

**The original documents are located in Box 15, folder “12/19/74 S4016 Nixon Papers and Tapes” of the White House Records Office: Legislation Case Files at the Gerald R. Ford Presidential Library.**

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**THE WHITE HOUSE**

WASHINGTON

December 19, 1974

**FOR THE RECORD:**

Diana Gwin of Jerry Jones' staff informed Mr. Linder's office (Katie) that there was verbal approval from the President for the use of the statement which was attached to the bill when received back from him signed this evening.

The info and the statement, together with a stencil on the statement, were given to Tom DeCair in the Press Office at 7:00 pm this evening. (Will be announced Friday am)

Tom Jones

**APPROVED**

**DEC 19 1974**

*Statement Issued  
12/19/74*

THE WHITE HOUSE  
WASHINGTON

December 19, 1974

*Announced  
12/19/74*

*To Archive  
12/29/74*

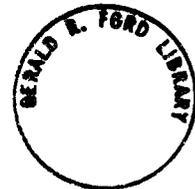
MEMORANDUM FOR THE PRESIDENT

THROUGH: DONALD RUMSFELD

FROM: JERRY H. JONES 

Attached at Tab A for your signature is enrolled bill S. 4016 -- Nixon Papers and Tapes -- which you have approved signing. Hartmann and Buchen have reviewed the statement at Tab B and reworked it per your request this morning.

Approve signing statement \_\_\_\_\_ Disapprove \_\_\_\_\_



MEMORANDUM

THE WHITE HOUSE

WASHINGTON

December 18, 1974

MEMORANDUM FOR: PHIL BUCHEN

FROM: BOB LINDER *RL*.

Attached are the Department of Justice views on S. 4016 for your consideration.

This letter should become part of the enrolled bill file when the President has finally acted on the matter.

Attachment



C. to Lazarus

12.18.74

Department of Justice  
Washington, D.C. 20530

DEC 17 1974

Honorable Roy L. Ash  
Director, Office of Management  
and Budget  
Washington, D. C. 20503

Dear Mr. Ash:

In compliance with your request, I have examined a facsimile of the enrolled bill S. 4016, "To protect and preserve tape recordings of conversations involving former President Richard M. Nixon and made during his tenure as President, and for other purposes."

Section 101 of the bill provides that the Administrator of General Services obtain or retain control of all of the Nixon tapes as well as Presidential "historical materials," as defined by 44 U.S.C. § 2101, covering the period January 20, 1969, to August 9, 1974. There would not appear to be any constitutional impediment to such provisions. The Department of Justice has taken the position that these materials are the private property of the former President, see Opinion of the Attorney General, September 6, 1974, but the bill does not purport to address ownership of the materials, providing instead that if a court determines that the bill results in deprivation of private property without just compensation, then the government shall pay the appropriate compensation. See Section 105(c). The bill apparently contemplates that this would constitute taking the materials under the power of eminent domain. While such a taking would appear to be novel, the fact that the materials of previous Presidents have been purchased with public monies is evidence of the public purposes served in obtaining Presidential historical materials. In addition, the fact that the bill has the effect of voiding the Sampson-Nixon agreement of September 8, 1974 should not affect the validity of the bill. It is settled law that acts of Congress may alter contract rights even where the government is a party to the contract. See Lichter v. United States, 334 U.S. 742 (1948). But see



Lynch v. United States, 292 U.S. 571 (1934). In any case, even if the agreement could not be retroactively voided, the remedy for failure to perform would be damages for breach rather than specific performance.

Section 102 of the bill provides that the materials may be subpoenaed. What this adds to existing law is unclear but there is no difficulty with the provision as it stands. This section also explicitly provides that the historical materials may be utilized "for lawful Government use," a conclusion already implied by tradition and practice. See Opinion of the Attorney General, supra.

Section 104 requires the Administrator to propose regulations providing public access to the materials. In creating these regulations the Administrator is directed to take into account seven factors: (1) the need to provide the public with the full truth about "Watergate"; (2) the need to make the materials available for judicial proceedings; (3) the need to protect information in the materials relating to national security; (4) the need to protect persons' right to a fair trial; (5) the need to protect any person's opportunity to assert any legally or constitutionally based right or privilege which would prevent public access to the materials; (6) the need to provide public access to materials which are not related to "Watergate" but are otherwise of general historical significance; and (7) the need to give to Mr. Nixon for his sole custody and use those materials not related to "Watergate" and not of general historical significance. This section could give rise to problems of a constitutional nature, particularly with respect to the right of privacy and Executive privilege. It cannot be said with assurance, however, that there is no set of regulations which could be drawn under it which would be constitutional, and hence it is in our view not possible to assert that the section is unconstitutional on its face.

