

The President and the Tapes (Cont.) Post 9/23/73

In virtually identical letters, Special Prosecutor Archibald Cox and presidential lawyer Charles Alan Wright have informed the Court of Appeals that despite "sincere efforts" to reach a voluntary agreement on their controversy about the subpoenaed White House tapes, no settlement was achieved.

Thus, the Court of Appeals, having heard oral arguments and having been fully briefed by the parties, must now face up to the hard constitutional questions at the heart of the impasse between the President and his special prosecutor. Without attempting to forecast the judgment which the court will ultimately make, it is perhaps not inappropriate to comment at this point on one or two of the arguments advanced in the President's behalf.

The core of the President's argument all along has been that he must withhold the requested tapes in order to preserve the integrity of the presidency. "To tear down the office of the American presidency is too high a price to pay, even for Watergate," was the way his lawyers put it in their latest brief. The brief also asserts, "the constitutional crisis that the press professes to see in this case is not of the President's making. He issued no subpoenas . . . It was the insistence of the special prosecutor and the Senate committee . . . that has brought this case here."

Somehow that stands the matter on its head—or so it seems to us. The President set the tone of his administration. Men he chose to help him govern and to run for office made the decisions and took the actions which eroded the moral core of this particular presidency and gave us what has come to be called Watergate—which gave us, in turn, the Battle of the Tapes. The Committee for the Re-election of the President did, after all, direct and finance the Watergate burglary. Men in the White House did instigate and participate in the burglary of Dr. Ellsberg's psychiatrist's office. An employee of Mr. Nixon's re-election effort is now in jail and another awaits sentencing. Two former White House officials have admitted under oath that they committed crimes. Two of Mr. Nixon's closest White House aides have been forced from office under a cloud. Two of his former cabinet officers and three former White House employees have been indicted for felonies and are fighting not simply for the remnants of their reputations, but for their very freedom. There has been much more. And there is more still to come.

So, it is not very useful for the President to argue that he did not precipitate the constitutional crisis or to argue that the most solemn business before him is to draw a majestic cloak of confidentiality around his White House transactions. We would agree that the President should be concerned about the tattered state

of the presidency. But since that condition came about because of actions taken by men to whom he entrusted power and who were acting in his name, it seems to us he has some responsibility, if only out of consideration for the integrity of the office he holds, to take forceful affirmative actions to restore faith in that office, rather than to propound constitutional arguments, no matter how deeply believed, that seem to perpetuate the aura of secrecy and evasion in which all of those wretched events occurred in the first place.

In that regard, it is more unfortunate that Mr. Nixon's lawyers could not reach a voluntary accommodation with the special prosecutor as proposed by the Court of Appeals. An accord, reached without judicial compulsion would have done much to change the atmosphere. Instead, we have Mr. Nixon's lawyers arguing that to let the court look at evidence from which it might conclude that the President had committed a crime—this prospect is projected hypothetically into the future in Mr. Nixon's brief—would be intolerable. "The President," the brief continues, "would stand condemned in the eyes of the nation without any of the safeguards that even the humblest citizen enjoys before he may be branded as a criminal."

Again, the President's lawyers have turned the whole thing upside down. It is the humblest citizen's duty to obey the law. It is the President's to uphold it. That is what he has sworn to do. Yet, the President has maneuvered himself into a position where he is refusing to take those steps which could restore faith in his own integrity and in his concern for justice. Worse, he has put himself in the position of appearing, at least, to be impeding those very processes of justice which he is called upon by the Constitution to advance and uphold. The impact of his decision to fight the constitutional issue of his "executive privilege" could extend far beyond the few tapes Mr. Cox has requested; his fight, in fact, has already expanded as a result of the subpoenas issued on behalf of Messrs. Mitchell and Stans for evidence which they think is material to their defenses in the Vesco case. More such subpoenas are sure to come. Although it is not a legal certainty, it is arguable that Mr. Nixon's position could result in the dismissal of a number—if not all—of the Watergate prosecutions.

Thus, in practical terms, if not in strictly legal terms, Mr. Nixon is gravely complicating the very process which offers the greatest hope of restoring the moral and political authority of his office and repairing the damage of Watergate. It is a curious way for him to go about achieving his professed objective of preserving the sanctity and the integrity of his office for Presidents yet to come.