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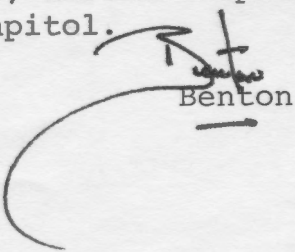
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May 4, 1978

Dear Trever:

Enclosed is my promised Annotated History of the Nixon-Sampson Agreement for use by you as you see fit.

Looking forward to seeing you in June when I return, albeit temporarily, to the nation's Capitol.

  
Benton



UNIVERSITY OF MIAMI  
SCHOOL OF LAW

M E M O R A N D U M

TO: Trever Ambruster

FROM: Professor Benton L. Becker

DATE: May 3, 1978

SUBJECT: Annotated History of the Nixon-Sampson Agreement

In addressing itself to the constitutionality of the "Presidential Recording and Materials Preservation Act,"<sup>1</sup> the United States Supreme Court in Nixon v. Administrator of General Services (Nixon II)<sup>2</sup> ruled for the first time on the permissible extent of congressional authority to regulate the disposition of official records and papers of a former chief executive. By its action, the Court undertook to reverse two hundred years of practice by past presidents.<sup>3</sup>

When Richard M. Nixon resigned as President of the United States,<sup>4</sup> there remained behind forty-two million pages of White House documents<sup>5</sup> and eight hundred eighty tape recorded conversations.<sup>6</sup> Before releasing these materials to Nixon, then-President Gerald R. Ford requested and received from the Attorney General of the United States an opinion respecting ownership of the materials. The Attorney General concluded that title rested with Mr. Nixon by virtue of historical practice and the absence of any statute to the contrary.<sup>7</sup> However, he further advised that Nixon's ownership claim was limited by public interest rights in the documents as records of government activity<sup>8</sup> and that the materials were subject to court orders and subpoenas.<sup>9</sup>

Following receipt of this opinion, the Administrator of General Services, Arthur F. Sampson, executed a depository agreement with the former President (Nixon-Sampson Agreement).<sup>10</sup> Under the terms of this agreement, Nixon retained title to all the materials but agreed to deposit them with the General Services Administration in accordance with the Federal Records Act.<sup>11</sup> Neither party could gain access to the materials without consent of the other. The arrangement further provided that Mr. Nixon could not withdraw originals of any written documents for three years, after which time he could either retain them for himself or donate the materials to the United States Government. Similar provisions for



review of the tape recordings were established with the time period extended to five years, following which time Nixon was free to destroy any or all of the tapes.<sup>12</sup> In any event, all of the taped conversations were to be destroyed at the expiration of ten years<sup>13</sup> or upon Nixon's death,<sup>14</sup> whichever occurred first.

Implementation of the Nixon-Sampson Agreement was delayed at the request of the Watergate Special Prosecutor who informed President Ford that he had a continuing need of the presidential materials for the successful prosecution of pending criminal cases.<sup>15</sup> Nixon then sued to compel specific performance of the Agreement.<sup>16</sup> His case was consolidated with various other actions<sup>17</sup> by private plaintiffs seeking to set aside the Nixon-Sampson Agreement and gain direct access to the presidential materials under the Freedom of Information Act.<sup>18</sup>

While these combined actions were pending, Congress enacted the challenged statute which was specifically designed to abrogate the Nixon-Sampson Agreement.<sup>19</sup> The bill directed the Administrator of General Services to take custody of the presidential papers<sup>20</sup> and devise regulations for the screening of the papers by executive branch archivists and for future distribution.<sup>21</sup> The following day, Nixon commenced action<sup>22</sup> for declaratory and injunctive relief against enforcement of the Act on the grounds that it was a violation of his constitutional rights and, unfairly, applied only to him.<sup>23</sup>

A three-judge United States District Court for the District of Columbia<sup>24</sup> rejected each of Mr. Nixon's challenges to the constitutionality of the Act.<sup>25</sup> On direct appeal,<sup>26</sup> the Supreme Court affirmed, holding only that granting custody of the presidential materials to the Administrator of General Services and permitting their archival screening did not render the statute unconstitutional on its face. Writing for a majority of seven, Justice Brennan defined Nixon as a "legitimate class of one"<sup>27</sup> and a proper target for special treatment by Congress. The concurring opinion of Justice Stevens reasoned that such a distinction was justified because of the unique circumstances regarding Nixon's premature departure from office and his immunity from criminal prosecution due to his pardon.<sup>28</sup> These circumstances and the danger that he might destroy evidence necessary to the Watergate investigation made Nixon a proper target for special treatment by Congress.

