In the

Supreme Court of the United States

RICHARD NIXON,

Appellant,

v.

ADMINISTRATOR OF GENERAL SERVICES, THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, et al., JACK ANDERSON, LILLIAN HELLMAN, et al.,

Appellees.

No. 75-1605

Pages 1 thru 78

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Washington, D. C.,

Wednesday, April 20, 1977.

The above-entitled matter came on for argument at 10:05 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

HERBERT J. MILLER, JR., ESQ., Miller, Cassidy, Larroca & Lewin, 2555 M Street, N.W., Suite 500, Washington, D. C. 20037; on behalf of the Appellant.

NATHAN LEWIN, ESQ., Miller, Cassidy, Larroca & Lewin, 2555 M Street, N. W., Suite 500, Washington, D. C. 20037; on behalf of the Appellant.

WADE H. McCREE, JR., ESQ., Solicitor General of the United States, Department of Justice, Washington, D. C. 20530; on behalf of the Federal Appellees.

ROBERT E. HERZSTEIN, ESQ., Arnold & Porter, 1229 Nineteenth Atreet, N. W., Washington, D. C. 20036; on behalf of the Public Appellees.

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C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments first this morning in 75-1605, Nixon against the Administrator of General Services Administration.

Mr. Miller, you may proceed whenever you're ready.

ORAL ARGUMENT OF HERBERT J. MILLER, JR., ESQ.,

ON BEHALF OF THE APPELLANT

MR. MILLER: Mr. Chief Justice, and may it please the Court:

This case involves the first time in the 200-year history of our republic that Congress has seen fit to enact legislation seizing the papers, five and a half years of the Administration of a former President of the United States.

The core of this case, if the Court please, involves tapes, some 5,000 hours of tapes which contain conversations by the former President, which deal with a broad spectrum. They range from political discussion to discussion with his aides as to what steps, decisions should be made by the presidency; it also deals with matters highly personal, such as conversations with his wife, conversations with his daughter immediately prior to her marriage, and also conversations with his counsel, with his physician, and with his clergyman.

One problem with this case, in realizing the impact and the effect of the legislation, is that involved is 42 million documents, as an estimate. But, really, the core of

this case are the tapes which were seized by Section 101 of the Act in question, and the balance of the presidential materials.

I would like at the outset to emphasize to the Court that Section 101(a), which seizes the tape recordings, has no qualifying language which indicates that the seizure is directed solely to presidential materials or the like. There is a wholesale seizure of those tapes.

Section 101(b) talks in terms of seizing all of the balance of the presidential materials. These materials which represent the actions, both personal and private, of the former President over a five and a half year period, are currently in the control of the United States.

When Mr. Nixon left the White House, he left directions that these materials were to be forwarded to him. This direction was countermanded at the request of the Special Prosecutor and subsequently the legislation in question was enacted.

And I emphasize that this legislation, which was enacted, and which seized the tapes, which seized all other presidential materials, was enacted in haste and was enacted without congressional hearing.

The impact of this statute on the former President and, indeed, on the presidency itself is very clear.

First, under Section 102(d) of the Act, access is

given to any agency or department of the United States, to have access to the tape recordings, to have access to any of the presidential materials of the former President, for any lawful government purpose.

Secondly, --

QUESTION: Well, subject to the regulations which the Administrator shall issue.

MR. MILLER: Subject to the regulations which have been enacted and have been in force since January of 1975, if the Court please.

QUESTION: Mr. Miller, at this point you are just factually describing the effect of the congressional legislation; right?

MR. MILLER: Yes, sir.

The regulations which have been adopted permit and confirm that the agencies or departments of the United States do have access to these tapes for any lawful government purpose.

QUESTION: Are the regulations in the material that's been submitted to us, Mr. Miller?

MR. MILLER: I believe that they are in the Appendix, if the Court please. If not, I can supply the Court with the citations.

The regulations are Part 105-63 et seq. of Title 41 Code of Federal Regulations.

The additional impact of this statute is very clear.

First of all, it directs, and it has been accomplished, a seizure of five and one-half years of a man's entire materials, whether they deal with the actions as President, whether they deal with his actions as political leader of his party, or whether they deal with actions as a father and as a husband. These records have been seized, and they have stayed seized ever since the statute was enacted.

Mr. Nixon has not had access to these records, m...[sic] except as he has sent someone 3,000 miles to his home to have access to these particular records.

The purpose, if the Court please, of Section 104 of the Presidential Materials Act is that these documents, or specified portions thereof, will be made public. That is what Congress enacted. That is what Congress intended. And that is subject only to the adoption of regulations by the Administrator of General Services, which must be approved; which must be approved or can be disapproved, if I may correct myself, by one house of the Congress.

Those regulations are not in effect. One of the reasons being that they have been proposed, that they have been disapproved, they have been withdrawn.

And, if the Court please, the status of those regulations is in a very confused state at the moment.

But the ultimate purpose, in addition to seizing these records, was that those certain matters in those records

would be extracted by the United States and be made public.

The most intrusive part of the statute in question is that it will -- has authorized the Archivist of the United States -- some hundred is what the plans are -- to go through all of these records, word by word, all of the tape recordings, whether they involve conversations with his wife, with his daughter, whether they involve conversations dealing with his political decisions, whether they involve decisions dealing with foreign affairs, whether they involve his decisions with respect to domestic matters. It is a wholesale and grand search, in any sense of the word.

That is the immediate impact of this statute.

The Constitution of the United States vests in a President of the United States the executive power of the United States. It is that executive power which this Act impacts directly. Because it permits access to, review of, and ultimately publication of matters which are totally privileged, presumptively privileged under the decision of this Court in United States vs. Nixon.

Without the confidentiality that a President of the United States has and expects, and has expected for over 200 years until this legislation, this Court has ruled that the President and his aides cannot -- the President cannot receive the plain, unvarnished and candid advice that he has a right to expect to receive and must receive for the proper operation

of the presidency of the United States.

QUESTION: Well, in so far as that's a separation of powers argument, Mr. Miller, the Act applies only to former President Nixon; there's no reason to think that Congress is going to pass an Act that is generally applicable to the Presidents in the future, is there?

MR. MILLER: I know of no reason to expect that to happen, except that, as a second half of the statute in question, a presidential or a governmental materials commission has been formed and is about to render a report in which they will make recommendations as to whether Congress should enact legislation which deals with the records and materials of future presidencies; and also with the third branch, the Judiciary.

QUESTION: But it would be time enough, I take it, to confront anything Congress does in response to that report when it does it.

MR. MILLER: It would be time enough as to the impact on existing presidencies, but this Act has an impact on the operation of the presidency already, because the people in the White House, whether it be the White House of President Ford or President Carter, recognize that it is possible, if this law is sustained on a constitutional basis, that a statute will be enacted which will deprive them of their private papers, and the papers of their presidencies.

Because if you can do it in one instance, there's no reason why you can't do it in another.

If the separation of powers principle permits Congress to enact legislation seizing every scrap of material of five and a half years, or six months, or three months as the case is now, of the operations of a President of the United States, I say that that Act is totally unconstitutional, because --

QUESTION: But there isn't any impairment of any presently conducted executive function by the Act, --

MR. MILLER: I say --

QUESTION: -- the way there was in Myers or Humphrey's Executor.

MR. MILLER: I say that there is -- the Act does not apply to any Administration except that of former President Nixon. I say that the principle is a restraining effect on successive presidencies, because when they, those Presidents, are conferring with their aides, they are doing so with the understanding that possibly all of those deliberations and conversations may be made public by subsequent legislative Acts.

So I say there is an immediate impact.

QUESTION: Well, would you still object to this Act if, on its face, it simply says -- and maybe this one does -- that anything that would threaten the executive privilege or

anything that would threaten to reveal the kinds of papers that might inhibit free and open discussion between the President and his aides will be destroyed, or that they will never been made public?

MR. MILLER: If I understand your question, the legislation would simply say that the records would never be made public?

I would say --

QUESTION: Not the records, but that they will be sorted out. Surely you don't say that every piece of paper out of this entire strawstack of papers is privileged?

MR. MILLER: I do not, absolutely not. A substantial portion of these records --

QUESTION: Well, let's assume, then, you could divide them into two parts, and without any idea of what the relative volume of each part might be. But assume you can divide them into two parts, --

MR. MILLER: Fine.

QUESTION: -- and one part is privileged. And suppose the Act said, once you get them divided into two parts and you know what the privileged information is, that will not be made public. Would that satisfy you or not?

MR. MILLER: That would satisfy --

QUESTION: Satisfy your separation of powers argument?

MR. MILLER: It would satisfy the separation of powers to this extent: it would stop the intrusion by Archivists and others into these papers, because, as privileged, they could not be reviewed by third parties.

QUESTION: Well, if things are intermixed, somebody is going to have to review them, and divide them.

MR. MILLER: If somebody has to review them or divide them, that is one of the very issues that goes to the basis of the Fourth Amendment argument, if the Court please.