There is a suggestion in the legislative history of the bill (not at all reflected in its language) that the Administrator would not only write regulations but would also, apparently through the Archivist, actually make the decisions regarding what material is or is not classified or otherwise is to remain confidential, see H. Rep. No. 93-1507, 93d Cong., 2d Sess. 6 (1974), and regarding what material is "purely personal" and therefore to be given to Mr. Nixon, see 120 Cong. Rec. H11209 (Daily ed. Dec. 3, 1974). The Department of Justice believes that it is essential that the former President retain the power to determine what material is subject to a claim of Executive privilege based upon the need to preserve the confidentiality

of Presidential consultation. The other interests served by the doctrine of Executive privilege, notably the ability to safeguard military and diplomatic secrets, can be protected by the incumbent President. (The present bill enables this to be achieved through the Administrator, who is a Presidential appointee.) But the interest in confidentiality of communications to and from a particular President can adequately be protected only by him, and not by his successors in office, whose political ends may be served by destroying rather than preserving confidentiality. To divorce the power of determining what is confidential from the person who has the paramount interest in the confidentiality would shatter the necessary expectation of privacy and the privilege itself.

By history and tradition former Presidents have been entrusted with the responsibility and power to determine what should remain confidential and what should not. As early as 1846 President Polk realized the importance of, and gave effect to, a determination of a former President that a matter should remain confidential. See Richardson, Messages and Papers of the Presidents, Vol. IV, 433-34.

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

It must be obvious to you that if the doctrine of separation of powers and the independence of the Presidency is to have any validity at all, it must be equally applicable to a President after his term of office has expired when he is sought to be examined with respect to any acts occurring while he is President.

The doctrine would be shattered, and the President, contrary to our fundamental theory of constitutional government, would become a mere arm of the Legislative Branch of the Government if he would feel during his term of office that his every act might be subject to official inquiry and possible distortion for political purposes.

New York Times, Late City ed., Nov. 13, 1953, p. 14, col. 4.

The House committee apparently accepted President Truman's position and did not attempt to enforce the subpoena.

Existing statutory law sanctions the historical practice by allowing former Presidents to place restrictions on access to materials placed in Presidential archival depositories, 44 U.S.C. § 2107(1). In the Department's view the events of Watergate, and the distrust of Executive privilege which they have engendered, neither require nor justify a departure from this sound principle. The broad public access which has already been accorded with respect to tapes and transcripts relating to Watergate reduces the risk of nondisclosure of significant information to a level which does not approach in importance the damage that would be done to a vital constitutional principle.

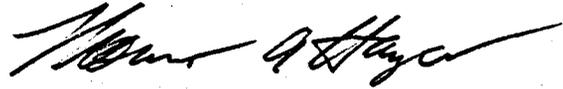
It is only a portion of the legislative history, and not the language of the bill, which would deprive the former President of his right to determine the application of Executive privilege with respect to material to be made available to the public. That legislative history is contradicted by the bill's express reservation (subsection 102(b)) of the former President's power to assert Executive privilege regarding subpoenaed material--which one would expect to be a case in which such protection is less needed. Because of the foregoing considerations of statutory interpretation and of constitutional principle, we believe ~~the regulations to be issued by the Administrator~~ under S. 4016 should provide for assertion by the former President himself of the doctrine of Executive privilege with respect to those materials he believes must be withheld to preserve the confidentiality of his consultations. Paragraph 104(a)(5) specifically envisions such protection. On that basis, we raise no constitutional objection to the bill itself on Executive privilege grounds.

Finally, Title II of the bill creates an independent Commission to study and report regarding appropriate rules and procedures with respect to the control, disposition, and preservation of records and documents produced by or on behalf of federal officials. While the Department maintains a certain skepticism, shared by the sponsor of S. 4016 himself, see 120 Cong. Rec. S20814 (daily ed. Dec. 9, 1974), regarding the desirability of yet another independent Commission, the Department feels that it is most desirable to rethink both the traditions and statutory law regarding historical materials of elected and appointed officials. Such a complete study is much preferable to patchwork attempts to change the law regarding Presidential papers generally in order to solve a particular problem in the heat of the moment. For these reasons the

Department does not oppose the concept of the Commission.

