

# 'The Nixon Tapes Must Be Destroyed'

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Richard Nixon's legacy is litigation, the latest lump of which is 134 pages of spirited argument from the Supreme Court. The Court has held, 7-2 (Chief Justice Warren Burger and Justice William Rehnquist dissenting), that Congress acted constitutionally when it denied Richard Nixon the statutory right of former Presidents to custody of their papers and other materials.

This ruling is dubious in several respects. Rushing to "do something" about Watergate, Congress compromised the doctrine of separation of powers and the principle of executive privilege that derives therefrom, and treated cavalierly Nixon's First Amendment right of privacy, and the Constitution's clause prohibiting bills of attainder.

In the 1974 decision compelling Nixon to surrender subpoenaed tapes needed for a quite specific purpose (a trial), the Court emphatically insisted: "The expectation of a President to the confidentiality of his conversations and correspondence . . . has all the values to which we accord deference for the privacy of all citizens and, added to those values, is the necessity for the protection of the public interest in candid, objective and even blunt or harsh opinions in presidential decision-making."

And as Harry Truman said in 1953, when refusing a congressional demand for certain information, "If the doctrine of separation of powers and the independence of the presidency is to have any validity at all, it must be equally applicable to a President after his term has expired."

Rehnquist notes that the Court now has affirmed the power of Congress to seize the papers of any retiring President. And Burger rightly believes the law and the Court's ruling on it may be "a 'ghost' at future White House conferences, with conferees choosing their words more cautiously because of the enlarged prospect of compelled disclosure to others."

The Court has affirmed a law that seizes all the commingled Nixon papers, the intimately private as well as the public. The Court majority rationalizes permitting this on the ground that archivists who will make public particular items (using undefined criteria of "general historical interest") will be "discreet." But it is unclear why government intrusion into an individual's sphere of privacy should be defended with reference to the reputation, however commendable, of the intruders.

In joining the majority, Justice John Paul Stephens gave a compelling reason for dissenting:

"[The statute] singles out one [President], by name, for special treatment.

. . . He is subjected to the burden of prolonged litigation over the administration of the statute, and his most private papers and conversations are to be scrutinized by government archivists. The statute implicitly condemns him as an unreliable custodian of his papers. Legislation that subjects a named individual to this humiliating treatment must raise serious questions under the Bill of Attainder Clause."

Indeed. This 1974 law dealing with Nixon does not purport to repeal the 1955 law that vests in Presidents the right to their papers. The Court majority insists that what Congress did to Nixon cannot be considered a bill of attainder because it does not involve legislative infliction of "punishment." But the Court has held that "punishment," for the purposes of bills of attainder, may be understood as the deprivation of any rights previously enjoyed.

The majority cites the U.S. District Court, which said that Congress's purpose was regulatory, not punitive. But the Court has held that retributive and

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vindictive motives are not elements of bills of attainder, which frequently have had regulatory or preventive purposes.

Congress was alarmed because, under the agreement that the law nullified, Nixon could have destroyed the tapes after five years, and they would have been destroyed in the event of his death, or by 1984, whichever came first. But the tapes were an invasion of the privacy of everyone who was unknowingly taped and should be destroyed. Invocations of "the public's right to know" neither justifies additional violations of privacy nor conceals the element of voyeurism (sometimes disguised as journalism) in the desire to make the tapes public.

The Court says this law was intended to help "restore confidence" in government propriety. But neither the law nor the Court's decision is redeemed by the fact that Nixon, author of much impropriety, is the victim. That may be poetic justice, but such is not the justice Congress and the Court should dispense.