

## A Presidency Under Law

Another round in the historic constitutional battle between President Nixon and the Watergate grand jury, represented by Special Prosecutor Archibald Cox, is over. The U.S. Court of Appeals for the District of Columbia Circuit has held that portions of the disputed tapes relevant to the proper scope of the grand jury's inquiry may be made available to that body unless the President can demonstrate to Judge John J. Sirica an overriding public interest in withholding "particular statements or information." The appellate court then fashioned careful procedures which make it possible for the President and his lawyers to make full arguments on his claims to any item of evidence he deems privileged and for the district court to select any material on which the President's claim is upheld.

On its way to that careful conclusion, the court of appeals reached some powerful and extraordinarily constructive conclusions about the way in which the Constitution and the laws of the United States apply at the top of the American government. In reaching its decision, the court had to deal with two contentions pressed by the President's lawyers which, if allowed to stand, would have severely distorted our constitutional system. The arguments that the President is immune from compulsory process and that the claim of executive privilege, when made by the President, is absolute, were both rejected.

In asserting presidential immunity from compulsory judicial process the President had relied on the argument that the Constitution provides only one way to reach a sitting President — impeachment. His lawyers also suggested that the court's lack of physical power to enforce obedience to a subpoena on the President demonstrated his immunity. The court considered that argument no impediment whatsoever to following what it took to be the mandate of the law. The court could find nothing in the text of the Constitution justifying the President's claim of immunity and declined his lawyers' invitation to find it by inference, saying "These are invitations to refashion the Constitution and we reject them."

Then, addressing the core of the President's claim to immunity, the court said, "Though the President is elected by nationwide ballot, and is often said to represent all the people, he does not embody the nation's sovereignty. He is not above the law's commands: 'With

all its defects, delays and inconveniences men have discovered no technique for long preserving free government except that the Executive be under the law . . . ' (quoting from the steel seizure case). Sovereignty remains at all times with the people, and they do not forfeit through elections the right to have the law construed against and applied to every citizen."

Passing then to the President's claim that his discretion to assert executive privilege is absolute, the court stated that assessing the validity of the claim of the privilege and its scope is a judicial, not an executive function. It then went to the heart of the mischief which would result if the President's argument were enshrined in law by saying, "Any claim to executive absolutism cannot override the duty of the court to assure that an official has not exceeded his charter or flouted the legislative will."

The court did recognize the existence of an executive privilege, but said that the interests that would be served by withholding information had to be balanced against those which would be served by disclosure. Because the President had permitted testimony regarding the taped conversations, the court concluded that the material was no longer confidential. It also noted that Special Prosecutor Cox had made a compelling showing of the grand jury's need for the material.

The only problem remaining was for the court to devise measures to protect material that did not relate to Watergate, that might deal with national defense or foreign affairs or that for some other reason might warrant protection. It devised a careful procedure, permitting segmentation of the tapes and secret *in camera* arguments on disputed items.

In our view, the court of appeals decision was correct and eminently wise. In no sense did the court hold that the President was powerless to protect material which for good reason should not be disclosed. It gave short shrift, however, to the notion that anything short of absolute privilege would cripple the presidency for all time. The measures it devised for culling the material seem both careful and fair. And most important, in our view, the court flatly and persuasively rejected the notion that, apart from impeachment and conviction, the President is above and beyond the reaches of the Constitution and the law of the United States.