The Burger Court Opinion Writing Database

Nixon v. Administrator of General Services

433 U.S. 425 (1977)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

October 14, 1976

Re: 75-1605 - Nixon v. Administrator of General Services

Dear Bill:

Please join me in your statement.

Regards,

WEB

Mr. Justice Rehnquist

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

April 19, 1977

MEMORANDUM TO THE CONFERENCE: 75-1605

Two problems:

(1) The Marshal has just reported to me that there is a "sellout" for the Nixon case tomorrow and that this presents logistical problems because it will be divided by the lunch hour. This should have been anticipated, but was not.

The only way to avoid the problem is to move the Nixon case to 10:00 a.m., which will enable us to complete it without a break.

(2) There are "mutterings of discontent" from some of the Brethren that we will run over until at least 3:30 p.m. tomorrow. The only escape is to reset the last case, 76-255 - Hazelwood School District v. United States, over to the next week.

Let me have your votes, pronto.

Regards, WEB

	Yes	No
Proposition No. 1	☐	☑
Proposition No. 2	☐	☑

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

75-1605

April 19, 1977

MEMORANDUM TO THE CONFERENCE:

Propositions (1) and (2) are both carried--"by a divided court," but carried.

I have suggested that we have better staff work in the future.

Regards,

WEB

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

May 3, 1977

PERSONAL TO JUSTICES

MEMORANDUM TO THE CONFERENCE:

Enclosed is the current (and final) assignment sheet, which was delayed due to the problem of accommodating several changes.

For me the conference on Nixon v. GSA was inadequate to really clarify the issues, and I am not at rest.

There appear to be four firm votes to affirm, two tentative, two to reverse, and I am still not at rest until I have a more adequate analysis than our brief conference discussion covered.

In these circumstances I think it best, given the time of the year, that Bill Brennan assume the responsibility for assignment.

I, therefore, request Bill to proceed accordingly.

Regards,

WEB

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

PERSONAL

May 26, 1977

Re: 75-1605 - Nixon v. Administrator of GSA

MEMORANDUM TO THE CONFERENCE:

You will recall, in my memorandum of May 3, I expressed my position as being uncertain of my vote on the basis of the Conference discussion.

Given the importance of the case, the lateness in the Term and my "passing" posture, I did not feel I should undertake to assign the case and requested Bill Brennan to do so.

I began to work on a memorandum which, as it progressed, I contemplated sending to the Conference in due course when Bill's opinion came out.

My work on the memorandum, which absorbed a very large amount of time, led to two results:

(a) I was persuaded that the briefs and arguments, which I had thought were quite good at the time, were not at all complete. Several major -- even dispositive -- points were not even touched.

(b) By the time I finished, my uncertainties were resolved and I will definitely vote to reverse. I therefore have converted the memorandum to a "putative" dissent.

I add that I regard this as one of the most -- if not the most -- far-reaching constitutional holdings in my tenure here.

Regards,

WEB

To: Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: The Chief Justice

Circulated: JUN 3 1977

1st PRINTED DRAFT

Recirculated: _____

SUPREME COURT OF THE UNITED STATES

No. 75-1605

Richard M. Nixon, Appellant,
v.
Administrator of General Services et al.

On Appeal from the United States District Court for the District of Columbia.

[June —, 1977]

MR. CHIEF JUSTICE BURGER, dissenting.

I dissent. I see the Court's holding as a grave repudiation of nearly 200 years of judicial precedent and historical practice. That repudiation arises out of an Act of Congress passed in the aftermath of a great national crisis which culminated in the resignation of a President. The Act is special legislation, applying only to one former President by name, and violates firmly established constitutional principles.

I find it very disturbing that significant and fundamental principles of constitutional law are subordinated to what seem the needs of a particular situation. That moments of public distress give rise to passions leading to unwise actions reminds us why the three Branches of government were created as separate and coequal, each intended as a check, in turn, on possible excesses by one or both of the others.

Any case in this Court calling upon principles of separation of powers, rights of privacy, the prohibitions against bills of attainder and denial of due process, whether urged by a former President or an ordinary person, is inevitably a major constitutional case. Mr. Justice Holmes, speaking of the tendency of "great cases like hard cases [to make] bad law," went on to observe the dangers inherent when

> "some accident of immediate overwhelming interest, . . . appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 6, 1977

Re: 75-1605 Nixon v. GSA

Dear Bill:

Enclosed are sheets of inserts for my draft dissent in the above case. There may be even more!

Regards,

WEB

Mr. Justice Brennan

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 16, 1977

Re: 75-1605 - Nixon v. Administrator, GSA

MEMORANDUM TO THE CONFERENCE:

When the "returns" are all in, I will be making some changes. Among others will be an insert along the following lines:

> "Assuming, arguendo, that Congress by statute can assume control of Presidential work papers, over objection, without trespassing separation of powers principles, that can be done only by legislation consistent with this Court's holdings in Cummings, Garland, Lovett and Brown, especially the latter two cases. The National Study Commission on Records and Documents of Federal Officials proposes such legislation under Title II of the Act. I can see no rational accommodation between what the Court holds today and what Justice Black stated for the Court in Lovett and what Chief Justice Warren stated in Brown.
>
> "That some members of the Court disagree with Lovett and Brown does not render those holdings less binding on us if we pay more than lip service to stare decisis. If a majority disagrees with the Black-Warren view of the Bill of Attainder issue, we should frankly overrule those cases, not brush them 'under the rug.' What the Court does today is analogous to what the Court said Congress could not constitutionally do in Lovett and Brown. Perhaps this is holding a 'ticket' good for one day and one way only -- and for but one man. Here the Court elects to join Congress to 'punish' one man by a legislative judgment for misdeeds, without notice, without hearing, or without trial."

