-105.
The clear holding on the property point (Id. at 108-09) is arguably converted to dictum by Justice Story's later indication, in connection with another issue, that copyright violation with respect to the official documents did not have to be established in order to maintain the suit. (Id. at 114).

States beginning with George Washington regarded all the papers and historical materials which accumulated in the White House during his administration, whether of a private or official nature, as his own property.[2/] A classic exposition of this Presidential view was set forth by President Taft in a lecture presented several years after he had left the White House:

> The office of the President is not a recording office. The vast amount of correspondence that goes through it, signed either by the President or his secretaries, does not become the property or a record of the government unless it goes on to the official files of the department to which it may be addressed. The President takes with him all the correspondence, original and copies, carried on during his administration. Taft, The Presidency 30-31 (1916).

2/ Statement of Dr. Wayne C. Grover, Archivist of the United States, during the House Hearings on the Joint Resolution of August 12, 1955, 69 Stat. 695, To provide for the acceptance and maintenance of Presidential libraries, and for other purposes (now codified in 44 U.S.C. 2101, 2107 and 2108; hereinafter referred to as the "Presidential Libraries Act"), Hearing before a Special Subcommittee of the Committee on Government Operations, House of Representatives, 84th Cong., 1st Sess., on H.J. Res. 330, H.J. Res. 331, and H.J. Res. 332 (hereafter referred to as "1955 Hearings"), pp. 28, 45.

Past Congressional recognition of the President's title is evidenced by the various statutes providing for Government purchase of the official and private papers of many of our early Presidents, including Washington, Jefferson, Madison, Monroe and Jackson. See 1955 Hearings at 28, 39-42.

Even if there were no recent statutory sanction of Presidential ownership, a consistent history such as that described above might well be determinative. As the Supreme Court said in United States v. Midwest Oil Co., 236 U.S. 459 (1915):

> [G]overment is a practical affair intended for practical men. Both officers, law-makers and citizens naturally adjust themselves to any long-continued action of the Executive Department--on the presumption that unauthorized acts would not have been allowed to be so often repeated as to crystallize into a regular practice. That presumption is not reasoning in a circle but the basis of a wise and quieting rule that in determining the meaning of a statute or the existence of a power, weight shall be given to the usage itself--even when the validity of the practice is the subject of investigation. Id. at 472-73.
>
> . . .
>
> [W]hile no . . . express authority has been granted [by Congress], there is nothing in the nature of the power exercised which prevents Congress from granting it by implication just as could be done by any other owner of property under similar conditions. Id. at 474.

Moreover, with respect to the practice at issue here, there is recent statutory sanction. The 1955 Presidential Libraries Act, which serves as the permanent basis of the Presidential Library system, constitutes clear legislative acknowledgement that a President has title to all the documents and historical materials--whether personal or official--which accumulate in the White House Office during his incumbency. The Federal Records Act of 1950, 64 Stat. 587, which was the predecessor of the Presidential Libraries Act, authorized the Administrator of General Services to accept for deposit "the personal papers and other personal historical documentary materials of the present President of the United States." Section 507(e), 64 Stat. 588. The word "personal" might have been read as intended to distinguish between the private and official papers of the President.[3/] The corresponding provision of the current law, however, 44 U.S.C. 2107(1), avoids the ambiguity. It envisions the President's deposit of all Presidential materials, not only personal ones. During

3/ Compare Section 507(e) with Section 507(a), dealing with the records of an agency. A memorandum prepared in the Office of the Assistant Solicitor General (now Office of Legal Counsel) on July 24, 1951 indicated that such a distinction between private and official Presidential papers would be inconsistent with historic precedents, and difficult if not impossible to maintain. It accordingly regarded the Records Act's use of the term "personal" as intended merely to exclude the permanent files of the Chief Executive Clerk discussed at page 12 below.

the House debate on the Presidential Libraries Act, Congressman Moss, who was in charge of the bill, expressly stated:

> Four. Finally, it should be remembered that Presidential papers belong to the President, and that they have increased tremendously in volume in the past 25 or 30 years. It is no longer possible for a President to take his papers home with him and care for them properly. It is no accident that the last three Presidents--Hoover, F. D. Roosevelt, and Harry Truman--have had to make special provisions through the means of the presidential library to take care of their papers. 101 Cong. Rec. 9935 (1955).