Though no specific law governed the ownership of documents and materials accumulated while in office,<sup>29</sup> departing presidents for two centuries have consistently considered their papers personal property, whether private or official in nature, and have taken such papers with them.<sup>30</sup> Prior to the abrupt termination of the Nixon Administration, the right of a former president to determine the disposition of his official communications and govern their public access had never been challenged. Considering this historical



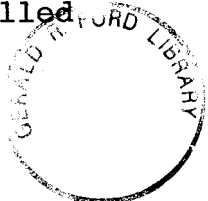
precedent, Appellant Nixon asserted that the executive branch was immune from all congressional regulation of its papers.<sup>31</sup>

Traditionally, every president, congressperson, and justice of the Supreme Court, i.e., each constitutional office holder, has had the right to determine the disposition of his or her own papers.<sup>32</sup> The practical importance of this tradition has its basis in separation of powers principles.<sup>33</sup> Congress has seemingly sanctioned this practice of former presidents by repeatedly appropriating funds for the purchase of various presidents' papers.<sup>34</sup> Such appropriations would appear to indicate congressional recognition of the legitimacy of a president's title in the papers compiled during his term in office. As late as 1955, with the passage of the Presidential Libraries Act,<sup>35</sup> Congress seemed to assume that the president retained ownership of his papers since that Act was designed to encourage the voluntary donation of such papers to the government.<sup>36</sup>

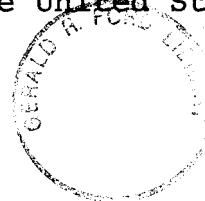


FOOTNOTES

1. The statute is divided into two titles. Title I, 44 U.S.C. § 2107 (Supp. V 1975) (Pub. L. No. 93-526, 88 Stat. 1695 (1974)) is the Act herein challenged. Title II, 44 U.S.C. §§ 3315-3324 (Supp. V 1975) (Pub. L. No. 93-526, 88 Stat. 1698 (1974)) establishes the National Study Commission of Records and Documents of Federal Officials.
2. 97 S. Ct. 2777 (1977).
3. J. McDonough, Who Owns Presidential Papers?, 27 Manuscripts 2 (1975).
4. The exact date was August 9, 1974. It is interesting to note that his resignation came less than two weeks after a unanimous recommendation by the House Committee on the Judiciary that he be impeached. House Comm. on the Judiciary, Impeachment of Richard M. Nixon, President of the United States, H.R. Rep. No. 93-1305, 93rd Cong., 2d Sess. (1974).
5. Mr. Nixon was personally familiar with only two hundred thousand documents. 97 S. Ct. at 2798.
6. These conversations were recorded at Camp David and various White House offices such as the Oval Office and the Executive Office Building. 44 U.S.C. § 2107 (Supp. V 1975) (Pub. L. No. 93-526, tit. I, § 101 (a) (2)).
7. 43 Op. Att'y Gen. 1 (1974).
8. Id.
9. Id.
10. See 10 Weekly Comp. of Pres. Doc. 1104 (Sept. 16, 1974) and Nixon v. Sampson, 389 F. Supp. 107, 160-62 app. A (1975).
11. 44 U.S.C. §§ 2101-2108 (1970).
12. Nixon-Sampson Agreement, note 10 supra.
13. That date was specified in the Agreement as September 1, 1984.
14. A prime motivating factor for sudden enactment of the challenged statute may have been congressional knowledge that during this time period Mr. Nixon suffered an ailment commonly called phlebitis, an illness which can be fatal.



