SFChronicle JUN 2 9 1977

U.S. Supreme Court

Nixon Loses Fight To Win Back Tapes

Washington

The Supreme Court upheld as constitutional yesterday, by a vote of 7 to 2, the 1974 law that gave the government control over Richard M. Nixon's presidential papers and tape recordings.

The court found, in part, that Nixon was "a legitimate class of one," subject to special treatment by Congress because of the possibility that his presidential materials might overwise have been destroyed.

Congress in 1974 was entitled to single out Nixon and treat his materials differently than those of all other Presidents, the court found, because at the time only the Nixon materials demanded "immediate attention" and protection.

Justice William J. Brennan Jr. wrote the court's opinion. Chief Justice Warren E. Burger and Justice William H. Rehnquist each filed harsh and detailed dissents.

Burger, in a 41-page opinion, declared that the majority "has now joined a Congress, in haste to 'do something,' and has invaded historic, fundamental principles of the separate powers of co-equal branches of government. To 'punish' one person, Congress — and now the court — tears into the fabric of our constitutional framework."

There was no immediate comment from Nixon.

The court's ruling came in a lawsuit that was filed by the former President on Dec. 20, 1974, challenging its constitutionality on several counts. The suit was filed the day after President Ford signed the law. The lower court in the case upheld the law by unanimous vote in January, 1976.

The court's decision yesterday, upholding the lower court, ends this lawsuit. However, it does not mean that the Nixon materials will be available to the public soon and it also does not mean that litigation over the materials is at an end.

Regulations must still be approved by Congress to spell out the rules for public access. It is considered likely that Nixon will bring one or more lawsuits challenging any public-access laws.

In addition, the materials — some 42 million documents and 330 tape recordings — must be screened by archivists, with purely personal materials taken out and

Back Page Col. 4

From Page 1

returned to the former President and Mrs. Nixon.

Leon Friedman, a Hofstra Law School professor who represented a group of writers, historians and civil liberties advocates, said yesterday that it could be three to four years before anyone outside of the government gets a look at the materials.

The court still has pending another case that may ultimately provide quicker public access to at least some Nixon tapes — the recordings that were used as evidence in the Watergate coverup trials. In this case, Nixon has appealed to the Supreme Court from a lower court ruling that these tapes may be reproduced, broadcast and sold to the public in the form of records.

The court, which ends its current term today, will hear arguments concerning these tapes during the next court year, which begins in October.

The broader significance of the case — what it may mean for other Presidents, for instance — is also somewhat unclear.

The Brennan opinion stressed the singularity of the case, noting that it arose in "a context unique in the history of the presidency."

Several justices who joined in the majority judgment sought in concurring opinions to stress the uniqueness of the case even more.

Justice John Paul Stevens said he agreed that Nixon was a "class of one." He thought so, he said, in part because of two factors that the Brennan opinion had left "unmentioned" — that Nixon resigned from office under "unique circumstances," and then had accepted a pardon for offenses committed while in office.

"By doing so, he placed himself in a different class from all other Presidents," Stevens wrote.

Harry A. Blackmun, who said he agreed with "much" of the Brennan opinion, and concurred in the judgment, wrote: "It is my hope and anticipation — as it obviously is of the others who have written in this case — that this act (yesterday's decision), concerned as it is with what the court describes as 'a legitimate class of one,' will not become the model for the disposition of the papers of each President who leaves office at a time when his successor or the Congress is not of his political persuasion."

Lewis F. Powell Jr. also wrote a concurring opinion elaborating his view that the law had both limited "justification" and "objectives."

Rehnquist, however, took the opposite view. In his dissent, he contended that "today's decision countenances the power of any future Congress to seize the official papers of an outgoing President as he leaves the inaugural stand."

He said that the ruling thus threatened the ability of future presidents to "receive candid advice and to give candid instructions," because of the inhibiting effect of the prospect that private communications might be made public.

"This result, so at odds with our previous case law on the separation of powers, will daily stand as a veritable sword of Damocles over every succeeding President and his advisers," Rehnquist wrote.

New York Times