

Presidential Records and the Public Interest

IN RESPONSE TO strong objections from the Special Prosecutor's office, the White House has now suspended the deal which gave former President Nixon almost complete control over the papers, tapes and other records of his presidency. To the extent that this is the first step toward renegotiating the agreement, it is welcome because the papers pact was just as ill-advised as the premature pardon which it accompanied. As the Special Prosecutor has recognized, the agreement between Mr. Nixon and GSA Administrator Arthur F. Sampson was a giveaway by the government — a giveaway which gave Mr. Nixon every opportunity to use the records of his presidency to obstruct justice and stonewall history.

Under the arrangement, Mr. Nixon would have controlled all access to the records deposited with GSA — the records of official presidential conduct and misconduct which Mr. Nixon referred to as "my presidential historical materials." The control was to be both legal and literal, since two different keys were to be required to open the vault and only Mr. Nixon would have had both. All the materials except the tapes were to be kept for three years, after which Mr. Nixon would have been able to withdraw anything "without formality" for any purpose, including publication, sale or shredding. The tapes were to be kept until Sept. 1, 1979, after which they would have been destroyed as Mr. Nixon might direct, or upon his death, or at the latest by Sept. 1, 1984.

This was an open invitation to a monumental cover-up. The pact's provisions regarding subpoenas were especially curious. In an opinion for President Ford, Attorney General William Saxbe wrote that even though Mr. Nixon owned the materials, the government would have to produce properly subpoenaed items within its possession. But the San Clemente arrangement said something else. It said that government officials, if served with a subpoena, must notify Mr. Nixon so that he could respond "as the owner and custodian of the materials, with sole right and power of access thereto and, if appropriate, assert any privilege or defense I may have." That, coupled with Mr. Nixon's exclusive ownership of one of the two different keys necessary to open the vault, promised only more rounds of objections, appeals, unilateral decisions that certain papers and conversations were not relevant — and probably a few announcements that some materials simply could not be found. In short, at the same time President Ford immunized Mr. Nixon against federal prosecution, he also gave his predecessor the power to

undermine or frustrate other probes and prosecutions as well. It is no wonder that the Special Prosecutor has objected so forcefully.

The agreement was doubly obnoxious because the cover-up could be an endless one. Mr. Nixon has expressed his "desire" to donate "a substantial portion" of the documents, excluding tapes, for historical purposes at some future date, but absolutely no binding commitment has been made. Thus he and his family would be at liberty to write their own memoirs, to publish selected documents and transcripts, to open the files to sympathetic writers — and to bar access, forever, to everybody else. Key documents and tapes could be suppressed and eventually destroyed with their contents undisclosed. Together with the presidential pardon, this adds up to a kind of eternal immunity protecting Mr. Nixon from final and dispassionate judgment either in the courts or at the bar of history.

In authorizing such a deal, President Ford may have been pushed by the suggestions that, in the absence of some formal accord, there was little to prevent Mr. Nixon from sending over the U-Hauls and carting all his files away. That idea was based on the assumption that the records of a presidency are the President's personal property to keep, donate or dispose of as he likes. That concept, however unwise, is backed by ample precedent — but there is no precedent governing the case of a President who has resigned in disgrace to avoid impeachment, and whose former aides and closest associates are under indictment or investigation for a wide range of alleged crimes, many of which involve abuse of presidential authority. In such a case, it is incumbent on the government to take every possible step to preserve the record and to assure that potential evidence will be available so that the agencies of justice may proceed without hindrance or delay.

President Ford now has the obligation to renegotiate the agreement which was so rashly signed. That task should certainly not be entrusted to Mr. Sampson of GSA, whose inclination seems to be to give Mr. Nixon anything and everything he wants. Instead, a new and more prudent arrangement should be worked out by the White House in full consultation with the Special Prosecutor. If Mr. Nixon balks, the courts or Congress may have to intervene. But the responsibility rests first of all with President Ford. He should regard this as an opportunity to demonstrate his commitment to fair and thorough enforcement of the laws, and thus repair some of the damage caused by the precipitous pardon and the initial decision to give these vital records away.