Partial Text of Report on Nixon Taxes

Following are excerpts from the Joint Committee on Internal Revenue Taxation staff's report on President Nixon's federal income taxes:

INTRODUCTION

On December 8, 1973, President Nixon made public his tax returns and asked the Joint Committee on Internal Revenue Taxation to examine whether two transactions, a gift of his papers claimed as a deduction in 1969 and the sale of 23 acres of land at San Clemente, were correctly reported on his tax returns. The full text of the letter dated December 8, 1973, which President Nixon wrote to Chairman Wilbur D. Mills is as follows:

"Dear Mr. Chairman: Recently there have been many questions in the press about my personal finances during my tenure as President.

"In order to answer these questions and to dispel public doubts, I am today making public a full accounting of my financial transactions since I assumed this office. This accounting includes copies of the income tax returns that Mrs. Nixon and I have filed for the years 1969-72; a full, certified audit of our finances; a full, certified report on the real and personal property we own; an analysis of our financial transactions, including taxes, from January 1, 1969 through May 31, 1973, and other pertinent documents.

"While these disclosures are the most exhaustive ever made by an American President, to the best of my knowledge, I recognize that two tax-related items may continue to be a subject of continuing public questioning. Both items are highly complex and, in the present environment, cannot easily be resolved to the public's satisfaction even with full disclosure of information.

"The first transaction is the gift of certain pre-presidential papers and other memorabilia which my wife and I claimed as a tax deduction of $576,000 on our 1969 return and have carried forward, in part, in each subsequent year. The second item in question is the transfer by us, through the Title Insurance and Trust Co., to the B&C Investment Co. of the beneficial interest in 23 acres of land in San Clemente, California, in 1970. I have been consistently advised by counsel that this transaction was correctly reported to the Internal Revenue Service. The IRS has also reviewed these items and has advised me that they were correctly reported.

"In order to resolve these issues to the full satisfaction of the American people, I hereby request the Joint Committee on Internal Revenue Taxation to examine both of these transactions and to inform me whether, in its judgment, the items have been correctly reported to the Internal Revenue Service. In the event that the committee determines that the items were incorrectly reported, I will pay whatever tax may be due. I also want to assure you that the committee will have full access to all relevant documents pertaining to these matters and will have the full cooperation of my office.

"I recognize that this request may pose an unusual challenge for the committee, but I believe your assistance on this matter would be a significant public service.

"With warmest regards,

"Sincerely,

/s/Richard Nixon."

On December 12, 1973, the Joint Committee on Internal Revenue Taxation met in executive session and decided to conduct a thorough examination of the President's income tax returns for the years 1969 through 1972 and to submit a report to the President and to the Congress on its findings.

The committee decided not to confine its examination to the two items mentioned by President Nixon in his letter quoted above, but rather to examine all tax items for the years 1969 through 1972. . . . The committee believed that the broader examination was necessary in part because various items on a tax return are often so interrelated that distortions result if a comprehensive review is not made. Probably more important, however, is that so many questions have been raised about the tax returns of the President for these years that the committee believed the general public can only be satisfied by a thorough examination of the President's taxes. From the standpoint of the tax system alone, this confidence of the general public is essential since ours is basically a voluntary assessment system which has

maintained its high level of effectiveness only because the general public has confidence in the basic fairness of the collection system. . . .

Generally, it is the responsibility of the taxpayer to substantiate his deductions or to show why other items should not be included in his return. However, in this case, because of the office held by the taxpayer, it has not been possible to call upon him for the usual substantiation. The unique position of the presidency has also raised other questions in these returns which the staff comments on at the appropriate points in this report. Although the staff has not been able to contact the taxpayer in this case, he has been represented by counsel, Kenneth W. Gemmill and H. Chapman Rose. The counsel have been helpful in the staff examination of the President's returns, and they have supplied most of the information requested.

In its examination of the President's tax returns, the staff conducted approximately 30 interviews with persons involved in different aspects of the President's tax matters. In a number of cases, this represents more than one interview with the same person. In addition, the staff has made contact with numerous other possible sources of information, has on two occasions sent staff members to California to consider various tax issues, and on another occasion has sent staff personnel to New York to carry out the examination. This is in addition to information the staff received through numerous investigations made by the Internal Revenue Service personnel. Finally, the staff has employed experts to help it appraise the value of the San Clemente property — an engineering firm and an appraisal firm, both in California. The staff believes that it has conducted an extensive examination.

As is true in any examination of a tax return, however, it is not possible to give assurance that all items of income have been included. The staff report contains recommendations on two categories of income which it believes should have been included but were not; namely, improvements made by the government to the San Clemente and Key Biscayne properties which the staff believes primarily represent personal economic benefits to the President, and economic benefits obtained by family and friends from the use of government aircraft for personal purposes.

The staff did not examine the President's income tax returns for years prior to 1969. In the course of its examination of the returns for 1969-1972, however, the staff found that because of interrelationships of prior years' returns it was necessary to consider a limited number of items relating to prior years' returns, since they affect the returns for the years in question. In addition, the staff has limited its recommendations to income tax matters, although in this examination it found instances where the employment taxes were not paid and gift tax returns not filed.

The staff has made no attempt in this report to draw any conclusions whether there was, or was not, fraud or negligence involved in any aspect of the returns, either on the part of the President or his personal representatives. The staff believes that it would be inappropriate to consider such matters in view of the fact that the House Judiciary Committee presently has before it an impeachment investigation relating to the President, and that members of the Joint Committee on Internal Revenue Taxation, along with members of the House and Senate, may subsequently be called upon to pass judgment on any charges which may be brought as a result of that investigation. The staff believes that neither the House nor the Senate members of the joint committee would want to have pre-judged any issue which might be brought in any such proceedings.

Summary of Recommendations

The report which follows is divided into ten separate parts. Each of these deals with one or more major question with respect to the tax returns of the President. In most cases the report indicates first the scope of the examination and then presents an analysis of points of law which may be involved. This is followed by a summary of staff recommendations, and finally the staff presents an analysis of these recommendations.

The staff recommendations would make the following increases in the President's taxes for the years involved:

	Proposed Deficiency	Interest	Deficiency plus Interest
1969	$171,055		$171,055
1970	93,410	$16,638	110,048
1971	89,667	10,547	100,214
1972	89,890	5,224	95,114
Total	$444,022	$32,409	$476,431

Should the President decide to reimburse the government for the General Services Administration improvements which the staff believes were primarily personal in nature, he would pay $106,262. In addition, if he should decide to reimburse the government for the amount determined by the staff to represent the cost for the personal trips of his family and friends, this would amount to $27,015. On the other hand, if the President were to receive reimbursement for the expense which he paid for the table located in the Cabinet Room in the White House for which the staff believes the Government should have paid, the amount he should receive would be $4,816.84. If the President were to make the reimbursements referred to above, he would be allowed to take deductions in the year of the payments, since the amounts were treated as taxable income in the years under examination in which they occurred.

The major cause of the deficiencies resulting from the staff examination are set forth below.

