

CONFIDENTIAL

DEPARTMENT OF STATE

Memorandum of Conversation

DATE: January 15, 1976

SUBJECT: Safire Request Under Freedom of Information Act

PARTICIPANTS: Mr. Philip Buchen, Counsel to the President
Mr. James A. Wilderotter, Associate Counsel to the President
Mr. Dudley H. Chapman, Associate Counsel, White House
Mr. Robert C. McFarlane, Military Assistant to the Assistant to the President for National Security Affairs
Mr. Monroe Leigh, Legal Adviser, Department of State
Mr. Carlyle E. Maw, Under Secretary of State for Security Assistance

Under Secretary Maw and I attended a meeting at the White House in Mr. Buchen's office this morning to discuss the Safire request under the Freedom of Information Act. In addition to Mr. Buchen, Messrs, Wilderotter, Chapman and McFarlane were also present throughout the meeting.

The first topic addressed was whether the transfer of telephone conversation memoranda from the White House to the State Department could be considered as a violation of Judge Richey's order in the case of Nixon v. Sampson.

I stated that in my judgment there was no violation of that order since that order by its terms applied only to documents in the custody of one of the named defendants in the law suit or their superiors, agents or assigns. In our view, the telephone conversation memoranda in the State Department were not in the custody of such a defendant at the time the order was issued. I passed out the attached memorandum dated January 14 which spells out this conclusion in more detail.

After considerable discussion the conclusion of this memorandum was accepted as correct.

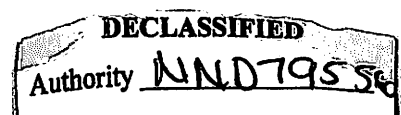
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Mr. Buchen then asked whether in my judgment the telephone conversation memoranda were within the scope of the Presidential Recordings and Materials Act of 1974. I responded that the scope of that act was limited to "Presidential historical materials of Richard M. Nixon" and that I did not consider that this test was met in the case of the telephone conversation memoranda. There was discussion as to whether the scope of "Presidential historical material" was further defined by 44 U.S.C. Section 2101 or by the attached White House office papers directive which was effective up until August 9, 1974. This discussion was inconclusive. There was agreement, however, that it might be necessary to secure a Department of Justice opinion on this point. However, no decision was taken to seek such an opinion until all possibilities had been examined.

Mr. Buchen pointed out that if these telephone conversation memoranda were deemed within the scope of the Presidential Recordings and Materials Act of 1974, the effect would be to render them unavailable under the Freedom of Information Act. He explained that the interpretation had been made that since the Presidential Recordings and Materials Act post-dated the Freedom of Information Act the earlier act was considered modified by the later act. I asked whether a Justice Department opinion had been obtained on this point and it was stated that so far there had been only a White House legal opinion.

It was also pointed out that if the telephone conversation memoranda were treated as within the Presidential Recordings and Materials Act it would not be necessary to make the detailed examination of those documents at this time which would otherwise be required under the Freedom of Information Act.

The next issue considered was whether the telephone conversation memoranda might be considered as personal papers of Secretary Kissinger. Initially Dudley Chapman thought this was the most plausible position. However, later after having noted that the papers had been prepared, as stated in the Secretary's response to Halperin interrogatories, in order to facilitate implementation and follow up of business transacted, he changed his view. Nevertheless, it was agreed that this possibility should be thoroughly considered. It is not necessarily true that the

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characterization in the response to the interrogatories is legally binding on anyone.

Thereafter, considerable discussion was devoted to the Freedom of Information Act. All agreed that some of the documents would undoubtedly be covered under the exemption in (b)(1) (classified material) and others would be covered under the internal memoranda exemption (b)(5). Mr. Chapman believed it was possible to consider that all of the documents were internal even though they might represent calls from the Secretary to persons outside the government, since they were to be used entirely for the internal management of a government office. The trouble with this argument is that exemption (b)(5) speaks in terms of inter or intra-agency memoranda.

It was also pointed out that some of the material might be withholdable on the ground that withholding was authorized by law within the meaning of exemption (b)(3). In fact it might be determined that the (b)(3) exemption was the means of reconciling the Freedom of Information Act with the Presidential Records and Materials Act of 1974. Another possibility considered was that all of the telephone conversation memoranda were in the categories of "drafts", since there is no evidence that the Secretary ever reviewed and corrected the typescript despite the contrary indications in the New York Times. It was agreed that this issue should also be studied.

Finally, Mr. Buchen requested that Larry Eagleburger prepare a memorandum for him giving a general description of the papers in question specifying the categories of such material and the quantity of papers involved.

