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Supreme Court Decisions: Nixon Loses Bid to Control "the Tapes"

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public funds to encourage its own values, such as favoring childbirth over abortion. The Court said that the Connecticut regulation:

“... places no obstacles—absolute or otherwise—in the pregnant woman’s path to an abortion. An indigent woman who desires an abortion suffers no disadvantage as a consequence of Connecticut’s decision to fund childbirth; she continues as before to be dependent on private sources The State may have made childbirth a more attractive alternative, thereby influencing the woman’s decision, but it has imposed no restriction on access to abortions that was not already there.” 97 S.Ct. 2382-2383.

Connecticut’s regulation can be sustained under the “rational basis” test that applies in the absence of a suspect classification or the interference with a fundamental right; i.e. whether the legislative scheme rationally furthers some legitimate, articulated purpose.

The Court concluded that the Connecticut regulation meets the requirement that the distinction between childbirth and nontherapeutic abortion is rationally related to a constitutionally permissible state purpose. That according to the Court, is the protection of the potential life of the fetus by encouraging normal childbirth.

The Court cited *Roe v. Wade* as recognizing the state’s strong interest existing throughout the pregnancy, including the first trimester. The subsidy of costs related to childbirth, which are greater than the costs of a first trimester abortion, is a rational means of furthering the state’s interest. In *Dandridge v. Williams*, 397 U.S. 471, 475 (1970), the court held that classifications survive equal protection challenges when a “reasonable basis” for the classification is shown, despite a recognition that laws and regulations allocating welfare funds involve “the most basic economic needs of impoverished human beings. . . .”

Marshall’s dissent in *Beal* actually is a challenge to the Court’s holding in *Maier*. Marshall calls for a new equal protection analysis, which would weigh three factors: the importance of the governmental benefits denied, the character of the class, and the asserted state interests.

The Court in *Maier*, however, refuses to engage in a weighing and balancing of benefits, class characteristics and strength of state interests. Rather, the Court stated that “[w]hen an issue involves policy choices as sensitive as those implicated by public funding of nontherapeutic abortions, the appropriate forum for their resolution in a democracy is the legislature.” 97 S.Ct. at 2385-2386.

Nixon Loses Bid To Control “The Tapes”

by Charles F. Chester

In *Nixon v. Administrator of General Services*, 97 S.Ct. 2777 (1977), the Supreme Court decided by a vote of 7-2 that it was necessary to prevent a president from concealing information of interest to the public simply because the information would reveal embarrassing yet truthful facts about him. By sustaining the constitutionality of the Presidential Recording and Materials Preservation Act (PRMPA) 44 U.S.C. §2107, the Court has taken a positive step in the direction of curbing the abuse of presidential power.

The PRMPA was the congressional reaction to an agreement between a former president, Richard M. Nixon and a former General Services Administrator, Arthur F. Sampson. They agreed that General Services Administration would possess the infamous “Nixon Tapes”, but that Nixon would retain all property rights to them. One of these rights was to have the tapes destroyed at Nixon’s will, upon his death, or by September 1, 1984.

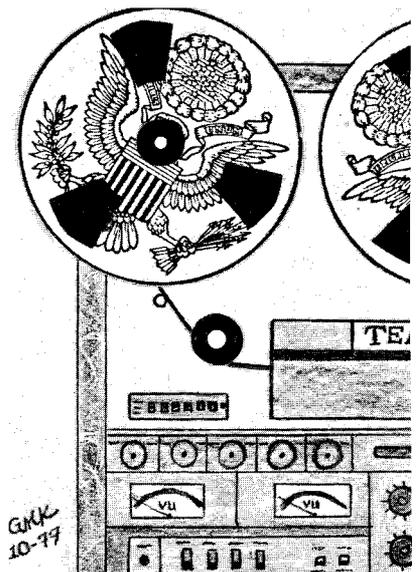
Congress, disturbed by this prospective and arbitrary power reserved for Nixon, passed legislation to control custody of 42 million pages of documents and 880 reels of tape. The PRMPA provides for a screening process by which materials of a personal nature would be returned to Nixon

and those of historical significance would be released to the public. The destruction of a President’s materials is prohibited and specific items necessary for judicial proceedings are subject to subpoena.

Although a president still had the right of access to his materials, Nixon wished to retain full control over his presidential materials.

Nixon sought declaratory and injunctive relief and enforcement of his agreement with the GSA in the District Court for the District of Columbia. The district court dismissed his case and the decision was affirmed by the U.S. Court of Appeals for the District of Columbia.

