General Services Administration
National Archives and Records Service Washington, DC 20408

January 19, 1981

Honorable Charles H. Percy
Chairman
Committee on Foreign Relations
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

On January 12, 1981, I testified before the Senate Foreign Relations Committee in response to a subpoena dated the previous day and issued by you on behalf of the Committee. The subpoena sought production of an archival log of presidential conversations between President Richard Nixon and General Alexander Haig tape-recorded while General Haig served as White House chief of staff during the Nixon administration. In my testimony I advised the Committee that regulations implementing the Presidential Recordings and Materials Preservation Act would not permit me to produce the subpoenaed log pending a five working-day period during which former President Nixon could object to its release to the Committee. My counsel also advised the Committee that the regulations further provided that upon receipt of any objection raised by Mr. Nixon, I was required to respond to that objection, accepting or rejecting it. If I agreed with Mr. Nixon's objection, I would then notify the Committee. If I rejected it, I would so advise counsel for Mr. Nixon and further refrain from producing the log for an additional five working-day period, during which time Mr. Nixon would have an opportunity to seek relief in the courts to prevent its production.

By letter dated January 16, 1981, addressed to the Administrator of General Services, Herbert J. Miller, Jr., counsel for former President Nixon, formally objected on numerous grounds to the production of the log. By separate letters of the same date, Mr. Miller also objected to the release to the White House or the Committee of any additional Nixon presidential materials within the scope of or developed pursuant to the Honorable Claiborne Pell's letters to the President of December 30, 1980, and January 6, 1981. I enclose copies of Mr. Miller's three letters.

Since receiving Mr. Miller's objection, my counsel, my staff and I have spent many hours deliberating his claims and the underlying legal principles and factual circumstances which support or deny them. To the extent permitted by the constraints of time, we have consulted with representatives of the Department of Justice. In almost every instance, I have concluded that these claims are either meritless or insufficient to prevent compliance with the subpoena. Nevertheless, I have also concluded, with greatest reluctance, that there do exist certain legal principles and factual circumstances which compel me to accept Mr. Miller's objection. Accordingly, I regret to inform you that I am unable to produce the subpoenaed log at this time. These same reasons also compel me to accept Mr. Miller's objection to the release of the duplicated

or derived Nixon presidential materials located or created in response to Senator Pell's requests. I enclose copies of my letters of this date to Michael M. Cardozo, Deputy Counsel to the President, informing him of the decision regarding Senator Pell's requests and to Mr. Miller, notifying him that I have determined not to release at this time any of the materials to which he has objected.

While I have served as Archivist of the United States for only six months, I suspect that I will never again during my tenure agonize over a decision as much as I have over this one. Please be assured that in declining to produce the subpoenaed log, I intend no disrespect to the Committee or the purposes behind its request. To the contrary, I respect the Committee's actions and I am fully committed to doing everything legally possible to support both it and the Congress as a whole. Only the legal and factual analysis discussed below has led me to conclude that I cannot now produce the subpoenaed log.

I. The Validity of the Committee's Subpoena

Several of Mr. Miller's bases for objecting to the subpoena relate to its alleged invalidity under the Presidential Recordings and Materials Preservation Act. As you may recall, my counsel advised the Committee during my testimony that the issue of the validity of a congressional subpoena remained unsettled. Mr. Miller puts forth a number of arguments in support of his contention that the subpoena is invalid as a matter of law, including several which bear reference. These include the language of the Act itself, which fails to include expressly any right of congressional access; the legislative history of the Act, which also fails to note any consideration of congressional access under the Act; and the language in the Supreme Court's decision upholding the constitutionality of the Act, which makes specific note of the Congress' failure to provide special access to itself.

On the other hand, there are other arguments to support the proposition that under the proper circumstances, a congressional subpoena would be valid. For example, the language of the statute is ambiguous enough to reject the contention that the Congress unequivocally barred itself from access to the Nixon presidential materials. To be sure, it would be incongruous for the Congress, which so soon before had been intent on gaining access to certain Nixon tapes and documents, to legislate away its right to do so. Also, it is certainly arguable that the Act does not provide the only potential avenue of congressional access to these or any other documentation. The Federal courts, including the Supreme Court, have long upheld the presumed validity of a congressional subpoena when the Congress or one of its committees is pursuing a specific and legitimate legislative function authorized under the Constitution.

These countervailing arguments are neither surprising nor novel. The precedents with respect both to the validity of congressional subpoenas and to claims of presidential privilege firmly establish that there are no absolutes. While a President's or former President's claim of privilege with respect to his presidential materials is presumed to be valid, a congressional subpoena may rebut that presumption. To determine whether or not the claim of privilege will withstand the subpoena, it is necessary to examine the nature of the congressional action and the nature of the materials being sought and to weigh the respective public interests which are served by protection or disclosure.

II. The Nature of the Committee's Inquiry

When you issued the subpoena on January 11, and when I testified before the Committee the next day, the Committee was in the process of considering the nomination of General Haig to be the Secretary of State. In this situation, the Committtee was pursuing its specific and legitimate "advice and consent" role under Article II of the Constitution and the pertinent Senate Rules. On January 15, 1981, in culmination of this function, the Committee voted to recommend General Haig's confirmation to the full Senate.

