

By Anthony Lewis

WASHINGTON, July 7—When President Nixon chose Warren E. Burger to be Chief Justice of the United States, on May 21, 1969, he announced the choice at a televised White House ceremony. The nomination was the most important a President could make, he said. He explained in these words:

"Respect for law in a nation is the most priceless asset a free people can have, and the Chief Justice and his Associates are the ultimate custodians and guardians of that priceless asset."

Neither the President nor anyone else could have dreamt then that the justices of the Supreme Court would one day sit in judgment on a case that could determine the fate of his Presidency. But that one sentence of his, explaining the importance of the Court, well and strangely captures in its two clauses what the case of *United States v. Richard M. Nixon* is about.

Respect for law has all along been the issue, the connecting theme, in the series of events called Watergate. More particularly, the issue has been the duty of those who enforce the law to obey it themselves—the duty especially of the President, sworn as he is to execute the nation's laws faithfully.

The public has understood that theme and followed it through all the evasions and distractions: The efforts of the President's lawyers to weave between the criminal process and impeachment, the dawdling and faint-heartedness of Congress. Most Americans have recognized the danger to freedom in official defiance of the law.

The case now before the Supreme Court sounds the theme of duty to law, but it naturally cannot be resolved in terms of a generality. It bristles with specific issues, among them the role of the Court itself. And here we come to the second part of Mr. Nixon's prescient 1969 sentence.

There are those who object philosophically to the idea of Supreme Court Justices as "ultimate custodians" of anything. Prof. Philip B. Kurland of the University of Chicago Law School has recently denounced "the dogma of the cult of the robe"—the belief that the judiciary should be "the ultimate forum for resolution of every major political, economic or social question."

It is fair enough criticism that Americans, including judges, have often taken too grandiose a view of the judicial function. But the argument is stretched beyond history and common sense when used to attack the Supreme Court's role in the case of the President's tapes. In so using it Professor Kurland has strayed from the teachings of his mentor, Justice Frankfurter.

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Justice Frankfurter, and before him Justices Holmes and Brandeis, thought the Court most grievously abused its power in the first third of this century when it substituted its judgment for that of legislatures on social and economic matters—striking down a law against child labor, for example. They might have felt the same way in the recent abortion cases, for there again the justices dealt with an issue outside their own special competence and experience.

But the context of *U.S. v. Nixon* is nothing like that. The demand for White House tapes for use by prosecution and defense at a criminal trial raises, initially, questions of evidence and privilege and procedure—the stuff of familiar judicial business, not legislative policy decisions on matters remote from the courts.

Of course there is a more profound constitutional dimension to this case. Its novel questions of executive privilege really ask the Supreme Court to define one boundary of Presidential power. That is indeed an awesome

thing to put to judges, but hardly unusual for this Court.

The Constitution might have created a system of totally independent governmental powers, settling disputes among themselves by contention, but from the beginning it was not so understood. The branches exercised overlapping power. And the Supreme Court often resolved jurisdictional disputes, even ones of great political content, between the states and the Federal Government or two branches of the latter.

U.S. v. Nixon does involve politics, in the grand sense of the word. There is no denying that, or the subtlety of some of its problems. But more deeply the case concerns law—the high place of law in our society.

Justice Robert H. Jackson, himself a skeptic about judicial power, wrote that, whatever the Supreme Court's defects, Americans persisted in regarding it as "the most detached, dispassionate and trustworthy custodian that our system affords for the translation of abstract into concrete constitutional commands." The public is right to look to the Supreme Court still as the ultimate custodian of the priceless asset, respect for law.