The legislative history of the Act reflects no disagreement with this position on the part of any member of the Congress. The hearings before a Special Subcommittee of the House Committee on Government Operations indicate congressional awareness of the Act's assumption that all Presidential papers are the private property of the President. 1955 Hearings at 12, 20, 28, 32, 52, 54, 58.

A recent discussion concerning ownership of Presidential materials appears in the report prepared by the staff of the Joint Committee on Internal Revenue Taxation involving the examination of President Nixon's tax returns. H. Rept. 93-966, 93d Cong., 2d Sess. (1974). The report points to the practice of Presidents since Washington of treating their papers, both private and official, as their

personal property; and to the congressional ratification of the practice in the 1955 library legislation. It concludes that "the historical precedents taken together with the provisions set forth in the Presidential Libraries Act, suggest that the papers of President Nixon are considered his personal property rather than public property." Id. at 28-29.

An apparent obstacle to Presidential ownership of all White House materials is Article II, section 1, clause 7 of the Constitution, which provides:

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Another obstacle to Presidential ownership of the materials in question is their character as public documents, often secret and sometimes necessary for the continued operation of government. However, without speaking to the desirability of the established property rule (and there is pending in the Congress legislation which would apparently alter it--S. 2951, 93d Cong., 2d Sess., a bill "[t]o provide for public ownership of certain documents of elected public officials"), it must

be conceded that accommodation of such concerns can be achieved whether or not ownership of the materials in question rests with the former President. Historically, there has been consistent acknowledgement that Presidential materials are peculiarly affected by a public interest which may justify subjecting the absolute ownership rights of the ex-President to certain limitations directly related to the character of the documents as records of government activity. Thus, in Folsom v. Marsh, supra, Mr. Justice Story stated the following:

> In respect to official letters, addressed to the government, or any of its departments, by public officers, so far as the right of the government extends, from principles of public policy, to withhold them from publication, or to give them publicity, there may be a just ground of distinction. It may be doubtful, whether any public officer is at liberty to publish them, at least, in the same age, when secrecy may be required by the public exigencies, without the sanction of the government. On the other hand, from the nature of the public service, or the character of the documents, embracing historical, military, or diplomatic information, it may be the right, and even the duty, of the government, to give them publicity, even against the will of the writers. 2 Story at 113.

That portion of the Criminal Code dealing with the transmission or loss of national security information, 18 U.S.C. § 793, obviously applies to Presidential papers even when

they are within the possession of the former President.[4/] Upon the death of Franklin D. Roosevelt during the closing months of World War II, with full acceptance of the traditional view that all White House papers belonged to the President and devolved to his estate, some of the papers dealing with prosecution of the War (the so-called "Map Room Papers") were retained by President Truman under a theory of "protective custody" until December 1946. Matter of Roosevelt, 190 Misc. 341, 344, 73 N.Y.S. 821, 825 (Sur. Ct. 1947); Eighth Annual Report of the Archivist of the United States as to the Franklin D. Roosevelt Library (1947) p. 1. Thus, regardless of whether this is the best way to approach the problem, precedent demonstrates that the governmental interests arising because of the peculiar nature of these materials (notably, any need to protect national security information and any need for continued use of certain documents in the process of government) can be protected in full conformity with the theory of ownership on the part of the ex-President.

4/ Section 11 of Executive Order 11652 makes explicit provision for declassification of Presidential material that has been deposited in the Archives.

Because the principle of Presidential ownership of White House materials has been acknowledged by all three branches of the Government from the earliest times; because that principle does not violate any provision of the Constitution or contravene any existing statute; and because that principle is not inconsistent with adequate protection of the interests of the United States; I conclude that the papers and materials in question were the property of Richard M. Nixon when his term of office ended. Any inference that the former President abandoned his ownership of the materials he left in the White House and the Executive Office Building is eliminated by a memorandum to the White House staff from Jerry H. Jones, Special Assistant to President Nixon, dated the day of his resignation, asserting that "the files of the White House Office belong to the President in whose Administration they were accumulated," and setting forth instructions with respect to the treatment of such materials until they can be collected and disposed of according to the ex-President's wishes. We are advised that the materials previously deposited with the Administrator of General Services were likewise transmitted and received with the understanding

of continuing Presidential ownership.