But let's assume, arguendo, --

QUESTION: Well, why doesn't it go to -- why doesn't it go to your separation of powers argument, that not only are some things privileged, but only the President should decide which are?

MR. MILLER: Only the --

QUESTION: Or the former President.

MR. MILLER: Well, the former President can determine which are privileged. This Court has already decided it would determine what are privileged occasions, and has so decided.

QUESTION: Well, is the -- is anything contemplated under this Act necessarily going to prevent the former President from giving -- from examining these papers and giving his opinion as to which are privileged?

MR. MILLER: Nothing will prevent the former

President from doing that. He is given a right of access, from 3,000 miles away, if he desires to come here to review them. He is -- the thing that would prevent him from reviewing and determining all of them would be the substantial burden involved. Because it does represent five and a half years of the presidency of the United States.

But, if I understand the decisions of this Court in the past, in terms of the concept of separation of powers, the deliberation of each Branch, whether it be the Judiciary, whether it be the Congress of the United States, or whether it be the presidency of the United States, the deliberations of each Branch are for the sole -- within the sole domain and the determination of the, each of those Branches.

The reason being stated very simply: that if one Branch of government can intervene into the deliberative process of the other, then truly the function -- then truly there has been a interference and a breach of the concept of separation of powers.

Because the ultimate decision-making -- how you make decisions is solely within the discretion and the determination of each of the Branches. Congress cannot pass --

QUESTION: Supposing you had a congressional committee thinking about legislating about this subject, and it subpoenaed some of these papers, do you think those objections on the part of the Executive Branch, even assuming

it was an incumbent President, would just be uniformly sustained?

MR. MILLER: I would say -- Justice Rehnquist, I would say this: if the documents subpoenaed were documents which dealt with, or tape recordings which revealed, the decision-making process, the conferences that were had, the positions put forth by the aides to the President, that those documents are presumptively privileged.

And, in fact, you may recall that the Senate of the United States, or a committee thereof, did in fact attempt to subpoena several of the tape recordings, and the Court of Appeals below held that no sufficient showing had been made to breach the presumptive privilege.

QUESTION: Have not the Presidents, all the way back to President Washington, declined to give to Congress, as distinguished from the courts, declined to give to Congress certain papers under the doctrine of executive privilege?

MR. MILLER: There has, if the Court please, been a long history and tradition. The first instance that I know of where the President of the United States refused to grant information requested by Congress was George Washington. Congress strongly requested that he supply information as to what his presidential instructions were to the advisors that were in the process of negotiating the Jay Treaty. President Washington refused to do so.

QUESTION: And you would be making the same argument, and are making it, with respect to a subpoena directed to our Conference notes?

MR. MILLER: Absolutely, if the Court please. Absolutely. The deliberative process cannot be invaded by one Branch of either of the other two. That has to be an established bases of the entire concept of the separation of powers.

Because if you can invade the deliberative process, you can control its result.

And the reason it's important, particularly in terms of the presidency, it's very difficult to understand how the office of the President works. It is not -- it is not, as most people assume, an office of records. All of the presidential final decisions, upon which this Court will act, upon which congressional action can be taken, are filed in various departments. Treaties are filed with the State Department. Pardons are filed with the Department of Justice.

You go through the various presidential decisions, and those become a part of the permanent files of the various departments of government which is involved in the decision.

The record -- the presidential office is not an office of records, it is an office whereby it is determined how decisions are to be made, and then those decisions are forwarded on.

A second broad reason for attack on this statute, and one which I don't think there can be any justifiable defense to, and that is that this congressional action is as clear and as grand and as wholesale a violation of the protected privacy of the Fourth Amendment of the United States as can be envisioned.

To enact legislation, as Congress has done, which directs that five and a half years of a man's papers, personal and private as well as presidential, be seized by a government agent or government agency, that those records be made available forthwith to any agency or department of the federal government, that they be made available immediately subject to any rights or privileges which may be raised for a judicial subpoena, and that while over one hundred archivists, accompanied by lawyers, technicians and secretaries, will have a right to review word-by-word five and one-half years of a man's life is, to me, an absolute clear, as clear as violation of the Fourth Amendment as one can imagine.

QUESTION: You wouldn't suggest, would you, that this stands on the same footing as if Congress had decided to take five and ahalf years of your papers, you being a private citizen?

MR. MILLER: The distinction with respect to Mr. Nixon's personal papers, does not exist. His papers, his personal papers are as personal to him as mine are to me.

And I say that the Congress does not have a right to enact legislation directing the head of GSA to take five years or, indeed, six months of my personal records, and they had no such right with respect to the parsonal records of the former President.

The cases of this Court which --

QUESTION: Does this Act now authorize any other government official who wants to look at any part of this collection of papers, give him the right to do so?

MR. MILLER: Under Section 102(d) of the Act, "Any agency or department of the Federal Government" has the right to immediate access to any part of these papers, be they the tape recordings, be they presidential papers, or --

QUESTION: Even if anyone who is halfway fairminded would concede that this is a purely private piece of paper, he may see it?

MR. MILLER: Even if -- the only caveat is that the intrusion must be for lawful government use.

QUESTION: Well, what does that mean?

MR. MILLER: It means that the --

QUESTION: How can something purely private and personal be of lawful government use?

MR. MILLER: It cannot be, if the Court please. It absolutely cannot be.

And yet this is what the statute directs, that these

personal --

QUESTION: But doesn't the statute say "subject to the regulations"?

MR. MILLER: No, sir. Well, subject to the regulations in Section -- to be enacted by Section 103. Those regulations, if the Court please, those regulations have been adopted, and were adopted in January of 1975.

QUESTION: And they are not in the record before us?

MR. MILLER: I assume that they were, but perhaps they are not.

QUESTION: Well, those have been adopted, and those are not the ones that were rejected by Congress?

MR. MILLER: They were not, no. The ones rejected by Congress --

QUESTION: All right, but, so they're not rejected, so they must be in the Federal Register?

MR. MILLER: Oh, they are. Absolutely.

QUESTION: That's what I thought.

MR. MILLER: The regulations rejected by Congress were pursuant to Section 104(a) of the Act, which required that the Administrator adopt regulations to make public -- to make public --

QUESTION: Well, what about the regulations permitting access by other government officials, do they have restrictions in them?

MR. MILLER: They have sections permitting -- what these regulations do is they track the exact language of the statute. They give access to any agency or department of the United States, to have access to these records.

QUESTION: Does Mr. Nixon, or his representatives, get notice any time any government official wants to look at any part of it, or not?

MR. MILLER: Under the regulations in the Federal Register, promulgated pursuant to Section 103, any archival intrusion, i.e., any time an archivist goes in, there is a provision that the counsel to the President of the United States -- in this instance President Carter -- will be notified and given a right to review what happened, and notice is given to the former President; notice.

QUESTION: So that if a government official -- if some other department of the government wanted to, supposedly for a lawful purpose, examine some of the papers, Mr. Nixon would have notice of it?

MR. MILLER: He would have notice under Section 103 of the regulations, yes.

QUESTION: I see.

MR. MILLER: And whether he would be given notice under the regulations ultimately to be adopted under Section 104, we would have to await for those regulations.

QUESTION: Does the Act contain any penalties for

disclosure by any employee of the many employees who would have access to this?

MR. MILLER: None whatsoever, if the Court please. None whatsoever.

In fact, with respect to archival intrusion, if these archivists, these hundred archivists with lawyers and what-have-you, go through these personal tape recordings and other conversations without a warrant, making a search, they have an obligation to turn over to the Department of Justice, if they find anything that might warrant further investigation.

So that this is, in truth, an absolute truth, a search followed by a seizure, which I strongly submit is totally violative of the Fourth Amendment.

QUESTION: Mr. Miller, --

QUESTION: Do the regulations deal with the question of impermissible disclosures? Suppose some clerk or any one of the many people dealing with this screening process makes a Xerox copy and sells it to someone, do you say there's no penalty at all on that?

MR. MILLER: There are general regulations adopted which apply to members of the -- employees of the General Services Administration, if the Court please, and those regulations generally forbid making available to the public -- there are also standard statutes in Title 18 which prohibit government officers from making available certain types of

information.

QUESTION: But no criminal penalties?

MR. MILLER: In those, there would be. But not under the GSA regulations which have broad applicability here.

At this time, if the Court please, Mr. Lewin will present the balance of the argument.

QUESTION: Mr. Miller, before you sit down, could I ask one question?

Is there any issue presented with respect to the materials that Mr. Nixon took out of government custody -- the footnote in the government's brief points out that some materials have been, are in his custody; and I would think Section 101(b)(1) may read on those materials. Is there any issue with respect to that?

MR. MILLER: Yes. In fact, there is -- there has been no issue raised yet, because the Administrator of GSA has not undertaken the reasonable efforts required of him by Section 102 to reach out and take those records.

QUESTION: That's what I really wanted to ask. There has been no attempt to enforce 101(b)(1) yet?

