

THE PRESIDENTIAL PAPERS:
PUBLIC OR PRIVATE PROPERTY?

by

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Who owns those little ribbons of plastic dynamite called "the Watergate tapes?" Archivist F. Gerald Ham maintains "what is produced on government time at government expense, and for a government purpose, is a public record."¹ President Gerald Ford, on the day he pardoned ex-president Nixon, assigned to him control of the tapes and the forty-two million documents of the Nixon presidential administration.² Congress quickly passed a law (P. L. 93-526) impounding the material, and Nixon's lawyers promptly challenged the constitutionality of the law.³

Public Law 93-526, entitled "Presidential Recordings and Materials Preservation Act," was passed December 19, 1974, and provides for the following: 1) All Nixon materials between January 20, 1969 and August 9, 1974, to be turned over to the General Services Administration; 2) Nothing shall be destroyed; 3) All shall be available for judicial proceedings; 4) The creation of a Public Documents Study Commission of 17 members to study the broad issues of ownership.⁴ The panel was duly established and is chaired by Eisenhower's Attorney-General, Herbert Brownell. Court challenges have delayed the panel's report until it is now set for March 31, 1977.⁵

¹Ham.

⁴"Presidential Recording..."

²Courier-Journal.

⁵Courier-Journal.

³Hubbard.

According to the Washington Post of November 29, 1976, the Supreme Court has agreed to hear Nixon's appeal of the U. S. District Court ruling last January ^{which} ratified the constitutionality of this law giving the government custody of the Nixon papers while giving him access to them and the right to reproduce them for his own use.⁶ The Supreme Court has set the review for the current year and promised a decision by June.

The question of who owns the Watergate tapes and the larger question of the ownership of presidential papers is a moot one. The fact that a portion of the Nixon papers provide vital evidence in criminal indictments and led to the unprecedented resignation and subsequent pre-trial or conviction pardon of the ex-president has made the issue of ownership suddenly critical, after years of benign neglect. It is my intention to examine the principal arguments and the historical setting and then to present a reasonable solution, both short and long-range, to the quandary.

Herbert J. Miller, Nixon's attorney, claims the law giving the government custody of the Nixon papers is unconstitutional for the following reasons: it violates the principle of separation of powers, it violates presidential privilege, it is an invasion of Nixon's personal rights of privacy and free speech, and it is a denial of his right to equality before the law.⁷ The U. S. District Court has rejected each of these arguments. Earlier, Nixon lawyers J. Fred Buzhardt and James St. Clair argued for presidential ownership from history, tradition, and the absence of any law prohibiting the private

⁶Mackenzie

⁷Ibid.

ownership of official papers.⁸

Archivist Herman Kahn argues pragmatically for any system which will make presidential papers available for scholarly use with a minimum of delay and obstruction, and he maintains that the present idea of private ownership has done this. Kahn feels that legislation, however benign its intent, will only create additional and unnecessary problems, particularly because it is so difficult to separate public and private papers.⁹

Presidential papers have an enormous monetary value, making the resolution of their ownership a matter of economics as well as history and national policy. Appraiser Ralph Newman set the value of Nixon's pre-presidential papers at \$2 million for the 400 cubic feet of documents. The Nixon presidency generated 27,000 cubic feet of documentation. The General Services Administration, which has physical possession, considers every piece Nixon's personal property until the court should finally determine otherwise.¹⁰ In this, the GSA is acting according to precedent.

Columnist James Reston has pointed out that Nixon bugged not only his enemies, but also his own staff and visiting presidents and prime ministers without their knowledge. He grants that the president clearly has a right to the records of his administration, but maintains that he should not have the sole right without at least leaving behind copies on issues of policy and official conversations.¹¹ This raises a delicate issue. It seems immoral, to say the least, to

⁸Lewis.

⁹Ham.

¹⁰Kuttner.

¹¹Reston.

record private conversations without the participant's previous consent. Beyond the personal issue is the issue of national security on sensitive issues. Public display, or even the danger of it, would seriously hamper vital information sharing. The presidential office obviously cannot function without some guarantee of privacy.¹² No one can deny that a president should have the right of ownership of his personal papers, letters, etc. Some argue that official and personal papers cannot and should not be separated because of the difficulty of classification and the historical problem presented by fragmentation.¹³ In addition, Archivist Wayne C. Grover once told Congress that the Office of the Presidency is constitutionally immune to such invasions.¹⁴

The one attempt that has been made by Congress to regulate in any way the ownership of official papers has not been an unmixed blessing. Former President Lyndon Johnson had the dubious honor of being the first ex-president to claim an income tax deduction on the value of his donated papers. Congress then, as you know from Nixon's debacle, acted to close this tax loophole. In so doing, however, they mitigated against artists and writers and may have kept numerous original manuscripts out of the public domain by making their donation financially unprofitable.¹⁵ This reinforces Kahn's pragmatic argument against legislation.

¹²McLeod.

¹⁴Ibid.

¹³Ibid.

¹⁵Kuttner.

So much for the arguments supporting private ownership of presidential papers. A little later, in the presentation of the historical precedents, these arguments will be reinforced to some degree. We may now examine the positions of those who assert public ownership of presidential papers including, of course, movies, recordings, and other physical data.

Prior to Nixon (and then only because of the violation of the law) the question of ownership of presidential papers concerned only a "tiny fraternity of ineffective archivists."¹⁶ Most archivists agree that what is produced on government time, at government expense, and for a government purpose, is a public record.¹⁷ The public pays for presidential papers three times: when they are made, when they are used for profit by the individual, and in the form of a tax break to contributors to presidential libraries.¹⁸ According to this point of view, it should be obvious that presidential papers cannot be the property of any individual. In fact, federal law currently prevents any government employee from copyrighting material produced on government time by government employees for governmental purposes.¹⁹ Indeed, Nixon himself used this argument with reference to governmental ownership and control of the Pentagon Papers.²⁰ In the Rickover suit of 1967, the Supreme Court held also that "historical record (practice) is not legal precedent."²¹

¹⁶Ham.