15. On November 11, 1974, Watergate Special Prosecutor Henry Ruth and President Ford entered an agreement allowing the Special Prosecutor access to the materials for investigation and prosecution purposes. 97 S. Ct. at 2784.
16. Nixon v. Sampson, 389 F. Supp. 107 (D.D.C. 1975).
17. Hellman v. Sampson, id.; Reporter's Comm. for Freedom of the Press v. Sampson, id.
18. 5 U.S.C. § 552 (1970).
19. 44 U.S.C. § 2107 (Supp. V 1975) (quoting Pub. L. No. 93-526, tit. I, § 101). See also Nixon v. Sampson, 389 F. Supp. 107 app. (D.D.C. 1975).
20. 44 U.S.C. § 2107, (Supp. V 1975) (quoting Pub. L. No. 93-526, tit. I, § 101).
21. 44 U.S.C. § 2107, (a) (Supp. V 1975) (quoting Pub. L. No. 93-526, tit. I, § 104).
22. At the time of filing his complaint, Nixon also made an application for a three-judge district court under 28 U.S.C. §§ 2282-2284 (1970). Judge Richey of the United States District Court for the District of Columbia declined to rule on the application. Nixon filed a petition for writ of mandamus to compel the District Court to act on the motion. That petition was denied, Nixon v. Richey 513 F.2d 427 (D.C. Cir. 1975) on the assumption that Judge Richey would proceed in accordance with 28 U.S.C. §§ 2282-2284 (1970). However, Judge Richey failed to rule on the application and filed an opinion. Nixon v. Sampson, 389 F. Supp. 107 (D.D.C. 1975). The Court of Appeals for the District of Columbia stayed the entry of judgment to enable a three-judge district court to hear the issues. Nixon v. Richey, 513 F.2d 430 (D.C. Cir. 1975).
23. Nixon attacked the constitutionality of Title I as a violation of (1) separation of powers, (2) presidential privilege doctrine, (3) Nixon's privacy interests, (4) Nixon's first amendment associational rights, and (5) the Bill of Attainder Clause. 97 S. Ct. at 2783. Nixon included the charge of violation of his equal protection rights under the fourth and fifth amendments in Nixon v. Administrator of Gen. Services, 408 F. Supp. 321 (D.D.C. 1976), but he did not raise that issue on appeal here.
24. 44 U.S.C. § 2107 (Supp. V 1975) (quoting Pub. L. No. 93-526, tit. I, § 105 (a)) (exclusive jurisdiction vested in the United States District Court for the District of Columbia).



25. Nixon v. Administrator of Gen. Services, 408 F. Supp. 321 (D.D.C. 1976).
26. Pursuant to 28 U.S.C. § 1253 (1966) direct appeals to the U.S. Supreme Court are available after the three-judge district court hands down rulings which grant or deny interlocutory or permanent injunctions in civil proceedings.
27. 97 S. Ct. at 2805.
28. Id. at 2814 (Stevens, J., concurring).
29. The issue of ownership of presidential papers has still not been settled. Though the court in Nixon v. Sampson, 389 F. Supp. 107 (D.D.C. 1975) declared that title lies with the government, that opinion was stayed in Nixon v. Richey, 513 F.2d 427 (D.C. Cir. 1975). The Supreme Court has determined that the issue of legal title to the materials is irrelevant to the constitutionality of the statute since 44 U.S.C. § 2107 (1977) provides for just compensation if anyone's economic interests are involved. 97 S. Ct. at 2806, 2810.
30. See J. McDonough, Who Owns Presidential Papers?, 27 Manuscripts 2 (1975)
31. 97 S. Ct. at 2789.
32. See Inland Waterways Corp. v Young, 309 U.S. 517 (1940). "Constitutional power, when the text is doubtful, may be established by usage." Thus, even with no statutory sanction, consistent historical practice may define ownership of property or determine the existence of a power. Id. at 525.
33. U.S. Const. art. II.
34. The most notable cases include George Washington, Thomas Jefferson, James Madison, James Monroe, and Andrew Jackson. J. McDonough, Who Owns Presidential Paper?, 27 Manuscripts 2, 4 (1975).
35. 44 U.S.C. §§ 2101, 2107, 2108 (1970).
36. Legislative history shows that Congress fully considered the question of ownership when debating the Presidential Libraries Act and determined that title rests with the President. 2 U.S. Code Cong. & Ad. News 3041 (1955).

