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Presidency Under Law

The court arguments in Washington last week over the availability of the disputed Presidential tapes for use in the Watergate criminal proceedings have put this crucial issue into sharp focus.

Charles Alan Wright, appearing as lawyer for President Nixon, told Chief Judge John J. Sirica that the President was the sole judge of whether such White House records should be made available and that no court had a right to substitute its judgment for the President's, particularly when there was a risk of revealing important national security information.

And, he added, the information on the tapes is so sensitive that the President did not even feel free to hint to him—his lawyer—what it is about. In this connection it should be recalled that the information was, however, not too sensitive for the ears of H. R. Halde- man, even after he left White House employ.

Archibald Cox, the special Watergate prosecutor, argued that the grand jury needs the *relevant* sections of the tapes—thus making it plain that national security matters could be screened out. He deemed the tapes essential because there is "strong reason to believe that the integrity of the executive office has been corrupted."

Throughout his presentation, Mr. Cox adhered to the central theme that "not even a President can be allowed to select some accounts of a conversation for public disclosure and then to frustrate further grand jury inquiries by withholding the best evidence of what actually took place." In short, the President is not above the law.

The dispute thus has narrowed dramatically to the question whether the President does in fact enjoy absolute powers—powers which would render the executive branch superior rather than co-equal with the judiciary and Congress. For if Mr. Nixon, simply by pleading national security on the basis of nobody's word but his own, is empowered to withhold evidence on alleged corruption and wrongdoing by high officials, then he is above the law, except for the extreme step of impeachment. From such a position, in turn, would flow powers clearly incompatible with democratic government.

Mr. Wright appeared painfully aware of the horrendous implications of an "I am the law" Presidency. "We have not suggested and do not contend in any way," he argued, "that the President is above the law" but rather "that the office of the Presidency is treated differently under the law . . ."

Most Americans will undoubtedly agree that the President enjoys and requires a wide range of powers *under the law*; but it would be dangerous to accept the proposition that any high official, including the President, should be *treated* differently under the law. Such a view, when combined with the doctrine that the President alone is to be judge of whether he may withhold relevant evidence—relevant to the investigation of alleged crimes, not to matters of national security—is tantamount to placing the President above the law. Mr. Wright himself has left no doubt that this is an unacceptable proposition. Yet, it is the proposition under which the tapes are being withheld.

Throughout the Watergate affair, Mr. Nixon has made much of the need to protect the Presidency from irreparable harm. Whatever risks for the concept of Presidential privacy may reside in the selective submission of specific tapes are slight when measured against the harm that will surely be done to the Presidency if suspicions are allowed to linger over the White House.

These suspicions inevitably feed on the President's insistence that he wants the Watergate scandals to be dealt with by the courts, even as he retains for himself the sole right to determine the evidence appropriate for court action. Mr. Cox said all that needs saying about that when he told Judge Sirica: "If he [the President] wants to leave this matter to the courts, he should leave it to the courts. If he wishes to dismiss the case, if he has the power, he should exercise it, and the people will know where the responsibility lies."