The meeting concluded with the State Department representatives agreeing to come back to the White House within two days for a further assessment.

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DEPARTMENT OF STATE

Washington, D.C. 20520

M. Lopez file

*copy sent
at White House*

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January 14, 1976

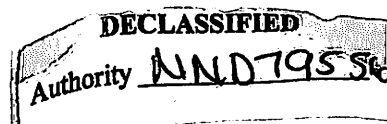
MEMORANDUM

Court Orders Affecting Documents
Transferred from White House to State Department

In connection with the Nixon papers litigation, Judge Richey on October 21, 1974 issued a protective order which is apparently still in effect today. That order enjoined the defendants in that litigation, including Philip Buchen, and their "superiors, agents and assigns" from "disclosing, transferring, disposing or otherwise making known to any person... the materials... known as the 'presidential materials of the Nixon Administration'" The order, as amended on October 22, 1974, specifically excluded from these prohibitions "the production of said materials pursuant to a validly-issued subpoena, discovery demand, or court order in any civil or criminal case" and also "the use of said materials, with prior notification to counsel for Plaintiff Richard M. Nison and with the consent of Defendant Philip W. Buchen, for purposes of current government business...." A copy of this order and its subsequent modifications are attached.

Two aspects of this Order are of particular significance to Secretary Kissinger's telephone conversation memoranda. First, the order applies only to materials in the "custody or control" of the defendants or their "agents, superiors or assigns" on October 21, 1974. The government defendants were Arthur Sampson of GSA, H. Stuart Knight (the Director of the Secret Service) and Philip Buchen. Henry Kissinger was not a defendant. Nor was he an "agent, superior or assign" of the

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government defendants. The critical question, then, is where were the telephone conversation memoranda on October 21, 1974. If they were already at the State Department, there would seem to be no problem. If, however, they were at the NSC, one might have an easier time arguing that they were within the "custody or control" of Mr. Buchen or his "superior," President Ford.

The fact is that the telephone conversation memoranda came to the State Department at approximately the same time as Henry Kissinger became Secretary of State in September 1973. Thus it seems clear that Judge Richey's order by its own terms did not apply to the telephone conversation memoranda which Dr. Kissinger brought to the Department.

Second, the protective order applies only to "presidential materials of the Nixon administration." This term is not defined in the order. However, an argument can be made that telephone conversation memoranda of the National Security Adviser are not, strictly speaking, "presidential materials." They may instead be records of the NSC. Or they may be personal papers of the National Security Adviser. Under this restrictive view, the only memoranda constituting "presidential materials" might be those referring to conversations directly with the President.

On the other hand, it may be argued that since the National Security Adviser is a direct assistant to the President, his papers constitute "presidential materials" insofar as they relate to his advisory duties. If so, the order precludes them from being "transferred", unless the prescribed exceptions are satisfied.

One exception would permit transfer of the papers for use in "current government business" provided Nixon's counsel has been notified and Philip Buchen has consented to the transfer. A second exception would permit transfer pursuant to a court order in any civil or criminal case.

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UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 74-1518

RICHARD M. NIXON, PLAINTIFF

v.

ARTHUR F. SAMPSON, ET AL., DEFENDANTS

Civil Action No. 74-1533

THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS ET AL., PLAINTIFFS

v.

ARTHUR F. SAMPSON, ET AL., DEFENDANTS

ORDER

Upon consideration of the Motion for a Temporary Restraining Order by Plaintiff Nixon and Plaintiffs Reporters Committee for Freedom of the Press, et al., the Points and Authorities in support thereof, and the oral argument by all parties as well as by the Special Prosecutor, and it appearing that the criteria for granting a Temporary Restraining Order have been met, and it further appearing to the Court that there exists a great interest on behalf of the litigants and the public in reaching a just resolution upon a sound legal basis, and due to the unique nature of the present matter, it is, by the Court this 21st day of October, 1974.

Ordered, That the Motions for a Temporary Restraining Order be, and the same are hereby granted in part and denied in part, and it is

Further Ordered, That the Defendants, their superiors, agents and assigns are, subject to the conditions hereinafter described in the balance of this Order, hereby enjoined from disclosing, transferring, disposing or otherwise making known to any person, be he/she private citizen or public official, the materials, including documents, tapes and other papers, known as the "presidential materials of the Nixon Administration," that are presently in the custody and control of the Defendants; and it is

Further Ordered, That the Defendants are hereby enjoined from effectuating the terms and conditions of the "Agreement" entered into by Richard M. Nixon and Arthur F. Sampson, on or about September 6, 1974, and it is

