

Justice Officials Bid Court Refuse Papers to Nixon

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By LESLEY OELSNER SEP 9 1975

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WASHINGTON, Sept. 8—The Justice Department contended today that Congress had ample reason to conclude that former President Richard M. Nixon "would not be a

trustworthy custodian, even temporarily," for his Presidential papers.

The department urged the United States District Court here to reject Mr. Nixon's bid to win back possession of the materials, and to uphold instead the constitutionality of the statute that placed the materials in the Government's control.

In a long brief filed at the court, where a three-judge panel is considering Mr. Nixon's claims as well as related litigation over the materials, the Justice Department cited a series of what it termed "threats to the integrity of the Presidential materials." Among the "threats" it cited the 18½-minute gap in one crucial White House tape recording.

It also cited "what Congress perceived, again quite rationally, as Mr. Nixon's propensity to distort the historical record."

It also noted that he "had resigned rather than face the prospect of impeachment where the entire story might have come out."

Rights of Family Cited

Mr. Nixon is trying to have the statute, enacted last December, overturned as unconstitutional. In a sworn statement in the case released last month, he contended that he would make the materials public "as expeditiously as possible," but that only he and his family had the right to process the materials and decide which portions should be released.

The Justice Department rejected his arguments in its brief and at times did so in a sometimes incredulous, sometimes scornful tone.

It argued that in view of the great bulk and number of materials, Mr. Nixon's suggestion that he, his wife and his two daughters do the processing was, "to put it kindly, unrealistic."

But beyond that, it said there is the "undeniable fact, perceived by Congress, that when Mr. Nixon was in control of these tapes, they were subject

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to unexplained gaps and distortions."

The former President had raised the possibility that the new law, by providing public access to the materials, might inhibit the free speech of those who converse with a President. The department replied in its brief:

"Mr. Nixon, having conversed with these people without advising them they were being recorded, is ill fitted to attempt now to assert their rights of free speech."

As for another of his assertions, that the law would infringe on his own First Amend-

ment rights, the department said:

"Mr. Nixon's claim that revelation of his past statements might prove embarrassing in the future is simply not the kind of interest that the First Amendment was designed to protect. All of us at one time or another make statements which we believe to be in confidence to those close to us... Those are the risks that individuals routinely take in any situation where they converse with others, let alone where they knowingly commit their words to tape."

The brief made repeated references to what it described as a "policy" that Mr. Nixon should not be trusted to preserve his materials intact.

It said, for instance, "A number of examples will suffice to show that Congress had a rational basis for perceiving that his Presidential materials might

not pass intact into the custody of the United States if he were permitted to have custody of them, even temporarily."

Then it listed, as examples, the 18½-minute gap; the fact that there were "material differences" between the White House transcripts that Mr. Nixon released in the spring of 1974 and those made by the special prosecutor and the House Judiciary Committee and the dismissal of the first special Watergate prosecutor, Archibald Cox, "when he persisted in demanding" certain tapes.

Later, in discussing the provisions of the new law that provide for processing by archivists rather than by the former President, the brief noted both the bulk of the materials and the fact that Mr. Nixon had once provided for archivist to

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process his Vice-Presidential papers.

It said:

"In light of both these practical considerations, and Congress's rational conclusion that Mr. Nixon would be a trustworthy custodian, even temporarily, for these materials, the act's second approach of directing that the segmenting out of personal papers be performed by professional governmental archivists, was plainly a valid means for Congress to employ."

The law is the Presidential Recordings and Materials Preservation Act.

The department brief was signed by five Justice Department officials: Rex E. Lee, Assistant Attorney General; Irwin Goldbloom, Deputy Assistant Attorney General, and David J. Anderson, Jeffrey F. Axelrad and John T. Boese, department lawyers.

Originally, the special Water-

gate prosecutor had intervened in the case. However, in court papers filed today, signed by Henry S. Ruth Jr., the special prosecutor, and two assistants, Peter M. Kreindler and Kenneth S. Geller, the prosecutor's office asked to withdraw from the case.

The office said that it had already examined all relevant materials and tapes, pursuant to an agreement with Mr. Nixon's counsel allowing it access. And, it said, "the positions that the special prosecutor was prepared to support in this litigation will be represented by the United States."

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