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A Government of Laws

Americans recite almost by rote that ours is a government of laws and not of men. This notion evolved against a background of a government being designed with the reign of King George III clearly in mind and with the strong desire of Americans no longer to be governed by one man's whim. Thus, the framers of the Constitution developed a governmental framework that included a loose and flexible scheme of laws covering all governmental institutions, and including checks and balances and separation of powers. They were men who understood compromise. The charter they bequeathed the nation was born of compromise, and it envisioned continuing flexibility and compromise throughout the turbulent life of a new nation.

By and large, that is how our constitutional system has worked throughout the nation's history. Statesmen have understood and revered the rule of law and have also understood the necessary imprecision of many of our governing doctrines. Compromise and accommodation within the spirit of the Constitution and the framework of the law have been the inspired genius of the American system of government and give and take has been the lubricant of the wheels of government. Constitutional showdowns at high noon have been avoided because of the dangers they pose to a delicate system.

In the early stages of the Senate Watergate hearings, this traditional way of doing governmental business in America was on display. The President retracted his sweeping assertions of executive privilege and permitted his former aides to testify fully before the committee. The committee, for its part, though obviously most anxious to hear from the President himself, made only the most gentlemanly and oblique suggestions as to how that might be accomplished. Then, on July 6, the curtain started to come down. Mr. Nixon informed the committee that he would not testify and also indicated his intention to keep presidential papers inviolate. Even then, however, a spirit of accommodation was discernible. The President agreed to meet with Sen. Sam Ervin to discuss the matter of the papers. But that was before Alexander Butterfield's startling revelation about the Nixon tapes. After that, the accommodating spirit of the Constitution seems altogether to have disappeared from the White House strategy.

A close examination of the President's response to the subpoenas shows just how far from that spirit Mr. Nixon has moved. If the President had chosen to move to quash the District Court's subpoena rather than to send a letter flatly rejecting the writ, he would have been sending a tacit signal that although he disagreed with the court's assertion of authority over his papers, he understood that a controversy—even involving presidential papers—was subject to the rule of law. Instead, he asserted that just as he can't tell the courts what to do, the courts have no right to "compel some particular action from the President."

In addition to spreading confusion about the differences between the judicial and the executive functions of government, that statement comes very close to an assertion that certain aspects of the presidency are apart from and above the rule of law. It is clearly outside the executive function to tell the courts what to do. It is, however, the function of the courts to adjudicate disputes involving, among other things, American institutions—including a presidency that was conceived in and deliberately subordinated to the Constitution of the United States and the laws flowing from it.

Professor Charles A. Wright's later clarification that the President would abide by a "definitive" ruling by the Supreme Court gave additional evidence of a hardened White House position. Since no one knows how the White House defines the word "definitive"—presumably that definition will be made and applied after the Supreme Court rules or declines to review the case—we have been put on notice that Mr. Nixon is reserving the right to decide for himself whether to obey the Constitution and the laws of the United States as interpreted by the courts.

We have already expressed the view in this space that Mr. Nixon's decision to withhold the relevant tapes and papers from the Senate committee and from the special prosecutor was a mistake in terms of the immediate Watergate issues. The hints about the White House's emerging legal position portend an escalation of that mistake into a genuine distortion of our constitutional scheme. It is keenly to be hoped that Mr. Nixon will reverse this course, as he did his original position on executive privilege.