¹⁹McLeod.

¹⁷Ibid.

²⁰Ibid.

¹⁸Wills.

²¹Ibid.

A section of the Constitution makes government documents ineligible for copyright, which is the guarantee of literary ownership. Another provision gives Congress sole power to dispose of property belonging to the United States. Congress has never enacted a law to the contrary. A Washington historian offered \$1,000 to anyone who could produce such a law, and has no takers.²² The same gentleman claims the constitutional provision prohibiting presidents from receiving "emoluments" other than salary would be violated if they could sell documents at a profit and, if that's true, there is no reason to assume an ex-president acquires rights in property not possessed as president.²³ Indeed, most arguments for presidential control rest upon the sanctity of the office, not on the property rights of man.²⁴

Past policy has had some capricious results. Americans have tended to be doers rather than documenters. For example, officials looking for an original copy of the Treaty of Versailles could not locate it for a year after Wilson's death, and then it took another six months to get Mrs. Wilson to retrieve it from her attic!²⁵ Perhaps the most famous case of the missing document is the "red line" map denoting the original boundary between Massachusetts (now Maine) and English Canada. Such laxity was more apropos in a simpler day. Many argue that presidential documents are simply too important to the policy and history of the nation to be private property.

²²Lewis.

²⁴McLeod.

²³Ibid.

²⁵"Preserving the Public's Papers."

As we shall see, one of the most ubiquitous arguments for personal ownership is historical. However, the historical precedent is a mixed one. Nineteen of our former presidents have deposited their papers with the Library of Congress or with historical depositories without any financial "quid pro quo" at all.²⁶ President Ford announced just last month that his papers would be deposited in a special collection in Michigan, his home state. The Library of Congress has been available for such collections since 1800 and the National Archives since 1934. The other avenue used by presidents acknowledging essential public ownership has been the establishment of Presidential Libraries.

Traditionally, European monarchs owned state papers because they owned the state. It is doubtful, however, that any such philosophical motivation led Washington to take his papers with him when he left office in 1797.²⁷ There was at that time no other provision for their disposal other than careless destruction. Washington left his papers to his nephew, Bushrod, who in turn willed them to his nephew, George Corbin Washington, who sold them to the government for \$25,000 in 1834.²⁸ Another source indicates the government eventually paid his heirs \$45,000 for Washington's papers.²⁹ At any rate, the precedent of private ownership was set, almost by default. By gift or purchase, the Library of Congress has the papers of twenty-three former presidents, though some of the collections were heavily depleted while in private hands.³⁰ \$20,000 was paid to the estate of Thomas Jefferson

²⁶Lewis.

²⁹McLeod.

²⁷McLeod.

³⁰Ibid.

²⁸Kuttner.

for some of his papers; \$65,000 was paid to Dolly Madison for her husband's papers; 20,000 was paid for Monroe's papers; and \$18,000 for Jackson's.³¹ Polk's niece sold her uncle's papers to the Library of Congress after some haggling over the price. Andrew Johnson's were the last presidential papers sold to the government.³² Between the two Johnsons' administrations, there is no evidence of personal profit from presidential papers.

Personal ownership of presidential papers has resulted in some heavy losses and restrictions. Fires depleted the collections of Harrison, Tyler, and Jackson. Mrs. Harding deliberately destroyed most of the papers from her husband's scandal-ridden administration, and Van Buren, Grant, and Pierce personally purged their papers rather heavily, thus influencing future conceptions of their regimes. Arthur's presidential papers have simply disappeared. Robert Todd Lincoln held his father's papers until 1923, finally giving them to the government after removing and destroying those he didn't want seen. The Lincoln papers, stored in a single trunk, were not made available to scholars until 1947. Federal law now sets a maximum seal, except in cases of national defense, of twenty-five years on publicly held documents.³³ In contrast to Lincoln's single trunk, FDR's presidential papers took 500 file cabinets, and you have already heard the size of the Nixon collection. The longest restriction on the availability of presidential papers was the Adams papers, sealed for 150 years.

³¹McLeod.

³²Kuttner.

³³McLeod.

In the light of this congeries of chaotic non-policy, what is to be done? Presently, the Nixon papers are held by the government with the ex-president and the courts having access to them. A Commission is debating policy, and is to report its findings by March. The Louisville Courier-Journal, in a recent editorial (December 9, 1976), suggests the need of a law to do the following: 1) Reserve ownership to the nation; 2) Grant limited privacy rights with care for national security; 3) Set a schedule for opening; and 4) A distinction between public and private papers made by professional archivists.³⁴

My own position is as follows:

- 1) The Nixon papers, tapes, et. al., should remain in governmental ownership. The nation has the right of eminent domain to them as vital evidence of criminal action. Nixon, however, because of historical precedent, should have sole right of private access and use for publication for private profit of the materials. Any law forbidding him this is obviously ex post facto.
- 2) In the future, all presidential papers should be considered public property, without exception or any attempt to separate public and private documents. In return for this, the ex-president should have sole access to them for publication rights for a period of five years. The papers should be sealed, as is now the case, for a maximum of twenty-five years and, in general, open after five years.
- 3) In the absence of a law in the past, regardless of how produced or how inequitable, the presidential papers belong to the individual, not to the nation.

³⁴Courier-Journal.

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