Depending on how the tension between Bill's view and Byron's is resolved, I may wind up concurring in part and in the judgment -- that is on a sharply narrowing construction of the privacy protection.

Regards,

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 17, 1977

Re: 75-1605 - Nixon v. Administrator, GSA

MEMORANDUM TO THE CONFERENCE:

To amplify the last point of my memorandum of June 16 I may concur on the privacy issue, depending on how the tension between Bill's view and Byron's is resolved over the immediate return of appellant's personal materials -- selected out by him or his representatives. Even if the Act is not unconstitutional on its face, as I believe it is, it is so as applied -- if we are to give heed to all the things we have been saying about privacy. In short, I would join that part of a Court opinion to the effect that the purely personal papers must be returned to the former President without the "censorship" of government agents.

Regards,

WEB

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 24, 1977

Re: 75-1605 Nixon v. Administrator, GSA

MEMORANDUM TO THE CONFERENCE:

I enclose 31 typed pages of my revised dissent. It is not feasible to mark the changes, and it should be treated as having "changes throughout."

Balance of pages will follow.

Regards,

WEB

To: Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: The Chief

Circulated: JUN 24 1977

Recirculated:

Re: 75-1605, Richard M. Nixon, Appellant v. Administrator of General Services, et al.

MR. CHIEF JUSTICE BURGER, dissenting.

In my view, the Court's holding is a grave repudiation of nearly 200 years of judicial precedent and historical practice. That repudiation arises out of an Act of Congress passed in the aftermath of a great national crisis which culminated in the resignation of a President. The Act violates firmly established constitutional principles in several respects.

I find it very disturbing that fundamental principles of constitutional law are subordinated to what seem the needs of a particular situation. That moments of great national distress give rise to passions reminds us why the three Branches of government were created as separate and coequal, each intended as a check, in turn,

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 24, 1977

Re: 75-1605 Nixon v. Administrator, GSA

MEMORANDUM TO THE CONFERENCE:

Here is the balance of my dissent.

Regards,

WEB

Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

STYLISTIC CHANGES THROUGHOUT
4 P.4)

2nd DRAFT

From: The Chief Justice

SUPREME COURT OF THE UNITED STATES

Circulated: _____

Recirculated: JUN 27 1977

No. 75-1605

Richard M. Nixon, Appellant, *v.* Administrator of General Services et al. | On Appeal from the United States District Court for the District of Columbia.

[June —, 1977]

MR. CHIEF JUSTICE BURGER, dissenting.

In my view, the Court's holding is a grave repudiation of nearly 200 years of judicial precedent and historical practice. That repudiation arises out of an Act of Congress passed in the aftermath of a great national crisis which culminated in the resignation of a President. The Act violates firmly established constitutional principles in several respects.

I find it very disturbing that fundamental principles of constitutional law are subordinated to what seem the needs of a particular situation. That moments of great national distress give rise to passions reminds us why the three Branches of government were created as separate and coequal, each intended as a check, in turn, on possible excesses by one or both of the others. The Court, however, has now joined a Congress, in haste to "do something," and has invaded historic, fundamental principles of the separate powers of coequal Branches of government. To "punish" one person, Congress—and now the Court—tears into the fabric of our constitutional framework.

Any case in this Court calling upon principles of separation of powers, rights of privacy, and the prohibitions against bills of attainder, whether urged by a former President—or any citizen—is inevitably a major constitutional holding. Mr. Justice Holmes, speaking of the tendency of "great cases like

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

May 5, 1977

RE: No. 75-1605, Nixon v. Administrator of General Services

Dear Chief:

Thank you for your note of May 3 regarding the assignment of the above. I have decided to assign it to myself.

Sincerely,

Bill

The Chief Justice

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 3, 1977

Re: No. 75-1605 Nixon v. GSA

MEMORANDUM TO THE CONFERENCE

I am circulating this draft "hot off the presses" so that you may have it for the weekend. It has not yet been proof-read. In addition, I have just acquired a copy of the recently-released Report of the National Study Commission on Records and Documents of Federal Officials, the body created by Title II of the Act before us to study the general problem of the disposition of federal documents. Because this Report is largely supportive of the conclusions reached in my opinion, I may wish to refer to it and therefore anticipate making some minor changes.

W.J.B. Jr.

To: The Chief Justice
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr Justice Brennan

Circulated: June 3, 77

Recirculated:

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 75–1605

Richard M. Nixon, Appellant, v. Administrator of General Services et al. | On Appeal from the United States District Court for the District of Columbia.

[June —, 1977]

MR. JUSTICE BRENNAN delivered the opinion of the Court.

Title I of Pub. L. 92–526 (1974), 44 U. S. C. § 2107, the "Presidential Recordings and Materials Preservation Act," directs the Administrator of General Services, an official of the Executive Branch, to take custody of the Presidential papers and tape recordings of appellant, former President Richard M. Nixon, and promulgate regulations that (1) provide for the orderly processing and screening by Executive Branch archivists of such materials for the purpose of returning to appellant such of them as are personal and private in nature, and (2) determine the terms and conditions upon which public access may eventually be had to those materials that are retained. The question for decision is whether Title I is unconstitutional on its face as a violation of (1) separation of powers; (2) Presidential privilege doctrines; (3) appellant's privacy interests; (4) appellant's First Amendment associational rights; or (5) the Bill of Attainder Clause.

On December 19, 1974, four months after appellant resigned as President of the United States, his successor, President Gerald R. Ford, signed Pub. L. 93–526 into law. 88 Stat. 1965 (1974). The next day, December 20, 1974, appellant filed this action in the District Court for the District of Columbia which under § 105 (a) of the Act has exclusive jurisdiction to entertain complaints challenging the Act's consti-

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 6, 1977

MEMORANDUM TO THE CONFERENCE

RE: No. 75-1605 Nixon v. Administrator of General Services

I propose to add the following footnotes at appropriate places as a response to the dissent of the Chief Justice.