I must, however, exclude one category of documents from the scope of this opinion concerning ownership and advise you that their status cannot be definitively determined on the basis of presently available information. Although the fact is not recorded in the published materials we have examined, our inquiry indicates that at least in recent memory certain "permanent files" have been retained by the Chief Executive Clerk of the White House from administration to administration. These include White House budget and personnel material, and records or copies of some Presidential actions useful to the Clerk's office for such purposes as keeping track of the terms of Presidential appointments and providing models or precedents for future Presidential action. Retention of these materials by the Chief Executive Clerk is of course not necessarily inconsistent with initial Presidential ownership. In light of the otherwise uniform practice with respect to much more important official documents, relinquishment of these materials may reasonably be regarded as a voluntary act of courtesy on the part of the outgoing Chief Executive. I cannot, however, make an adequately informed judgment concerning these files without

more extensive factual and historical inquiry, which your need for this opinion does not permit. Of course, even if such inquiry should show that these particular documents have been regarded as Government property, that conclusion would not support a generalization of Government ownership with respect to the much more extensive other material covered by this opinion, as to which the Presidential practice and congressional acquiesence are clear.

As to the obligations of the Government with respect to subpoenas and court orders directed to the United States or its officials pertaining to the subject materials: Even though the Government is merely the custodian and not the owner, it can properly be subjected to court directives relating to the materials. The Federal Rules of Criminal Procedure authorize the courts, upon motion of a defendant, to order the Government to permit access to papers and other objects "which are within the possession, custody or control of the government. . . ." Fed. R. Crim. P. 16(b). A similar provision is applicable with regard to discovery in civil cases involving material within the "possession, custody or control" of a party (including the Government).

Fed. R. Civ. P. 34(a). In addition, in both criminal and civil cases, a subpoena may be issued directing a person to produce documents or objects which are within his possession, but which belong to another person. Fed. R. Crim. P. 17(c); Fed. R. Civ. P. 45(b). See, e.g., Couch v. United States, 409 U.S. 322 (1973); Schwimmer v. United States, 232 F.2d 855, 860 (8th Cir., 1956), cert. denied, 352 U.S. 833; United States v. Re, 313 F. Supp. 442, 449 (S.D.N.Y. 1970). I advise you, therefore, that items included within the subject materials properly subpoenaed from the Government or its officials must be produced; and that none of the materials can be moved or otherwise disposed of contrary to the provisions of any duly issued court order against the Government or its officials pertaining to them. Of course both the former President and the Government can seek modification of such subpoenas and orders, and can challenge their validity on Constitutional or other grounds.

Respectfully,

Wm B Saxbe

Attorney General

[Sept. 1974]

Legal Basis Questioned

Saxbe Not Told of Tape Deal

By George Lardner
Washington Post Staff Writer

The Justice Department

At least some Justice Department officials who worked on the Saxbe ruling were re-

to rule out that possibility. It explicitly names the former President "alone as custodian

Some items in this folder were not digitized because it contains copyrighted materials. Please contact the Gerald R. Ford Presidential Library for access to these materials.

9/6/74

To: Larry Silberman

From: Phil Buchen

As we discussed.

September 6, 1974

MEMORANDUM FOR

The Honorable Lawrence 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.

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.

Department of the Treasury

Office of the General Counsel

to: Mr. Buchen

room: _____ date: 9/6/74

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. 10-61)

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. Lowe
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—993

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.

September 10, 1974

Dear Mr. Attorney General:

You are hereby authorized to release for publication your opinion rendered to me on September 6, 1974 concerning the ownership of certain papers and other historical materials retained by the White House Office during the administration of former President Nixon.

Sincerely,

Philip W. Buchen
Counsel to the President

Honorable William B. Saxbe
The Attorney General
Department of Justice
Washington, D. C. 20530

September 10, 1974

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September 10, 1974

Dear Mr. Attorney General:

You are hereby authorized to release for publication your opinion rendered to me on September 6, 1974 concerning the ownership of certain papers and other historical materials retained by the White House Office during the administration of former President Nixon.

Sincerely,

Philip W. Buchen
Counsel to the President

Honorable William B. Saxbe
The Attorney General
Department of Justice
Washington, D. C. 20530

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(As dictated over the phone by Leon Jaworski's secretary; letter to follow)

September 10, 1974

Dear Mr. Buchen:

Although the copy of my memorandum from Henry Ruth to me dated September 3, 1974 "Subject: Mr. Nixon" was sent to you in confidence, if you are willing to assume the responsibility for its release, I shall raise no objection to your doing so.

In the event of its release, we would expect, of course, that it be made available in its entirety, including the first and last paragraphs of the memorandum. I emphasize this because news media references have been made to a list without pointing to other significant portions of the memorandum. The reported statement of Senator Scott this morning also falls in this category.

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