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Battle Over Control Of The Nixon Papers and Tapes

By LYLE DENNISTON

ALL THREE official sides of Washington — Congress, the courts, and the White House — seem as excited as children over the delights of discovery awaiting them in hundreds of unopened boxes.

The other, unofficial side of Washington — the press — is just as eager.

Those boxes contain 42 million documents, and 888 tape recordings. These are the "Nixon presidential materials," the written and spoken record of Richard Nixon's years in the White House.

It is, at times, almost unseemly the way much of Washington is letting its expectations become aroused over those papers and tapes. That has something, perhaps much, to do with the fascination already built up with "expletive deleted," that over-used phrase in the transcripts released by Richard Nixon himself.

But beneath the coarse, the idle and the justifiable curiosity, there is a serious issue over how the press and the public in the future monitor the work of presidents and the workings of the White House. Decisions about ownership, control and access regarding the Nixon materials are bound to set precedents which will affect if not control the records of present and future presidents, and very likely of other federal officials.

Awaiting the outcome of various courtroom and legislative bouts over the Nixon papers and tapes will be a still-to-be-appointed National Study Commission on Records and Documents of Federal Officials. Congress created this commission in the same law last year which directed the government to keep Nixon's presidential materials in custody.

Because its time to study will be short (it is due to make its final report next March 31), the commission perhaps won't be able to do much more than adopt the Nixon precedents wholesale. At the least, the commission will be influenced heavily by what is now being done. It will have no power, for example, to reopen the basic questions about ownership that are due to be settled in the lawsuits involving the Nixon materials.

Those questions — a mixture of issues involving constitutional clauses, acts of Congress, and past practices dating back to George Washington — are the heart of the matter.

As ownership goes so goes access. Throughout all of American presidential history up to Nixon's administration, there was next to no doubt about who owned a president's documents. On leaving office, presidents simply took their papers with them.

But that not only settled the issue of ownership. It also gave former presidents, or their heirs, undisputed control over who could use or even look at their official papers, when and how.

Since Herbert Hoover, presidents have been willing to donate many, sometimes the bulk, of their papers to the public. But in every case they have kept the sole power to define what was to be included, what could be donated but not disclosed, and, in some cases, what would be destroyed and put forever beyond scrutiny.

In 1955, Congress provided that the government could accept these donations on behalf of presidential libraries. That, in effect, meant that federal officials could take what was offered but not demand more.

Today, Washington, in all three branches, is debating whether custom applies in the Nixon situation.

Some of the former President's friends, supporters and lawyers are saying that he has been singled out, denied what every predecessor routinely could expect, in order to add another penalty and new insult following his forced resignation.

But the Nixon situation *is* different in at least two significant ways:

First, the public has already sampled the tapes and some of the papers, and no doubt there is ample appetite for more.

That has had much bearing on the swift congressional action to insist upon temporary government control of all of the materials.

And Congress was certainly stimulated by the agreement made between President Gerald Ford and the former President to grant Nixon access to and ownership of the materials, as well as the ultimate right to destroy the tapes.

Before all this, the public, the press and Congress gave little if any thought to what might be lost if presidents kept their materials upon leaving office. But now, Washington is beginning to see what the stakes could be — including possible destruction of the Nixon tapes.

The second peculiarity about the Nixon situation came about primar-

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ily because he left town in such a hurry. His decision to resign, of course, was a last-minute, last-resort choice. White House aides during those final days have said that no real effort was made to start gathering the papers and tapes until immediately after Nixon had resigned and left.

The materials were on deposit with a government he no longer headed, and thus the potential existed — for the first time in history — for presidential materials to be "taken away" from a president.

To be sure, Nixon, within a month after resigning, had not only a pardon for himself, but also a formal concession that the materials he left behind belonged to him.

But then the Watergate special prosecutor objected, and President Ford — setting another "first" — ordered the papers and tapes temporarily held in Washington.

Court action followed, resulting in another order temporarily holding the materials in government custody. Finally, on Dec. 9, the third branch, Congress, added its own binding order. It, too, required that the papers and tapes stay in Washington, under government control, at least until procedures could be worked out to assure public access to many of the materials.

Enter Judge Richey

A key point in dispute now is whether Congress, in passing that bill (which President Ford signed into law Dec. 19), was saying anything about ownership. The main sponsor of the bill in the House, Rep. John Brademas of Indiana, insists it does not.

But Nixon's lawyers are arguing in court that the law is unconstitutional because the papers and tapes belong to Nixon. It is thus possible that a special three-judge federal court which is now reviewing the new law will deal with the ownership issue.

Even if it doesn't, however, sooner or later another federal tribunal will. Nixon and those who want access to his papers and tapes are involved in an entirely separate lawsuit. That case is pending before a single federal judge, Charles R. Richey.

Already Richey has made up his mind that Nixon is wrong legally in claiming ownership of this presidential material. The judge concluded on Jan. 31 that ". . . the 'presidential materials and tape-recorded conversations' which were generated, created, produced or kept in the administration and performance of the powers and duties of the Office of the President belong to the government, and are not personal property of the former President."

But his conclusion means nothing at all, as a matter of law, at this point. The U.S. Court of Appeals in Washington has said, in unusually strong language, that he should never have released his opinion. It even implied that Richey sneaked out his decision in the pre-dawn hours. His sole obligation at this stage, the Count of Appeals said, was to decide whether to assemble the special three-judge court to pass upon the constitutionality of the new law on control of the Nixon papers and tapes.

