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King George III and the Nixon Tapes

When all the citations of Supreme Court cases, the Federalist Papers and learned legal commentators are boiled out of it, the dispute put to Judge Sirica by Special Prosecutor Archibald Cox and White House Counsel Charles Alan Wright comes down to a question of the extent to which the presidency is circumscribed by the Constitution and the laws of the United States. The outcome of this case may profoundly affect the nature of our democracy long after questions of who said what to whom in the oval office on March 21, 1973, have receded from memory.

The case will almost certainly go to the Supreme Court and if the court decides on the merits, Americans will have a substantially clearer notion of what the powers of the presidency are and what they are not, even if such clarity may not be altogether desirable under our scheme of government. If the court does not decide the merits of the issues, but disposes of the case on procedural grounds, the enormous claims about the extent of presidential power asserted by Mr. Nixon and the limits on that power argued by Mr. Cox will still influence the give and take in debates on the powers of the presidency for years to come.

Mr. Cox subpoenaed nine tape recordings of telephone conversations or meetings the President had with a number of principal Watergate figures between June 20, 1972, and April 15, 1973, in an effort to assist the grand jury's search for truth about the Watergate crimes and coverup. In refusing to comply with the subpoena, the President has marshalled the full weight of the presidency and as much constitutional doctrine as his lawyers could extract from the country's basic charter in support of his position.

On its surface, the dispute is about the court's power to require presidential obedience to a subpoena on the one hand and the breadth of the executive privilege which is claimed to flow from the constitutional doctrine of separation of powers on the other. The shape of the more powerful issue lurking in the background was foreshadowed by Mr. Nixon's letter to Judge Sirica declining to obey the command of the subpoena. Mr. Nixon said he would not comply with the order of a lower court and his press spokesman clarified that statement a day or two later when he said that the President would comply with a "definitive" ruling by the Supreme Court —reserving, presumably, the definition of "definitive" to the President himself. The obvious question became whether Mr. Nixon was asserting that the President was a law unto himself.

Mr. Cox shot back his answers. His brief asserted that "even the highest executive officials are subject to the rule of law" and that "the President of the United States, like the humblest citizen, has an enforceable legal duty not to withhold from the grand jury material evidence the production of which the court determines to be in the public interest." While recognizing that a privilege does exist in some circumstances, Mr. Cox argues that White House conversations about a criminal conspiracy are not among them. In any event, he argues, it is for the court—not the executive—to determine whether the material is privileged after examining the disputed evidence.

Against this view, the President's lawyers argue that confidentiality of presidential conversations is essential to the effective discharge of the duties imposed on the Chief Executive by the Constitution. A judicial intrusion upon that confidentiality would violate the doctrine of separation of powers and cripple the presidency, they say. Moreover, they assert that the President's privilege to keep his conversations and records confidential is absolute in the sense that he has the unfettered authority to determine what is and what is not in the public interest to disclose. Mr. Cox does not argue the obverse of that coin—that there is absolutely no privilege—merely that the privilege is substantially more limited than the President claims it is.

Thus, the question as framed, pretty much asks the courts how much of the absolute authority of a monarch the framers of the Constitution meant to strip from the new office of the Presidency they were creating. Up to now this question has been shrouded in a useful kind of vagueness in which limits were assumed by Presidents and not pressed too hard by others. Recent events, notably the secret incubation of the Vietnam war and the Watergate crisis have changed some of that. The President and his lawyers by advancing arguments that amount to a form of Constitutional extremism have almost insured that some of that useful vagueness will be dissipated by the courts. Mr. Wright, arguing for the President, says that the people's only recourse for the abuse of the absolute power he claims for the President is impeachment. In his press conference on Wednesday, Mr. Nixon described the limits as "the limitation of public opinion and, of course, congressional and other pressures that may arise."

Mr. Cox disagrees. He argues that under our laws, no man may be the judge in his own case. He also cites a statement by Charles Pinckney, a member of the Constitutional Convention, to the Senate in 1800: "They, the framers, well knew how oppressively the power of undefined privileges had been exercised in Great Britain and were determined no such authority should ever be exercised here. No privilege of this kind was intended for your executive nor was any except that which I have mentioned for your legislature."

Mr. Wright agrees that the founders did not want a king, but he argues that the only check on the President is the practically remote and politically dangerous device of impeachment. That plus his assertion of absolute power in the President to decide what to withhold from public scrutiny does not take us very many steps down the road from King George. Whether, indeed, we have come further, as many of us have assumed over the years, is now up to the courts.