MR. MILLER: Not as to documents in Mr. Nixon's possession. But, if they are, then they are going to reach the Dictabelts and his oral diaries that he dictated at the end of every day, most of which are also a part of the tape recordings I mentioned. Because when he dictated his diaries

at the end of the day, as to what transpired, how his day went, his most personal thoughts, those, too, become a part of the tape recordings that I mentioned here, as well as being on the Dictabelts.

QUESTION: Does the record tell us why there's been no effort to enforce that section?

MR. MILLER: The record tells that there has been no record because, in effect, there's been a stay of any action as to this.

QUESTION: I see.

MR. CHIEF JUSTICE BURGER: Mr. Lewin.

ORAL ARGUMENT OF NATHAN LEWIN, ESQ.,

ON BEHALF OF THE APPELLANT

MR. LEWIN: Mr. Chief Justice, and may it please the Court:

I would like, in the time available to me, to speak to the constitutional standards for evaluating of the statute under the three arguments that we have presented in our brief, because we think that the standards are different, and the district court really applied a balancing test, which is inappropriate to two of the three separate arguments that are made in our brief.

But just momentarily, before going to that question, and I think in some way it does relate to the application of a balancing test to the question of separation of powers, I

believe Justices White and Rehnquist did raise the question of whether this statute is not in some way constitutionally sufficient, because it either applies only retrospectively to one President or because it might, by its application, really be read to give President Nixon an opportunity to challenge whenever there is some violation of presidential confidentiality.

And we think that that overlooks the basic presumption that underlies our separation of powers argument; which is, that the notion of separation of powers, as applied to statements and advice given to a President in confidence, is really a proposition that acts in futuro.

In other words, only if a presumption of confidentiality exists do existing advisors speak frankly, just as existing law clerks will speak frankly to Justices of this Court, because they know that their advice is given in confidence; in the same way, the mere possibility that a statute may be enacted retrospectively to apply to President Ford or Carter, or the possibility that a President may be put -- with regard to every individual piece of paper or every advice -- to the burden of litigating it at some future time, and asserting his presidential privilege, is sufficient to impede the free flow of communication. And that's precisely why we think this Court adopted the rule of presumption of confidentiality and stated it as strongly as it did in United

States vs. Nixon.

QUESTION: But the analogy here, Mr. Lewin, is a former Justice of this Court comes in and objects to a law that Congress has passed, and all the present Justices say, "We don't see any problem with it".

MR. LEWIN: Well, I think that the present Justices' law clerks, even if all the present Justices said there was no problem, I think that the Justices would agree that the present law clerks and their own relations with their law clerks would be substantially affected by the existence and, indeed, by the judicial imprimatur put upon such a statute.

It would mean, with regard to your own law clerks, that after you left the Court, a similar statute might be enacted. And even though you might think, today, that it does not concern, or it does not relate to the way you operate your office, the successor to that seat might differ with that view.

And, consequently, we have argued in our brief and we believe that no present occupant of a position such as the presidency or such as an Article III position on this Court, or on any federal district court, or, indeed, any Congressman may not permanently waive those elements which are necessarily incident to the proper functioning of that office, even if he agrees with it today.

And that, we think, is the basic deficiency in the

argument that is made both by the Solicitor General and by the private appellees, when they say that this is not a separation of powers case. Indeed, it is, in every sense, because the issue of confidentiality of presidential communications, irrespective of what the present incumbent may think of that confidentiality, is a question which is decided in this case for all time. And will therefore bind future Presidents, who may disagree with what Mr. Carter believes or what Mr. Ford believed, if indeed Mr. Ford did believe that it made no difference.

Qe submit that to the extent that there was really any indication of what presidential policy was, the agreement, which is in the record, the Nixon-Sampson Depository Agreement, indicates that President Ford believed that for purposes of on-going government business, which is really, I think, the principal thing that the appellees are relying on in this case, which is not so much historical interest, although that is talked about in the legislation, but in the briefs before this Court, heavy emphasis is placed on on-going government business.

And President Ford was entirely satisfied with an arrangement between himself and his predecessor under which he would be given access. And we think that's what 200 years of history have shown; that that is satisfied by arrangements between succeeding Presidents.

The Congress had before it no record of extensive disagreement or of extensive situations which presented problems with regard to future Presidents obtaining records that their predecessors may have had.

And, indeed, the appellees have only plucked out, out of an entire 200-year history, basically, I think, one, two, or at most three instances where there was a request -- which was honored, and indeed only one situation where there was a request, a lower level request, which was not honored, as between successor Presidents; and that was not by the President in office but by a very low-ranking individual who had made a call to John Eisenhower and asked whether he might have a paper. And when Mr. Eisenhower said, Well, have that request made by the President himself; the request was never made.

QUESTION: I'm a little puzzled by your repeated reference to the judicial area, the communications between law clerks and Justices and judges; what about communications as among the Justices and judges themselves? Would you think they are of less or greater privilege?

MR. LEWIN: I think the privilege is -- in terms of policy reasons, I think it is certainly even greater. I have only analogized it in terms of law clerks, because, with this Court -- and I believe with every individual judge who sits -- the analog, I would think, to the President, who

is at the very top of the Executive structure, who is The Chief Executive, are the subordinates to that President, and consequently, in order to provide the closest analogy, I tried to compare it to those who work for Justices of the Court.

But certainly to the extent that there are internal Judicial Branch discussions which, by approving this kind of statute, this Court would be saying Congress might very well reach those kinds of papers, I think the very same problem exists. And, indeed, that very report which Mr. Miller was referring to, I think was suggesting that there would be restraints placed on the ability of Justices to destroy papers. Which the leading Justices in the history of this Court down to very modern times have assumed they had certainly the right to do, in terms of internal papers.

QUESTION: Well, previous Presidents have received substantial tax benefits by virtue of claimed ownership, have they not, of their papers?

MR. LEWIN: Yes, Mr. Chief Justice, and we think that that's a totally separate problem. We are not here today arguing anything, really, that goes to what ownership rights may be, except to the extent that they bear on Mr. Nixon's expectations,on what the proper constitutional rule is, on how the country is operated.

QUESTION: Does it bear on your bill of attainder

arguments?

MR. LEWIN: Yes. And if I could, just in the very few minutes I have, I would like to speak to that bill of attainder argument.

Because I think that here, too, the court below has mistaken the proper constitutional standard.

Congress could have enacted a law, if it thought, on the basis of its various investigations and the discussions on the Floor of the Senate, that Mr. Nixon was an unreliable custodian of documents, it could have enacted a law that said any unreliable custodian of documents, be he President, Vice President, or any other federal officer, may have those documents taken away from him if it is shown, in a judicial forum, that he is an unreliable custodian.

And there could be temporary restraining orders, and preliminary injunctions, every remedy that this statute provides.

What does this statute do, more than that statute does? I makes Congress the fact-finder. And that's exactly what this Court has said in a series of cases, culminating with United States vs. Brown, that Congress may not be the fact-finder.

And why may not Congress be the fact-finder? Because in that case the party against whom it finds the facts has no judicial trial, no counsel to represent him, no opportunity

to cross-examine witnesses or present witnesses in his defense. The entire range of what judicial trial is all about is obviated.

In this case, Congress held not a single hearing on this statute. It did hold hearings on a predecessor statute, looking to the question of federal officials' records generally, but not on this statute.

There was no opportunity, other than statements made on the Floor of the Senate, just assertions, which were picked up by the district court in this case, to the notion that Mr. Nixon is an unreliable custodian for historical purposes.

And we submit that the bill of attainder clause says is that you may not, Congress may not make that ultimate factual finding. And here it has done it, it has mentioned Richard Nixon by name -- Congress didn't even dare do anything like that in the Brown case. And this Court mentioned that certainly if "Archie Brown" had been mentioned by name as someone who could not occupy a union office, that would be a bill of attainder. And here Congress has said "Richard Nixon" is the person who cannot decide which papers are confidential and which papers are not.

That aspect of the presidency and what carries on with it after the President leaves office is taken away from him.

Now, Mr. Chief Justice, I suppose your suggestion was

that there was in effect a bill of attainder, because he has also been deprived of ownership of these papers. I think that may very well be true.

In addition to that, he has been deprived of custody, of access, of any meaningful opportunity to have those documents in the way that former Presidents have, and the Archie Brown case also says that even preventive purposes, even entirely preventive purposes are punishment within the meaning of the bill of attainder.

Thank you.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Solicitor General.

ORAL ARGUMENT OF WADE H. McCREE, ESQ.,

ON BEHALF OF THE FEDERAL APPELLEES

MR. McCREE: Mr. Chief Justice, and may it please the Court:

This appeal requires the Court to determine whether the Presidential Recordings and Materials Preservation Act, that provides for the impoundment and classification by officials of the Executive Branch of certain materials generated during the Administration of a former President, and left by him temporarily in the White House following his resignation, facially offends the Constitution.

We emphasize "facially" because the Act became effective on December 19, 1974, and this action for declaratory

judgment and other relief was filed December 20th, before any action was taken under the statute.

QUESTION: Mr. Solicitor General, I take it, the question as you put it, you could mean the entire Act -- is that the question? Or is it legitimate to ask whether any section of it is facially unconstitutional?