Notwithstanding objections noted above to particular portions of the bill, most of which may be met by GSA's interpretation of the bill and its regulations issued thereunder, the Department of Justice does not object to Executive approval.

Sincerely,

A handwritten signature in cursive script, appearing to read "Thomas A. Hayes".

Thomas A. Hayes  
Deputy Assistant Attorney General  
Legislative Affairs

## Office of the White House Press Secretary

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THE WHITE HOUSE**STATEMENT BY THE PRESIDENT**

I have signed S. 4016, the Presidential Recordings and Materials Act. This measure provides the following:

Title I: governs the possession, security and accessibility of tape recordings and other materials of the former President. Included are virtually all documents produced within the White House during the previous Administration. The Administrator of General Services is charged with obtaining "complete possession and control" of the tape recordings and materials which would be made available immediately, subject to any rights, defenses or privileges which may be asserted, for "subpoena or other legal process."

The Administrator is also directed to issue protective regulations "at the earliest possible date" governing the possession, security and custody of the tapes and materials. Finally, the Administrator shall draft regulations governing general public access to the tapes and materials, taking into account a series of specified needs: (1) to provide the public with the "full truth" on the abuses of governmental power incident to "Watergate"; (2) to make available the tapes and materials for judicial proceedings; (3) to guarantee the integrity of national security information; (4) to protect individual rights to a fair trial; (5) to protect the opportunity to assert available rights and privileges; (6) to provide public access to materials of historical significance; and (7) to provide the former President with tapes or materials in which the public has no interest.

Title I also provides for the expeditious judicial review of challenges to the "legal or constitutional validity" of the statute or of any regulation issued under its authority, and any action or proceeding involving "the question of title, ownership, custody, possession or control" of any tape recording or other material. In the event it is determined that the former President has been deprived of personal property under the provisions of Title I, "just compensation" shall be paid to him.

Title II: establishes a "Public Documents Commission" to study problems with respect to the control, disposition and preservation of records produced by or on behalf of "Federal officials." These are defined to include elected Federal officials and any officer of the executive, judicial or legislative branch of the Federal Government. The Commission is directed to make specific recommendations for legislation and other recommendations for rules and procedures as may be appropriate regarding the documents of such officials. A final report fulfilling their mandate is to be submitted to the Congress and the President by March 31, 1976.

more



It has been my consistent policy toward the records of the former President to protect both the records themselves and the legal rights of all parties involved. Following the release of an opinion of the Attorney General of the United States to the effect that the tapes and materials of the former President constituted his personal property, an agreement was entered into by Mr. Nixon and Mr. Sampson, the Administrator of General Services, on September 6, 1974. This agreement was intended to govern the possession, security and accessibility of the tapes and materials and it secured them from destruction or alteration during the periods when they might be needed in court and grand jury proceedings. Since then, a great deal of litigation and public attention have centered on that agreement. Although I believe it would not be appropriate to comment on the various issues, constitutional or otherwise, which are presented by pending cases or by the subject bill, I do want to mention that, by agreement made November 9, 1974, the interests of the Watergate Special Prosecution Force for access to the tapes and materials were fully accommodated.

It is my understanding of the intent of the Congress that this Act will provide the former President and others with the opportunity to litigate any right or privilege which may be asserted relevant to the tapes or materials.

The Administrator of General Services will move promptly to obtain complete possession and control of the tapes and materials and to discharge his other duties under the law.

I will name the Presidential appointees to the "Public Documents Commission" as quickly as possible. I am hopeful that the commission will suggest even-handed and uniform rules governing the documents of all Federal officials.

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STATEMENT BY THE PRESIDENT  
UPON SIGNING S. 4016, THE  
"PRESIDENTIAL RECORDINGS AND  
MATERIALS PRESERVATION ACT"

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Title I: governs the possession, security and accessibility of tape recordings and other materials of the former President. Included are virtually all documents produced within the White House during the previous Administration. The Administrator of General Services is charged with obtaining "complete possession and control" of the tape recordings and materials which would be made available immediately, subject to any rights, defenses or privileges which may be asserted, for "subpoena or other legal process."

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