

NYTimes

# Letters to the E

## The Pitfalls of Judge Sirica's Ruling

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To the Editor:

For three principal reasons, Judge Sirica's decision is not a good solution to the problem of Presidential confidentiality.

First, it creates an insoluble procedural dilemma. If the President must submit to a district judge the material for which confidentiality is claimed, then that judge's decision on the claim of privilege must (1) be final and unappealable (an absurd solution, given the numerousness of district judges, the differences of all sorts among them and the obvious inaptness of the district judge's position and training to vouch him an expert in delicate judgments of statecraft or to make it right for him unreviewably to control the President of the United States) or (2) be fully appealable, which, with all the good intentions in the world, must mean (given the number of hands through which the material must pass and the time that must elapse) that continued confidentiality would be deeply jeopardized and often if not always lost.

Secondly, the reason for maintenance of confidentiality may not, and sometimes will not, appear on the face of the submitted material but may lie in its context, outside the record. The President, in attempting to persuade the judge of the necessity for confidentiality, would thus often be forced to reveal more and more material, beyond what had been subpoenaed, with no assurance that any of this

material would remain confidential.

Thirdly, if the law allows any Presidential privilege at all (and Judge Sirica's opinion seems to concede that it does) then the entirely practical question whether any given communication has such a bearing on the affairs of state, or on the proper conduct of the Presidency, as to make its disclosure unwise is a question for which the methods of law are just about totally unsuited.

(I have not discussed the possibility that not only Federal but state agencies and state courts might issue subpoenas to the President; it would be interesting to know what the acclaimers of Judge Sirica's decision think about that nightmare—and how, on their theory of Presidential vulnerability to subpoena, it could be avoided.)

The only solution that can get around all these difficulties is that of leaving to the President the decision as to which of his internal records are to be kept confidential. Like all power (including, let us remind ourselves, the power of judges) this power may be sometimes abused. But if we are to form our law and practice on the assumption that the Presidents we elect are to be the sort of men who will often abuse this privilege, or claim it in bad faith, then we might as well give up.

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