MR. McCREE: I believe my answer to that, Mr. Justice White, is the plaintiff contends -- the appellant contends that the Act is invalid in many respects. But our response is that there is a severability clause, and in the event this Court should find a provision of it invalid, it would not invalidate the entire legislation.

Appellant contends that the Act violates the principle of the separation of powers, the prohibition against bills of attainder, and his right to privacy and liberty of political expression and association. The government submits that the Congress acted constitutionally, and that the judgment of the district court should be affirmed.

As my brother has pointed out, the Act requires the Administrator of General Services to take possession and complete control of the materials, to prevent their destruction, except as required by law, to make them available for use in any judicial proceeding or otherwise subject to legal process, subject to any rights, defense or privileges that anyone, including the former President, might raise.

The Act also requires the Administrator of General Services to afford former President Richard Nixon access at all times, consistent with the Act, and to afford access to the Executive Branch -- and I stress Executive Branch -- for lawful governmental use.

And then, of course, it requires the issuance of regulations, to prevent loss and destruction, and ultimately to submit to the Congress regulations relating to public access -- and I stress the distinction between the two sets of regulations, taking into account seven enumerated factors denominated as needs, which I suggest we need not discuss in detail, because these regulations had not been promulgated at the time the attack on the statute was made, have not yet taken place because they require congressional acquiescence to become effective; and that acquiescence, in the two efforts that were attempted, was not forthcoming.

Finally, the Act provides for the appropriation of money if a court should determine that a provision of the legislation should deprive an individual of private property without just compensation.

And so, at this point, I reiterate, since there are no regulations providing for public access, and only regulations for safekeeping, which are not before the Court, as my brother indicated, and are not part of the record here, because, indeed, the appellant does not claim that they abridge

any rights of his, we suggest respectfully that this Court should limit its inquiry to the face of the statute, and should not be concerned with the many hypothetical horrors, as the district court characterized them, that appellant suggests might occur at some future time.

We suggest the proper time to consider these hobgoblins may be when the public access regulations will have been promulgated and will have become effective, and there will have been decisions with respect to particular materials.

QUESTION: Mr. Solicitor General, do you -- I'm not sure this bears directly -- would you think Congress could enact a statute impounding the papers of federal judges generally, or judges of one particular category or level, circuit judges, Supreme Court Justices, or a particular Supreme Court or other judge or Justice?

MR. McCREE: I believe if the Congress apprehended some great harm to the republic, it could prevent the destruction of records in the custody of any public officer.

Now, there would be restrictions on its power to do it, but I would think the Congress would have that power, to prevent the destruction of public records by any public custodian thereof.

QUESTION: What kind of proceeding would be necessary to make that determination? Presumably, your response indicates there would first be a finding or a determination. By what

process would the Congress make that? I don't assume you mean it would be just the ipse dixit of the legislative process.

MR. McCREE: Well, I think the Congress, if the Court please, has the power and even the duty to protect government property, and that's a specific charge that the Congress must accept. And I think the Congress, if it apprehends the destruction of public property, has the responsibility to provide for it. But it must provide for means adequate to protect the integrity of the branch of government that's concerned, to protect personal rights, executive privilege, judicial rights, judical privileges; but, in response to the Chief Justice's inquiry, yes, I think the Congress has the power to protect the papers from destruction.

Now, what it can do with it after that is quite a different matter.

QUESTION: General McCree, do you think this case would stand on any different footing if the congressional statute had been directed at presidential papers that were located in Key Biscayne rather than in the White House, where, presumably, the government did not own the building they were located in, but the papers might be of the same general caliber?

MR. McCREE: I don't believe that would make any difference, Mr. Justice Rehnquist. I believe if these are

public papers, if they belong to the government, or if the government has a substantial interest in them, and there is apprehension about their destruction, before this can be ascertained, I think the Congress has that power.

QUESTION: Is it necessary,for you to sustain your proposition, for us to find that the government in fact owns the papers in question?

MR. McCREE: I submit it is not. I think if the government has a sufficient interest in them, the government may have an interest that would require it to copy the papers.

I suggest to the Court that the papers might indicate material useful in the SALT talks that have just been recently pursued. They might have information that would be necessary in matters of national security, that the Executive Branch should have access to. And if these papers were in danger of destruction, I would think the Congress would have the power to provide for their protection until their contents could be made available to the appropriate persons.

QUESTION: You wouldn't carry that over to papers in the hands of a private individual, I take it?

MR. McCREE: I don't believe I have to, at this time. And I'm not aware that the Congress has that power. But I just don't think I have to reach that question at this time.

And I don't think this Act does.

QUESTION: Well, Mr. Solicitor General, you do have

to reach the question, though, of private papers. You mentioned only public papers, and Congress's power over public papers.

Now, apparently no one suggests that all the papers that are seized, that have been seized here are public papers.

MR. McCREE: I concede, Mr. Justice White, --

QUESTION: And let's just assume that, as this Court read this statute, the statute would empower the empowerer, the regulator, to withhold papers that anyone in his right mind would say are private papers.

Now, would you suggest that, then, that statute is unconstitutional on its face to that extent?

MR. McCREE: On its face, if it instructed or authorized the impoundment of purely private papers, --

QUESTION: Well, you know that --

MR. McCREE: -- I am not here to defend --

QUESTION: -- well, you know that that's been done already. That's been done already, and the only question is: Is there some adequate procedure to sort them out and return private papers?

MR. McCREE: If I may respond, the papers were co-mingled --

QUESTION: Yes.

MR. McCREE: -- by the former President. And some method has to be employed to determine what papers are private and what papers are public, or affected with such a

public interest that they may be retained.

QUESTION: Well, I may as well make my point --

MR. McCREE: And the procedure has been established to classify them.

QUESTION: Yes. Now, I'll make my question very specific. I would like to know where, in the criteria that the regulator must use in preparing his regulations, where in those criteria is any assurance given that purely private papers will be returned to Mr. Nixon?

And, even more precisely, suppose that someone like a regulator claims that this piece of paper, even though purely prive, is of general historical interest? Do you think those two categories are mutually exclusive?

MR. McCREE: I think it may be difficult to separate them, but, if the Court please, Section 104 provides, as the seventh of the enumerated needs, on page 4a of Appellant's brief one finds that, --

QUESTION: Yes.

MR. McCREE: -- that the regulations shall take into account, among other things, the "need to give to Richard M. Nixon, or his heirs, for his sole custody and use, tape recordings and other materials which are not likely to be related to the need described in" the foregoing paragraphs. And so there is no intention --

QUESTION: Now, wait a minute, just finish the --

just finish the provision.

MR. McCREE: "and are not otherwise of general historical significance."

QUESTION: Well now, suppose Mr. Nixon has prepared a diary every day and put down what, exactly what he did, and let's suppose that someone thought that was a purely personal account. Now, I can just imagine that someone might think that it nevertheless is of general historical significance.

MR. McCREE: May I refer the Court to need No. 5? "The need to protect any party's opportunity to assert any legally or constitutionally based right or privilege which would prevent or otherwise limit access to such recordings and materials".

And I submit that this Act affords Richard M. Nixon the opportunity to assert the contention that this diary of his is personal and has not the kind of general historical significance that will permit his deprivation; and that would then have to be adjudicated in a court.

QUESTION: Well, do --

MR. McCREE: And ultimately this Court will answer that question.

QUESTION: Well, how do you -- so you would agree, then, that 104 must be construed -- must be construed to sooner or later return to Mr. Nixon what we might call purely private papers?

MR. McCREE: Indeed I do.

QUESTION: Can you imagine any diary -- thinking of Mr. Truman's diary, which, it is reported, was a result of being dictated every evening, after the day's work -- can you conceive of any such material that would not be of general historical interest?

MR. McCREE: I must concede, being acquainted with some historians, that it's difficult to conceive of anything that might not be of historical interest. But --

[Laughter.]

QUESTION: Yes. Archivists and historians, like journalists, --

MR. McCREE: Indeed they are.

QUESTION: -- think that everything is.

[Laughter.]

MR. McCREE: But this legislation recognizes that a claim of privacy, a claim of privilege must be protected, and if the regulations are insufficient to do that, again a court will have an opportunity to address itself to a particular item such as the diary before it can be turned over.

And for that reason, we suggest that the attack at this time is premature because the statute, in recognizing the right of privacy, is facially adequate. And the attack that was made the day after it became effective brought to this Court a marvelous opportunity to speculate about what might

happen, but the regulations haven't even been promulgated and acquiesced in so that they have become effective.

Now, this Court is asked to speculate about any number of horrors, as the distinguished court below says.

QUESTION: But the specific procedure has taken place -- for want of a better word, yes.

MR. McCREE: Yes, Mr. Justice Rehnquist, it has, and it has been done for the purpose of safekeeping and preventing destruction. But the sorting and sifting has not even been begun.

QUESTION: And I take it, from your answer to the Chief Justice's question, that Congress could,immediately upon the retirement of Chief Justice Warren from this Court, have passed a statute similar, sequestering all the papers that he had in this building?

