*George F. Will*

# The 'Guidance and Judgment' of the Constitution

James St. Clair and his client are caught in a logical cleft stick. They will try to escape by splintering the logic of the Constitution.

In arguing that Mr. Nixon should be immune from judicial compulsion (specifically, immune from a court order for him to surrender Watergate evidence that the prosecution says it needs for trials of his indicted co-conspirators) Mr. St. Clair has emphasized a particular description of the President. But that description only serves to demonstrate that Mr. Nixon is subject to judicial compulsion.

Mr. St. Clair emphatically rejects the notion that Mr. Nixon is merely "the head of the executive branch." He insists on the peculiar language of an 1867 Supreme Court decision stating that "the President is the executive department."

Chief Justice Chase said in Mississippi v. Johnson:

"The Congress is the legislative department of the Government, the President is the executive department. Neither can be restrained in its action by the judicial department; though the acts of both, when performed are, in proper cases, subject to its cognizance."

*William Raspberry is on vacation. His column will resume on his return.*

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Whatever Mr. Chase meant, he could not have meant quite what he said.

He knew that in Marbury v. Madison (1803) the Court restrained Congress, declaring an act of Congress unconstitutional. And the next time the Court did that the consequences were especially memorable. It was in 1857, Dred Scott v. Sanford.

Moreover, recent American history provides a vivid example of judicial restraint of the executive branch.

In 1952, with the Korean War raging, President Truman, in an attempt to prevent a nationwide steel strike, directed his Secretary of Commerce to order seizure of most steel mills. Mr. Truman had no statutory warrant for this, but he insisted that it was an exercise of a power implied by the authority vested in him as commander-in-chief.

But an injunction stopped the Secretary from executing his order, and the Supreme Court affirmed the injunction.

The court did not deny that a President possesses implied powers in addition to the powers the Constitution specifically grants to him in the field of national security. But the Court clearly affirmed the principle that the Court is the final arbiter of what those powers are, and how they may be exercised.

If Mr. St. Clair had not been so insistent about saying that the President "is" the executive branch, he at least could try to argue that the Court merely sustained an injunction against a Secretary of Commerce, and hence there was no judicial compulsion of a President. But having insisted that the President "is" the executive branch, Mr. St. Clair can hardly deny that when the Court compelled Mr. Trumans' agent, the Secretary of Commerce, it compelled Mr. Truman.

However, reasonable consistency is not the hobgoblin of devious minds, so Mr. Nixon will not feel bound by the logic of the argument his lawyer has used up to now. My guess is that he has a novel constitutional theory to justify his planned defiance of the forthcoming Supreme Court decision requiring him to surrender the evidence.

Look for him to say the following.

Although the President controls the executive branch, the presidency has evolved "necessarily" (you know: the nuclear age, our complex society, and all that) into a free-floating extra-constitutional fourth branch of government.

Mr. St. Clair hinted at this rationale for defiance when Justice Thurgood Marshall twice challenged him to say that Mr. Nixon was submitting the dispute about evidence to the Court for a "decision." Mr. St. Clair carefully responded that Mr. Nixon was submitting the dispute to the Court only for the Court's "guidance and judgment" regarding the law.

And he added: "The President, on the other hand, has his obligations under the Constitution."

"On the other hand"? This suggests that Mr. Nixon will say that the Court only makes binding decisions regarding the three lesser branches of government, and that Court opinions are no more than advisory whenever a President designs to send his lawyer to seek the Court's "guidance and judgment."