1. The dissent's view of the separation of powers doctrine as an absolute prohibition against exercise of "coercive influence" by one branch over another, and against any interference with Presidential papers, see post at 7-10, was explicitly rejected in United States v. Nixon, supra, 418 U.S., at 707, where it was said that "In designing the structure of our Government and dividing and allocating the sovereign power among the three co-equal branches, the Framers of the Constitution sought to provide a comprehensive system, but the separate powers were not intended to operate with absolute independence." (emphasis supplied). Accordingly, United States v. Nixon recognized only a qualified executive

privilege in Presidential papers, which negates the dissent's view of an absolute Presidential privilege with a "narrowly limited exception." Post, at 9. In any event the dissent offers no explanation why the "narrowly limited exception" permits "coercion" of the Executive by the Judicial Branch but not "coercion" of the Executive Branch by the Legislative Branch, however slight and however subject to stringent judicial safeguards. In addition, in recognizing that Congress has exercised in numerous ways a conceded authority to limit, define, and deal with the activities and papers of the Executive Branch, the dissent offers no explanation for its proffered constitutional distinction between such regulations affecting Presidential papers and similar regulations affecting the papers of other Executive Branch agencies or officials, post at 4, a distinction at odds with the very cases on which the dissent relies. See, e.g., Myers v. United States, 272 U.S. 52, 117 (1926). Finally, virtually all of the dissent's arguments are now premature, for it essentially ignores the fact that the §104 public access regulations designed to effectuate the Act while preserving appellant's privileges have yet to be promulgated.

2. The dissent's understandable concern for appellant's privacy interests nonetheless rests on a faulty premise and on facts that are refuted by the record. The dissent acknowledges that the overwhelming majority of the materials in issue are entitled to no privacy protection. The dissent argues, however, that because archival screening entails interference, however minimal, with materials that are undeniably private, the Act therefore is subject to the "most searching kind of judicial scrutiny," post, at 17. This argument, of course, was expressly rejected by a unanimous Court earlier this Term, at least in the absence of likely public dissemination of such private information. See Whalen v. Rose, supra. The dissent therefore argues that "no one knows" if the government archivists will be "reliably discreet," post, at 24, although it offers no basis for disagreement with the factual finding of the District Court that the archivists have "an unblemished record for discretion." 408 F. Supp., at 365. Finally, the dissent fails to recognize that, unlike the computerized information network upheld in Whalen v. Roe, the Government will not retain long-term possession over appellant's private information, but must return all such papers and records to him or his family following archival screening. §104(a)(7).

3. The dissent's bill of attainder argument rests on the view that appellant is being punished because he "owns" his papers and the Act constitutes their confiscation by the Government. This is without merit. Our cases establish that whatever property interest inheres in appellant is nonpunitively taken when provision is made for the payment of "just compensation." United States v. Reynolds, 397 U.S. 14, 16 (1970). Appellant's corollary interest in preserving access to the materials is expressly assured under the Act. §102(c). For similar reasons, the dissent's procedural due process argument has no merit. Appellant's rights of ownership can be procedurally and judicially vindicated simply by commencing an action for "just compensation." Indeed his rights and privileges receive far more procedural protection than in any previous case, for the Act expressly provides for complete and expedited judicial consideration of all such claims. §105(a).

W.J.B.Jr.

Technical and stylistic changes throughout.
Part III B rewritten, see pp. 18-27.
See also pp. 5, 9, 16, 17, 28, 29, 36, 53, 56
Footnotes renumbered after n. 12

To: The Chief Justice
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Brennan

Circulated: _____

Recirculated: 6/14/77

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 75–1605

Richard M. Nixon, Appellant, *v.* Administrator of General Services et al. | On Appeal from the United States District Court for the District of Columbia.

[June —, 1977]

MR. JUSTICE BRENNAN delivered the opinion of the Court.

Title I of Pub. L. 93–526 (1974), 44 U. S. C. § 2107, the "Presidential Recordings and Materials Preservation Act," directs the Administrator of General Services, an official of the Executive Branch, to take custody of the Presidential papers and tape recordings of appellant, former President Richard M. Nixon, and promulgate regulations that (1) provide for the orderly processing and screening by Executive Branch archivists of such materials for the purpose of returning to appellant those that are personal and private in nature, and (2) determine the terms and conditions upon which public access may eventually be had to those materials that are retained. The question for decision is whether Title I is unconstitutional on its face as a violation of (1) separation of powers; (2) Presidential privilege doctrines; (3) appellant's privacy interests; (4) appellant's First Amendment associational rights; or (5) the Bill of Attainder Clause.

On December 19, 1974, four months after appellant resigned as President of the United States, his successor, President Gerald R. Ford, signed Pub. L. 93–526 into law. 88 Stat. 1695–1698 (1974). The next day, December 20, 1974, appellant filed this action in the District Court for the District of Columbia, which under § 105 (a) of the Act has exclusive jurisdiction to entertain complaints challenging the Act's legal

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

Supreme Court of the United States
Washington, D. C. 20543

June 15, 1977

RE: No. 75-1605 Nixon v. Administrator of General Services

Dear Byron:

I am pleased that you can join the judgment and most of my opinion. I find your remaining suggestions helpful and am willing to make the following changes to meet your concerns.

Page 11. I will delete the sentence beginning "As shall be seen" etc. In its place I will substitute something along the following lines: "We reject the argument that only an incumbent President may assert such claims and hold that appellant, as a former President,may also be heard to assert them. We further hold, however, that neither his separation of powers claim nor his claim of breach of constitutional privilege has merit."

Page 14. I'll delete the reference to the British system.