(1) The charitable deductions

($482,018) taken for a gift of papers from 1969-1972 should not, in the staff's view, be allowed because the gift was made after July 25,1969, the date when the provisions of the Tax Reform Act of 1969 disallowing such deductions became effective. The staff believes that in view of the restrictions and retained rights contained in the deed of the gift of papers, that the deed is necessary for the gift. The deed (dated March 27, 1969) which purportedly was signed on April 21, 1969, was not signed (at least by all parties) until Apiil 10, 1970 and was not delivered until after that date. It should also be noted that this deed was signed by Edward Morgan (rather than the President), and the staff found no evidence that he was authorized to sign for the President. In addition, the deed stated that its delivery conveyed title to the papers to the United States and since the deed was not delivered until after April 10, 1970, it is clear that title could not have been conveyed by way of the deed until after July 25, 1969. Furthermore, because the gift is so restricted, in the opinion of the staff, it is a gift of a future interest in tangible personal property, which is not deductible currently under law, even if the gift was valid in all other respects; that is, it had been made and the deed delivered prior to July 25, 1969. President Nixon's 1968 gift of papers contains the same restrictions as the second gift so that in the staff's opinion it, too, is a non-deductible gift of a future interest. As a result, the staff believes that the amount of the 1968 gift in excess of what was deducted in 1968 is not available to be carried over into 1969.

(2) In 1970, no capital gain was reported on the sale of the President's excess San Clemente acreage. The staff believes that there was an erroneous allocation of basis between the property retained and the property sold and that a capital gain of $117,836 should have been reported.

(3) The staff believes that the President is not allowed to defer recognition of his capital gain on the sale of his New York City cooperative apartment because it does not view the San Clemente residence in which he reinvested the proceeds of the sale (within one year) as his principal residence. Also, the staff believes this gain is larger than the $142,912 reported on the 1969 tax return, because the President's cost basis should be reduced by the depreciation and amortization allowable on the New York apartment resulting from its use in a trade or business by Mr. Nixon. The staff determined that the amount of depreciation and amortization allowable is $8,936. The staff measures the total capital gain at $151,848, which in its view should be reported as income in 1969.

(4) The staff believes that depreciation on the San Clemente house and on certain furniture purchased by the

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Sen. Long holds 784-page appendix to the committee staff report.

President, business expense deductions taken on the San Clemente property, as well as certain expenditures from the White House "guest fund" are not proper business expenses and are not allowable deductions. These deductions totalled $91,452 during the years under examination. In the case of the purchase of part of the furniture, however, the staff believes the government should reimburse President Nixon for his expenditure.

(5) In the case of capital gain on the sale of the Cape Florida Development lots in 1972, 60 per cent was reported by President Nixon and 40 per cent was reported by his daughter Patricia. The staff believes the entire amount should be reported as income to the President. Thus in the view of the staff, he should report $11,617 (this is the amount allocated to his daughter from the installment payment in 1972) as a capital gain in 1972 and the remainder of the gain in 1973. On this basis, Mrs. Cox should also file an amended return and not include any of this gain for 1972 (or in 1973). Also, on this basis President Nixon could deduct as interest part of the payment he made in 1973 to Patrcia on the money she loaned him. She, of course, should report the interest as income in 1973.

(6) The staff believes President Nixon should declare as income the value of flights in government planes taken by his family and friends when there was no business purpose for the furnishing of transportation. The staff was given no information about family and friends on flights where the President was a passenger. However, for other flights the first-class fare costs of his family and friends are estimated to be $27,015 for the years 1969 through 1972. From April 1971, through March 1972, and again after November 7, 1972, President Nixon paid for most of such travel expense himself.

(7) The staff believes that President Nixon should declare as income $92,298 in improvements made to his Key Biscayne and San Clemente estates. The only improvements taken into account for this purpose, the staff believes, were those undertaken primarily for the President's personal benefit.

(8) The staff believes the President should be allowed an additional $1,007 in sales tax deductions.

(9) The staff believes that $148 of gasoline tax deductions should not be allowed for 1969 through 1971. However, the staff has determined that an additional $10 in gasoline tax deductions is allowable for 1972.

(10) Several other income items should be reported on President Nixon's tax returns, although these are entirely offset by deductions and hence do not increase taxable income.

PART ONE

GIFTS OF PAPERS

1. Scope of Examination

Gifts of Papers

On his tax return filed for 1969, President Nixon claimed a deduction for a charitable contribution to the United States. The tax return indicated that the gift consisted of personal papers, manuscripts, and other material; that the date of the gift was March 27, 1969; and that the value of the gift was $576,000. The tax return also indicated that there were no restrictions on the gift and that the gift was free and clear, with no rights remaining in the taxpayer.

The amount of this gift allowed as a deduction in 1969 was $95,298. The deductions for this gift carried over and taken in subsequent years are as follows: in 1970, $123,959; in 1971, $128,668; and in 1972, $134,093. Accordingly, the President has taken deductions totaling $482,018. Since the gift is valued at $576,000, presumably deductions of $93,982 remain for subsequent years.

A deed for this gift of papers, dated March 27, 1969, was delivered to the General Services Administration shortly after April 10, 1970. This deed was not signed by President Nixon but rather by Edward L. Morgan, a deputy counsel to the President who was on John Ehrlichman's staff. Questions have been raised whether Mr. Morgan had the authority to sign the deed, whether the deed was backdated, and also whether a deed was necessary for this gift.

The President also made a gift of papers to the United States in 1968. Since in 1968 the amount of the gift was in excess of the maximum charitable contribution deduction available in that year, a carryover was available to be used in future years, but it has not been used because the amount of the charitable contribution by the President in 1969 was large enough to account for the maximum allowable charitable contributions through 1972.

In 1969, the Congress passed, and the President signed, the Tax Reform Act of 1969 which contained amendments which, in effect, repealed provisions of the Internal Revenue Code allowing charitable contribution deductions for gifts of papers. The 1969 act repealed these provisions retroactively as of July 25, 1969. This had the effect of allowing a charitable contribution deduction for gifts of papers if they were made on or before July 25, 1969, but not if they were made after that date. The question has arisen whether the gift of papers for which President Nixon claimed a deduction was completed prior to July 25, 1969.

The staff has examined the gift of papers to the United States made by President Nixon (through the General Services Administration) and claimed in part as a deduction on his 1969 tax return to determine whether the gift was actually made prior to July 25, 1969. The staff has also looked into the events relating to the deed. In addition, questions have been raised about certain restrictions on access to the papers that were imposed in the deed. On this latter point, the question

arises whether the restrictions are such that the gift should be treated as a gift of a future interest, which would not be deductible under the tax laws regardless of when the gift was made . . .

3. Documents on the Second Gift of Papers Furnished the Joint Committee by President Nixon's Representatives

President Nixon's representatives have released to the public or submitted to the joint committee three documents setting forth facts and legal opinions on the validity of the charitable contribution deduction taken by President Nixon on his 1969 tax return for the gift of the second installment of his pre-Presidential papers. These three documents are:

(1) A description of the second gift of papers contained in the documents released by the White House on the President's personal finances on December 8, 1973.

(2) A letter from Kalmbach, DeMarco, Knapp & Chillingworth to Coopers & Lybrand stating their opinion regarding the deductibility for tax purposes of the President's second gift of pre-Presidential papers.

(3) A brief on the bases sustaining the charitable contribution deductions taken in connection with President Nixon's second gift, submitted to the Joint Committee on February 19, 1974, by Kenneth W. Gemmill and H. Chapman Rose, attorneys for President Richard M. Nixon. . . .

Opinion letter from the President's attorneys to Coopers & Lybrand dated August 22, 1973.

As part of the documents released by the White House on December 8, 1973, on the gift of papers, there was a letter from Kalmbach, DeMarco, Knapp & Chillingworth to Coopers & Lybrand dated August 22, 1973, stating their opinion regarding the deductibility for tax purposes of the President's gift of pre-presidential papers. . . .

