Protecting Mr. Nixon's Records

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FORMER PRESIDENT NIXON'S papers and tapes will stay in government custody but the most intriguing materials will not be made public very soon—and may never be released at all. That is about where matters stand in the wake of the Supreme Court's 7-2 decision last week upholding the act of Congress that placed Mr. Nixon's presidential records under protective government control.

The decision, like the law itself, is carefully limited. Neither Congress nor the Court intended to set a precedent for seizure of the files of every departing chief executive. As Justice Brennan wrote for the Court, Congress was responding to a "unique" situation in which "immediate attention" was required to preclude, for instance, any destruction of the tapes. Moreover, the Court did not dismiss or disparage Mr. Nixon's claims of presidential privilege and personal privacy. Instead, the majority simply held that those interests are not undermined too much by government safeguarding of the records and screening by discreet, dispassionate archivists. As several Justices emphasized, the law explicitly allows Mr. Nixon to renew his arguments against disclosure after the General Services Administration's regulations on public access have been composed and before anything is opened to the public and the press.

We do not find in the decision, or the law, the wholesale attack on presidential prerogatives that Chief Justice Burger and Justice Rehnquist complained about so harshly in their dissents. Their views, like Mr. Nixon's, seem to stem from a concept of the presidency as some sort of regal state endowed with vast autonomy and entitled to enormous deference.

The rest of the Court, in contrast, has taken a far more temperate and traditional approach. None of the Justices denied that, down the line, there will be conflicts between the national interest in disclosure of the Nixon records and the national interest in protecting the privacy of individuals and the presidential decision-making processes that depend on confidential communications. For instance, some of the most tantalizing materials, such as Mr. Nixon's diaries and Dictabelts, may well be classified as personal and returned to him. The majority even suggested that the First Amendment may dictate non-disclosure of some political documents, a problem that has barely been discussed so far.

Overall, Justice Powell was right: "The difficult constitutional questions lie ahead." And the Court was right to defer these questions until they can be addressed in the most specific form. It would be best, of course, if public-access policies for the Nixon records did not have to be carved out by courts at all. Other recent Presidents, including Gerald Ford, have been content to rely on a careful process of archival winnowing, with relatively little material held back—and that embargoed only until its sensitivity has faded. President Carter indicated last Thursday that he plans to follow a similar course.

Now it is true, presumably, that in addition to the usual run of presidential papers, Mr. Ford does not have and Mr. Carter is not going to have Mr. Nixon's self-imposed problem—a sound-actuated, indiscriminate taping system that recorded everything, or almost everything—that transpired within its hearing during several years of his presidency. Quite aside from what may be on the tapes that might be incriminating or at least highly unflattering, one can understand Mr. Nixon's somewhat less public-spirited approach and his determination to suppress many things picked up by that recorder that not even the most upright President would want in the public domain. Mr. Nixon's case, in short, is singular. And that just underscores the importance of judicial precision and perspective as the litigation goes on.