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How Much Should the Public Know About Public Policy?

A federal court will soon rule on former President Nixon's constitutional challenge to a law placing his presidential tapes and papers under permanent federal custody. Central to that challenge is Nixon's argument that the law's implementation would result in public disclosure of the materials and that this would violate the confidentiality required for government decision-making.

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The issue posed here goes to the heart of how much the people have a right to know about the making of public policy. The court's ruling will surely influence the resolution of that issue for future Presidents and other public officials.

The law being challenged is the Presidential Recordings and Materials Preservation Act, introduced by Sen. Gaylord Nelson (D-Wis.) and signed into law by President Ford last December. Contrary to Nixon's suggestions, the law does not mandate total disclosure of his presidential materials. To be sure, the law was intended to preserve the Nixon materials so that at some future point the public would understand the whole truth about the uses and abuses of power in the Nixon presidency.

But Congress recognized the complexity and sensitivity of trying to decide which materials should be made public. The law therefore directed the General Service Administration to recommend regulations on public access, subject to disapproval by either house of Congress.

GSA's proposed regulations, submitted on March 19, set up a procedure to have archivists isolate the "historically significant" materials, defined in terms of Nixon's performance as President. Purely personal items (such as letters between Nixon and his family) were to be returned to Nixon or otherwise excised from the material to be made available. The regulations also gave Nixon or any other party the opportunity to raise any constitutional or legal argument for limiting public access to the material. And the regulations implemented the law's command that Nixon be given access to all the materials at any time and for any purpose.

Despite these meritorious provisions, the Senate rejected the regulations because they created the risk that politically embarrassing material would never see the light of day. Thus, GSA suggested that material could be withheld if it would "disclose or compromise" national security information. This raised the possibility that even unclassified material could be kept secret if it was determined that its release would somehow "compromise" national security.

The GSA plan also provided for restrictions on Watergate-related material which "would tend to embarrass, damage or harass living persons," provided the material was not "essential" to an understanding of the Watergate abuses. The Senate report rejected this out of hand, observing that "almost by definition, the Watergate affairs are embarrassing to those who were associated with them." And so it went.

For all their defects, the regulations do much to undercut Nixon's confidentiality argument. In a deposition in connection with his law suit, Nixon said that total secrecy was needed in the development of administration policy with respect to China, Vietnam and other matters. But as the regulations demonstrate, nothing in the law is at odds with the need for secrecy in the making of decisions. The law is concerned only with decisions already made and implemented by a President who has left office.

Nixon nonetheless asserts that any public disclosure of his presidential materials would disappoint those who believed their advice would be kept confidential. No doubt some people will be disappointed. But Nixon's assertion is still too much. Virtually every adviser of presidents—a White House aide, a congressman, or simply a friend—accepts the risk that, no matter how confidential the setting, his advice will be publicized. It may be leaked to the press, for example, or perhaps discussed in a later book by an administration official or even the President himself. Indeed, Nixon admitted in the deposition that William Safire, Daniel Moynihan and others had used or would use "confidential" material to write memoirs—and that he would do so himself.

It would be a good rule for the future if every adviser of Presidents knew that—subject to legitimate national security, investigatory and privacy interests—his advice would eventually be made public. This might cause some advisers to be more guarded with the President, at least on paper. But such a rule might also make a presidential adviser more sensitive to his public obligations. A more detailed public accounting of presidential decisions could mean that there would be less talk in the Oval Office about abusing government agencies and more talk about serving the public's interests in an honest fashion.

Nevertheless, in many cases it will be extremely difficult to strike a proper balance between the people's right to know and other conflicting interests. Given the difficulties and importance of the matter, it is critical that such decisions be made by an impartial body.

The GSA's revised regulations provide that final decisions will be made by a Presidential Materials Review Board consisting of the GSA Administrator, the U.S. Archivist, the Librarian of Congress, a representative of the Justice Department, and a representative of the American Society of Archivists. This is a sensible approach, and may be useful in resolving other disputes involving a presidential refusal to make certain information public.

But whatever the response to future dilemmas, one thing is clear: the President and his associates should not be allowed to decide alone how much the public knows about past presidential decisions. Vietnam and Watergate should have taught us at least that.