

The WxPost story and excerpts from the decision suggest that it has broader application than the paper and radio and TV reports indicate. I think that long as it is a careful reading is necessary for FOI cases.

Regardless of what happens on appeal.

It gets into areas I did in OA 2569-90, when I presume I was regarded as prolix, argumentative, etc. But I did get into the ownership of what was generated by a presidency and Ritchey seems to be saying essentially what I did.

Whether or not his decision survives, his reasoning and citations are important in usch matters as Memorandum of Transfer, autopsy film (as distinguished from clothing) and accessibility.

Story quotes (not directly) "lawyers familiar with the case" as holding "it probably could not be applied to past presidents." If so, the view is restrictive, relating to appers comparable with those at issue in this case. However, there are other records not comparable, as in above graf. The Memorandum of Transfer was after the JFK Presidency, as were the film. They are also not LBJ Presidential papers.

I think this decision says pretty clearly that all the JFK materials not his personal property, like the clóthing, can't be withheld under the terms of the GSA-family contract, which I also held in 2569-70, because of the self-serving federal contract which has as its only purpose a machine for withholding.

JL:We might want to discuss re-opening that case on "new evidence" grounds or based on this decision and ask for copies of the pictures taken for me. They will be sensational in at least one currently topical respect. It might cost me a book but it also might be worth it. We might attach a copy of WW IV as an exhibit?

Where he holds that the materials are directly related to the performance of the office, does that not include all papers of a Presidential commission?

I think his language about sovereignty just about nullifies the act on presidential papers and libraries. It would be good, too.

I think it can be argued from this reasoning that the FOI act repeals part of that on Presidential papers, too.

# Nixon Data Held U.S.-Owned, But Order Is Stayed

## Appeals Unit To Meet on Case Today

By Timothy S. Robinson  
Washington Post Staff Writer

The tape recordings and documents produced in Richard M. Nixon's White House belong to the federal government rather than Nixon as the former President claimed, U.S. District Judge Charles R. Richey ruled yesterday.

But the effectiveness of Richey's ruling was immediately delayed by the U.S. Court of Appeals. In an order signed by Circuit Judges Spottswood Robinson and Malcolm Wilkey, the appeals court set an emergency hearing for 3 p.m. today, stayed Richey's order and temporarily ordered him to make no further rulings in the case.

Richey's ruling came about an hour after the appeals court had suggested that he instead decide first whether a three-judge panel should test the constitutionality of a recent law concerning the documents and tapes.

Richey had postponed ruling on convening that three-judge court until later in the case. His reasoning was that the issues he decided yesterday needed "immediate resolution" and could be ruled on irrespective of the constitutionality of the new legislation.

Richey's 98-page decision yesterday dealt with the main issues of ownership of the materials and Nixon's claim of presidential privilege. Attor-



Associated Press

Judge Richey leaves court after ruling in Nixon case.

neys in the case said the order is sure to be appealed.

Richey ruled that accepting Nixon's claim that he owned the tapes and documents would be "repugnant to the very nature of the office of the presidency."

"To uphold former President Nixon's claim of ownership would be to place him above the law . . . to compare him to a monarch," Richey wrote.

He rejected Nixon's claim of executive privilege, saying that only an incumbent President could assert that privilege on documents that belong to the Office of the Presidency.

He also said a Nov. 9 agreement approved by President Ford, which gives first access to the documents and tapes to the Watergate special prosecutor's office and which will go into effect if yesterday's ruling is upheld, does not violate Nixon's constitutional right against illegal searches.

But Richey did set up a procedure under which Nixon could claim that his privacy was being invaded through release of certain portions of the tapes or documents. Under the judge's plans, the court would be the final arbiter on such claims.

The rulings yesterday came in litigation that has grown in size and complexity since it was filed shortly after Nixon accepted a pardon last September.

In conjunction with the pardon, Nixon and General Services Administrator Arthur Sampson signed a White House-approved agreement giving Nixon sole custody and ownership of the tapes and

See TAPES, A6, Col. 1

Cover-up prosecutors urge rejection of new trial motions. Page A4.



# Nixon Data Ruled U.S.-Owned

## TAPES, From A1

documents from his White House years.