Page 16. I have not made clear the purpose of my argument. I do not mean to imply that merely placing the function in the Executive Branch by itself answers the separation of powers argument. The core of the separation of powers inquiry is the extent of interference with the function of the Executive Branch. In this light it is clearly less intrusive to place custody of the materials within the Executive Branch itself rather

To: The Chief Justice
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Brennan

Circulated: _____

Recirculated: 6/24/77

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 75–1605

Richard M. Nixon, Appellant, *v.* Administrator of General Services et al. | On Appeal from the United States District Court for the District of Columbia.

[June —, 1977]

MR. JUSTICE BRENNAN delivered the opinion of the Court.

Title I of Pub. L. 93–526 (1974), 44 U. S. C. § 2107, the "Presidential Recordings and Materials Preservation Act," directs the Administrator of General Services, an official of the Executive Branch, to take custody of the Presidential papers and tape recordings of appellant, former President Richard M. Nixon, and promulgate regulations that (1) provide for the orderly processing and screening by Executive Branch archivists of such materials for the purpose of returning to appellant those that are personal and private in nature, and (2) determine the terms and conditions upon which public access may eventually be had to those materials that are retained. The question for decision is whether Title I is unconstitutional on its face as a violation of (1) separation of powers; (2) Presidential privilege doctrines; (3) appellant's privacy interests; (4) appellant's First Amendment associational rights; or (5) the Bill of Attainder Clause.

On December 19, 1974, four months after appellant resigned as President of the United States, his successor, President Gerald R. Ford, signed Pub. L. 93–526 into law. 88 Stat. 1695–1698 (1974). The next day, December 20, 1974, appellant filed this action in the District Court for the District of Columbia, which under § 105 (a) of the Act has exclusive jurisdiction to entertain complaints challenging the Act's legal

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

June 8, 1977

75-1605, Nixon v. GSA

Dear Bill,

Upon the understanding that you are willing to give favorable consideration to the stylistic changes I have suggested, and perhaps additional ones to come, I am glad to join your opinion in this case.

Sincerely yours,

P.S.

Mr. Justice Brennan

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

June 17, 1977

Re: No. 75-1605, Nixon v. Administrator of General Services

Dear Bill,

The changes that you propose to make in response to Byron's suggestions are all acceptable to me.

Sincerely yours,

P.S.

Mr. Justice Brennan

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 15, 1977

Re: No. 75-1605 - Nixon v. Administrator of General Services

Dear Bill:

As I have already indicated, I join the judgment and most of your opinion, my reservations being indicated in the following comments.

Page 11: You say that we need not resolve questions of standing with respect to separation of powers and presidential privilege (I note that your first circulation said we need not resolve "all" of these questions). But on page 21 you appear to resolve the major issue of standing--that with respect to presidential privilege. It seems to me that if there is otherwise any substantial doubt about standing, we should resolve it to avoid the possibility that much of what you say will be a series of extended and unwarranted dicta on important constitutional issues.

Page 14, fn. 5: I would not purport to draw support for this opinion by reference to the British system, which is hardly a model for anyone interested in separating executive and legislative powers.

Page 16: You take comfort from the fact that it is the executive branch itself that has possession of and is in control of the papers. But it is not the President nor the presidency that is in charge. The Administrator is carrying out legislatively-imposed duties and his regulations are subject to rejection by either House of Congress. What is challenged here is the very existence of and the content of the restraints and duties placed on the presidency by this legislation. Because this thought appears more than once, you may not be interested in modifying your opinion, in which event I would indicate that you overemphasize what is at best a make-weight argument.

Page 17, fn. 8: You infer the irrelevance of the title issue--at least you say that you see no reason to engage in the title debate but later in the footnote you indicate that if the Government has title to the materials now in the custody of the Administrator, the property clause would justify most if not all of what is done here. Thus, if the title question were decided for the Government, a great deal of the opinion would apparently be beside the point.

Page 17, also fn. 8, page 53: I do not see how the compensation clause provides any support with respect to the purely private papers and tapes that may be involved in this case. They surely do not belong to the Government and their retention is not necessary to the public business. I would not think the compensation clause would authorize the Government to seize a private diary as long as it was willing to pay for it. Even if the diary were of "historical interest," I doubt that this section would furnish the necessary public purpose for the seizure of the diary.

As long as I am on the subject, I should say that if return of the purely private materials to the former President must await and is subject to the issuance of regulations under § 104, as the reference to these materials in § 104(a)(7) would indicate, then I think the act, while not unconstitutional on its face, is being unconstitutionally applied at this point since there is no excuse whatsoever, other than obstinacy, for not having identified and returned at least some of the private materials. Even if the return of the papers may be effected independently of § 104 regulations--and if this is the case, the opinion should be very clear on the point--I suggest that the opinion should also say that the mere fact that private materials may be of historical interest does not warrant their retention. As I recall it, the Solicitor General himself indicated that even if private materials, once identified, were thought to be of historical interest, they could not be retained but should be returned.

Page 31: You say that purely private materials will be returned to the former President. But again is this subject to the condition that they not be of historical interest, as § 104(a)(7) would indicate?

Page 31: I do not subscribe to the statement, as a general proposition, that once something has been published,

there can be no longer any privacy interest in preventing its further dissemination.

Pages 38-39: The screening process permits archivists to read even private papers even though they might be identified as private without reading them line by line.

Page 46: I was in dissent in Brown and still think it was a disaster. I doubt that I shall join this part of your opinion although I shall join the result. In any event, doesn't it go pretty far to say as you do at the bottom of pages 46-47 that bills of attainder include "any legislative enactment that bars specified individuals or groups from participation in certain types of employment or vocations, a mode of punishment commonly employed against those legislatively branded as disloyal"? (Emphasis added.) If this is true we have been spinning our wheels in the alien cases.