This opinion letter from the President's attorneys at the time of the gift states that their examination of the facts and circumstances show that immediately prior to March 27, 1969, the taxpayer declared an intention to make a gift of papers to the United States; that at his direction his personal counsel, Edward L. Morgan, directed and supervised the removal of the papers from the Executive Office Building to the National Archives; and that at all times subsequent to the March 27 date, the materials constituting the gift were under the exclusive dominion and control of the National Archives.

The letter also states, "On or about April 6, 7, and 8, 1969, the material constituting the subject matter of the gift was examined and segregated from other materials by an appraiser duly appointed by the taxpayer to appraise the market value of the said papers. . . ."

In addition, the letter from the President's attorneys indicates, "The materials constituting the gift thereafter were, after a period of time extending from April 6, 1969, through March 27, 1970, individually itemized and appraised by the appraiser. . . ."

With respect to the deed, the President's attorneys comment, "While, in our opinion, the law is clear that an instrument of deed is not a necessary requisite to a gift of personal property, the duly appointed and constituted attorney-in-fact and agent of the taxpayer did on April 21, 1969, execute an instrument of gift reciting and declaring the intent of the donor to make such gift. . . ."

Brief submitted to the Joint Committee by the attorneys for President Nixon on February 19, 1974.

President Nixon's counsel submitted to the committee staff a brief presenting legal arguments in favor of sustaining the charitable contribution deductions taken in connection with President Nixon's second gift of his pre-Presidential papers. . . . The brief contains a discussion of the common law of gifts. It begins by stating that courts sitting in tax cases have universally applied common law gift standards to determine whether a taxpayer was entitled to a deduction. However, the brief argues that where the common law requirements vary from clearly defined national policies, such national policies should take precedence.

The brief argues that a substantial national policy exists from the Presidential Libraries Act in favor of encouraging presidents to donate their papers to the United States government. The brief describes in detail the origins of the Presidential Libraries Act as most recently enacted in 1955. The key section of that act is 44 U.S.C. section 2107, which authorizes the administrator of the General Services Administration (hereafter sometimes called "GSA"), which agency oversees the Presidential Libraries, to accept the papers of any President or former President for deposit at presidential libraries. The section goes on to state that the administrator can accept papers subject to any restictions imposed on the papers by the donor which are agreeable to the administrator as to their use. The brief states that this legislation was proposed by GSA because it "contemplated the incorporation of presidential libraries into the National Archives system and sought to make this arrangement attractive to potential presidential donors by adding flexibility to the section dealing with the acceptance of papers." The brief states that, according to the House committee report on the legislation, the effect of the statute was to make it easier for GSA to accept gifts subject to substantial restrictions in an effort to make gifts more attractive to potential presidential donees. From

this legislative history the brief concludes that:

"It is clear from the foregoing that the Presidential Libraries Act represents an effort to encourage and facilitate the donation of presidential papers. The act does not supplant the common law of gifts, but it is a vital consideration in determining under common law whether the 1969 gift was effective prior to the statutory cutoff date."

The brief goes on to state the general common law requirements for completing a gift. The brief states, "a gift is defined in common law as a present, irrevocable transfer of his property by one to another without consideration, and courts generally employ the criteria of donative intent, delivery and acceptance to determine whether such a transfer has occurred."

The brief argues that this mechanical formula is not, in fact, applied rigidly by the courts. Rather "the central issue in every gift case is the donor's intent, and a clear manifestation of intent is frequently held to be curative of ambiguities and other mechanical imperfections." The brief continues by stating that "[i]n ascertaining and giving effect to the donor's intent, the courts give controlling weight to the circumstances surrounding a purported gift." With this background the brief discusses the three main elements of the gift: donative intent, delivery and acceptance.

The brief states that donative intent is the paramount consideration in determining under common law whether a purported gift has been made, and if this intention is clearly shown, "courts in many circumstances will sustain a gift even though the remaining common law criteria are not fully satisfied." In support of this argument the brief refers to a case involving President Franklin D. Roosevelt, In re Roosevelt's will, 73 N.Y.S. 2d, (Sur. Ct. 1947). The question in that case was whether President Roosevelt had made a gift of his papers to the United States before his death. In 1938 the President had publicly announced his intent to donate his papers to the United States to a library which was to be established in Hyde Park. During his Presidency, Mr. Roosevelt delivered groups of papers to the library as their value became sufficiently remote to work going on at the White House. However, at the President's death a substantial portion of the papers remained in Washington. Thus, these papers had not been delivered to the library, and no deed or other written document conveying the papers existed.

On these facts the question before the Surrogate Court was whether an inter vivos gift had been made; if not, the papers would be included in the President's estate and, since no provision had been made for them in his will, an estate tax would have had to be paid. The court held that given the President's public announcement of his intention to donate the papers, a constructive delivery of them had been made and the gift was effective. The brief goes on to discuss two other cases in which gifts were deemed to be effective regardless of delivery of papers in cases where an intent to give all of an entire group of papers or other materials was clear.

The brief then states in its discussion of delivery, "Evidence of donative intent is often subjective, and courts normally insist upon corroborative evidence in the form of actual or constructive delivery. In many cases this means there must be a transfer of possession and dominion from one party to another." The brief states that the requirement of delivery serves an evidentiary function and if the delivery is ambiguous, donative intent often becomes the "critical evaluative tool."

The brief concedes that no segregation of the papers listed in the deed dated March 27, 1969, was made before July 25, 1969.

The brief argues that what was given before July 25, 1969, was like a gift of an undivided interest in the property delivered in March, 1969. Cases are cited which involved a gift of an undivided interest in bonds, in savings accounts and in corporate shares. The brief concludes that segregation is unimportant if the gift is one of an undivided interest. The brief goes on to state that cases have held delivery to have been accomplished even though the donor has retained some control over donated property (through restrictions in the gift) and in cases where the potential for revocation of the gift by the donor exists (because the donor has not given up complete dominion and control over the property). In addition, the brief states that there is no requirement for communication with the donee to perfect delivery, but that delivery vests immediate title in the donee, subject to his right to repudiate when informed of the gift.

The brief argues that acceptance is the least important and most flexible of the three criteria for establishing a gift. Indeed, the brief argues that the criteria of acceptance has been dropped by many courts in the absence of any evidence of repudiation by the donee. The brief concludes that courts will assume acceptance of a gift by the donee unless the donee explicitly rejects it.

Thus, the brief relies heavily on two arguments. First, that a strong public policy of encouraging presidents to donate their papers to the government affects the standard by which it is determined what constitutes a completed gift, and that the key to determining whether a completed gift has occurred is the intent of the donor. Finally, the brief implies that what was given in the President's case was an individed interest in property rather than a specific group of papers. The brief concludes that under these standards, a gift had been made by July 25, 1969.

5. Staff Conclusions on the Deductions for the Second Gift of Papers

. . . The staff has concluded that a valid gift of papers was not made by the President on or before July 25, 1969. The staff does not believe that on or before July 25, 1969, there was: (1) a firm intent to make a gift; (2) a designation of the papers to be given; (3) a delivery of a designated gift; (4) a relinquishment of dominion and control over the property by the donor; or (5) an acceptance of the papers by the donee. Moreover, the staff does not believe that there is a legal basis for the argument that there was a gift of an undivided interest or anything like an undivided interest in the papers delivered to the National Archives on March 26-27, 1969. The staff also believes that, since the deed had restrictions on access to the papers and also stipulated that the papers were eventually to be stored in the Nixon Library after its construction, the deed was necessary for this gift, although deeds are not generally essential for gifts. Since the deed itself provided that title to the papers is conveyed to the United States by the delivery of the deed and the deed was not delivered until after April 10, 1970, this also supports a conclusion that a valid gift was not made before July 25, 1969.

