

Law Giving Nixon's Tapes To U.S. Is Upheld by Court

NYTimes

By LESLEY OELSNER JAN 8 1976
Special to The New York Times

WASHINGTON, Jan. 7—A three-judge Federal court unanimously upheld today the 1974 law that gave the Government control over Richard M. Nixon's Presidential papers and tape recordings, saying that Congress had had "an adequate basis for concluding that Mr. Nixon might not be a wholly reliable custodian of the materials."

The court barred almost all disclosure or processing of the Presidential documents pending appeal. This afternoon, Mr. Nixon's lawyer, Herbert J. Miller Jr., said that the former President would appeal to the Supreme Court.

The three-judge court, in a 105-page opinion, said "there is always some risk" that any President with unbridled control of his papers might destroy or alter some items.

"That risk might rationally be thought by Congress to be considerably magnified by reference to the circumstances surrounding Mr. Nixon's depart-

ure from office," the court added.

The various Watergate investigations and the "substantial evidence they brought forth which might reasonably have been thought by Congress to suggest that there was misconduct on the part of Mr. Nixon and his close associates, are too familiar and too well-recorded elsewhere to merit elaboration by us," the court said.

"The temptation to distort or destroy the historical record might be thought by Congress to be less resistible in the event that the materials provided some foundation for allegations that misconduct took place," the court continued.

The court, which went on to say it was not "indicating any view about the accuracy" of such allegations, said that the law did pose a "not insignificant" invasion of Mr. Nixon's privacy. It said, however, that the law served national inter-

Continued on Page 15, Column 1

Continued From Page 1, Col. 2

ests of "overriding importance," and that in view of the "special circumstances" of these, the invasion was "not unreasonable."

Mr. Nixon challenged the statute as unconstitutional on a variety of grounds.

He contends that it violates the principle of separation of powers, in that it is an incursion by Congress on the executive branch; that it conflicts with the constitutional "Presidential privilege"; that it provides an illegal search and seizure; that it violates his right to privacy; that it denies him equal protection of the laws in that it treats him differently from other Presidents, and that it infringes his First Amendment rights of expression.

Today's ruling grew out of long and tangled litigation.

Originally, Mr. Nixon sought to have the courts enforce the agreement that was made with the White House by the General Services Administration immediately after his resignation. That agreement gave him some control over the documents.

Various other people, such as reporters and historians, also filed suit, seeking access to the Nixon materials.

When the law went into effect, superseding the agreement, Mr. Nixon filed a suit challenging it. He asked for a three-judge panel, under the procedure used when a law is challenged as unconstitutional.

However, the trial judge who had heard the first round of cases, Judge Charles R. Richey of United States District Court here, issued an opinion saying that the materials be-

longed to the Government. The Court of Appeals immediately stayed the ruling, at the request of Mr. Nixon's lawyers, who contended that a three-judge panel should have been convened, and that Judge Richey's decision interfered with the test of the new law.

Subsequently, the appeals court ordered a three-judge panel to hear the challenge to the law—Mr. Nixon's second lawsuit.

This is the suit in which the court ruled today.

The court's opinion was written by Judge Carl McGowan of the United States Court of Appeals here and joined by Edward A. Tamm of the same court and Aubrey E. Robinson

Jr. of the United States District Court. It discussed each of the contentions in a few instances, such as the contention involving privacy, and said that the challenges were "troublesome."

Regulations Are Cited

However, it said that regulations pending in Congress that are to be adopted to implement the law might solve some of the problems expected by Mr. Nixon.

It said that it was limiting its ruling to the constitutionality of the law on its face—specifically, to the directive that the Administrator of General Services take custody of the Nixon materials and prom-

ulgate regulations that would provide for processing the papers so the purely personal and private would be returned to the Nixons, and provide for terms and conditions of access to the materials.

"We do not believe these [constitutional] problems [raised by Mr. Nixon] to be such as to justify stopping the act in its tracks, given its scheme of implementation by regulations in the writing of which Congress itself has retained a role," the court said.

In effect, the judges found that while Mr. Nixon had some legitimate interests such as privacy and perhaps an interest stemming from the Presidential

privilege, the national interests served by the law were strong enough to override the personal interests, and that the law was a reasonable way to achieve these interests.

At the same time, however, the opinion seemed almost to invite litigation over the law as eventually implemented. If today's ruling is affirmed, the regulations, when adopted, are almost certain to be the subject of court action.

Another remaining issue, as the court noted today, is whether Mr. Nixon was the owner of the documents before the law went into effect, and thus whether he must be compensated for the Government's

taking possession and ownership of the material.

The court, in disposing of each of Mr. Nixon's challenges, made the following additional points:

¶ On separation of powers, it said that Mr. Nixon's view of the principle, "requiring three air-tight departments of government," was "archaic."

¶ On the claim of privilege, it said that it was not sure that a former President could claim privilege, and that even if a former President could, his claim was entitled to substantially less force than a claim by an incumbent; that the law, which provides for screening of

the documents by trained archivists, would lead to only a minimal intrusion on confidentiality of executive communications, the value being protected by the privilege.

The court reached this conclusion by applying a kind of balancing test. It weighed the right to confidentiality against the amount of material that might be protected by this right—a small amount of the total, the court said—and, in addition, the fact that professional archivists would be doing the screening; that Congress might "rationally" have concluded that Mr. Nixon would not be a "wholly reliable" custodian, and

that there were public interests in preserving the historical record.

¶ On privacy, the court said that Mr. Nixon had a reasonable expectation of privacy, since previous Presidents had on leaving office not been subjected to forced government screening of their papers.

It also said, however, that the constitutional test was whether the invasion of privacy was reasonable, and that in this case, given such factors as the use of archivists and the mixture of personal and work papers in the Presidential files, it was reasonable.

REMEMBER THE NEEDiest!