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Common Sense and the Constitution

In the Watergate tapes case, the U.S. Court of Appeals for the District of Columbia Circuit has acted like a court of original jurisdiction in an automobile accident case. The court suggested that the parties get together and try to settle the matter privately. It was a simple move that made a great deal of sense.

Special Prosecutor Archibald Cox, acting for the grand jury, is asking for tapes of certain specified meetings and conversations which the President had with a number of the principals in the Watergate affair on the ground that they shed light on confessed and alleged criminal behavior. The clear concentration on a criminal investigation and a request for evidence which would shape eventual prosecutions, Mr. Cox has argued, excepted the subpoenaed evidence from any privilege the President might assert. In the lower court, the President's lawyers argued flatly that any intrusion whatever into communications which the President deemed private would violate the scheme of the Constitution and would cripple the presidency. When they got to the appellate court, the President's lawyers modified that argument a bit and urged the court not to force a constitutional confrontation, but rather to leave the matter to the President's good judgment.

Judge John Sirica, in his lower court decision, allowed that the privilege which the President asserted did exist, but ruled that its application in any specific case had to be determined by the courts, not by the President alone. This was a moderate view which sought to avoid the harsh constitutional clash which was threatened by the uncompromising and unaccommodating character of the President's initial approach to the controversy.. The modified position presented by the President's lawyers on appeal appeared to be a signal that the White House had acquired an interest in something other than a head-on clash.

From all appearances, the Court of Appeals has heeded that signal by giving the parties—the President or his designee and his lawyer, Professor Charles Alan Wright, on the one hand, and Special Prosecutor Cox, on the other—a chance to come to agreement among themselves before the court is forced to an ultimate decision. Such a course, if adopted by the parties, would be in accord with the traditional constitutional practice of accommodation to avoid stretching the Constitution to intolerable limits.

The court noted, appropriately, we think, the eminence of the principal lawyers involved. They know how dangerous it is to play the game of chicken with high constitutional principles. Thus, in urging the parties toward compromise, the Court of Appeals may not have enunciated great constitutional principles. It did, however, exhibit a good deal of wisdom—in attempting to find a solution which would enable the parties to live within the Constitution without ripping it apart. The court has made it clear that it will not shirk its duty to decide the hard questions if it is pushed to do so by the parties. For our part, we think the wisest thing for all concerned would be to take the opportunity the court has afforded them for an accommodation in the spirit with which the Constitution was brought to life.