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Summary of Ruling on Nixon Tapes

WASHINGTON, Jan. 31—Following is a summary prepared by Federal District Judge Charles R. Richey outlining the major points in his ruling that dismissed former President Richard M. Nixon's claim of personal ownership of his tapes and papers:

A. Introduction

These consolidated cases present a unique controversy, the heart of which concerns the ownership of and the right to assert or waive privilege with respect to the "Presidential materials and tape-recorded conversations" of the Nixon Administration.

These actions are before the court on the following motions: Plaintiff Nixon's motions to dismiss the Hellman, et al., and Anderson suits for lack of standing; the Government defendant's motion to dismiss all the actions, except that by the special prosecutor, on the ground that they are moot; and on motions for summary judgment or partial summary judgment by plaintiffs Anderson, the Reporters Committee for Freedom of the Press, et al., Lillian Hellman, et al., and the special prosecutor, on his counter-claim for declaratory relief, and as the intervenor-defendant in *Nixon v. Sampson, et al.*, (C.A. No. 74-1518).

B. Standing

The court finds that plaintiffs Anderson, Hellman, et al., and the Reporters Committee for Freedom of the Press, et al., have standing to sue under the Freedom of Information Act and to challenge the Nixon-Sampson agreement of Sept. 7, 1974.

C. Justiciability

The court finds that although the Presidential Recordings and Materials Preservation Act of Dec. 19, 1974, nullifies the Nixon-Sampson agreement of Sept. 7, 1974, the said act does not resolve the basic questions of ownership of the Presidential materials and tape recordings, nor whether the former President may assert any privilege in regard thereto.

Therefore, the questions of ownership and privilege must be decided by this court. Furthermore, the court has decided the additional issue raised by the pleadings with regard to Mr. Nixon's asserted Fourth Amendment claims.

D. Summary Judgment

Because the court finds that there are no genuine issues of material fact in dispute in these proceedings, the parties are clearly entitled to summary judgment on the issues as a matter of law.

E. Ownership

1. The claim of ownership of former President Nixon to the "Presidential materials and tape-recorded conversations" of the Nixon administration is contrary to the general principle of law that

that which is generated or kept in the administration and performance of the powers and duties of a public office belongs to the Government.

2. Former President Nixon's assertion of ownership of the documents, papers, tapes and other materials generated or retained by himself or others on his behalf in the performance of his duties as the President of the United States is contrary to the nature of the office of the President and the Constitution.

3. The inherent continuity of the office of the President negates a claim by former President Nixon that the independence of the office requires that his assertion of ownership be sustained.

4. There is no precedent which compels a finding that the "Presidential materials and tapes" are the personal property of former President Nixon.

5. The historical practice of past Presidents does not evince a clear and constant recognition of ownership of the materials generated and

retained in the conduct of the office of the President.

6. Congress has not sanctioned the personal ownership of "Presidential materials and tapes" generated and retained in the conduct of the office of the President.

7. Materials and tape-recorded conversations generated by executives departments and agencies, although subsequently transferred to and currently located in the White House, are "records" within the meaning of the Freedom of Information Act, and the public has a right of access thereto; however, materials and tape-recorded conversations generated by the President and his personal aides are not "records" within the meaning of the Freedom of Information Act and, thus, are not available to the public under the Freedom of Information Act.

F. Privilege

A former President may not assert or waive the privilege which attaches to the confidential communications relating to the conduct of the office of the President contained in Presidential materials and tape recordings as the privilege belongs to the Government and may only be asserted or waived by the incumbent President.

G. Fourth Amendment

1. Mr. Nixon's Fourth Amendment rights have not been violated because the Nov. 9 agreement is not a general warrant; nor does it subject him to an unreasonable search and seizure. However, under the circumstances, Mr. Nixon's right of privacy must be afforded protection.

2. Mr. Nixon's right to privacy does not entitle him to an injunction, but the court has the power to protect his rights and those of the Government by fashioning a remedy.

H. Remedy

The court will require the following procedure with regard to effectuation of the Nov. 9 agreement, with regard to any requests for Presidential materials and tape recordings made pursuant to court order or subpoena, or with regard to any requests made under the Freedom of Information Act:

1. Documents: The Government defendants, or their agents, prior to any governmental examination of the materials, shall permit Mr. Nixon or his counsel, (a) to segregate from any box or file, any document which is deemed personal, as defined by this court; (b) to mark those portions of any document which are deemed private, as defined by this

court, without destroying or impairing the integrity of that portion or any other portion of the document.

2. Tapes: The government defendants or their agents, prior to any governmental examination of the tape-recorded conversations, shall permit Mr. Nixon or his counsel to listen to those tape-recorded conversations and, if any such tape-recorded conversation contains matters which are deemed private, as defined by this court, then Mr. Nixon or his counsel shall so designate.

This procedure is to be effectuated as follows:

(A) The defendants shall specify one individual official of the Government having expertise in the use of tape recording mechanisms (hereinafter, "operator") who at all times shall operate the mechanisms chosen by the operator for use in this procedure; and (B) the operator shall employ two tape recorders, one (hereinafter, "recorder a") of which shall include the following features: (1) a single-listening device, commonly known as headphones; and (2) a digital "counter"; the other (hereinafter, "recorder b") shall include the capacity to duplicate the recording from (C) when Mr. Nixon, or his counsel, are in the process of listening to the tapes, he shall utilize the single-listener device; and

(D) The operator shall play the tape on recorder a and duplicate the tape onto recorder b, and when Mr. Nixon or his counsel deem any conversation or portion thereof as private, as defined by this court, the operator shall stop recorder b at the commencement of that conversation or portion thereof so as not to record that conversation or portion thereof on the tape on recorder b at the termination of the conversation or portion thereof designated as private, and the operator shall also, utilizing the "counter," mark in a log the digital number of the commencement and termination of the conversation or portion thereof designated as private. When a dispute arises with respect to the validity of a claim that a particular item, or portion thereof, is private, upon notice of counsel, the court shall examine the material or tape-recorded conversation, or portion thereof, in camera. This shall be followed by a hearing under the procedure set forth in the opinion.

The burden of proof as to whether a particular paper or tape-recorded conversation, or portion thereof, is personal, shall be borne by Mr. Nixon.