. . . With respect to the question whether the restrictions are such as to make the gift one of a future interest in property, the staff believes that since President Nixon restricted access to the papers, except to National Archives personnel only for archival purposes, the gift was not free and

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clear but rather was so restricted that President Nixon was not really giving the papers until the restrictions no longer applied. This being the case, the staff believes that even if a valid gift had been made before July 25, 1969, in all respects, a charitable contribution deduction should not be allowed because the gift represented a future interest, which is disallowed as a deduction under section 170(a)(3) of the Internal Revenue Code.

A. Was There a Valid Gift of Papers On or Before July 25, 1969

The staff has concluded that President Nixon's gift of the second installment of his pre-presidential papers was not completed on or before July 25, 1969. The elements of a completed gift generally are intent of the donor, delivery, relinquishment of dominion and control and acceptance by the donee.

Intent of donor to make a gift in early 1969

The joint committee staff believes that President Nixon intended to make a gift of papers some time in 1969. This conclusion is based on the February 1969 correspondence between Egil Krogh and Richard Ritzel, the President's former law partner, and a memorandum from John Ehrlichman, Mr. Nixon's White House counsel, to President Nixon discussing gifts of papers, in which President Nixon commented at the end of the memorandum, which apparently was forwarded back to Mr. Ehrlichman, "Good."

There is not sufficient evidence however, that the President intended to make his gift on or before July 25, 1969, or that he intended his gift to be a bulk gift, one large enough to use up the maximum available charitable contribution for several years, rather than a one-year gift, such as he had made in 1968 and such as President Johnson had made while he was President. The staff has seen no written evidence to indicate that President Nixon intended a bulk gift of papers before July 25, 1969, and the other evidence relating to this consists of reports of conversations which are ambiguous.

For purposes of determining the validity of tax deductions, the burden of proof is on the taxpayer. The President's counsel summarized the evidence that President Nixon intended to make a bulk gift in early 1969 in a memorandum dated February 19, 1974. This memorandum stated that near the end of February 1969 the President had discussions with Mr. Ehrlichman concerning the donation of his pre-Presidential papers. The memorandum asserted that President Nixon expressed his intention during these discussions to make a gift in 1969 of as great a volume of papers as he could treat as a deduction in that year and the statutory carryover period and to give any remaining papers later. The memorandum further stated that Mr. Ehrlichman conveyed this intention to Mr. Morgan and gave him staff responsibility for implementing it immediately.

In an interview with the joint committee staff, Mr. Ehrlichman did not inform the staff of this conversation with the President. He did say that the President intended to make a gift of his pre-presidential papers in 1969 and that the gift was to cover the maximum available deduction for more years than just 1969, but he did not indicate that the President told him of this directly in February, 1969, or that he had relayed this to Mr. Morgan. Rather Mr. Ehrlichman stated that the decision to make a 1969 gift was made at the time of the 1968 gift. In Mr. Morgan's staff interview he also did not indicate that he was told by Mr. Ehrlichman of the specific intentions of the President to make a large gift in early 1969; and, in addition, the staff has reviewed his memorandum of August 14, 1973, to Douglas Parker of the White House staff setting forth his "basic recollection of the facts regarding the President's papers." He made no mention of these instructions in that memoranum.

Another related factor in analyzing the President's intent in early 1969 is his decision to change lawyers, replacing Richard Ritzel of New York with Herbert Kalmbach and Frank DeMarco of California. The staff understands that Mr. Kalmbach was the conduit between Mr. Ehrlichman and H. R. Haldeman on the President's behalf and Mr. DeMarco, and he has told the staff in his initial staff interview that he has no recollection of any conversation relating to a gift of papers in the early part of 1969. Mr. DeMarco, on the other hand, indicates that he had heard that the President had made a second gift of papers on March 27, 1969, from either his partner, Mr. Kalmbach, or from Mr. Morgan in a telephone conversation in early April, 1969. Not only has Mr. Kalmbach said that he could not have been the one who told Mr. DeMarco of a gift of papers because he was unaware of such a gift, but also Mr. Morgan has no recollection of a conversation about the papers with Mr. DeMarco in early April 1969. In a second staff interview, Mr. Kalmbach said that while he has no specific recollection of discussing the papers with Mr. DeMarco, his impression is that he may have done so. He said that this is so because after his first meeting with the staff, he reviewed this matter and, when he examined his diary, he saw Mr. Morgan's name listed on March 26, 1969. He reasons that if he talked to Mr. Morgan that day (it being the first day the papers were delivered), Mr. Morgan must have told him of the gift. He added, however, that he has no specific recollection of this, only his impression.

The staff has also tried to determine how the amount of the gift ($576,000) was derived. Mr. DeMarco told the staff that information on the amount of the President's income was obtained from Martin Feinstein ,the accountant at Vincent Andrews, Inc., who handled the President's taxes at that time, that this information was relayed by Mr. Feinstein to either Mr. Morgan or Mr. Kalmbach, and that Mr. Morgan and Mr. DeMarco calculated the approximate size of the gift. In an interview with the staff, Mr. Feinstein has said that no one contacted him in this regard and that he was never aware of the second gift of papers until he read about it in the newspapers in 1973. Neither Mr. Ehrlichman nor Mr. Morgan have any knowledge of the determination of the amount of the gift, and neither of them indicated they gave any figure to Mr. DeMarco.

The staff has been told of only one conversation about a bulk gift in early 1969 that both parties now recall, a phone conversation between Arthur Blech and Frank DeMarco in May 1969. Their recollections of the conversation are practically identical, except that Mr. DeMarco states that they talked about a $500,000 figure, while Mr. Blech said the figure was $550,000. Both Mr. DeMarco and Mr. Blech assert that in that conversation Mr. DeMarco told Mr. Blech that the President had made a large gift prior to the phone call.

Mr. DeMarco has indicated that when the original deed was signed on April 21, 1969, he used a $500,000 amount on a schedule that he personally typed, which is the amount he was told was to be the amount of the gift. However, Mr. DeMarco has been unable to produce that deed, so the only indication that the schedule was prepared in April 1969 is Mr. DeMarco's statement to that effect.

Furthermore, there is some circumstantial evidence that in early 1969 President Nixon intended a one-year gift to be made later in the year. This would have been sensible from the standpoint of tax planning, since the President's income and other charitable contributions were not known in early 1969, and a memorandum written by John Ehrlichman in February 1969 implies that the President was planning to make a one-year gift.

For these various reasons, the staff concludes that there is insufficient evidence to indicate that President Nixon intended to make a bulk gift in early 1969.