Page 53: You indicate that the former President has ready access to the materials. But as you indicate on page 6, his right of access under § 102(c) is "subsequent and subject to the regulations" issued by the Administrator. I take it these access regulations have already been issued. Should not there be said that the regulations themselves are unexceptionable, if they are?

It is likely that I shall write briefly in concurrence.

Sincerely,

Mr. Justice Brennan

Copies to Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 15, 1977

Re: No. 75-1605 - Nixon v. Administrator of General Services

Dear Bill:

I join the judgment and shall be joining most if not all of your proposed opinion now in circulation.

Sincerely,

Mr. Justice Brennan

Copies to Conference

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice White

Circulated: 6-20-77

Recirculated: _____

FIRST DRAFT

No. 75-1605 — Nixon v. Administrator of General Services

MR. JUSTICE WHITE, concurring.

I concur in the judgment and, except for Part VII, in the Court's opinion. With respect to the bill of attainder issue, I concur in the result reached in Part VII; the statute does not impose "punishment" and is not, therefore, a bill of attainder. See United States v. Brown, 381 U.S. 437, 462 (1965) (WHITE, J., dissenting). I also append the following observations with respect to one of the many issues in this case.

It is conceded by all concerned that a very small portion of the vast collection of presidential materials now in possession of the Administrator consists of purely private materials, such as diaries, recordings of family conversations, private correspondence -- "personal property of any kind not involving the actual transaction of government business." Tr. Oral Arg. 55. It is also conceded by the United States and the other respondents that these private materials, once identified, must be returned to Mr. Nixon. Tr. Oral Arg. 38-40, 57-59. The Court now declares that "the

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice White

Circulated: _____

Recirculated: 6-24-77

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 75–1605

Richard M. Nixon, Appellant, *v.* Administrator of General Services et al. | On Appeal from the United States District Court for the District of Columbia.

[June —, 1977]

MR. JUSTICE WHITE, concurring.

I concur in the judgment and, except for Part VII, in the Court's opinion. With respect to the bill of attainder issue, I concur in the result reached in Part VII; the statute does not impose "punishment" and is not, therefore, a bill of attainder. See *United States* v. *Brown*, 381 U. S. 437, 462 (1965) (WHITE, J., dissenting). I also append the following observations with respect to one of the many issues in this case.

It is conceded by all concerned that a very small portion of the vast collection of presidential materials now in possession of the Administrator consists of purely private materials, such as diaries, recordings of family conversations, private correspondence—"personal property of any kind not involving the actual transaction of government business." Tr. of Oral Arg. 55. It is also conceded by the United States and the other respondents that these private materials, once identified, must be returned to Mr. Nixon. Tr. of Oral Arg. 38–40, 57–59. The Court now declares that "the Government, without awaiting a court order, should promptly disclaim any interest in materials conceded to be appellant's purely private communications and deliver them to him." *Ante*, at 31–32, n. 22. I agree that the separation and return of these materials should proceed without delay. Furthermore, even if under the Act this process can occur only after the issuance of regulations under § 104 that are subject to congressional approval, surely

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

June 9, 1977

Re: No. 75-1605, Nixon v. Administrator of General Services

Dear Bill:

Please join me.

Sincerely,

T.M.

Mr. Justice Brennan

cc: The Conference

June 20, 1977

Re: No. 75-1605 - Nixon v. GSA

Dear Bill and Lewis:

The enclosed is what I came up with over the weekend. It is submitted for your information and pending further developments in accord with our respective conversations of this morning.

Sincerely,

HAB

Mr. Justice Brennan
Mr. Justice Powell

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Blackmun

Circulated: JUN 20 1977

Recirculated: _____

No. 75-1605 - Nixon v. GSA

MR. JUSTICE BLACKMUN, concurring in part and concurring in the judgment.

My posture in this case is essentially that of Mr. Justice Powell, post, page _____. I refrain from joining his opinion, however, because I fall somewhat short of sharing his view, id., at 8, 13, that the incumbent President's submission, made through the Solicitor General, that the Act serves, rather than hinders the Chief Executive's Article II functions, is dispositive of the separation of powers issue. I would be willing to agree that it is significant and that it is entitled to serious consideration, but I am not convinced that it is dispositive. The fact that President Ford signed the Act does not mean that he necessarily approved of its every detail. Political realities often guide a President to a decision not to veto.

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Blackmun

Circulated: _____

Recirculated: JUN 24 1977

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 75-1605

Richard M. Nixon, Appellant, *v.* Administrator of General Services et al. | On Appeal from the United States District Court for the District of Columbia.

[June —, 1977]

MR. JUSTICE BLACKMUN, concurring in part and concurring in the judgment.

My posture in this case is essentially that of MR. JUSTICE POWELL, *post*, p. —. I refrain from joining his opinion, however, because I fall somewhat short of sharing his view, *id.*, at — and —, that the incumbent President's submission, made through the Solicitor General, that the Act serves rather than hinders the Chief Executive's Article II functions, is *dispositive* of the separation of powers issue. I would be willing to agree that it is significant and that it is entitled to serious consideration, but I am not convinced that it is dispositive. The fact that President Ford signed the Act does not mean that he necessarily approved of its every deail. Political realities often guide a President to a decision not to veto.

One must remind oneself that our Nation's history reveals a number of instances where presidential transition has not been particularly friendly or easy. On occasion it has been openly hostile. It is my hope and anticipation—as it obviously is of the others who have written in this case—that this Act, concerned as it is with what the Court describes, *ante*, p. 44, as "a legitimate class of one," will not become a model for the disposition of the papers of each President who leaves office at a time when his successor or the Congress is not of his political persuasion.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 10, 1977

No. 75-1605 Nixon v. Administrator of General Services

Dear Bill:

I write to say that I am not yet at rest in this troublesome case.