That court is now assembled — after Judge Richey, who normally would have been a member, disqualified himself. As long as it ponders, the Richey decision on ownership won't take effect and thus can't be appealed.

It appears now that the three-judge court will not hold a hearing until late September. That means it is not likely to reach a decision until sometime early in 1976, at the earliest. Anything that that court decides probably will be appealed directly to the Supreme Court. It thus will be many months until even some of the fundamental legal questions are assured of final settlement.

Complicating that process, in the meantime, is the possibility that the three-judge court won't deal at all with the key question of ownership. It is possible that that court could rule either for or against the new law on custody without ever getting to ownership.

In that event, Richey's decision that the materials belong to the government probably would be allowed to be issued, and Nixon's lawyers surely would appeal that. It would take a slower route to the Supreme Court, passing through the Court of Appeals on the way.

These timetables indicate still another development in the controversy over the Nixon papers and tapes: a good deal of urgency seems to be going out of the question. With those materials protected from movement out of Washington and from destruction, Congress simply may be losing a good measure of its interest in them.

Time Is on Nixon's Side

But, if that is true, it is of considerable potential significance. The more the issue recedes politically, and the more time that passes as it is being worked out in courts and Congress, the more likely it is that former President Nixon's claims to the materials will seem stronger.

Even now, as the lawsuits and legislative review of access go forward, there seems to be a tendency among some lawyers and politicians to wonder about what they call the "sympathy" factor. It is possible that, as anger and resentment over the misdeeds of Watergate ease, there could develop a sentiment that Richard Nixon should not be treated very much differently, if at all, than other ex-presidents.

In practice, such a development would likely mean that Nixon at least could expect to be awarded ownership and control over many documents and taped conversations on the ground that they are "private" and thus need not remain in government possession.

The "sympathy" factor, at most,

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might even have some influence in shaping the basic questions about ownership, whether those questions ultimately are settled in court or in Congress.

This, in turn, is related to another factor in the entire controversy — undercurrents of worry among judges and legislators that the materials they generate in their public positions might be affected by whatever is done now on Nixon's documents and conversations. So far, there is little indication that the basic question about public ownership of public records will be settled solely in terms of presidential records.

Judge Richey's "unofficial" opinion, for example, says very plainly at one point: "It is a general principle of law that that which is generated, created, produced or kept by a public official in the administration and performance of the powers and duties of a public office belongs to the government and may not be considered the private property of the official." He adds in a footnote that "that which is done on behalf of the sovereign belongs to the sovereign, which in our system of government is the public."

A recent American Assembly report, published after a two-day seminar on the issue, concludes that there should be "a public property interest" in records of "permanent historical significance," and that this "should be the same for the records of all federal officials . . . executive, legislative and judicial."

Congress, moreover, in creating the new National Study Commission, ordered it to examine "problems and questions with respect to the control, disposition and preservation of records and documents produced by or on behalf of federal officials" — a phrase that expressly includes "any officer of the executive, judicial or legislative branch of the federal government." It is not clear whether, in using the word "control," Congress meant to include notions of ownership. But, as past experience indicates, control does seem to depend heavily upon ownership.

Presidents Aren't the Only Ones

These considerations, it now seems possible, could put at least some judges and some members of Congress on guard. There are many documents that figure in judicial and legislative decision-making which those two branches would appear to be unwilling to release for public or press inspection, now or in the future. (Both branches, Congress has made clear, are already exempt from the disclosure requirements of the federal Freedom of Information Act.)

There are no restraints now on the disposition, or even the destruction, of the "internal memoranda" of federal judges or legislators.

Historians, journalists and others were astonished, or worse, to learn that Justice Hugo L. Black's will had ordered the burning of all of his "bench notes," the often revealing private communications he had had with the other justices and with his staff. Nothing could be done about that, in law or in fact, and the notes were destroyed.

The Supreme Court has recently organized its own Historical Society, but it is doubtful whether that group would be in a position to get a justice to release documents he does not want to let go.

Members of Congress are similarly in control of their "own" papers. When he was in the House of Representatives, Gerald Ford periodically sent off bundles of his materials to the University of Michigan. (As a result, that library already is laying claim to his presidential materials.) It is a fairly common practice for lawmakers to turn over records of their congressional service to institutions in their home states. Indeed, there is now no official mechanism for encouraging them — or judges, either — to do otherwise. Presumably, the new National Study Commission will get into that.

Even when all the basic issues over ownership and control are settled, or deliberately bypassed, there will remain one other area of major conflict and controversy over the handling of public records. That is the question of where to place the authority to pick the records to be kept and to decide when and how they will be opened to the public and the press.

Already, that issue has produced a division, in Washington and elsewhere. There apparently is some sentiment for relying upon the present National Archives and Records Service, which is a part of the government's general housekeeping agency, the General Services Administration.

But there seems also to be developing pressure for an entirely independent arm of government, perhaps like the agency which advises Congress on whether federal laws are being carried out properly, the General Accounting Office.

The National Archives has years of experience managing the presidential libraries. But when the biggest deal ever made over presidential records arose last September — the agreement to concede the Nixon papers to his ownership — the Archives was not even consulted. The Archives' superior, GSA Administrator Arthur Sampson, says he was called in to sign the deal at the White House the night before it was made public.

This incident shows that, where a president is personally involved, those who work for him are not inclined to second-guess what he wants to do. That timidity seems even more likely to exist when the President wants to act swiftly and outside of public scrutiny.

Thus, against this background, Washington is now trying to find another way to settle issues over presidential materials that will not leave the choice solely to presidents. ■