Delivery of the gift

On March 26-27, 1969, approximately 1,217 cubic feet of papers were transferred from the Executive Office Building to the National Archives. The President claimed on his tax return that the date of this delivery was the date of the gift, and the President's counsel have asserted that it consti-

tuted a gift of an undivided interest in property, or was like an undivided interest, since a portion of the papers actually delivered on that date did constitute the gift that was ultimately made. The staff believes it is important to note with respect to the delivery of the papers that Dr. Daniel Reed, the assistant archivist for presidential libraries, has told the staff that he instigated the delivery of the papers to the National Archives, not Mr. Morgan, because when they were asked to perform archival work on the papers, he was concerned that there was insufficient space in the Executive Office Building where the papers were housed. Dr. Reed said he also preferred to have the personnel directly under his supervision at the National Archives, rather than at the Executive Office Building; therefore, he suggested that the papers be delivered to the National Archives so that the work could be performed on them there.

The staff believes that the gift was not an undivided interest, or like an undivided interest, since some of the papers were intended to be given and some retained, instead of an undivided interest in each paper being given. Moreover, because of the dual functions of the National Archives for presidential papers the staff does not believe that delivery of papers to the Archives indicates intent to make a gift. Not only is the National Archives a recipient of gifts of papers, manuscripts, objects, etc., that may be given by Presidents or any other individual, to the United States, but also the National Archives serves as a depository and provides courtesy storage of materials for Presidents, members of Congress, and certain others. President Johnson's case is typical. He delivered a large quantity of his papers and materials to the National Archives for storage purposes and made subsequent gifts on a yearly basis of the material that he had previously delivered for storage.

On account of this dual purpose of the National Archives, the staff believes that for purposes of the tax deduction there needs to be some expression that the delivery of these papers represented a gift of a specific portion of the papers. The staff has no evidence that any such expression, either oral or written, was made on or before July 25, 1969; and no one at the National Archives or the General Services Administration has indicated any awareness that any portion of the papers delivered on March 26-27, 1969, was to be given to the United States as of that date. They believed, rather, that the papers were delivered for storage purposes and that there would be future gifts from among the papers that had been delivered, but not that a gift had been made as of that date.

There are three other reasons as to why this delivery could not have represented a gift of an undivided interest in property. First, these papers were viewed as the property of the president by the National Archives at all times in 1969. When requests were made for withdrawals of papers, the National Archives had no hesitation in returning to the White House those papers that were requested since they at all times viewed the papers as the property of the President. Second, the schedule that was attached to the deed which was given to the National Archives in April 1970 contained an itemization of those papers that were considered as given to the United States. Thus, there was eventually a designation of a specific portion of the papers that had been delivered which meant that the undesignated papers were evidently still considered to be the property of the President. Finally, the amount of the gift claimed on the tax return was $576,000, which is different from the other two amounts that were allegedly discussed in early 1969; that is, the $500,000 amount to which Mr. De Marco referred and the $550,000 amount to which Mr. Blech referred.

Based on these facts, the staff concludes that there is not sufficient evidence that the delivery of the papers on March 26-27, 1969, represented a gift of an undivided interest in the papers. . . .

Summary

The staff concludes that there is insufficient evidence of President Nixon's intent to make a bulk gift, of the delivery of the designated gift, of his relinquishment of dominion and control over the papers, or of acceptance by the GSA or the National Archives before July 25, 1969, to support a tax deduction for the gift of papers. Thus, the staff believes the President's tax returns for 1969 through 1972 should be adjusted to reflect the disallowance of the deductions in those years.

B. Was it necessary for a deed to accompany the gift.

A deed dated March 27, 1969, signed by Edward L. Morgan, the deputy counsel to the President, (but not signed by President Nixon), was delivered to the GSA in April 1970. The documents accompanying the deed include the notarization of Mr. Morgan's signature dated April 21, 1969 (the notary public was Frank DeMarco, the President's attorney at that time), an affidavit signed by Edward L. Morgan that he had the authority to sign the deed (which also was notarized by Frank DeMarco), and a Schedule A which listed the materials conveyed by the chattel deed. Questions have been raised whether the deed was necessary for this gift of papers, whether the deed was in fact signed in 1969, and whether Mr. Morgan had the authority to sign the deed.

Need for a deed with the second gift of papers

As indicated above, the first gift of papers made by the President in 1968 was made by the use of a deed signed by President Nixon and countersigned by an authorized representative of the GSA, and the word "accepted" was specifically written on the deed next to the signature of the GSA representative.

The 1968 and 1969 deeds both state that the conveyance is made without any reservation to Richard M. Nixon "of any intervening interest or any right to the actual possession of the said materials, it being understood that the delivery of this chattel deed to the General Services Administrator shall convey to the United States of America the right and power immediately to take possession of the said materials and to hold, use and dispose of the same."

The chattel deeds provided certain restrictions or conditions. First, there were restrictions on the access to the materials. The chattel deeds provided that during the time that the President is in office no person shall have the right to access to the materials except the President and those that he may designate in writing and that any such person shall be limited in the right of access to those materials described in the document as being designated for use. In addition, the chattel deed gave the President the right and power at any time during his lifetime to modify or remove this restriction on any or all of the materials and to grant access to any group or groups of persons by notifying the GSA or other appropriate U.S. agency in writing. (It is not clear whether this latter clause was intended to operate as an extension of the period of restriction beyond the President's term in office, or was simply intended to make clear that he could relax the restrictions while in office if he so chose.)

Second, the chattel deeds provided that if a presidential or archival depository is established, that as soon as practical after the establishment of such depository, the deeded materials are to be transferred to and housed at such presidential archival depository.

Third, the deeds also provided that the employees designated by the Archivist of the United States may have access to the materials, but only in the course of the performance of their normal archival processing activities.

At the end of the deeds it is stated that none of the foregoing restrictions to be so construed, nor are they intended to vest any ownership or title in the President.

As discussed above, the staff does not believe that a gift must be effected by a deed. In fact, the staff does not believe that a gift of presidential papers has to be made by any written document, even though GSA guidelines indicate a preference for some form of written document.

However, the staff believes that a deed was necessary to complete the intended 1969 gift of papers. Everyone agrees that the President did not intend to simply give these papers to the National Archives. He intended to give the papers subject to certain very specific restrictions, as outlined above. If

a gift is to be restricted or conditioned in any respect, the staff believes that there must be some explanation of the condition or restriction to the donee, and an acceptance of the gift, subject to the restriction, by the donee. See L. A. Gagne, 16 T.C. 498 (1951). The law does not require that this expression concerning the restriction must be made by deed; it could be made orally or by some form of written document other than a deed, so long as it has been conveyed to the donee and the gift is accepted subject to the condition or restrictions which have been imposed.

But in this case, the staff has no evidence that any expression of intent relating to the restrictions or conditions set forth in the deed was conveyed to anyone at GSA or the National Archives either orally or any written document other than by deed. The deed and only the deed conveyed these restrictions. . . .

Was there a valid deed signed in 1969

Although the 1969 chattel deed was dated March 27, ,969, no one contends that it was signed on that date. Mr. DeMarco told the staff that either a copy of the 1968 chattel deed was sent to him by Mr. Morgan or was given to him by Mr. Kalmbach, who had received it from someone in Washington, in the early part of April 1969, and that he used this copy to prepare a deed for the second gift. Mr. Morgan and Mr. Kalmbach, however, told the staff that they have no recollection of sending a copy of the 1968 chattel deed to Mr. DeMarco. Thus, the staff does not know who furnished Mr. DeMarco April 21, 1969.