MR. McCREE: I believe it might, for safekeeping. But it would have to set up reasons for doing it, indicating why, and provisions for returning to him everything that it could not appropriately take from him. And this statute purports to do that. And we submit --

QUESTION: But why would it have to set up reasons for so doing?

MR. McCREE: I think I'd like to reconsider my response. I'm not certain it would have to. I'm not certain it would have to, except we assume that the Congress acts

because of a perceived need to act.

Now, it doesn't have to recite in the statute, if this is what Mr. Justice Blackmun is inquiring, why it so acted.

QUESTION: Mr. Solicitor General, are you saying -- you emphasized the danger of destruction as an important justification, as I understand, for this kind of legislation; are we to assume that Congress has made a finding of fact that there was a danger of destruction and that Mr. Nixon was an unreliable custodian?

And, if so, does that have any bearing on the bill of attainder argument?

MR. McCREE: If the Court please, I would like to refer the Court to the House Report, House Committee Report, it's House of Representatives Report, on page 3, where we find two significant items.

QUESTION: Is that in your brief, Mr. Solicitor General, or not?

MR. McCREE: I'm not certain that this specific reference is, Mr. Chief Justice.

QUESTION: Well, then, excuse me; go ahead with your citation.

MR. McCREE: If I just might be permitted to read a line. In speaking of the agreement which former President Nixon enacted with Mr. Sampson, the Administrator of General

Services, which agreement was abrogated by this statute: "Thus the agreement gives Mr. Nixon total control over all the materials and records of his Administration. It allows him to have access to the materials, but excludes others from reviewing these records. Then, by allowing Mr. Nixon to destroy all the materials, the agreement ignores the public interest in preserving them."

And so we have some evidence of congressional apprehension.

QUESTION: Mr. Solicitor General, could that reference concern the problem of immediate destruction, or was that talking about destruction at a future date?

MR. McCREE: I'm unable to --

QUESTION: Did it allow Mr. Nixon to --

MR. McCREE: I'm unable to differentiate. I must concede that it follows a paragraph that provides for the destruction of the tapes at a stated date, September 1, '79, or his death at a sooner date.

QUESTION: Certainly that agreement didn't contemplate the immediate destruction of any of these materials?

MR. McCREE: Except, if the Court please, it permitted him sole access --

QUESTION: In fact, it would seem to me that perhaps -- the sole access.

MR. McCREE: -- and opportunity.

QUESTION: But you're saying this statute may be justified because of the danger of destruction. And it seems to me that agreement prevented the very danger that you're describing, for a limited period of time. And therefore would have permitted a careful deliberation of an appropriate statute applying to all Presidents.

MR. McCREE: If the Court please, the Committee Report contains this characterization of the agreement, and I quote again from page 3: "This agreement would permit Mr. Nixon to remove and destroy any of these documents if he wishes to do so." And that certainly appears to evidence concern, apprehension that it might indeed happen.

QUESTION: Well, isn't that a statement of fact that would apply to every employee of the United States Government, from the President down to the lowliest doorkeeper? That it affords the opportunity. Is that a finding of apprehension?

MR. McCREE: Well, coupled with historical facts, including the unexplained erasure of 18 and a half minutes of a tape recording, it would appear to be more than just a platitude.

QUESTION: Did Congress recite that factor?

MR. McCREE: I'm not aware that that recital appears in the Committee Report, but reference is made to it in both briefs, and there is a record reference to it, that I'm unable

to furnish right now.

QUESTION: Mr. Solicitor General, I don't know whether we can take judicial notice of the biographical writings of former Presidents or other public officials, but, if we can, it's quite clear from what Mr. Lyndon Johnson wrote and what Mr. Harry Truman wrote, that when they left the White House they had, with their own resources plus the resources furnished by Acts of Congress, a completely private screening under the exclusive control of the former President, of all the papers, to separate the personal from the truly public or even some of the historical matter.

And the biographical material of former Justices of this Court indicates that's generally the process they followed.

Do you see a difference between having that screening process under the sole control of the individual and the process provided by Congress? And, if so, whether there are any constitutional implications in the difference?

MR. McCREE: Well, there are similarities and differences, if the Court please. The same people, essentially, are doing the screening as accomplish it under the Presidential Libraries legislation. The archival section of the General Services Administration. And, indeed, this Act provides that these archivists, who are professional persons, as the Court of course knows, with ethical standards to which to adhere and so forth, will also screen the material

here. And, I submit also, it's within the same Branch of Government, it is not outside of the Executive Branch of Government.

So, in that respect, it's the same.

The difference is under the Presidential Libraries Act previous Presidents have been permitted to or -- no one has tried to stop them -- have indeed established conditions upon access, concerning access to their papers, provided for periods of time when they will be closed to everyone, and provided various methods for access and release.

The Congress, though, over the years, has passed a series of amendments to the Congressional Libraries Act, until -- this really happens to be the last one in line, although it is not of general application.

If the Court please, my --

QUESTION: Mr. Solicitor General, before you move on, do you have any idea approximately as to how many archivists, secretaries, lawyers, and other staff personnel have or will have access to these documents?

I think Mr. Miller mentioned a hundred archivists. Would it be one hundred?

MR. McCREE: There is a statement in the record, and I regret, Mr. Justice Powell, that I cannot refer to it specifically. I don't think the number is that high, but it could be, when one considers that there are 42 million

documents and 800 hours of tape. But a hundred sounds quite high, and I would just have to find that for the Court and furnish it to the Court.

QUESTION: That number was identified in connection with the archivists. A good many other personnel would see the papers.

I now ask you a question that may sound frivolous, but do you think if a hundred people know anything of great interest in the City of Washington, it will remain a secret?

[Laughter.]

MR. McCREE: Mr. Justice Powell, I have heard that if two people have heard it, it will not.

[Laughter.]

QUESTION: You're probably right!

QUESTION: The Pentagon Papers case illustrated that, did it not? Not two, but very few.

MR. McCREE: Well, if the Court please, we submit that there is no violation of the principle of separation of powers. Viewed on its face, as we suggest the statute must be viewed, instead of being an encroachment on powers reserved to the Executive Branch, the Act entrusts the material to the custody of the Administrator of General Services, an executive official appointed by the President and responsible to him; and so the suggestion that there would be any compromise of the integrity of the Executive Branch appears

not to have force, because the person who will supervise the archivists who will do the classifications is responsible to the President.

QUESTION: Mr. Solicitor General, may I return for a moment to the question -- I didn't really follow through enough on it -- about the question of danger of destruction. I suppose there's always a possibility of destruction. If that's enough, why, then, that would justify legislation of this kind with respect to any retiring official.

But are we to take it that the view of the government is that the House Committee in the legislation is predicated on a finding that there was some abnormal danger of destruction that does not always exist with respect to any retiring official?

MR. McCREE: If the Court please, may I refer the Court to the government's brief, the bottom of page 50 and the top of page 51, where there is a reference to specific House determinations of a specific fear of distrust.

QUESTION: Mr. Solicitor General, I want to be sure you get the full import of my question. I assume you could find support for the view that there is such a finding, but what I wanted to know is what the government's position is, because if you say the Legislature made such a finding, that may undermine your position on the bill of attainder point.

It seems to me you must take a position one way or

the other. And the postion must be -- is relevant to two different arguments that your opponents make.

MR. McCREE: If the Court please, --

QUESTION: And I'm just curious to know what your position is.

MR. McCREE: -- the government does not suggest that there must be such a finding.

QUESTION: No. My question is: does the government suggest there was such a finding?

MR. McCREE: The government acknowledges that there was such a finding.

QUESTION: I see.

MR. McCREE: But suggests that since no punishment was imposed, or is imposed by the Act, that the prohibition against a bill of attainder is not violated. That is our response to the attainder argument.

QUESTION: Do you think that -- can there be a violation of a protected interest by the impact of such a finding on a person's reputation?

MR. McCREE: Indeed there can be. Indeed there can be, but that --

QUESTION: And would you take the view that this finding that you describe has had no impact on this man's reputation?

MR. McCREE: I certainly do not. But --

QUESTION: Then, why is it not a bill of attainder?

MR. McCREE: Well, our understanding is that the prohibition against a bill of attainder is a prohibition against something more traditionally associated with punishment than injury to a person's reputation.

In fact, we would submit that going through a congressional investigation is not likely to assist a person in maintaining a good reputation, but no one suggests, I think, that that violates the attainder prohibition.

If the Court please, in the few minutes remaining, we would like to touch on one or two other matters.

We submit that facially the Act does not invade the President's right of privacy or any executive privelege. The Act specifically provides that these are concerns with which the General Services Administrator is to be aware in the promulgation of his regulations, and his determination of allowing access, public or private, to these papers.

And the right of former President Nixon to assert these privileges is given to him by the statute, and we submit a court, perhaps this Court, will have to determine whether an assertive right exists, and whether it must yield to an overriding interest, as it did in United States vs. Nixon.

And so, facially, the Act protects these interests that my brother -- about which my brother expressed so much concern.

