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Courts: Above the Law?

The Watergate affair has already shown itself to be so versatile a scandal that if offers something for everyone to deplore. But when the list of horribles is finally drawn, perhaps the ultimate horrible may be the capacity of this particular scandal to pervert and strain institutions. This has, of course, already been noticed in relation to the presidency. It has passed unnoticed in relation to the judiciary.

For the moment, Judge Sirica is a near-hero, a David, armed only with the Corpus Juris, standing off a Goliath not merely powerful but sinister and disingenuous as well. If he orders production of the tapes, well and good. If he subpoenas the President's private secretary, even better. Perhaps he will end by issuing a testimonial subpoena to the President himself. After all, no man is above the law.

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The question, of course, is what that law is and ought to be. When we ponder the implications of the tapes litigation for our institutions, we may well wonder what the courts have brought us.

Consider, for example, the paradoxical positions of many who have cheered the courts on in this encounter, positions that can only be explained in terms of whose ox was being gored. In the aftermath of the Cox firing, many urged Judge Sirica to fill the void, putting a prosecutor at the service of the grand jury. Not long ago, when journalists and scholars were on the receiving end of its attentions, the grand jury was fast becoming the bugbear of American institutions. In those days, a claim of privilege from disclosure was an honorable plea, and the courts were petty institutions staffed by small men thwarting a free press. When the subpoena goes to an unpopular President, the grand jury becomes an instrument of democracy, the judge a statesman, and the claim of privilege no more than a shield for criminality. The public has a right to every man's evidence.

Perhaps the most serious paradox is the one created by the two courts that passed on the tapes case, for it affects the integrity of their own procedure. What may be privileged and what may be disclosed is to be decided, said the Court of Appeals, by an *in camera* (in chambers) inspection of the tapes. "In case of appeal," the court promised, "this Court will provide for sealed records and confidentiality in presentation" — in other words, a secret appeal.

And so we were to have disclosure by secrecy — hardly a procedure calculated to inspire confidence in the process by which that decision was to be made, and this not merely because it takes place out of public view but because it might also take place out of the view of one party to the case, namely the prosecutor seeking the evidence. If he is excluded from the inspection, he obviously finds it difficult to meet the arguments of those in possession of the evidence, since he does not know what he is missing. If the prosecutor is present, the President's lawyers cannot be expected to argue fully the case against disclosure if this requires them to disclose to the prosecutor the very contents of what they seek not to disclose. And if, in the interest of candid argument, the prosecutor is temporarily excused from the proceedings so his opponent may speak freely, what has become of the adversary process on which the courts rightly pride themselves?

The Court of Appeals seemed inclined to obviate this problem by suggesting that the prosecutor might be entitled to full participation in the inspection. This, of course, is no solution whatever, for while his participation would undoubtedly aid the court in judging the relevance of the evidence for the grand jury, disclosure to him is a substantial breach of the privilege whose validity it is the purpose of the hearing to establish. As a matter of fact, the Supreme Court has recognized that *in camera* inspection, even by a judge, impairs the "open expression of opinion as to governmental policy," and it has sought to limit the use of the *in camera* technique.

Now all of this would be quite academic at this point — the President having thrown in the tapes, as it were (or most of them) — were it not for two potentially enormous consequences of this decision.

First, the confidence reposed in the courts rests in no small measure on public reverence for their procedure. "A day in court" has come to mean an open hearing in which all arguments can be heard and the outcome is not foreordained. When courts debase their procedure, even in a good cause, they squander the currency their confidence is made of.

Rather than sanctifying a bastard procedure like *in camera* inspection, it would be far better to judge claims of executive privilege as claims of self-incrimination are judged, without requiring disclosure of the evidence itself. When the Fifth Amendment is invoked in response to a question, there is no *in camera* hearing to determine whether the answer really would be incriminating. If the court is satisfied from the implications of the questions and from the circumstances that an an-

swer might be incriminating, the privilege is upheld. If this procedure were followed in executive privilege cases, some valid evidence might be lost, even evidence of crime. But it is equally lost in Fifth Amendment cases. This is in fact the procedure laid down by the Supreme Court 20 years ago in the *Reynolds* case, a decision that the Court of Appeals in the tapes case chose to read in a rather perverse fashion.

The second consequence relates to the long-term outlook for the powers of the presidency and the judiciary. The courts have now punctured an-

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other hole in the confidentiality of an already leaky executive branch. They have overruled a blanket claim of privilege which, it is safe to say, would have been upheld under almost any other circumstances. They did so despite the availability of other evidence on the same matters, and despite the vaunted ability of the judicial system to resolve conflicts of testimony by judging the relative credibility of the witnesses. The decision is another step on the way to depriving the President of the candid advice that many students of the presidency have said that Presidents are already sorely missing.

As for the courts themselves, they have met the presidency and humbled it. They are more popular institutions than they or we might have thought. Will there be a spillover? Will the courts venture now into previously forbidden areas, confident of their "mandate"? We have had some unhappy historical experiences with judicial arrogance, most notably during the New Deal period. We may well be in for some more.

That this President, by some unique combination of culpability, cynicism and unwisdom, has brought us to this pass I do not doubt for a moment. This *was* an exceptional case. But that is exactly why the "lessons" that emerge from it are likely to be well-remembered. If those who speak to a President say even more banal things to him as a result, isolation and arrogance at the pinnacle may become even more endemic. If the courts assume that they can take on any task or anyone, we may be in for less representative government than we are entitled to. The case was exceptional, but no case is above the law.