

APR 25 1977

NYTimes

Mr. Nixon's Day in Court

ABROAD AT HOME

By Anthony Lewis

WASHINGTON—Before pardoning his predecessor, in September 1974, President Ford approved an agreement with Mr. Nixon making him "custodian" of all the papers and tapes accumulated during his years in the White House. The vast materials were to be kept in a building near San Clemente.

Under the agreement, no one could see anything without Mr. Nixon's approval—not even a Government official seeking a vital diplomatic paper. Mr. Nixon was given the right to destroy any of the White House tapes after Sept. 1, 1979. And all the tapes were to be destroyed automatically when he died or on Sept. 1, 1984, "whichever event shall first occur."

When those terms were disclosed, there was an outcry from Congress and the Special Prosecutor's office, which feared that evidence would be withheld or destroyed. Congress passed, and President Ford signed, legislation to safeguard the materials by keeping them in the Government's custody, in the National Archives.

Why recall that history now? Because people have forgotten it amazingly fast. Or so it seemed in the Supreme Court last week.

Mr. Nixon has asked the Court to hold the legislation unconstitutional and, in effect, to reinstate the 1974 agreement giving him control of the tapes and the papers. When the case was argued last week, both Court and counsel occasionally sounded strangely unaware of the realities involved.

The legislation was defended by the new Solicitor General, Wade H. McCree, making his first appearance before the Court. Unfortunately, he was

not sufficiently familiar with the record to handle important factual questions.

The Justices wanted to know, for example, whether the Government thought there was a risk of Mr. Nixon withholding or destroying anything except Watergate material—a national security document, say. Mr. McCree said no.

But officials in both the Ford and Carter Administrations have in fact been concerned about the problem of seeing national security material if Mr. Nixon controlled access. They have had to go into those files for documents on Vietnam and on the SALT negotiations that existed nowhere else, and they have wondered whether Mr. Nixon would allow access to a paper—however important—if he thought it might embarrass him.

The larger question is whether Congress was constitutionally justified in regarding Mr. Nixon as an unreliable custodian of papers with such a public interest. A three-judge district court held unanimously that it was. But some members of the Supreme Court asked whether such a finding might not make the papers legislation a bill of attainder—an act punishing an individual without a judicial trial.

What sort of judicial trial would be needed to establish Richard Nixon's unreliability as a custodian of tapes and documents? Prof. James David Barber of Duke remarked recently that when Congress finally

took action against Mr. Nixon, it had enough evidence "to choke Caligula's horse." If Congress cannot be aware of that evidence, one wonders what constitutional discretion it does have.

Chief Justice Warren E. Burger, who sounded generally hostile to the legislation, even suggested that depriving Mr. Nixon of the right to tax deductions for his papers might be "punishment" amounting to a bill of attainder. But the tax deduction for papers was ended by Congress in 1969, and in any event the Nixon papers legislation provides that he shall be compensated if deprived of any property rights.

Several justices seemed upset that the Government would keep from Mr. Nixon something as private as dictabelts he is said to have dictated each night as a diary. But in fact, the materials held by the National Archives do not include such daily dictabelts. If they existed, Mr. Nixon must have taken them with him on the plane when he left Washington on Aug. 9, 1974.

A Chief Justice worried that Mr. Nixon's privacy would be at risk from leaks as archivists sorted personal from official materials. But the same professional archivists from the National Archives have sorted the papers of every President since Hoover without leaks—and in fact sorted Richard Nixon's Vice Presidential papers.

The other claim by Mr. Nixon is that in this legislation Congress invaded the prerogatives of the Executive. But the act is administered by Executive officials, and neither the Ford nor the Carter Administration has perceived any risk to its interests. It is significant that the legislation was supported by the previous Solicitor General, Robert Bork, who was appointed

by Mr. Nixon and who had a particular concern for Executive privilege.

Considering how Mr. Nixon treated the constitutional rights of others when he was President, there was a certain irony in hearing his claims of privacy and due process. But the Constitution protects him as it does others. One hopes only that in weighing his claims, the Court does not blind itself—and Congress—to realities.