Finally, we suggest that the comingling of these papers was the act of the former President, and for him to suggest that the Fourth Amendment prevents the sifting of these papers to determine what are clearly his private papers, and what are papers pertaining to matters in the public interest, to which the Executive Branch should have access, is something of his doing, and that he should not be heard to complain about it.

The Fourth Amendment bars unreasonable searches, and the government submits that the imperatives of national security and other aspects of the public interest makes such an inspection eminently reasonable.

Professor Paul Freund wrote: History is a way of mocking those spectres of disaster forecast from judicial decisions.

The government believes that so long as the courts retain their resourcefulness in applying precedents, their authority to reconsider doctrines in the light of the lessons of experience and the force of better reasoning, that the fears of irreparable harm, which we have heard here today, are likely to prove exaggerated.

We submit that on its face this statute is constitutional, and we respectfully submit that the judgment should be affirmed.

Thank you.

QUESTION: General McCree, the national government is of course one of delegated powers, I suppose. Which delegated power was Congress exercising, do you think, as far as under Article I, when it passed this legislation?

MR. McCREE: There is a power -- I can't give you the exact language -- to preserve and protect public property; and I certainly think that one, and I think the necessary and proper powers.

QUESTION: Would the power to preserve government property depend on a finding by this Court that it was government property?

MR. McCREE: Perhaps for some purpose, as this Court has pointed out, the concept of property has many aspects. Perhaps the government might have an interest, not a proprietary interest, but the kind of interest that would be entitled to protection of the Congress.

QUESTION: General McCree, you mentioned national defense as one of the justifications for the Act. Would you elaborate on that a bit?

MR. McCREE: If the Court please, some of these papers may contain information furnished to the negotiators for our nation in the SALT talks, information perhaps concerning the number of nuclear submarines that we possess capable of launching missiles, subsurface missiles. These are matters that the on-going Administration, whatever it is,

must have access to if it is adequately to protect our security.

QUESTION: Is there one word in the record anywhere that suggests any danger that a former President of the United States would destroy records related to national defense?

MR. McCREE: There are 42 million -- no, if the Court please, the answer is no, there is no word to that.

QUESTION: You are not representing to this Court that there was any danger known to your office or, so far as the record is concerned, known to the Congress that documents pertaining to national defense would have been destroyed?

MR. McCREE: I am not suggesting that. I can advise the Court that I am aware that there has been retrieval of certain documents of the type I have -- of the type generally relating to national security from these papers, since they have been in the custody of the Administrator of the General Services Administration, and with 42 million comingled documents, some method of retrieval must be established if a critical document is to be found within a time within which it can be useful to our nation.

And this also is provided for by the Act. Access -- and contrary to what my brother says -- to members of any department or agency of the Executive Branch -- he neglected to emphasize that -- and there has been that access.

QUESTION: May I ask you a question? Excuse me for

interrupting you.

How many agencies and departments are there in the Executive Branch, Mr. Solicitor General?

MR. McCREE: I do not have that figure at my fingertips, if the Court please.

QUESTION: There's a great big --

MR. McCREE: More than I think, I suspect.

[Laughter.]

QUESTION: I suspect you're right.

And there are a couple of million people in the Executive Branch. I think.

But, put that aside for the moment, I have another question I'd like to ask. If you were a foreign diplomat, and this Act is sustained, would you feel as free to divulge state secrets to the President of the United States as you would have felt prior to the enactment of this statute?

MR. McCREE: I can honestly say that I would, because this statute mandates protecting any information relating to the nation's security, and any legal or constitutionally based rights or privileges. And I would expect --

QUESTION: What are the penalties?

MR. McCREE: -- executive privilege to be protected from any unauthorized invasion.

QUESTION: But these several hundred people reading

or listening to what the Ambassador from this country or that country said to the President of the United States, do you really think that that information will be kept confidential?

MR. McCREE: If the Court please, my only response to that can be this: that previous Presidents have taken their papers, subject to no restrictions whatsoever, which means that an Ambassador would have to believe that anything that he spoke to another President might be discovered by persons not even under the restrictions that these responsible government archivists submit to.

QUESTION: But this is after this former President that you hypothesize has gone through the process of selecting and segregating, which each of the former Presidents, according to his own account, has done.

MR. McCREE: If the Court please, the life of President John F. Kennedy terminated in office, and he did not have that privilege, his estate, his executors were the ones to make that decision, not having the sensitivity, perhaps, about some of these matters that the archivists might.

So it doesn't necessarily follow, if the Court please.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Solicitor General.

MR. McCREE: Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Herzstein.

ORAL ARGUMENT OF ROBERT E. HERZSTEIN, ESQ.,

ON BEHALF OF THE PUBLIC APPELLEES

MR. HERZSTEIN: Mr. Chief Justice, and may it please the Court:

As you know, we're appearing on behalf of distinguished national organizations of historians, political scientists, reporters, and various prominent members thereof; also a separate group of intervenors, the Committee for Public Justice, and prominent members thereof, and a separate group, reporter Jack Anderson.

The national organizations include the American Historical Association and the American Political Science Association.

Now, I would like to make one thing very clear, and that is that there has been no question in this case raised by any of the intervenors or the government concerning Mr. Nixon's entitlement to the return of his personal materials. This includes diaries, it includes conversations with his family, any privileged conversation, any personal property of any kind not involving the actual transaction of government business.

No issue of this sort was raised in the previous case before this statute was adopted. The groups I represented brought suit against the Administrator to enjoin enforcement

of the Nixon-Sampson agreement. In the very initial complaint that was filed in that case, it was made clear that all parties acknowledged the personal records should go back to Mr. Nixon.

QUESTION: But, as a result of this legislation, there's been almost a three-year delay so far in his getting possession of what are concededly entirely personal property, and --

MR. HERZSTEIN: That's right, Your Honor.

QUESTION: -- and personally confidential documents and property, and the delay is not over yet.

And that's the reason --

QUESTION: And anything that's of historical interest never will be given over.

MR. HERZSTEIN: All right. May I address first the question of delay? I think that's --

QUESTION: Either way.

MR. HERZSTEIN: -- that's been very regrettable for us also, Your Honor. There's also been a delay in, of course, getting access to the governmental materials that might otherwise have been made available for public access under normal circumstances.

For instance, if these were treated as other government materials.

The delay, I think, has been caused by the fact that

the statute -- the other litigation was well along and actually resulted in a decision by Judge Richey, but that was stayed in favor of the litigation concerning this statute. So it's simply one of the costs of litigation, which we regret, too.

But there's just no question about the return of personal diaries, Dictabelts, so long as they are not the materials involved in the transaction of government business.

Now, the statute, I agree, could have been drafted a little more clearly, but we think there are several points which make it quite clear that his personal materials are to be returned to him.

One is the fact that statute refers to the presidential historical materials of Richard Nixon, not to the person or private materials.

The second is that, as Judge McCree mentioned, criterion 7 calls for a return of materials to him, and if you read those two in conjunction with the legislative history, there are statements on the Floor of the Senate, on the Floor of the House, and in the Committee Reports, indicating the expectation that Nixon's personal records would be returned to him.

QUESTION: Could you give us a capsule summary of the difference between what you have just referred to as Nixon's personal records, which will be returned, and the matter which

will not be returned?

MR. HERZSTEIN: Well, yes. Certainly any personal letters, among his family or friends, certainly a diary made at the end of the day, as it were, after the event --

QUESTION: Even though the Dictabelt was paid for out of White House appropriations?

MR. HERZSTEIN: That's right. That doesn't bother us. I think it's incidental now. But we do have a different view on the tapes, which actually recorded the transaction of government business by government employees on government time and so on. The normal tapes that we've all heard so much about.

The Dictabelts, Mr. Nixon has said, are his personal diary. Instead of writing it down, in other words, he dictated it at the end of the day. And we think that's --

QUESTION: I want to be sure about that concession, because this certainly is of historical interest.

MR. HERZSTEIN: That's right, it is, but we do not feel it's covered by the statute. We have acknowledged that from the start.

QUESTION: Is this concession shared by the Solicitor General, do you think?

MR. HERZSTEIN: We believe it is.

QUESTION: What about that?

MR. McCREE: About the fact that the paper belongs

to the government and so forth, we don't believe that makes a document a government documents. We certainly agree with that.

Beyond that, if the Court please, --

QUESTION: What about the Dictabelts representing his daily diary?

MR. McCREE: I would think that's a personal matter that would be -- should be returned to him once it was identified.

QUESTION: Well, is there any problem about, right this very minute, of picking those up and giving them back to Mr. Nixon?

MR. McCREE: I know of no problem. Whether it would have to await the adoption of the regulation, which has been stymied by Mr. Nixon's lawsuit, which has been delayed for three years, --

QUESTION: How has that stymied the issuance of regulations, Mr. Solicitor General?

MR. McCREE: One of the dispositions of the district court was to stay the effectiveness of regulations. Now, I think it held up principally the regulations for public access. The other regulations are not part of this record, and I cannot speak to the Court with any knowledge about them.