Further Ordered, That the injunction shall not serve as a bar to the production of said materials pursuant to a validly issued subpoena in any civil or criminal case, either outstanding or while this injunction is extant, or to the production of said materials in regard to the ongoing Watergate criminal trial before United States District Judge John Sirica, or to the production of said material pursuant to a validly issued subpoena by a grand jury; and it is

Further Ordered, That Plaintiff Richard M. Nixon shall be afforded access to said materials for the sole purpose of preparing to testify in the Watergate criminal trial, and if he shall be unable to physically do so, he shall be allowed to make copies of said materials for such use, but shall not disclose or divulge the contents thereof except in regard to his testimony, and said copies shall be returned to the Defendants upon the completion of his obligations as a witness; and it is

Further Ordered, That the Plaintiffs shall not be required to post any bond; and it is

Further Ordered, That this injunction shall be effective for ten (10) days and shall be renewed upon proper application of the parties.

CHARLES R. RICHEY,
U.S. District Judge.

OCTOBER 21, 1974.

Upon consideration of the requests for consent to said Order are hereby granted. It is by the Court this 21st day of October, 1974.

Ordered, That the same are hereby granted in part and denied in part, and it is

Further Ordered, That the Defendants, their superiors, agents and assigns are, subject to the conditions hereinafter described in the balance of this Order, hereby enjoined from disclosing, transferring, disposing or otherwise making known to any person, be he/she private citizen or public official, the materials, including documents, tapes and other papers, known as the "presidential materials of the Nixon Administration," that are presently in the custody and control of the Defendants; and it is

Further Ordered, That the Defendants are hereby enjoined from effectuating the terms and conditions of the "Agreement" entered into by Richard M. Nixon and Arthur F. Sampson, on or about September 6, 1974, and it is

Further Ordered, That the injunction shall not serve as a bar to the production of said materials pursuant to a validly issued subpoena in any civil or criminal case, either outstanding or while this injunction is extant, or to the production of said materials in regard to the ongoing Watergate criminal trial before United States District Judge John Sirica; or to the production of said material pursuant to a validly issued subpoena by a grand jury; and it is

Further Ordered, That Plaintiff Richard M. Nixon shall be afforded access to said materials for the sole purpose of preparing to testify in the Watergate criminal trial, and if he shall be unable to physically do so, he shall be allowed to make copies of said materials for such use, but shall not disclose or divulge the contents thereof except in regard to his testimony, and said copies shall be returned to the Defendants upon the completion of his obligations as a witness; and it is

Further Ordered, That the Plaintiffs shall not be required to post any bond; and it is

Further Ordered, That this injunction shall be effective for ten (10) days and shall be renewed upon proper application of the parties.

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UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 74-1518

RICHARD M. NIXON, PLAINTIFF

v.

ARTHUR F. SAMPSON, ET AL., DEFENDANTS

Civil Action No. 74-1533

THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS,
ET AL., PLAINTIFFS

v.

ARTHUR F. SAMPSON, ET AL., DEFENDANTS

SUPPLEMENTAL ORDER

Upon consideration of the Temporary Restraining Order issued yesterday, dated October 21, 1974 at 4:20 p.m., and upon consideration of the parties' requests for certain modifications thereof, and it appearing that the parties consent to said modifications and that the same are consistent with the ends of justice, and it appearing that the aforesaid Order as well as this Supplemental Order are necessary to preserve the status quo in the above-entitled litigation, it is by the Court this 22nd day of October, 1974.

Ordered, That the Court's Order of October 21, 1974, be and the same is hereby amended and supplemented as follows:

Ordered, That the Motions for a Temporary Restraining Order be, and the same are hereby granted in part and denied in part; and it is

Further Ordered, That the Defendants, their superiors, agents and assigns are, subject to the conditions hereinafter described in the balance of this Order, hereby enjoined from disclosing, transferring, disposing or otherwise making known to any person, be he/she private citizen or public official, the materials, including documents, tapes and other papers, known as the "Presidential materials of the Nixon Administration," that are presently in the custody and control of the Defendants; and it is

Further Ordered, That the Defendants are hereby enjoined from effectuating the terms and conditions of the "Agreement" entered into by Richard M. Nixon and Arthur F. Sampson, on or about September 6, 1974, and it is

Further Ordered, That the injunction shall not serve as a bar to the production of said materials pursuant to a validly-issued subpoena, discovery demand, or court order in any civil or criminal case, either outstanding or while this injunction is extant; or to the production of said materials in regard to the ongoing Watergate criminal trial before United States District Judge John Sirica; or to the production of said material pursuant to requests by the Special Prosecutor, or to a validly issued subpoena by a Grand Jury; or to the use of said materials, with prior notification to counsel for Plaintiff Richard M. Nixon and with the consent of Defendant Philip W. Buchen, for purposes of current government business; and it is