The special prosecutor's office and others protested that agreement, and President Ford subsequently said it would not be implemented pending a review. It was superseded by the Nov. 9 agreement, and the law passed by Congress in December, both of which affected various aspects of the issues over the tapes and documents.

The first court move was made by attorneys for Nixon, who filed suit in October attempting to force the government to implement the original agreement.

Attorneys for columnist Jack Anderson, meanwhile, had unsuccessfully sought access to the same materials under the Freedom of Information Act. They were allowed to join in the suit.

The special prosecutor's office also joined the suit to protect the interests of his office in the materials and tapes. Along the way, still more parties to the suit were added: the Reporters Committee for Freedom of the Press, which wanted access to the materials; the Committee for Public Justice, with a similar demand; and several members of Congress who were involved in then-pending legislation concerning the documents.

By the time yesterday's opinion was filed, it took more than two legal-size, typewritten pages merely to list the parties and the attorneys in the various civil actions.

Judge Richey, meanwhile, had issued a temporary order last October maintaining the

status quo—the materials and tapes were to remain in the White House, and not shipped to Nixon in California.

Attorneys for Nixon asked for the original agreement to be implemented. The main claim they put forward was that he has a constitutional right and duty to protect and assert the privilege of confidentiality over the presidential papers and tapes, and that their ownership and control is an essential element of this right and duty.

Even a search of those materials for specific documents and tapes by the special prosecutor's office would violate his rights, Nixon claimed.

The first 42 pages of the opinion deal with the various claims put forth by the parties in the suit, the parties' standing and whether the case can be decided at this point.

Richey found that the plaintiffs who were involved through the Freedom of Information Act could participate in the suit, saying that to rule otherwise "would do great violence to the letter and the spirit" of the act.

He then ruled that the case could be decided now, because the Presidential Recordings and Materials Preservation Act passed in December did not resolve the questions of ownership or privilege.

Although that act provides for the issuance of regulations concerning public access to White House documents, Richey also said he felt he could rule on the Freedom of Information Act issues as well.

In finding that the federal government owned the tapes and documents, Richey re-

jected legal and historical arguments put forward by Nixon's attorneys.

He pointed out that it is a general principle of law that materials produced or kept by a public official in the course of his duties belong to the government.

To accept Nixon's claim of ownership, "it must be found that an individual President is distinguishable from other public servants," Richey said.

"Such a conclusion, however, is untenable as it is refuted by the Constitution and the very concept of the Office of President . . . (The) president, although elected to the highest office in the nation, is but a transient holder of the public trust," the judge wrote.

Richey also rejected Nixon's claim that he must have the documents from his presidency to insure the independence of the office of the President.

"To allow any one President to remove the documents, papers, tapes and other materials which contain information vital to the ongoing affairs of the nation would be totally disruptive to the Office of the Presidency and would impair the ability of his successor in office to properly carry out the duties and powers of the office," the judge said.

While not going so far as to rule that presidential tape recordings are covered by the Freedom of Information Act, Richey did say that many of the documents sent to the White House from other executive agencies now fall under the act.

The ruling explained in detail the concept of executive

privilege, denying that there was any special presidential privilege that attaches to a former President.

Such a privilege belongs to the office itself, and not to any particular office-holder, the judge said.

Richey took judicial notice that nothing on the tapes could be used as evidence against the former President in a criminal proceeding, since Nixon has received an unconditional pardon.

He did conclude, however, with a specific outline for a procedure whereby Nixon could listen to tapes and examine documents before they are given to the prosecutor, in an attempt to protect against an invasion of the former President's right to privacy.

He suggested that the procedure could be used in connection with 138 boxes of papers and 900 tape-recorded conversations in which the prosecutor's office has expressed possible interest.

If Nixon raises such a claim, it will be up to him to prove to the court that the conversation or paper is personal, Richey said.

Lawyers familiar with the case said that although the ruling—if upheld—would have a major impact on the disposition of presidential materials by future chief executives, it probably could not be applied to past presidents.

Judge Richey said in his opinion that the practice of recent presidents of depositing materials in presidential libraries "may be considered not one of asserting a right to ownership, but of retention in trust for the public."