QUESTION: Well, that would not have prevented, would it, Mr. Solicitor General, the development of regulations,

the proposal of publication of all the regulations that were contemplated, would it?

Unless they have already done that and contemplate no other regulations.

MR. McCREE: Of course, as the Court knows, two sets of regulations were sent to the Congress and were disapproved. These were regulations for public access and not the 103 regulations.

And the 103 regulations are to assure the protection of the tape recordings and other materials, and to prevent access by unauthorized persons and so forth. So I just can't answer that, except to way that certainly the private diaries should be returned, no one would dispute that.

MR. HERZSTEIN: May I say also on that point that we do not understand the regulations to be here under attack, including these Section 103 regulations. Mr. Nixon has not made any audible complaint, so far as we've known, about the fact that those regulations should have been redrafted. He had an opportunity, I think, to litigate those -- has had an opportunity, and still does -- to litigate those Section 103 regulations.

QUESTION: Well, there aren't any 104 regulations, though, are there?

MR. HERZSTEIN: No. But the 103 regulations are the ones which pertain to Mr. Nixon's continuing access, which

he's allowed to do right now, and --

QUESTION: Well, do you know what the present status is of regulations -- the preparation of regulations for 104?

MR. HERZSTEIN: Well, it's a very long story. Two -- I believe they've been submitted to Congress on two occasions, and certain portions were objected to the first time. They came back. A certain smaller portion was objected to.

QUESTION: Well, would you suggest that the Act becomes more suspect the longer it goes on, --

MR. HERZSTEIN: Well, there has been --

QUESTION: -- without any provision whatsoever for implementing sorting out and return?

MR. HERZSTEIN: Frankly, Your Honor, I think the implementation of the regulations has been held up, or at least has gone slower, because this litigation was pending, and they --

QUESTION: Well, I know that's what you keep saying, but every now and then you say that the Congress has disapproved the regulations. So apparently the statute did not hold up the -- I mean the litigation did not hold up the preparation of the regulations.

What held up -- if Congress hadn't disapproved them, they would long since have been issued.

MR. HERZSTEIN: Oh, I think that's --

QUESTION: Well, how could the litigation have held them up?

MR. HERZSTEIN: All I meant to say was I'm speculating that the General Services Administrator has been abiding the decision in this case.

QUESTION: Well, I'll ask you again: Suppose that goes on for ten years, does the Act become more suspect or not?

MR. HERZSTEIN: Oh, of course it does, yes, Your Honor.

QUESTION: Well, there's nothing in Section 103 to authorize the return of the private diaries to Mr. Nixon, is there?

MR. HERZSTEIN: No, except there is a problem of sorting. Mr. Nixon has objected to the Administrator going through and sorting even anything, and the courts, at his request, have enjoined any archival sorting of these materials at all.

QUESTION: Because, I suppose, the steam of the statute is that before any private material is returned, some third party must read the material to be sure it's private.

MR. HERZSTEIN: That's right. That's the problem. And since Mr. Nixon has said -- he hasn't gone in and said, "look, please sort out my Dictabelts and my personal diaries and so on and return them to me"; he's gone in and said, "No,

no one may see those things", and he's asked the court to enjoin that. And we have not objected. No one has objected.

In other words, there's been a freeze on the thing at Mr. Nixon's request, pending this litigation.

Now, as I say, there's not really a dispute about the fact that Mr. Nixon should have back his personal papers. The fact is -- the dispute is caused by the fact that the personal records are a tiny fragment of this vast archive, which includes many papers of great public importance, importance both to the continuing needs of the government, which is documented in the record quite amply, and in the decision of the court below; and the needs of the --

QUESTION: May I ask one other question about the vast quantity of material?

MR. HERZSTEIN: Yes, sir.

QUESTION: Some of that material was Watergate related, I suppose, and that was the material which was most likely to be destroyed, I suppose, if we were to read the congressional material. Is there any evidence of a danger of destruction of anything other than Watergate related material?

MR. HERZSTEIN: Not that I know of, Your Honor, I would have to check through the legislative history on that and see.

I think there certainly is evidence of a lack of confidence that the de facto practice that's existed in the

case of past Presidents perhaps might not work so well this time. I think that appears amply --

QUESTION: Is there any such evidence respecting anything except material related to Watergate?

MR. HERZSTEIN: Not that I know of, Your Honor. There certainly were -- there has been a need for access to, I think, some 25 boxes of the material since Mr. Nixon left office, for national security purposes.

That came out in a deposition of the Secretary of the National Security Council. In other words, the Ford Administration has had to go in there and use some of these things.

Now, whether they would have been able to do it as well or as readily if they were in Mr. Nixon's possession is, of course, hard to say. There is also evidence in the record, however, of difficulties in past Administrations getting access to national security material of prior Administrations. And I think this, quite apart from Watergate, there was a justification for Congress to say, "Look, the presidency is important nowadays, it generates vast amounts of material that the President never sees, which are needed for the government; it's time that we continue this evolution that has been going on since the days of Hoover, presidential libraries and so on, it's time we continue this and set up an orderly regime which takes these materials and puts them into

government custody."

We think that there's no problem about the power of Congress to do that. The only problem in this case is caused by the intermingling that occurred with some of Mr. Nixon's records during his Administration. And the problems Mr. Nixon is raising, concerning executive privilege and concerning privacy, really have to do -- they really come down to the question of how do we segregate these things, protecting the interests of both sides.

Basically, his position is, "Because a small fragment of my materials are in there, I should be able to take the whole thing, and it should be my sole judgment what is personal and what is public."

QUESTION: How do you know it's a small fragment that's personal?

MR. HERZSTEIN: Well, Your Honor, Mr. Nixon testified that of the 42 million he could not have -- in his deposition in this case -- he could not have seen possibly more than 200,000 during his Administration.

And of course most of those 200,000 that he saw would have been in the course of government business. So that that means only a small fragment of that would be personal.

QUESTION: Well, his claim of executive privilege, by which I take it you mean his separation of powers claim, basically, --

MR. HERZSTEIN: Yes.

QUESTION: -- is not premised at all upon the fact that these are personal papers, but almost the opposite, that they are presidential, official papers.

MR. HERZSTEIN: That's right. I think -- that's right, basically, he has two points. As to the privacy, he's saying they are personal; as to the executive privilege, --

QUESTION: It's quite the opposite.

MR. HERZSTEIN: -- he's saying, "The presidency will founder unless I can do this."

I would like to comment on that.

QUESTION: No, not necessarily founder, but --

MR. HERZSTEIN: Well, at least it will impair it.

QUESTION: -- it will impair the protection of the separation of powers that's found in our Constitution.

MR. HERZSTEIN: Yes, that's right.

I think that basically what we face here on that question, the separation of powers, is the situation in which the incumbent executive, both the Ford Administration and the Carter Administration, are satisfied that there is no impairment of executive powers.

Congress is satisfied. So we have two branches of the government entirely satisfied, in fact, aiming at working out these problems of continuity of government in a certain way.

Mr. Nixon, a person who is no longer in the govern-

ment, who no longer is subject to public accountability, is seeking the assistance of this Court to intercede with the Executive Branch and tell the Executive Branch that the way it is planning on handling Executive Branch records, with concurrence of Congress, is a separation of powers.

We believe, Your Honor, that it's a violation of the separation of powers to do what Mr. Nixon is requesting.

QUESTION: Do you share the view that Congress could constitutionally provide that, on the termination of office of any federal judge or Justice, all his papers then located in any public building or under his control, relating to his tenure of office, could be impounded until the archivists have decided which were the personal items and which were those relating to the decision-making process?

MR. HERZSTEIN: We believe, Your Honor, and needless to say this case is not before us, but we have given attention to that, and we address it in our brief. We believe that, quite apart from the segregation, there probably is a grave -- there is certainly a basis for distinguishing judicial records from Executive Branch records. There may be even grave doubt as to the power of Congress to say that the unpublished records of members of the Judicial Branch are subject to congressional power.

The reason I say that, without meaning to show any lack of reverence for the Court, is that I think frankly the

public interest in having access to the unpublished records of the Court is simply not nearly as great as that relating to the President.

The President is part of a political process. The effectiveness of his regime and the legitimacy of what he does depends on his following procedures that are designed to maximize public information about what he's doing. The Court is insulated from the political process.

Everything the Court does is on the public record already, the materials that it can use in reaching its decision are only those on the record, and the decisions it reaches are on the record.

In the case of the President, because he's part of a political process and because of his vast powers, he can draw on any information he wants, it's not on the public record when he uses it, and many of the decisions he makes are never on the public record. So we think --

QUESTION: Are you suggesting that we limit ourselves to the briefs when we reach a decision in the case, and the record?

MR. HERZSTEIN: Yes, I am, Your Honor.

[Laughter.]

QUESTION: You mean --

MR. HERZSTEIN: I hope that's not a contempt of court.

QUESTION: You mean these oral arguments are useless?

[Laughter.]

MR. HERZSTEIN: Oh, no, just that --

[Laughter.]