Further Ordered, That Plaintiff Richard M. Nixon, or his attorney, shall be afforded access to said materials under current access procedures established by Defendants for the sole purposes of preparing to testify in the Watergate trial and determining whether to raise any privileges or defense he believes he might have in opposition to production of said materials for current government business or pursuant to requests by the Special Prosecutor or to validly-issued subpoenas, discovery demand or a court order, and if Plaintiff Richard M. Nixon shall be unable to physically do so, the government Defendants shall provide copies of said materials for such use, but he shall not disclose or divulge the contents thereof except in regard to his testimony or in response to validly-issued subpoenas, and said copies shall be returned promptly to the Defendants when such purposes have been served; and it is

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Further Ordered, That any person either now or previously a member of the White House staff shall be afforded access under current access procedures established by Defendants, with or without his/her attorney present, to said materials which comprise or comprised his/her files while a member of the White House staff, and be allowed to take notes regarding the same, but not to make copies thereof, all the above solely for any purposes relating to criminal investigations or prosecutions; and it is

Further ordered, that any search conducted for purposes of producing or using said materials as provided in this Order shall be conducted jointly by Defendant Philip W. Buchen, or his agent, and counsel for Plaintiff Richard M. Nixon, or his agent, and said persons shall take such steps as are necessary to assure that the search for and copying of said materials will in no way destroy or affect the original character of any of the materials, including tapes, documents or other papers referred to herein; and it is

Further Ordered, that the Plaintiffs shall not be required to post any bond; and it is

Further ordered, that this injunction shall be effective for ten (10) days and shall be renewed upon proper application of the parties.

CHARLES R. RICHEY,
U.S. District Judge.

OCTOBER 22, 1974.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 74-1518

RICHARD M. NIXON, PLAINTIFF

v.

ARTHUR F. SAMPSON, ET AL., DEFENDANTS

Civil Action No. 74-1533

THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, ET AL., PLAINTIFFS

v.

ARTHUR F. SAMPSON, ET AL., DEFENDANTS

Civil Action No. 74-1551

LILLIAN HELLMAN, ET AL., PLAINTIFFS

v.

ARTHUR F. SAMPSON, ET AL., DEFENDANTS

ORDER

Upon consideration of the Motion of the Special Prosecutor to Intervene as a matter of right pursuant to Rule 42(a) (2) of the F.R.C.P., in the case of *Richard M. Nixon v. Arthur F. Sampson, et al.*, C.A. No. 74-1518, Richard M. Nixon's Motion to Intervene as a matter of right pursuant to Rule 42(a) (2) of the F.R.C.P., in the case of *The Reporters Committee for the Freedom of the Press, et al., v. Arthur F. Sampson, et al.*, C.A. No. 74-1533, and Jack Anderson's Motion to Intervene as a matter of right pursuant to Rule 42(a) (2), of the F.R.C.P., in the case of *Richard M. Nixon v. Arthur F. Sampson, et al.*, C.A. No. 74-1518, the points and authorities in support of and in opposition thereto, and the oral argument of the parties, it is, by the Court, this 31st day of October, 1974.

Ordered, that the Motion of the Special Prosecutor be, and the same is, hereby granted; and it is

Further ordered, that the Motion of Richard M. Nixon be, and the same is, hereby granted; and it is

Further ordered, that the Motion of Jack Anderson be, and the same is, hereby granted; and it is

Further ordered, that the above Motions are granted, without prejudice to the claims of the opposing parties with respect to such issues as standing.

CHARLES R. RICHEY,
U.S. District Judge.

Date:

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This case
M. Nixon
October 22
Plaintiff
of the F.R.C.P.
Arthur F.
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74-1518
Sampson
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C.A. No. 74-1518
Richard M.
Reporters
et al., C.A.

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Date: October 31, 1974.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 74-1518

RICHARD M. NIXON, PLAINTIFF

v.

ARTHUR F. SAMPSON, ET AL., DEFENDANTS

Civil Action No. 74-1533

THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, ET AL., PLAINTIFFS

v.

ARTHUR F. SAMPSON, ET AL., DEFENDANTS

Civil Action No. 74-1551

LILLIAN HELLMAN, ET AL., PLAINTIFFS

v.