When Mr. DeMarco first met with the staff in early January 1974, he told a copy of the 1968 chattel deed prior the staff that he thought all of the papers that had been delivered to the National Archives in March constituted the gift and that he expected Mr. Morgan to bring receipts of what was given to attach to the deed. He said that he had prepared a rough version of the deed, which contained strike-overs, and that when he met with Mr. Morgan on April 21 in California, he had intended for Mr. Morgan to sign a deed on that trip, but that since Mr. Morgan did not bring any receipts for what was given, Mr. DeMarco did not know what to designate as the gift. He claims that he had heard that the gift was to be approximately $500,000 and that on April 21, he personally typed a Schedule A which stated that the gift was to be $500,000 worth of papers. Mr. DeMarco told the staff in his January 1974 interview, however, that Mr. Morgan did not sign the deed that day. Mr. DeMarco also said that he did not know prior to April 21, 1969, that Mr. Morgan had the authority to sign on the President's behalf. In his second interview with the staff, Mr. DeMarco said he now believes Mr. Morgan signed the deed that day. The staff understands that Mr. DeMarco has given this version of his story in the deposition taken by the State of California and interviews which were all subsequent to his first interview with the staff.

When Mr. Morgan met with the staff, he said that he only recalled signing the deed once and that he is 98 per cent sure that he signed it on April 21, 1969. The staff has a copy of the deposition taken by the State of California from Mr. DeMarco's secretary, Mrs. LaRonna Kuenny, in connection with their investigation of Mr. DeMarco's use of his notary commission. In her deposition she stated that she typed all the papers prior to April 21, 1969, except for the Schedule A which Mr. DeMarco said he typed himself on that date. One question that the staff raises concerning the story of Mrs. Kueny is that she indicates that she typed all of the papers prior to April 21, 1969, but Mr. DeMarco told the staff that he was not aware that Mr. Morgan had the authority to sign the deed on behalf of the President until their April 21 meeting. This raises the question as to how the documents with Mr. Morgan's name on them, especially the affidavit, could have been prepared before April 21, 1969. The staff understands that Mrs. Kueny, in a later version of her story, indicated that all the documents were prepared because she was told that they had to be prepared before April 21 because Mr. Morgan was going to sign the deed that day.

Mr. Kalmbach, who was with Mr. Morgan and Mr. DeMarco virtually the entire day on April 21, 1969, indicated that he has no recollection of any conversations relating to a gift of papers by the President. He did say that later in the affernoon in their firm's office he saw Mr. Morgan sign something but he had no knowledge that it was a deed and has no recollection of hearing anything in the office at that time or anytime during the day in regard to a deed.

The staff questioned the time of the signing of the deed because of information brought to its attention about the deed in the possession of the National Archives. This deed is a duplicate original, which means that it is a photostat of the original but with an original signature by Mr. Morgan and Mr. DeMarco. This deed consisted of the Schedule A, which had an itemized listing of the papers donated as part of the second gift of papers. It is clear that this Schedule A could not have been prepared before March 27, 1970, because not all of the papers were designated as a part of the gift until that time. The staff learned, however, that each of the pages of the documents accompanying the deed, including the page on which Mr. Morgan signed the deed and the page that contains the Schedule A, contain similar photostating marks. This strongly suggests that this version of the deed was prepared and signed after the preparation of the

Schedule A after March 27, 1970.

Mr. DeMarco gave the following explanation. He indicated that when the Schedule A was finally prepared and typed, it was of a different type face than the rest of the deed that he alleges had been typed in 1969, because they had moved their offices and bought new typewriters. This being the case, Mr. DeMarco said that the entire deed was retyped for aesthetic purposes and that Mr. Morgan signed the new deed on April 10, 1970, which in effect, memorialized the previous deed he signed in 1969. Mr. DeMarco's secretary said in her California deposition that she did type all of the documents relating to the deed a second time in 1970 to conform the type. She said that she was retyping from the original 1969 typed documents but does not recall whether there were any signatures on the documents she copied. She is positive that they were the original documents and that they did not have any strikeovers or changes on them.

Mr. Morgan, the staff understands, now claims that he signed the deed twice, once on April 21, 1969, and a second time on April 10, 1970, which differs from his original statement to the staff that he only remembered signing the deed once.

The staff has no information or evidence as to whether the President had any knowledge of what was done on his behalf with respect to the deed. It should be noted, however, that the second deed was signed by Mr. Morgan on April 10, 1970, in his office at the White House, which is the same day Mr. Nixon signed the tax returns.

The staff asked Herbert Kalmbach and Frank DeMarco, about what transpired during the meeting with President Nixon on April 10, 1970, when he signed his 1969 tax return. (President Nixon signed a waiver of attorney-client privilege in order that this question could be answered.)

Messrs. Kalmbach and DeMarco told essentially the same story of the April 10 meeting. They said that they were ushered into the Oval Office at approximately 12:15 p.m. They said that they spent some time discussing California politics with the President and then Mr. DeMarco led President Nixon through a cursory examination of each page of his return. They said that the President commented "That's fine" after most of the pages and complimented them on doing such a competent job on his return. They said that there was no discussion of the possibility that the President's charitable contribution deduction for the gift of papers was not valid or of the deed to that gift. Messrs. Kalmbach and DeMarco then said that they went to see Mrs. Nixon, who talked with them for several minutes and then signed the return.

The staff does not draw any conclusions from this information that the President had any knowldge of any of the facts involving this deed. Insofar as Mr. DeMarco and Mr. Morgan are concerned, the staff notes that their versions of the stories have changed from the original versions related to the staff.

The staff believes that a deed is necessary to accompany this gift of papers because the restrictions and conditions contained in the deed and that since the deed was not delivered until after April 10, 1970, this is a basis also for concluding that a valid gift was not made prior to July 25, 1969, since the deed stated that its delivery conveyed title of the papers to the United States. Furthermore, the staff questions whether Mr. Morgan had the authority to sign the deed, since he was given no power of attorney . . .

6. Staff Analysis of Facts Relating to the Second Gift of Papers Apart From the Deed

A. INTENTIONS OF PRESIDENT NIXON TO MAKE A GIFT IN EARLY 1969

During the course of its investigations into the validity of the deduction for the second gift of papers, the staff made an effort to determine whether President Nixon intended to make a gift of his papers in the early part of 1969 and the amount of the intended gift, including whether the thinking at this time was to make a bulk gift (that is, one large enough to permit a carryforward) or a one-year gift for tax purposes. The staff discussed this issue with several members of President Nixon's staff who were handling his personal finances in early 1969, other individuals who were involved in President Nixon's legal and financial matters at that time, and personnel at the National Archives who were involved in the discussions and arrangements with the White House staff relating to the gift . . .

Staff Analysis

In their defense of President Nixon's deduction for his second gift of papers, the President's counsel have relied heavily on the assertion that early in 1969 the President intended to make a large gift of his papers. The staff acknowledges that at this time the President intended to make a gift sometime in 1969. The issue then is whether there was an intent to make a gift in early 1969 and whether the gift intended sometime in 1969 was to be a bulk gift, one large enough to use up the maximum charitable contribution deduction for several years, or like the gifts of President Johnson and like President-elect Nixon's 1968 gift, a gift large enough to use up only one year's available deductions.

The staff has seen no written evidence to indicate that in early 1969 the President intended to make a gift before July 25, 1969, nor has it seen any written evidence to indicate that the gift the President planned to make sometime in 1969 was to be a bulk gift. The evidence for these assertions by President Nixon's counsel consists entirely of reported conversations about the President's gift. Their memorandum asserts that in February 1969, President Nixon told John Ehrlichman to make a bulk gift and that Mr. Ehrlichman told Edward Morgan to make the gift on behalf of the President. However, in his interview with the staff, Mr. Ehrlichman did not mention this alleged conversation with the President, nor did Mr. Morgan in his staff interview recall any conversation with Mr. Ehrlichman about executing President Nixon's intent to make a bulk gift rather than a one-year gift.