MR. HERZSTEIN: This is part of the public record, too, I assume.

QUESTION: Not necessarily.

MR. HERZSTEIN: I saw some reporters here this morning.

QUESTION: The tape recording is not necessarily a part of any public record.

MR. HERZSTEIN: Oh, no, but of course the public is attending the proceedings.

QUESTION: I just wanted to make sure you weren't denigrating the oral argument.

[Laughter.]

MR. HERZSTEIN: Are there any further questions, Your Honor?

MR. CHIEF JUSTICE BURGER: Very well. Thank you.

Mr. Miller, do you have anything further? You have about nine or ten minutes left.

REBUTTAL ARGUMENT OF HERBERT J. MILLER, JR., ESQ.,

ON BEHALF OF THE APPELLANT

MR. MILLER: If I may, Your Honor, I'd like to address myself to try to clear one factor up before we go any

further.

Of 42 million papers, which may be involved in the presidential material, --

QUESTION: By the way, how does anybody know how many there are? Is that just an --

MR. MILLER: It's an estimate, if the Court please. I don't know that there's a --

QUESTION: Where did it come from? Whose estimate is that?

MR. MILLER: I believe it was the -- I believe probably the GSA made the estimate, if the Court please, but I'm not really certain of it.

But my point is, you cannot ignore the vast substantial quantity of personal and private conversations and records in this case because over-all there may be 42 million documents.

Now, you're talking about five and one-half years of a man's private life. So you cannot ignore and say there is nothing involved, so far as the personal is concerned, because they may only be five or ten percent of a large -- yes, sir?

QUESTION: Mr. Miller, have you made any effort to get the personal papers back?

MR. MILLER: We have filed a lawsuit, which is not this lawsuit, before Judge Richey, requesting that the

Government of the United States comply with the obligation that it entered by contract, whereby all of these documents would be shipped to a government installation in California, not far from Mr. Nixon's home; that they would be placed under strict safeguards pursuant to the contract; that there would be two keys for access --

QUESTION: My question was: Did you ask specifically -- not all the documents, but that the person documents be given to him?

MR. MILLER: We -- I don't recall if that was specifically covered, but I do recall in oral argument before Judge Richey pointing out that the personal documents were not being turned over and asking and pointing out how unfair this was.

QUESTION: This was under the old -- this wasn't under this Act, was it?

MR. MILLER: That's right. That's right.

QUESTION: Well, during this -- have you ever asked for these -- since this Act was passed, --

MR. MILLER: Yes, sir.

QUESTION: -- have you ever asked that the personal property be returned?

MR. MILLER: I've never asked,specifically asked that the personal property be returned, but I have asked --

QUESTION: Well, then, doesn't that cut into your

argument by saying that all of this involves personal property?

MR. MILLER: If the Court please, when we filed a complaint in this case on December 20th, the day after the Act went into effect, we challenged the constitutionality, and as a part of that complaint we requested that the documents be returned.

QUESTION: Private issues?

MR. MILLER: All that -- whatever the documents were --

QUESTION: You said all of them.

MR. MILLER: Yes, it would include the private.

QUESTION: But did you ever specifically --

MR. MILLER: Specify between the two?

QUESTION: -- say that you want the Dictabelts back? Did you ever say that?

MR. MILLER: I don't recall specifically asking for the Dictabelts back.

QUESTION: Did you ever say, "We want the personal documents"?

MR. MILLER: As part of --

QUESTION: "And then we will litigate the others"?

MR. MILLER: As part of the return of the documents, all of the documents, yes. As specifically, the complaint did ask for the return of the personal documents.

QUESTION: Your complaint alleged that?

MR. MILLER: I believe you will find that in the complaint that was filed December 20th.

QUESTION: Well, I'll go look at it. I'll try to find it.

QUESTION: Of course, what you -- it would be inconsistent in a way for you to ask for anything less than all of them, because one of your constitutional complaints is that you don't want government agents, in the dozens or maybe a hundred, rummaging through these things. That is one of your constitutional challenges.

MR. MILLER: That's right. Yes. That is precisely right. And that is precisely what --

QUESTION: To decide what's personal and what isn't.

MR. MILLER: That is precisely what --

QUESTION: But you asked for your own man to go in there and pick them out?

MR. MILLER: No, sir; and the reason is is because the statute prohibited it.

QUESTION: Did you ask for it?

MR. MILLER: No, sir.

QUESTION: The court can -- the court could have given you that relief, despite --

MR. MILLER: If it was --

QUESTION: Do you agree the court could have given you

that relief, despite the statute?

MR. MILLER: No. I don't believe -- no, you cannot, I don't believe.

QUESTION: Oh, you don't think the court could have enjoined that part of the statute?

MR. MILLER: I don't think it's possible.

QUESTION: I see.

QUESTION: Not until the sorting-out process is completed, I take it.

MR. MILLER: No. And, furthermore, if the Court please, with respect to the tape recordings themselves, we have to remember that there are two provisions of this particular statute. 101(a), which applies directly to the tape recordings, and that is a severable, distinct and separate section from Section 101(b), which seizes all of the other material.

QUESTION: Mr. Miller, I think Mr. Herzstein suggested that, of the 42 million total, there are about 200,000 or less that would qualify as personal documents. Is that right?

MR. MILLER: That may -- that is what Mr. Herzstein said.

QUESTION: And do you agree with that?

MR. MILLER: No, I do not.

QUESTION: There are more than 200,000?

MR. MILLER: I think there are more than 200,000.

QUESTION: In the category of the Dictabelts and other personal letters and things?

MR. MILLER: Yes, I do. And the reason I say that is --

QUESTION: Well, what does the record suggest?

MR. MILLER: The record shows that when Mr. Nixon was asked during his deposition how many documents he had seen in the course of his function as President of the United States, he finally estimated approximately 200,000.

The record further shows that that has no relationship whatsoever to the tapes, which is 5,000 hours of conversations. And he has -- the evidence in the record shows that he talked to his wife or his daughter one or maybe several times a day.

QUESTION: And recorded those also?

MR. MILLER: And that these were recorded. That he had discussions with his lawyer, with his friends, he discussed political matters as the head of the political party. All of these political personal matters are on these tapes, and there is no limitation in the statute that these tapes are "presidential material".

QUESTION: Well, what do you think the -- if it suggests anything -- the record shows as to how many would fall into what you would define as personal?

MR. MILLER: There is --

QUESTION: As against what otherwise would be official?

MR. MILLER: There is no way to make a proper estimate of the number of papers that are personal. You take the record which shows that Mr. Nixon resided in the White House for five and a half years, that there are some 800 reels of tape that covered not only the Oval Office, the EOB office, but also the telephone in the residential part of the White House.

QUESTION: Incidentally, do the 42 million include, as my brother Rehnquist suggested earlier -- what about papers or whatever they may constitute, at San Clemente or in Florida? Do these 42 million items include any of those, or are we talking only about White House recordings?

MR. MILLER: The 42 million, I don't know whether it would include those or not. The statute, as the Court will recall, empowers the Administrator of General Services to take steps to retrieve any presidential materials which are not at the White House, which would include those at San Clemente, and --

QUESTION: Well, has that been done?

MR. MILLER: No, it has not, because the implementation of the statute was, in effect, stayed when we filed our lawsuit. But the statute gives --

QUESTION: Well, I suggest that the 42 million are only White House originated documents.

MR. MILLER: The White House, and frankly, maybe 20 million of those are government publications, anniversary greetings, birthday greetings; I mean they have no bearing whatsoever on this lawsuit.

But we're talking here -- the guts of this lawsuit are the tapes and the presidential discussions and decision-making process, and the political aspects of the President of the United States for a five and a half year period.

I mean, this 42 million papers is a nother, it's a makeway, it has no bearing on this case whatsoever.

What we're talking about is a man's life for five and a half years, acting as the President of the United States, meeting with his associates and his subordinates, obtaining advice from them, meeting with foreign officials, determining the conduct of the foreign policy of the United States, talking with his wife, talking with his daughter the day before she was married, and what discussions those were.

I mean, these are the sum and substance of what we're talking about. It's not 42 million documents, that's a figure that shouldn't even be a part of the record in terms of what the gut issues of this case are.

Because we're talking about a gross violation of the Fourth Amendment that will take effect forthwith, because the

Section 102(b) gives access to agencies or departments of the United States, they can review these records. And let me disabuse the Court, if I may, of one thing, and that is the comingling argument. Those records were comingling -- comingled because, for 200 years, the Presidents of the United States had a right to expect the right to control and the privacy of their papers.

Thank you.

QUESTION: Mr. Miller, before you sit down, I'd like to ask you the same question I asked your opponent.

Do you construe the legislative history as being tantamount to a finding that Mr. Nixon was an unreliable custodian?

MR. MILLER: Listening to the argument of my estseemed opponent, that's the only basis upon which you can justify the legislation, that there was such a finding; and that such a finding, existing as it does, turns this Act into a bill of attainder. That's our argument.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 11:47 o'clock, a.m., the case in the above-entitled matter was submitted.]

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