ARTHUR F. SAMPSON, ET AL., DEFENDANTS

ORDER

This cause came before the Court on October 30, 1974, on Plaintiff Richard M. Nixon's Motion for Modification of the Temporary Restraining Order of October 21, 1974, as Supplemented by Order of the Court of October 22, 1974. Plaintiffs, Lillian Hellman, et al., Motion for Consolidation under Rule 42(a) of the Federal Rules of Civil Procedure of the case of *Lillian Hellman, et al., vs. Arthur F. Sampson, et al.*, Civil Action No. 74-1551, with the previously-consolidated cases of *Richard M. Nixon v. Arthur F. Sampson, et al.*, Civil Action No. 74-1518, and *The Reporters Committee for Freedom of the Press v. Arthur F. Sampson, et al.*, Civil Action No. 74-1533, and Plaintiff Richard M. Nixon's Motion for Consolidation of the Trial with a Hearing on the Preliminary Injunction pursuant to Rule 65(a)(2) of the F.R.C.P., Messrs. Erlichman and Haldeman's Request for Relief from certain provisions of the temporary restraining order, and the Reporters Committee's Motion to Extend the Temporary Restraining Order, and upon consideration thereof, and it appearing to the Court, upon consideration of the points and authorities in support of and in opposition to the above motions and the oral argument of counsel for the parties.

That (1) Plaintiff Richard M. Nixon's Motion has been withdrawn, and (2) there are common questions of law and fact, as required by Rule 42(a) of the F.R.C.P., between the cases, and that the interests of fair and efficient judicial administration and fairness to the parties as well as the avoidance of the possibility of conflicting rulings, necessitate consolidation, and (3) there is no objection from the parties to the lifting of the bar to the copying of the materials in issue by the defendants in the Watergate criminal trial, and that such relief would also prevent the Temporary Restraining Order from interfering with the conduct of that trial, and it further appearing to the Court (4) that: the questions presented in the several cases are of sufficient complexity and importance, some of which are of first impression, and that the matters before the Court are of a unique nature, so as to require that the parties be given further time to brief the issues and prepare the evidence; that an extension of the Temporary Restraining Order is necessary to accomplish its purpose, to maintain the status quo, and that no injury will be sustained by any of the parties by its extension; that neither the initial application, nor the application for an extension of, the Temporary Restraining Order was heard *ex parte*, and that the Order was and is sufficient to protect the interests of all the parties. It is, by the Court, this 31st day of October, 1974.

Ordered, That the case of *Lillian Hellman, et al. v. Arthur F. Sampson, et al.*, C.A. No. 74-1551, be and the same is hereby consolidated with the cases of *Richard M. Nixon, v. Arthur F. Sampson, et al.*, C.A. No. 74-1518, and *The Reporters Committee for Freedom of the Press, et al., v. Arthur F. Sampson, et al.*, C.A. No. 74-1533, for all purposes; and it is

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Further Ordered, That the Motion to Consolidate the Trial with the Hearing on the Preliminary Injunction be, and the same is, hereby denied; and it is

Further Ordered, That, notwithstanding the withdrawal of the Motion for Modification of the Temporary Restraining Order, the Defendants, having offered in good faith to copy the materials with all deliberate speed and under present security procedures, shall proceed to do so upon the receipt from Mr. Nixon's counsel of a request for designated materials, and in each instance notice shall be furnished to the Court; and it is

Further Ordered, That all parties shall submit briefs on the Motions for a Preliminary Injunction by November 11, 1974, and that the hearing on the Motions shall be held on November 15, 1974; and it is

Further Ordered, That the Temporary Restraining Order be, and the same is, hereby extended until the hearing on the Motion for Preliminary Injunction, set for November 15, 1974, at 9:30 a.m., and for a reasonable time thereafter until the Court renders its decision on the Motions; and it is

Further Ordered, That the first full paragraph of page 3 of the Court's Supplemental Order of October 22, 1974, be, and the same is, hereby amended to read as follows:

Further Ordered, That any person, either now or previously a member of the White House staff, or any defendant in the Watergate criminal trial now pending before the Honorable John J. Sirica shall be afforded access under current access procedures established by Defendants, with or without his/her attorney present, to said materials which comprise or comprised his or her files while a member of the White House staff, and be allowed to take notes regarding the same and to make copies thereof, all of the above solely for any purposes relating to criminal investigation or prosecution, and said copies shall be returned promptly to the defendants when such purposes have been served; and it is" and it is

Further Ordered, That any copies provided to any person under the terms of the above paragraph shall also be provided to the office of the Special Prosecutor; and it is

Further Ordered, That all such copies shall not be disclosed or divulged to any person except in regard to the criminal investigations or prosecutions; and it is

Further Ordered, That the Order of this Court entered October 22, 1974, shall remain in all other respects in full force and effect until further order of this Court, except as herein modified.

CHARLES R. RICHEY,
U.S. District Judge.

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