

Judge Sirica and Presidential Power

The order entered by Judge John Sirica commanding President Nixon to produce tapes of White House conversations for his examination, so that he can determine whether they are appropriate evidence for the grand jury which subpoenaed them or whether they are privileged as President Nixon claims, is a judicial event of historic proportions. It is one of those rare moments when strikingly different interpretations of a profoundly important constitutional concept clash head on and are arbitrated, not in theoretical texts or academic debates, but in the real world. Although Judge Sirica's order and opinion may be overturned or modified by appellate courts, the issue which he confronted—the constitutional nature of the American presidency—insures that his act will stand as substantially more than a footnote in American constitutional history.

The problem at the center of the special court proceedings was fairly simple. Archibald Cox, the special Watergate prosecutor, argued persuasively that certain specified tapes of presidential conversations were essential to the Watergate grand jury's investigation into confessed and alleged criminal behavior. Without seriously disputing that proposition, the President's lawyers asserted that (1) the doctrine of separation of powers and (2) the President's need for the fullest and freest flow of information, opinion and advice absolutely precluded the intrusion of the judiciary or anybody else, no matter how weighty the need, into matters which the President alone decided to keep secret. It was a claim of absolute presidential privacy at the President's absolute discretion, unfettered by anything but the risk of impeachment.

It is that claim which Judge Sirica rejected and it is that rejection with which the President and the appellate courts will have to deal unless the President limits the large claims of presidential power he has made. While not giving the special prosecutor everything he asked

—a wholesale and indiscriminate delivery of the tapes to the grand jury—and without utterly rejecting the President's claim of executive privilege, Judge Sirica asserted a constitutional scheme of a presidency circumscribed by the Constitution and the laws of the United States. Conflicts within this scheme are to be arbitrated by the courts.

While the President's lawyers claimed an unfettered privilege in the presidency, Mr. Cox acknowledged the existence of an executive privilege, but argued that the judgment of its applicability on the facts of any given case was to be made by the judiciary, not by the executive. Judge Sirica, looking back at the proceedings of the constitutional convention, the Federalist Papers and as much relevant case law as he could find, agreed that an evidentiary privilege existed, but concluded that the framers of the Constitution intended for such privileges in the executive to be carefully circumscribed. Following Chief Justice John Marshall, he concluded that it is the duty of the judicial branch to "control . . . the evidence in a case" and that "it is emphatically the province and duty of the judicial department to say what the law is." Because of the nature of the claims made by Mr. Nixon and his lawyers, Judge Sirica's application of the constitutional precedents, in settling what was essentially a question of evidence, necessarily went also to questions of the limits on presidential power.

So, the question on appeal will be whether the President or the judiciary is the final arbiter of the extent of a privilege which the President claims flows from the Constitution and is absolute. Though adhering to what he called "a middle ground," Judge Sirica stood firmly for a government of separated, limited and interdependent powers. It is precisely this kind of government which the framers of the Constitution thought would best protect this nation from the absolutism they were determined to escape.