Although you and the Chief have both written fine opinions (and seemingly have left little for anyone to add), I am trying to write something as a means of formulating my own conclusion.

In view of the unprecedented volume - by number and pages - of opinions that have circulated recently, together with some other writing that I have undertaken, I am running somewhat behind with my work. It may be about a week before I circulate anything in Nixon, if indeed this is my final decision.

Sincerely,

L. Lewis

Mr. Justice Brennan

lfp/ss

cc: The Conference

6/17/77

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Powell

Circulated: JUN 17 1977

Recirculated: _____

No. 75-1605 Nixon v. GSA

MR. JUSTICE POWELL, concurring in part and concurring in the judgment.

I join the judgment of the Court and agree with much of its opinion. For the reasons stated by the Court, I agree that the Act does not violate appellant's rights under the First and Fourth Amendments and the Bill of Attainder Clause. For reasons quite different from those stated by the Court, I also would hold that the Act is consistent on its face with the separation of powers.

I

The Court begins its analysis of the issues by limiting its inquiry to those constitutional claims that are addressed to "the facial validity of the provisions of the Act requiring the Administrator to take the recordings and materials into the Government's custody subject to

1, 8, 13-16, FN-1, FN-2;
footnotes renumbered;
stylistic changes.

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

2nd Draft

From: Mr. Justice Powell

No. 75-1605 Nixon v. GSA

Circulated: _____

Recirculated: JUN 22 1977

MR. JUSTICE POWELL, concurring in part and concurring in the judgment.

I join the judgment of the Court and all but Parts IV and V of its opinion. For the reasons stated by the Court, I agree that the Act on its face does not violate appellant's rights under the First, Fourth, and Fifth Amendments and the Bill of Attainder Clause.[1] For reasons quite different from those stated by the Court, I also would hold that the Act is consistent on its face with the separation of powers.

I

The Court begins its analysis of the issues by limiting its inquiry to those constitutional claims that are addressed to "the facial validity of the provisions of the Act requiring the Administrator to take the recordings and materials into the Government's custody subject to

pp 1, 6, 11, 12

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Powell

Circulated: _____

3rd DRAFT

Recirculated: JUN 25 1977

SUPREME COURT OF THE UNITED STATES

No. 75-1605

Richard M. Nixon, Appellant, *v.* Administrator of General Services et al. | On Appeal from the United States District Court for the District of Columbia.

[June —, 1977]

MR. JUSTICE POWELL, concurring in part and concurring in the judgment.

I join the judgment of the Court and all but Parts IV and V of its opinion. For substantially the reasons stated by the Court, I agree that the Act on its face does not violate appellant's rights under the First, Fourth, and Fifth Amendments and the Bill of Attainder Clause.[1] For reasons quite different from those stated by the Court, I also would hold that the Act is consistent on its face with the separation of powers.

I

The Court begins its analysis of the issues by limiting its inquiry to those constitutional claims that are addressed to "the facial validity of the provisions of the Act requiring the Administrator to take the recordings and materials into the Government's custody subject to screening by Government archivists." *Ante,* at 11. I agree that the inquiry must be limited in this manner, but I would add two qualifications that in my view further restrict the reach of today's decision.

First, Title I of the Act does not purport to be a generalized

[1] Although I agree with much of Parts IV and V, I am unable to join those parts of the Court's opinion because of my uncertainty as to the reach of its extended discussion of the competing constitutional interests implicated by the Act.

P. 14+7

1st DRAFT

OCT 5 1976

SUPREME COURT OF THE UNITED STATES

RICHARD M. NIXON *v.* ADMINISTRATOR OF GENERAL SERVICES ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

No. 75–1605. Decided October —, 1976

MR. JUSTICE REHNQUIST, dissenting.

Appellant, Richard M. Nixon, has challenged on a variety of grounds the constitutionality of Title I of the Presidential Recordings and Materials Preservation Act, Pub. L. 93–526, 88 Stat. 1695, 44 U. S. C. § 2107. Appellant's jurisdictional statement phrases two of the "questions presented" as follows:

> "1. Whether the fundamental principle of separation of powers mandated by Articles I, II and III of the Constitution is violated by a legislative enactment that deprives a former President of any control over the confidential papers and effects accumulated by him and his staff while in office and vests complete authority over such material in the Administrator of General Services pursuant to regulations to be approved by Congress.
>
> "3. Whether appellant's constitutional right to privacy, protected by various provisions of the Bill of Rights, is violated by statutory seizure of *all* the papers and effects accumulated in his home and office during a five year period, and by government screening of every item and conversation seized, including intra-family communications and recordings of personal and political conversations."

I omit 1/3

The Court's summary affirmance of the judgment of the District Court rejecting appellant's contentions seems quite mistaken to me. It seems mistaken not because at this stage of the case I would be prepared to state that the con-

Noted Nov. 29, 1976

HAB

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice

From: Mr. Justice Rehnquist

Circulated:

Recirculated: OCT 14 1976

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

RICHARD M. NIXON *v.* ADMINISTRATOR OF GENERAL SERVICES ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

No. 75-1605. Decided October —, 1976

MR. JUSTICE REHNQUIST, with whom MR. JUSTICE WHITE joins, dissenting.