In response to Nixon’s claim that he was being unlawfully deprived of constitutionally delegated executive powers, the Supreme Court decided that Congress did have the authority to pass legislation affecting the disposition of presidential materials. The opinion acknowledged that Nixon retained the full executive control to which he was entitled because the release of any tapes is subject to “any legally or constitutionally based right of privilege.” In the Court’s opinion Congress was not attempting to gain any new authority or take away any legitimate presidential powers. The legislative intent of the PRMPA was held to be the protection of the public’s right to know the truth about Watergate and the restoration of public confidence in government.



Once again the Court refused to recognize an absolute and unqualified executive privilege in a president. To allow such a privilege would have permitted Nixon to withhold tapes from judicial officers which would roadblock the legal proceedings connected with Watergate.

The opinion distinguished legitimate constitutional privileges relating to military, diplomatic, and national security from mere political expedience. The Court found that most of the presidential materials related more to a public interest in Watergate than to national security or diplomacy. The Court's disbelief in Nixon's claim for executive privilege covering all the materials was bolstered by his demonstrated lack of personal familiarity with all but a few of his presidential materials.

Since the bulk of the recordings and papers related to executive activities in which the public had an interest, the Court found that the tapes were not solely of a personal nature and therefore could not remain under Nixon's exclusive control. The Court agreed that had the former president's materials been of such a type, unrelated to Nixon's public activities, their removal from public scrutiny would be justified.

Conceding that Nixon's privacy deserved some legal protection, the Court believed the PRMPA provided adequate safeguards. Under the Presidential Recordings Act, the materials of former presidents are subjected to screening procedures by government archivists. After screening, purely private information is to be returned to the chief executive and cannot be publicly disseminated. Even Nixon's brief acknowledged how limited the privacy interest of a public official would be in citing *New York Times v. Sullivan*, 376 U.S. 254 (1964), which holds that any individual entering public life voluntarily surrenders some rights of privacy.

With a touch of irony, Nixon, who advanced his early political career by denouncing the Communist Party, relied upon cases brought by members of the Party in his own Fourth Amendment argument. These cases were brought in response to unreasonable government searches of Communist Party members'

homes for extra evidence, unrelated to the offenses with which they were charged.

The Court was not persuaded by the argument that the net effect of the PRMPA amounted to an unreasonable search and seizure of Nixon's property. Under the Act, the scope of the archivists' search and investigation must be restricted. Nixon had stated an alternative of screening a president's materials via judicial review, but the court stated that this would subject him to *greater* public scrutiny.

Nixon's claim that the PRMPA violated his First Amendment rights was also rejected. He claimed the Act restricted his freedom to participate freely in political activity, would hamper his ability to speak freely, and would prohibit him from taking inconsistent positions. The Court expressed confidence in the screening process of the PRMPA and, in his concurring opinion, Justice Powell observed that the original District Court decision recommended actual involvement by Nixon in that process.

Finally, Nixon urged the Act violated the Bill of Attainder Clause. He equated the legislation with the rendering of a guilty verdict and with subsequent punishment without the benefit of a trial. The Court admitted that Title I of the Act was created specifically to control Nixon's materials, but, the Court was quick to add that Title II dealt with recommendations for future presidential materials. Title I was not considered punishment in the traditional sense, since Nixon could still have access to his materials. After reviewing the Congressional committee reports, the Court concluded that the legislative intent was merely to negate the Nixon-Sampson agreement and not to punish Nixon.

Undaunted by this legal setback, Nixon will have yet another case argued before the Court this term. The issue will be whether his presidential tapes, especially those involving the Watergate coverup, may be broadcasted over the airwaves for public consumption.

Hugo Zacchini: Flying In The Face Of Press Privilege

by Andrew S. Katz

Carnival entertainer Hugo Zacchini found that even a man who earns his living by being shot from a cannon can have redress of his legal grievances in the nation's highest court. The United States Supreme Court, by narrowing the scope of news media privilege provided by the First Amendment, gave the "human cannonball" a second chance to seek damages for a tortious appropriation of his performance in *Zacchini v. Scripps-Howard Broadcasting Co.*, 97 S.Ct. 2849 (1977).

Zacchini's appearance as petitioner in the case arose from an incident occurring in August, 1972. He was then engaged to perform his "human cannonball" act on a regular basis at the Geagua County fair in Burton, Ohio. A freelance reporter for a local television station filmed the 15-second act, which involved Zacchini being fired from a cannon into a net some 200 feet away. Prior to the performance the reporter was warned by Zacchini not to make the film. The film clip was shown that evening on the 11 o'clock news, accompanied by favorable commentary.

The performer subsequently brought an action in state court for damages against the station's operator, Scripps-Howard Broadcasting Company. His complaint alleged that the carnival act was "invented by his father and . . . performed only by his family for the last fifty years . . .," that the Broadcasting Company "showed and commercialized the film of his act without his consent . . ." and that this conduct was an "unlawful appropriation of plaintiff's professional property." 97 S.Ct. at 2851. The defendant's motion