Concurrent with the Committee's vote on General Haig, it also adopted the following resolution:

> Resolved, that in anticipation of its vote on reporting to the Senate the nomination of Alexander M. Haig to be Secretary of State, and other nominations which may come before it for consideration, the Committee on Foreign Relations:
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> (1) adopts this resolution for the purpose of continuing the jurisdiction of the Committee over matters relating to such nominations and its general oversight responsibilities, and
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> (2) will continue all reasonable efforts, including those actions taken by the Committee to date, to obtain materials relating to such nominations and such general oversight responsibilities.

The Committee's action in voting on General Haig's nomination and the quoted resolution are critical to determining the validity of its outstanding subpoena. At this time, instead of exercising a specific constitutional function, the Committee is exercising far more general areas of inquiry, the ultimate purposes of which are uncertain, open-ended, and speculative. These functions are less specific than those chartered in the Senate Watergate Committee eight years ago, whose subpoena for Nixon materials was found insufficient by the United States Court of Appeals for the District of Columbia Circuit to rebut a claim of presidential privilege.

Under this and other judicial precedents, it is uncertain whether the Committee's subpoena could prevail over a challenge of presidential privilege, even if the Committee had not already voted on the Haig nomination. In the context of its present inquiries, having voted to recommend General Haig, it is most unlikely that the Committee's subpoena could survive a court challenge brought by Mr. Nixon.

III. The Nature of the Materials

As I noted in my testimony before the Committee, the subpoenaed material is a portion of a log being created in the archival processing of the Nixon tapes. The log contains the following information: the date, time and location of the conversation;

the participants in the conversation; a list of the subjects discussed; a preliminary archival determination of any factor which may bar or delay ultimate public access to the conversations or portions of it; and a guide to assist the archivist in locating the particular conversations on the tape.

Contrary to what one may perceive from the allegations contained in Thomas B. Carr's affidavit accompanying Mr. Miller's objection to producing the log, it is not intended to be nor does it in any way achieve the status of a mini-transcript. The subject listing is simply that, and not an attempt to record who said what and why. Consistent with several of Mr. Carr's allegations, it is impossible to reconstruct the substance of the conversation from the log of that conversation.

In one respect the nature of the log argues against Mr. Nixon's claim of privilege. Because the log is not a substantive account of a presidential conversation, it does not reproduce the exchange of ideas or opinions, which is the ordinary barometer of privileged conversations. Although the courts have established that a presumptive privilege would exist with respect to the log, that privilege is more vulnerable to rebuttal than it would be if the materials in question were the conversations themselves.

But just as the log is less susceptible to a valid claim of privilege than would be the conversations behind it, so also is the log of minimal value to the Committee's inquiries without the subsequent production of the conversations. The Committee could draw no reasonable conclusions at all concerning anyone's conduct or thinking based solely on the logs. There are likely to be many instances in which the log may convey a misleading impression when examined in a vacuum. The Committee's inquiries would almost of necessity lead to the conversations themselves, for which the former President's claim of privilege would almost certainly prevail over the Committee's present subpoena.

IV. The Weighing of the Public Interest

I have no doubt that the public interest is served by the disclosure of relevant background information about persons nominated to or even occupying the highest appointive offices. To be sure, the Committee's unprecedented questioning of General Haig was designed to meet this purpose. Were the Committee destined to receive additional pertinent information about General Haig in a timely manner through the production of this log, it would be reasonable to assume that the public interest would be served by its production.

Unfortunately, the attempted production of the log is highly unlikely to present the Committee with additional pertinent information in a timely manner. First, as noted above, the information contained in the log is non-substantive and would be all but useless in adjudging General Haig's performance as White House chief of staff. It is even possible that what little information there was could be misleading about General Haig's actions or attitudes. Second, the attempted release over Mr. Nixon's objection of this log, or, ultimately, of the tapes referenced in the log will almost certainly

[1] The surveys created in response to Senator Pell's request would be even less useful to the Committee. They contain even less substantive information about a far broader universe of materials (70,000 pages and 800 tape-recorded conversations), much of which is likely irrelevant to the Committee's inquiries.

lead to a court challenge. Notwithstanding the final judicial determination, the National Archives' experience with Nixon materials litigation portends at least several years before it is reached. Any production at that time would hardly be timely or relevant to the Committee's consideration of General Haig's past performance.

In the absence of the Committee's subpoena, archival processing of the Nixon-Haig conversations will nonetheless continue. As required by the Presidential Recordings and Materials Preservation Act, the ultimate goal is public access to these materials, a goal which is completely consistent with the policies of the National Archives and Records Service. Protracted litigation over the Committee's subpoena is a potential threat to public access and, almost assuredly, would not facilitate its achievement.

For these reasons, and these reasons alone, I conclude that I must accept Mr. Miller's objection. Let me repeat that this was a most difficult decision to reach. I have acted at all times in consonance with the requirements of the Presidential Recordings and Materials Preservation Act and the regulations issued thereunder. At your request, I am available to respond to your questions or those of the Committee. I sincerely hope that the Committee will understand and accept the reasons for my determination, and that the mutual respect we have achieved to date will continue.

Sincerely,

Robert M. Warner

ROBERT M. WARNER
Archivist of the United States

Enclosures