Appellant, Richard M. Nixon, has challenged on a variety of grounds the constitutionality of Title I of the Presidential Recordings and Materials Preservation Act, Pub. L. 93-526, 88 Stat. 1695, 44 U. S. C. § 2107. Appellant's jurisdictional statement phrases two of the "questions presented" as follows:

> "1. Whether the fundamental principle of separation of powers mandated by Articles I, II and III of the Constitution is violated by a legislative enactment that deprives a former President of any control over the confidential papers and effects accumulated by him and his staff while in office and vests complete authority over such material in the Administrator of General Services pursuant to regulations to be approved by Congress.
>
> "3. Whether appellant's constitutional right to privacy, protected by various provisions of the Bill of Rights, is violated by statutory seizure of *all* the papers and effects accumulated in his home and office during a five year period, and by government screening of every item and conversation seized, including intra-family communications and recordings of personal and political conversations."

The Court's summary affirmance of the judgment of the District Court rejecting appellant's contentions seems quite mistaken to me. It seems mistaken not because at this stage of the case I would be prepared to state that the con-

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

75-1605

April 18, 1977

Dear Chief:

I agree with your proposal to schedule the Nixon case for 10:00 tomorrow morning. And I vote to put Hazelwood over until next week.

Sincerely,

The Chief Justice

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 6, 1977

Re: No. 75-1605 - Nixon v. GSA

Dear Bill:

In the parlance of the shop, "in due course" I will circulate a separate dissent addressing only the separation of powers and the just compensation clause as affected by the delay in the promulgation of the regulations. I will circulate it in Xerox form to speed things up.

Sincerely,

WHR

Mr. Justice Brennan

Copies to the Conference

Date?

No. 75-1605 Nixon v. Administrator of General Services

MR. JUSTICE REHNQUIST, dissenting.

Appellant resigned the Office of the Presidency nearly three years ago, and if the issue here were limited to the right of Congress to dispose of his particular Presidential papers, this case would not be of major constitutional significance. Unfortunately, however, today's decision countenances the power of any future Congress to seize the official papers of an out-going President as he leaves the inaugural stand. In so doing, it poses a real threat to the ability of future Presidents to receive candid advice and to give candid instructions. This result, so at odds with our previous case law on the separation of powers, will daily stand as a veritable sword of Damocles over every succeeding President and his advisors. Believing as I do that the Act is a clear violation of the constitutional principle separation of powers, I need not address the other issues considered by the Court. 1/

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 75–1605

Richard M. Nixon, Appellant, v. Administrator of General Services et al. | On Appeal from the United States District Court for the District of Columbia.

[June —, 1977]

MR. JUSTICE REHNQUIST, dissenting.

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My conclusion that the Act violates the principle of separation of powers is based upon three fundamental propposition. First, candid and open discourse among the President, his advisors, foreign heads of state and Ambassadors, Mem-

[1] I fully subscribe to most of what is said respecting the separation of powers in the dissent of THE CHIEF JUSTICE. Indeed, it is because I so thoroughly agree with his observation that the Court's holding today is a "grave repudiation of nearly two hundred years of judicial precedent and historical practice" that I take this opportunity to write separately on the subject, thinking that its importance justifies such an opinion.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 15, 1977

MEMORANDUM TO THE CONFERENCE

Re: No. 75-1605 Nixon v. Administrator of General Services

I have sent to the printer the attached addition to footnote 1 of my dissent in this case.

Sincerely,

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 17, 1977

MEMORANDUM TO THE CONFERENCE

Re: No. 76-1605 Nixon v. Administrator of General Services

I have sent to the printer the attached footnote, which will appear at the end of the first sentence of the first full paragraph on page 2.

Sincerely,

WHR

No. 75-1605 Nixon v. Administrator of General Services

Footnote to appear at the end of the first sentence of the first full paragraph on page 2.

I am not unmindful of the excesses of Watergate, and of the impetus it gave to this legislation. However, the Court's opinion does not set forth a principled distinction that would limit the constitutionality of an Act such as this to President Nixon's papers. Absent such a distinction:

> "The emotional aspects of a case make it difficult to decide dispassionately, but do not qualify our obligation to apply the law with an eye to the future as well as with concern for the result in a particular case before us." Brewer v. Williams, ____ U.S. ____, ____ (Mr. Justice Stevens, concurring.)

✓

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 20, 1977

MEMORANDUM TO THE CONFERENCE

Re: No. 75-1605 Nixon v. GSA

I plan to make fairly substantial revisions in my present dissenting opinion in this case in response to John's separate opinion, circulated on Friday, and Lewis' separate opinion, which I saw for the first time today. I will attempt to have the entire revised draft circulated, at least in xerox form, by late Wednesday.

Sincerely,

WHR

P. 3, 4, 7, 9, and 10

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Stevens

From: Mr. Justice Rehnquist

Circulated: _____

3rd [redacted] DRAFT

Recirculated: JUN 22 1977

SUPREME COURT OF THE UNITED STATES

No. 75-1605

Richard M. Nixon, Appellant, *v.* Administrator of General Services et al. | On Appeal from the United States District Court for the District of Columbia.

[June —, 1977]

MR. JUSTICE REHNQUIST, dissenting.

Appellant resigned the Office of the Presidency nearly three years ago, and if the issue here were limited to the right of Congress to dispose of his particular Presidential papers, this case would not be of major constitutional significance. Unfortunately, however, today's decision countenances the power of any future Congress to seize the official papers of an out-going President as he leaves the inaugural stand. In so doing, it poses a real threat to the ability of future Presidents to receive candid advice and to give candid instructions. This result, so at odds with our previous case law on the separation of powers, will daily stand as a veritable sword of Damocles over every succeeding President and his advisors. Believing as I do that the Act is a clear violation of the constitutional principle separation of powers, I need not address the other issues considered by the Court.[1]

[1] While the entire substance of this dissent is devoted to the constitutional principle of separation of powers, and not to the other issues that the Court addresses separately, it seems to me that the Court is too facile in separating appellant's "privacy" claims from his "separation of powers" claims, as if they were two separate and wholly unrelated attacks on the statute. The concept of "privacy" can be a coat of many colors, and quite differing kinds of rights to "privacy" have been recognized in the law. Property may be "private," in the sense that the Fifth Amendment prohibits the Government from seizing it without paying just compensation. A dictabelt tape or diary may be "private" in that sense, but may

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 23, 1977

MEMORANDUM TO THE CONFERENCE

Re: No. 75-1605 Nixon v. Administrator of General Services

Sorry! One additional footnote (attached) to be added at the end of the second sentence in Part C.

