

The Nixon Brief ^{MT} 8/9/73

At the heart of the Watergate controversy are the charges of John W. Dean 3d, former White House counsel, against President Nixon. Mr. Dean has testified that the President was aware last Sept. 15 that senior White House aides were engaged in a cover-up of the Watergate burglary and that the cover-up included the suborning of perjured testimony by Jeb Stuart Magruder and others, the destruction of documentary evidence, the payment of "hush money" to silence the Watergate defendants and, subsequently, a promise of executive clemency to those same defendants if they did not reveal the involvement of high-ranking officials of the Nixon Administration.

Mr. Dean's charges have been corroborated in part but not conclusively by the testimony of other participants in the Watergate cover-up. It is possible, though by no means certain, that conclusive proof could be found in the tapes of Presidential conversations which are now the subject of legal dispute.

The extraordinary character and seriousness of the Dean charges have to be borne in mind in any analysis of the brief submitted in the President's behalf by his attorneys. No comparable charges of criminal wrongdoing have ever been leveled against any previous Chief Executive. This case is unique in American history.

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If the President's attorneys were making a claim of executive privilege in ordinary circumstances, their brief would be persuasive. Executive privilege is usually asserted to protect conversations or documents relating to whether a President should approve the building of a dam, the granting of an airline route or the appointment of a particular individual to a job, or whether he should sign or veto a pending bill, approve or reject a budget request or put forward certain ideas in a forthcoming speech.

In these or any other of the thousands of details which come before a President in his conduct of the business of his office, confidentiality is desirable and sometimes essential. But that cannot be sound constitutional practice where a President has knowledge of crimes or is himself suspected of participation in a crime. In those

circumstances, his highest duty is to make his evidence available to the prosecutors and the grand jury.

The President's attorneys assert that his withholding of the tapes will not defeat the prosecution of his aides who may have committed crimes because other evidence is available to the prosecutors. "But the President has concluded," the brief adds, "that even if he should be mistaken about this in some particular case, the public interest in a conviction, important though it is, must yield to the public interest in preserving the confidentiality of the President's office."

The Supreme Court may well conclude that confidentiality is not to be valued so highly. It strains credulity for the President's attorneys to argue that if the tapes are made available, "the damage to the institution of the Presidency will be severe and irreparable. The character of that office will be fundamentally altered." On the contrary, the unique character of the Watergate case virtually insures that any damage to the Presidency from the breaching of normal confidentiality would be superficial and transient. No far-reaching precedent would be set. Even in the context of Watergate, it requires an extremely cynical and despairing view of the future of American Government to believe that felonies would often come to the personal knowledge and attention of a President.

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If the President is himself criminally involved, it does not suffice to argue—as Mr. Nixon's attorneys do—that he "is liable to prosecution and punishment in the ordinary course of law for crimes he has committed but only after he has been impeached, convicted, and removed from office." How could he be impeached if tapes are the best evidence or even the sole evidence of his crimes but he will not release those tapes?

The correct course in this matter remains what it has been from the outset. That is, the President should release the tapes to the trial judge who would hear them in secret and then decide whether all or part of them should be released to the special prosecutor. No other course of action can now satisfactorily resolve this dispute and halt the ever-growing damage to the office of the Presidency and the public life of this nation.