The lawyer who prepared President Nixon's tax return in 1969, Frank DeMarco, has told the staff of several discussions of the gift in early 1969 which mentioned approximately a $500,000 figure. These were with Edward Morgan, Ralph Newman, and Arther Blech. Mr. Morgan does not recall discussing the $500,000 figure with Mr. DeMarco, and Mr. Newman believes that his discussion occurred in late October 1969, not in April. Only Mr. Blech corroborates Mr. DeMarco's story about discussing a bulk gift in early 1969, except for the difference between them in the precise amount of the gift.

There are also several pieces of circumstantial evidence that suggest that the President in early 1969 planned to make a one-year gift later in the year, as he had done in 1968, not a bulk gift in March. In early 1969, it would have been difficult to make an accurate projection of the President's income for that year, as the staff was told had been done, because several issues had not yet been settled, including the tax consequences of the sale of his New York apartment, the sale of his stock in Fisher's Island, Inc., and the distribution resulting from the termination of his interests in the law partnership. Also, the President had certain income from some of his writings which he wanted to assign to charity. From the standpoint of rational tax planning, it would have made more sense to wait until toward the end of the year, when the President's income for 1969 and his other charitable contributions were known, before making a gift of papers to take up the balance of the maximum charitable deduction available. This was the course followed in all of President Johnson's gifts of papers and in President Nixon's 1968 gift of papers.

The staff therefore concludes that for the purpose of determining the validity of President Nixon's deduction for his gift of papers, where the burden of proof is on the taxpayer, it cannot accept as fact the assertion of President's counsel that President Nixon intended to make a bulk gift of papers in March 1969 . . .

7. Staff Analysis of Facts Relating to the Deed Dated March 27, 1969, of the Second Gift of Papers

The President's counsel claimed that the date of the delivery of the pre-Presidential papers to the National Archives on March 27, 1969, was the date of the second gift of papers of President Nixon, which were claimed as a charitable contribution deduction

on his 1969 tax return. Although a deed exists and is dated March 27, 1969, it was not signed by President Nixon but rather by Edward L. Morgan, the Deputy Counsel to the President, and was not delivered to the National Archives until after April 10, 1970. The copy of the deed that was furnished to the National Archives is a duplicate original (that is, a photostat of the original deed with an original signature). Because the deed contains substantial restrictions on access to and use of the papers, the staff believes that delivery of a signed deed was necessary to complete the gift....

Questions have been raised whether this deed was ever signed in 1969. The staff questioned this fact when it first learned certain facts relating to the Schedule A that was attached to the deed. It is clear that the Schedule A could not have been prepared until after March 27, 1970, because it was not until then that a list ever existed of exactly what was to be given. It was brought to the attention of the staff that the duplicate original deed at the National Archives had similar photostating marks as the Schedule A, indicating that the deed and the Schedule A were both prepared at the same time. Thus, it became clear to the staff at an early date that the signature of Mr. Morgan could not have been made on this duplicate original prior to March 27, 1970....

Staff Analysis

For purposes of determining the validity of tax deductions, the burden of proof is on the taxpayer, not the Government. The only evidence that Mr. DeMarco prepared and Mr. Morgan signed a deed of gift for the second gift of papers on April 21, 1969, is the statements of Messrs. DeMarco and Morgan to that effect. The staff has received only one written document purporting to relate or even refer to this deed — the draft of the Schedule A that Mr. DeMarco said he prepared on April 21, 1969. The deed itself, if it existed, was, apparently, discarded or lost. Furthermore, Herbert Kalmbach, who participated in most of the meeting with Messrs. Morgan and DeMarco, does not recall having heard any discussion of the gift or the deed; and John Ehrlichman, Mr. Morgan's boss, does not recall discussing the deed with him. Finally, the staff has found no evidence to corroborate Mr. DeMarco's statement that he had a copy of the 1968 deed in April 1969....

PART TWO

Purchase of property at San Clemente and subsequent sale of a portion to the B & C Investment Company

1. Scope of Examination

On July 15, 1969, the President purchased approximately 27 acres of property in San Clemente, California. The property is generally referred to as the "Cotton estate." On October 13, 1969, the President purchased an additional 2.934 acres of property, known as the "Elmore property," immediately adjacent to the Cotton estate. Then, on December 15, 1970, pursuant to the President's original desire to own only a portion of the Cotton estate (as indicated in the White House statement on President Nixon's finances released on December 8, 1973), the President sold a large portion of his interest in these adjoining properties to the B & C Investment Company. The portion of his interest sold represented a large part of the Cotton estate and all of the Elmore property.

In reporting this transaction on President Nixon's 1970 income tax return, it was stated that the sale to the B & C Investment Company did not result in any gain which was taxable to him. This resulted from the claim that the amount of the original purchase price of the property allocated to the portion of the property sold was exactly equal to the sales price, thus resulting in no gain or loss on the transaction.

Because a number of questions have arisen with respect to this transaction, the staff made an independent review of the sale to the B & C Investment Company. To assist the staff in determining whether this transaction was reported correctly for income purposes, an engineering firm and a real estate firm located in Southern California were commissioned to independently determine the value of that portion of the property sold and that portion of the property retained at the time of the sale. In addition to this appraisal, the staff examined other appraisals made on the property and analyzed Mr Blech's rationale for treating the transaction as he did on the President's tax return. . . .

5. Summary

Under the tax law, the total cost basis of the Cotton estate must be "equitably apportioned" between that portion of the Cotton estate sold to B & C Investment Company and that portion of the Cotton estate retained. The staff believes that an equitable allocation in this case must be one that reflects the relative fair market values of these portions at the time of the purchase of the Cotton estate, on July 15, 1969. Although the estimates of actual fair market values varied considerably, the important element is the relationship between the estimated value of the portion that was sold in 1970 and the portion that was retained Of the four allocations that were made the table below indicates that three of these allocations arrived at similar relative values.

Allocation of Cotton Estate Cost Basis for Purposes of Computing Gain on 1970 Sale

	Adjusted basis allocated	Gain or loss
Mr. Blech, per tax return	$1,149,000	0
Internal Revenue Service	1,039,837	$109,163
Committee Staff	1,031,164	117,836
Coopers & Lybrand	1,031,630	117,370

Nonrecognition of Gain on the Sale of President and Mrs. Nixon's New York City Residence in 1969.

Facts concerning the sale of the New York apartment and purchase of San Clemente.

On May 14, 1963, President and Mrs. Nixon purchased an apartment in a New York City cooperative apartment building located at 810 Fifth Avenue. Because the building was organized as a cooperative, this transaction was accomplished by selling to the President 770 shares of common stock in the apartment building corporation. The President paid $100,000 for this stock. President and Mrs. Nixon lived

See TEXT, A14, Col. 1

TEXT, From A11

in that apartment from 1963 until just before the President's inauguration in 1969. It was reported on the President's 1969 tax return that he spent $66,860 for improvements to the apartment....

Treatment of Gain on the Sale of the New York City Apartment.

On the tax return the President filed for 1969, the profit of $142,912, which was realized on the sale and is subject to long-term capital gain treatment, was deferred because of the claim that the San Clemente residence was to be the principal residence of the President. The tax return also indicated that there was no business use at any time of the New York City apartment and that there was no business use of the San Clemente residence....

