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Who Owns The Nixon Tapes And Papers?

Mr. Sampson agreed . . .

. . . To Mr. Nixon's terms.

The question of who owns documents accumulated in the White House during a President's tenure has been thrown into sharp controversy by the "agreement" concluded between Richard Nixon and General Services Administrator Arthur Sampson. Two days before President Ford pardoned him, Mr. Nixon sent a letter to Mr. Sampson indicating that he desired "to donate to the United States, at a future date, a substantial portion of my Presidential materials . . ."

In the letter Mr. Nixon flatly stated the materials, including tape recordings, were his: "I retain all legal and equitable title to the Materials, including all literary property rights." Mr. Sampson agreed to the entire letter on Sept. 7, ceding to Nixon the power to destroy the tapes after Sept. 1, 1979. The letter purports to be a legal document, which binds both Mr. Nixon and Mr. Sampson (speaking for the government).

Presumably, Mr. Sampson relied on an Attorney General's opinion sent to President Ford on Sept. 6, in which William Saxbe concluded Mr. Nixon was the owner of the "papers and other historical materials retained by the White House Office" during the Nixon administration. As is the custom with the "President's lawyers' lawyer," Mr. Saxbe found that a practice traceable to George Washington meant that the materials are "the property of former President Nixon."

That conclusion seems more the result of reaching a desired decision than of a process of reasoning that could get by any middling competent law student. There are no Supreme Court decisions on this point. Nor is there any statute that expressly states that Presidents have legal title to White House documents. Mr. Saxbe relied on the Presidential Libraries Act of 1955 as a congressional "acknowledgement" of ownership by Presidents. But Congress did not say so; nor did it define what "presidential papers" are. The question of title to White House documents has never been examined by Congress.

One federal court decision of modern vintage (*Nichols v. United States*, decided by the 10th Circuit Court of Appeals in 1972) holds that President Kennedy's executor could validly restrict access to X-rays and other materials of the Warren Commission, even through the materials were not owned by the Kennedy family. That case, not mentioned by Mr. Saxbe, does not recognize a property interest of Presidents in White House materials. It

thus could not be used to justify the Saxbe conclusion.

A proper analysis should begin with the Nixon-Sampson "agreement" itself. While Mr. Sampson had statutory authority to accept "papers and other historical materials" of a former President, nowhere is he given authority to agree to their destruction. Rather, 44 U.S. Code Sec. 2108 states in part that the GSA administrator, "in negotiating for the deposit of presidential historical materials, shall take steps to secure to the Government, as far as possible, the right to have continuous and permanent possession of the materials."

The agreement about destruction thus is a legal nullity, for any public administrator has only the authority delegated to him by Congress. The extent of Mr. Sampson's power was to agree to restrictions as to the "use" of

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presidential materials. "Use" can hardly mean destruction. Anything that goes beyond the statutory language is, in legal parlance, *ultra vires*—and that is so whether or not Mr. Nixon has title to the materials.

Despite the Saxbe opinion, the question of legal title for Mr. Nixon is still very much an open question. Under the Constitution, Congress has express power to "make all needful rules and regulations respecting the . . . property belonging to the United States." The materials—files, papers, tapes, etc.—were produced by public money on public property by people paid with public funds and now rest in publicly owned files. To rely, as did the Attorney General, on past practice to justify ownership by Richard Nixon is to put forth an untenable theory of law.

Under that theory, whatever occurs for a period of time becomes part of American law simply by custom and usage. But can that be so, particularly with respect to presidential powers? The answer must be negative if one examines some analogous claims by Presidents about other powers. Several may be mentioned.

• President Nixon, both personally and through his minions in the Justice Department, maintained in 1973 that he had an unrestricted power to "impound" appropriated funds. Other than some flimsy statutory arguments, which do not hold up under scrutiny, the principal basis for the claim was past practice—said to go back to President Jefferson. Federal judges disagree: Of the more than three dozen judicial opinions in impoundment cases in the last two years, the vast majority emphatically rejected the broad claim of presidential power.

• Presidents since at least the Hoover administration have engaged in wiretapping—with Nixon asserting an "inherent" power to do so without prior judicial approval. That claim was repudiated 8-0 by the Supreme Court in 1972.

• In like manner, extravagant claims about executive privilege have been made, again by Mr. Nixon or his cohorts and again based on a reading of history. The Supreme Court knocked back that claim of "absolute power" unanimously in July of this year.

• Both Presidents Johnson and Nixon asserted complete power to commit American troops to combat, under the "commander-in-chief" clause of the Constitution. Although the Supreme Court has consistently ducked that question, there can be little doubt that past practice would be rigidly examined and probably even rejected, should the Court ever rule on the merits.

• In 1952, President Truman seized the nation's steel mills during a strike. Among other arguments to justify the seizure, government lawyers cited a series of other seizures, including one in 1941 upheld by then Attorney General Robert Jackson. Jackson, as Associate Justice, saw the matter differently 11 years later, saying : "I do not regard it [the 1941 seizure] as a precedent for this, but even if I did *I should not bind present judicial judgment with earlier partisan advocacy.*" (Italics added.)

That, if nothing else, should put an effective quietus on the Saxbe opinion. Government lawyers, it should be remembered, are legal *apparatchiks*—paid to take orders. As President Andrew Jackson reportedly said when faced with an Attorney General who had doubts about Jackson's actions concerning deposits of U.S. funds: "Sir, you must find a law authorizing the act or I will appoint an Attorney General who will." Or, as Senator Sam Ervin often reminded executive branch lawyers, "We have had thievery and homicide for thousands of years, but that does not make murder meritorious nor larcency legal."

The Saxbe opinion and the Nixon-Sampson "agreement" as to ownership are at most interesting historical oddities without legal validity. But even so, that still does not definitively settle the question of legal title to "presidential" or "White House" materials. That could, and should, best be done by congressional action under its Article IV power over the property of the United States.

Needed are two statutes. One, which should be enacted without delay, would vitiate the Nixon-Sampson "agreement" and place title where it belongs—in the government. If the former President contested that, a judicial ruling could then determine the question of legal title. Even if the courts ruled for Nixon, the papers and tapes could still be taken by eminent domain—provided, of course, that the constitutional requirement of "just compensation" was paid. It is highly doubtful that the courts would rule against an express congressional decision. Further, there need be no worry that it be held to be an *ex post facto* law and thus invalid. Since *Calder v. Bull* (1798), it has been settled that the *ex post facto* prohibition applies only to penal and criminal statutes.

The second statute should be long-range. The Presidential Libraries Act should be amended to provide that *all* documents officially produced by or for a President or Vice President are the property of the United States. Custody could, as now, remain with the National Archivist. Perhaps more presidential libraries could be built, although a valid reason for them is hard to find—other than the quest for symbolic immortality by chief executives. Just before he left office, Lyndon Johnson "raided" the executive branch, gathered millions of documents—some say as many as 75 million—for deposit in the Johnson Library in Austin, Tex. How most of those documents can be called "presidential" is completely mysterious. It is time to halt such a practice, and the imbroglio over the Nixon tapes and files provides an unparalleled opportunity to do so.