Court Denies Nixon's Bid For Papers

Upholds '74 Law On Public Access To Tapes, Documents

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The Supreme Court yesterday upheld the public's right of access to Richard M. Nixon's White House papers and tape recordings, with the government—not the former President—deciding what is and what isn't personal and private.

The court ruled 7 to 2 that the Constitution empowered Congress to remove the materials from the custody of the only President in history implicitly presumed to be an unreliable guardian of his papers.

The ruling upheld a 1974 law directing the General Services Administration—an executive branch agency—to take possession of the materials, screen them, return those that are personal and private, and determine the conditions of public access to those that are retained.

The justices rejected all of Nixon's claims that the law is unconstitutional on its face. Affirming a panel of three federal judges, they held that none of the claims had merit.

Two of the four justices appointed by Nixon, Harry A. Blackmun and Lewis F. Powell Jr., joined in certain parts of the majority opinion as well as in the judgment.

The other Nixon appointees, Chief Justice Warren E. Burger and Justice William H. Rehnquist, each wrote a dissenting opinon.

The law, the Presidential Recordings and Materials Act, governs 42 million pages of documents and 880 recordings—5,000 hours of conversations taped in the White House, the Old Executive Office Building, the presidential retreat at Camp David, Md., and the Nixon "White Houses" in Key Biscayne, Fla., and San Clemente, Calif. The documents and tapes cover a 5½-year period—from Nixon's inauguration on Jan. 20, 1969, to his resignation on Aug. 9, 1974.

The law directs the GSA to propose regulations for public access to the materials that take effect in 90 legislative days unless either the House or the Senate disapproves them.

Public access apears to be a long way off. the Senate disapproved the first proposed regulations on Sept. 11, 1975, and the second set—after it had been withdrawn —on April 8, 1976. The House disapproved the third set last Sept. 14.

After resolving disputes that led to the rejections, GSA proposed a fourth set of regulations on June 6. If not vetoed, it probably will take effect in early December.

But public access, which Congress said would "provide the public with the full truth" about "the abuses of governmental power popularly identified under the generic term 'Watergate,'" is expected by the agency to be delayed by lawsuits "for a long time." GSA Assistant General Counsel Donald P. Young said three weeks ago, "I think Nixon will be dead and gone long before this thing is finally resolved."

Once litigation no longer impedes the process, and if Congress provides funds for hiring 100 professional archivists, it will take six months to start the flow of Watergate-related materials and about three years to complete it, Steven Garfinkel, chief counsel of the National Archives, a GSA unit, said yesterday.

He said it could take the archivists eight or nine years to sift through the material.

A lawyer for Nixon said the former President is "aware of the decision." The lawyer, R. Stan Mortenson, told United Press International, "I'd rather not talk to you about it."

In the opinion for the court, Justice William J. Brennan Jr. wrote that the law does not on its face violate the constitutional principle of separation of powers among the branches of government.

He pointed out that President Ford

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signed the act into law (on Dec. 20, 1974); that President Carter, through Solicitor General Wade H. McCree, had urged affirmance of the three-judge panel, and that control of the material will remain in the hands of "trusted and disinterested" executive branch archivists.

Pointing out that Nixon's claim of confidentiality, or executive privilege, "could apply at most to the 200,000 items" with which he was personally familiar, Brennan said the law does not violate the privilege.

Brennan also wrote that the law did not unconstitutionally invade Nixon's right of privacy. Only a small portion of the materials are claimed by Nixon to be private, such as communications with his family and doctor, he said. Moreover, government archivists have an "unblemished record" of discretion. And, he said, the law specifically recognizes the need to give Nixon or his heirs "sole custody and use" of materials unrelated to Watergate and "not otherwise of general historical significance."

Brennan found no merit in Nixon's claim that the act undermined — for future presidents as well as himself — the First Amendment guarantee of free speech and association.

Finally, he rejected Nixon's claim that the law is an unconstitutional bill of attainder—a law that legislatively determines guilt and inflicts punishment on a particular individual without the protections of a trial.

Nixon "constituted a 'legitimate class of one,'" Brennan wrote. "This provides a basis for Congress' decision to proceed with dispatch with respect to his materials" while accepting the arrangements made to preserve the papers of previous presidents and to order consideration of general standards for future presidents, he said.

Agreeing, Justice John Paul Stevens emphasized two facts "I consider decisive": Nixon resigned "under unique circumstances and accepted a pardon for offenses committed while in office." Furthermore, he said, "this case will not be a precedent for future

legislation which relates, not to the Office of the President, but just to one of its occupants."

Dissenting, Rehnquist said the decision "countenances the power of any future Congress to seize the official papers of an outgoing President as he leaves the inaugural stand," poses "a real threat to the ability of future presidents to receive candid advice and to give candid instructions," and "will daily stand as a veritable sword of Damocles over every succeeding President and his advisers."

Predicting leaks, Rehnquist termed it "extremely naive . . . to suppose that each and every one of the archivists . . . would remain completely silent with respect to those portions of the presidential papers which are extremely newsworthy."

Burger termed the decision "a grave repudiation of nearly 200 years of judicial precedent and historial precedent" and an invasion of "historic, fundamental principles of the separate powers of co-equal branches of government."

He viewed the law as "an attempt by Congress to exercise powers vested exclusively in the President—the power to control files, records and papers of the office, which are comparable to the internal workpapers of members of the House and Senate."

The chief justice predicted that the law "may well 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 Reporters Committee for Freedom of the Press, which filed the first legal challenge to Nixon's claim that the documents and tapes were his to control, termed the decision "a historic victory for the public's right to know how this nation is governed." Aligned with the committee was columnist Jack Anderson; the Committee for Public Justice, composed of writers and others concerned about civil rights and liberties, and the American Historical and American Political Science associations.