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The Limitations of Judicial Review

United States v. Nixon is truly one of the great decisions of the Supreme Court. It reaffirms our constitutional commitment to the rule of law.

"The King," said Lord Coke, "is under God and the law." "The President," said Chief Justice Burger, "cannot prevail over the fundamental demands of due process of law." And, to emphasize that a President, like any citizen, is subject to the laws' commands, the Chief Justice went on to say, quoting Chief Justice Marshall in *Marbury v. Madison*, "we therefore reaffirm that it is 'emphatically the province and the duty' of this court 'to say what the law is.'"

It is the awesome power of judicial review of executive and legislative actions which the court rightly exercised in *United States v. Nixon*. In applauding the exercise of this power, as I do, it is perhaps appropriate however, in Watergate's aftermath, to emphasize its limitations.

The Court is the final arbiter of the law; it is not the repository of the power to resolve all of the many other grave problems confronting us. Belief in judicial review does not compel adherence to the cult of the robe.

The pervasive belief that judicial law can fundamentally change our social and economic institutions is evidenced by the flood of young men and women to our nation's law schools and the creation of new law schools. This reflects commendable idealism and does give the bar new voices that should be heard. It is necessary, however, to bear the limitations of the judicial process in mind. Judicial law can help us mend our ways to ensure compliance with valid laws and regulations and greater observance of the bill of rights — matters of transcendent importance. It cannot, however, establish social and economic justice by itself.

Directing compliance with a subpoena, even one directed against a President, is one thing — this is judicial stuff; coping with our nation's economic, social and foreign ills is another.

The Court can do nothing about in-

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flation and unemployment; it is up to President Ford and Congress to seek the remedy. Yet, the consequences of the failure to curb inflation and check unemployment may be even more menacing to our democratic institutions than the clear danger to them of Watergate. The fate of the Weimar Republic is a stark example. And at this very time the future of democratic government in several European countries is threatened more by inflation than by Communist subversion.

The Court cannot solve our energy crisis. Only the Executive, Congress and the people can.

The Court cannot negotiate SALT II or prevent nuclear proliferation. But our very survival depends upon staying the hand of the nuclear clock, now inexorably advancing to midnight.

The list of our domestic and foreign problems is staggering. These primary examples, however, illustrate my thesis.

There was a time when the Supreme Court attempted to intervene in the resolution of the nation's economic problems during the 1930s. Its attempt to veto President Roosevelt's anti-Depression measures almost resulted in national disaster, prevented only by self-correction on the Court's part. Fortunately, all members of the present Court, regardless of which President appointed them, would surely agree that the remedy for our domestic economic woes and foreign travails is the sole province of the executive and legislative branches of government.

Even in the area of the Court's demonstrated competence, as the ultimate guardian of our fundamental rights, the Court alone cannot ensure the preservation of our liberties. Judge Learned Hand once observed that "a society so riven that the spirit of moderation is gone, no court can save; that a society where that spirit flourishes,

no court need save." This rather overstates the case. The Supreme Court has acted on many occasions, and most in *United States v. Nixon* needs to be the moral conscience of the nation and, to quote one of Justice Hugo Black's last opinions, as a "palladium of liberty" and a "citadel of (equal) justice." But the Court, lacking the power of the purse and the sword, cannot preserve our liberties if the people are indifferent to them, as they seemed to be for many months about Watergate, until a vigilant press and an aroused Congress alerted them that their very freedoms were in jeopardy.

A nation rightly euphoric about the Court's courageous exercise of power in *United States v. Nixon* needs to be reminded of its limitations. This in no way denigrates the role of the Court. Rather, it emphasizes the duty of the executive and legislative branches of the government to exercise their power and responsibility to act with equal courage and responsibility to cure the nation's economic and foreign policy ills. There seems to be a broad consensus that the anti-inflation program that President Ford set forth in his message to Congress is hardly the prescription for our economic malady.

In *United States v. Nixon*, the Court, without extraneous considerations, did its duty. Now, it is the time for the President and Congress, without regard to political consequences or special interests, to do theirs.