3. Summary of staff conclusion

As a result of the above analysis, the staff concludes that the nonrecognition of gain provisions on the sale of a residence (under sec. 1034 of the Internal Revenue Code) are no applicable to the gain on the sale of the President's New York apartment. In addition, the basis of the stock of the New York apartment should be reduced by $3,366 and the basis of the leasehold improvement should be reduced in the amount of $5,570 to take into account the depreciation and amortization "allowable" for 1963 through 1968. Consequently, the tax return of President Nixon for 1969 should be adjusted to reflect a long-term capital gain of $151,848 (sales price of $312,500 reduced by the adjusted basis of $157,924 and legal fees and miscellaneous expenses of sale amounting to $2,728).

Expenditures of Federal Funds at President Nixon's properties at Key Biscayne and San Clemente

2. Analysis of Tax Treatment

Under section 61 of the Internal Revenue Code of 1954, gross income is defined as "all income from whatever source derived" unless excluded by other provisions of the Internal Revenue Code....

Amounts received by an employee

from his employer are generally taxed to the employee as compensation because of the existing employment relationship. This does not mean that an expenditure by the employer is income only if it is intended to be conferred as actual compensation for services rendered. Such a concept of gross income is too restrictive. Further, items of gross income need not be in the form of cash; it is sufficient that an item can be valued in terms of money. In Commissioner v. John Smith, a case dealing with the taxability of a stock option, the Supreme Court stated that section 22(a) of the Revenue Act of 1938 (predecessor of section 61 of the 1954 Code) "is broad enough to include in taxable income any economic or financial benefit conferred on the employee as compensation, whatever the form or mode by which it is effected."

It thus seems clear that the concept of gross income established by the courts under section 61 can include the types of expenditures for property involved in the President's case. In determining what expenditures give rise to taxable income, the staff has applied the standard adopted by the courts for determining what expenditures by an employer constitute taxable income to an employee. In these employer-employee cases the courts have sought to determine whether the expenditure was incurred primarily for the convenience of the employer or primarily to fulfill a business purpose. If the expenditre was incurred for either of these purposes, no taxable income was received by the employee. In President Nixon's case the staff believes that expenditures which primarily served a protective purpose were incurred for the convenience of the federal governmet to fulfill its governmental purpose. Thus, those expenditures should not give rise to taxable income to the President even though he may have received some personal economic benefit from the expenditures. However, if the expenditure does not primarily serve a protective purpose and does provide a substantial personal economic benefit to the President, the staff believes that the President has received taxable income. The measure of the amount of taxable income received should be the mount of personal economic benefit obtained from the expenditure . . .

In the case at hand, many of the expenditures have resulted in property that has been affixed to the President's residences. At a minimum, the President has the complete use and enjoyment of the properties resulting from those expenditures. However, the staff believes that the President's interest in these expenditures goes substantially beyond mere use and enjoyment. It is unlikely that the property provided by the government will be removed in the immediate future since the Secret Service has a responsibility to provide protection for the President and his wife durin gthe remainder of their lives. Moreover it is doubtful that when the requirement for protection cases, the salvage value of any item of property will be greater than the cost of removing the improvements and replacing the property in its original conditions. Thus, the staff believes that in most cases the President's interest in the property approaches complete control and dominion and is almost certain to ripen into title. . . .

Even though it is believed that the President has received some taxable income the question remains as to how the amount of taxable income he receives is to be measured. In making these determinations, the staff attempted to estimate the amount of personal economic benefit conferred on the President from each expenditure by considering several factors. First, where it seemed likely that the President would have personally incurred an expense even if the government had not, the staff believed that the amount of personal economic benefit was significant. In such a case, where it was able to do so, the staff determined the amount of personal economic benefit as the amount of money that the President saved as a result of the government incurring the expenditure. Only the cost which the President would have incurred was determined to be taxable income. For example, while the government paid $18,494 for the electric forced-air heating system installed at San Clemente, only $12,988 of the amount was an amount which the President would have paid for a heating system satisfactory to him. Thus, only the lesser amount was included as taxable income.

Second, even in cases where it is not clear that the President would have been willing to incur the expenditure himself, nevertheless the staff believes a portion of the expenditure is taxable income if the expenditure primarily benefited the President. In those cases the staff made an allocation of the cost of the expenditure to measure the amount of economic benefit to the President. For example, although the staff determined that the expenditure for renovating the "point gazebo" primarily benefited the President, it is also used to some extent to store certain security devices in one of the cabinets. In this case, it is not certain that the President would have personally been willing to incur the full costs of renovating the "point gazebo" himself. However, the renovation did primarily provide a benefit to him and only secondarily serves a security purpose. Accordingly, the staff believed it was appropriate to make allocations with respect to this expenditure.

Finally, in cases where the staff determined that an entire expenditure may have served a security purpose, but where the original security mandates were modified at a substantial increase in costs because of the personal aesthetic preferences or desires of the President, the staff believes that a portion of the additional expenditure pursuant to the President's personal taste was incurred primarily for the

President's benefit. While the staff recognizes that the President has a right to be assured that security improvements placed on his premises do not adversely affect the appearances of the premises, the staff believes that substantial additional expenditures by reason of his tastes should be income to him. The staff has estimated the amount of taxable income to be a portion of the additional cost incurred by reason of these desires. For examples, while the "original" fence requested by the Secret Service at Kay Biscayne did not primarily benefit the President, additional costs were incurred as a result of the President's desire to install a fence similar to the fence at the White House in Washington, D.C. The staff concluded that a portion of this additional cost should be taxable income to the President . . .

3. Expenditures at San Clemente

INTRODUCTION

Since the President's purchase of the "Cotton estate" in San Clemente (containing approximately 27 acres), and the "Elmore property" (2.935 acres), the Government has secured this property by completely encircling the area with a fence and block wall. The total Government expenditures on the President's property are listed by GSA at $764,000.

5. Summary

The following table summarizes the additional taxable income because of the expenditure of Federal funds at the President's properties in San Clemente and Key Biscayne.

Additional Taxable Income Because of the Expenditure of Federal Funds at the President's Properties in San Clemente and Key Biscayne

	1969	1970
San Clemente expenditures:		
Den windows in residence	$1,600.00	
Heating system	12,988.00	
Boundary surveys	5,472.59	
Sewer	3,800.00	
Handrails	998.50	
Paving	5,866.66	
Cabana, stair rail to beach, railroad crossing and warning signals	3,500.00	
Landscape construction	3,600.00	
Landscape maintenance	5,799.00	$15,635.00
Total San Clemente expenditures	43,624.75	15,635.00
Key Biscayne expenditures:		
Shuffleboard court	1,600.00	
Fence and hedge system	12,679.00	
Landscape construction	3,414.00	
Landscape maintenance	1,124.00	2,165.00
Total Key Biscayne expenditures	18,817.00	2,165.00
Total Federal expenditures at San Clemente and Key Biscayne	62,441.75	17,800.00
	1971	1972
San Clemente expenditures:		
Exhaust fan	$388.78	
Point gazebo	4,981.50	
Landscape maintenance	1,593.00	$391.00
Total San Clemente expenditures	6,963.28	391.00
Key Biscayne expenditures:		
Landscape maintenance	1,992.00	2,710.00
Total Federal expenditures at San Clemente and Key Biscayne	8,955.28	3,101.00