# 'It Is Refuted by the Constitution'

U.S. District Judge Charles R. Richey yesterday ruled that presidential documents and tape recordings of the Nixon administration are not the personal property of Richard M. Nixon but belong to the government. Here are excerpts from the 70-page opinion.

In order to sustain the assertion that former President Nixon personally owns the documents, papers, tapes and other materials generated or retained by himself or others in the performance of his duties as the President of the United States, it must be found that an individual President is distinguishable from other public servants. Such a conclusion, however, is untenable as it is refuted by the Constitution and the very concept of the office of the President.

Art. II, Sec. I, cl. 1 of the Constitution provides that: "The Executive power shall be vested in a President of the United States of America. He shall hold his office during the Term of four years, and together with the Vice President, chosen for the same Term, be elected as follows: . . ." And, Sec. I, cl. 5 further provides that:

In Case of the Removal of the President from Office, or his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the same shall devolve on the Vice President, and the Congress may by Law provide for the Case of Removal, Death, Resignation, or Inability, both of the President or Vice President, Declaring what Officer shall then act as President, and such Officer shall act accordingly, until

the Disability be removed, or a President elected.

These sections of Article II compel only one conclusion: the powers and duties of the executive inure to the office and not to any individual office-holder; for the President, although elected to the highest office in the nation, is but a transient holder of the public trust. Even though a President while in office may exercise specific and enumerated powers . . . he is nevertheless a servant of the people. The President is elected by the people (Art. II, Sec. I, cl. 1), to execute the laws made by the people (Art. II, Sec. I, cl. 7), and may be removed by the people (Art. I, Sec. IV); and, as recently articulated by the U.S. Court of Appeals for the District of Columbia:

Though the President is elected by a nationwide ballot, and is often said to represent all the people, he does not embody the nation's sovereignty. He is not above the law's commands . . . Sovereignty remains at all times with the people. . . .

Former President Nixon's claim of ownership is therefore repugnant to the very nature of the office of the President.

It is important to remember that the original Articles of Confederation did not include a chief executive, and that there was a great reluctance in formulating the Constitution to include such an office because of the fear that it would lead to a monarchical rather than a republican form of government.

The framers of the Constitution, however, were successful in establishing such an office by convincing the people that a President was necessary for the proper administration of the government and that he would be in the nature of a chief magistrate and not a monarch. James Madison argued in *The Federalist* No. 69 that:

The President of the United States would be an Officer elected by the people for four years, the King of Great Britain is a perpetual and hereditary prince. . . . What answer shall we give to those who would persuade us that things so unlike resemble each other? The same that ought to be given to those who tell us that a government, the whole power of which would be in the hands of the elective and periodical servants of the people, is an aristocracy, a monarchy, and a despotism.

Thus, as the Supreme Court has cautioned, "it would be altogether unsafe to reason from any supposed resemblance between [the President and a monarch] where the rights and powers of the executive are brought into question." . . . Rather, the President is a "creature of the Law." . . . And, in order to preserve the freedom of the people, the President is bound by the law. . . . Therefore, to uphold former President Nixon's claim of ownership would be to place him above the law as well as recognize that he may assert a right to the products of the

office, which would be to compare him to a monarch. This the court cannot do.

Further, not only must President Nixon's claim of ownership be rejected as contrary to the nature of the office, but also because it is expressly negated by the Constitution itself. Art. II, Sec. I, cl. 6, generally known as the Emoluments Clause, provides that: "The President shall, at stated Times, receive for his Services, a Compensation which shall neither be increased nor diminished during the period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them." Since the materials in question are directly related to the performance of the office of the President and are of incalculable value, it would be contradictory to and a violation of the Emoluments clause for a President to be given or to be permitted to assert a personal right to such materials.

Moreover, it was the intent of the framers of the Constitution to prevent the office of the President from being a position of both power and profit. While they recognized that they could not divest the office of power, they sought to prevent the corruption of the office by removing profit. They feared that if the office offered both power and profit, the persons who sought the office would "not be the wise and moderate, the lovers of peace and good order, the men fit-test for trust." . . .