Sincerely,

WHR

3, 4, 5, 9, 12, 13, 14, 15

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Stevens

From: Mr. Justice Rehnquist

Circulated: _____

Recirculated: JUN 14 1977

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 75-1605

Richard M. Nixon, Appellant, *v.* Administrator of General Services et al. | On Appeal from the United States District Court for the District of Columbia.

[June —, 1977]

MR. JUSTICE REHNQUIST, dissenting.

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[1] While the entire substance of this dissent is devoted to the constitutional principle of separation of powers, and not to the other issues that the Court addresses separately, it seems to me that the Court is too facile in separating appellant's "privacy" claims from his "separation of powers" claims, as if they were two separate and wholly unrelated attacks on the statute. The concept of "privacy" can be a coat of many colors, and quite differing kinds of rights to "privacy" have been recognized in the law. Property may be "private," in the sense that the Fifth Amendment prohibits the Government from seizing it without paying just compensation. A dictabelt tape or diary may be "private" in that sense, but may

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Stevens

From: Mr. Justice Rehnquist

Circulated: _____

Recirculated: JUN [illegible] 1977

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 75–1605

Richard M. Nixon, Appellant, *v.* Administrator of General Services et al. | On Appeal from the United States District Court for the District of Columbia.

[June —, 1977]

MR. JUSTICE REHNQUIST, dissenting.

Appellant resigned the Office of the Presidency nearly three years ago, and if the issue here were limited to the right of Congress to dispose of his particular Presidential papers, this case would not be of major constitutional significance. Unfortunately, however, today's decision countenances the power of any future Congress to seize the official papers of an out-going President as he leaves the inaugural stand. In so doing, it poses a real threat to the ability of future Presidents to receive candid advice and to give candid instructions. This result, so at odds with our previous case law on the separation of powers, will daily stand as a veritable sword of Damocles over every succeeding President and his advisors. Believing as I do that the Act is a clear violation of the constitutional principle separation of powers, I need not address the other issues considered by the Court.[1]

[1] While the entire substance of this dissent is devoted to the constitutional principle of separation of powers, and not to the other issues that the Court addresses separately, it seems to me that the Court is too facile in separating appellant's "privacy" claims from his "separation of powers" claims, as if they were two separate and wholly unrelated attacks on the statute. The concept of "privacy" can be a coat of many colors, and quite differing kinds of rights to "privacy" have been recognized in the law. Property may be "private," in the sense that the Fifth Amendment prohibits the Government from seizing it without paying just compensation. A dictabelt tape or diary may be "private" in that sense, but may

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

June 17, 1977

Re: 75-1605 - Nixon v. Administrator

Dear Bill:

Although I am not yet completely at rest in this case, the enclosed draft represents what I presently contemplate filing.

Respectfully,

John

Enclosure

Mr. Justice Brennan

Copies to the Conference

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: Mr. Justice Stevens

JUN 17 77

Circulated: _____

Recirculated: _____

75-1605 - Nixon v. Administrator

MR. JUSTICE STEVENS, concurring.

The statute before the Court does not apply to all Presidents or former Presidents. It singles out one, by name, for special treatment. Unlike all other former Presidents in our history, he is denied custody of his own Presidential papers; he is subjected to the burden of prolonged litigation over the administration of the statute; and his most private papers and conversations are to be scrutinized by government archivists. The statute implicitly condemns him as an unreliable custodian of his papers. Legislation which subjects a named individual to this humiliating treatment must raise serious questions under the Bill of Attainder Clause.

Bills of Attainder were typically directed at once powerful leaders of government. By special legislative acts, Parliament deprived one statesman after another of his reputation, his property, and his potential for future leadership. The motivation for such bills was as much political as it was punitive--and often the victims were those who had been the most relentless in attacking their political enemies at

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: Mr. Justice Stevens

Circulated: _____

Recirculated: JUN 23 1977

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 75–1605

Richard M. Nixon, Appellant, *v.* Administrator of General Services et al. | On Appeal from the United States District Court for the District of Columbia.

[June —, 1977]

MR. JUSTICE STEVENS, concurring.

The statute before the Court does not apply to all Presidents or former Presidents. It singles one out, by name, for special treatment. Unlike all other former Presidents in our history, he is denied custody of his own Presidential papers; he is subjected to the burden of prolonged litigation over the administration of the statute; and his most private papers and conversations are to be scrutinized by government archivists. The statute implicitly condemns him as an unreliable custodian of his papers. Legislation which subjects a named individual to this humiliating treatment must raise serious questions under the Bill of Attainder Clause.

Bills of Attainder were typically directed at once powerful leaders of government. By special legislative acts, Parliament deprived one statesman after another of his reputation, his property, and his potential for future leadership. The motivation for such bills was as much political as it was punitive—and often the victims were those who had been the most relentless in attacking their political enemies at the height of their own power.[1] In light of this history, legislation like that before us must be scrutinized with great care.

[1] At the debate on the impeachment of the Earl of Danby, the Earl of Carnarvon recounted this history:

"My Lords, I understand but little of Latin, but a good deal of English, and not a little of the English history, from which I have learnt the mis-

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

June 27, 1977

MEMORANDUM TO THE CONFERENCE

Re: 75-1605 - Nixon v. Administrator of General Services

Enclosed is a revision to page 3 of my concurring opinion.

Respectfully,