

Complex Legal Issues Involved in the Dispute

President's Capitulation Sets Some Precedents

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WASHINGTON, Oct. 24 — The past weeks' climactic events in the custody battle over secret White House tape recordings may have averted a dangerous constitutional deadlock between President Nixon and the Supreme Court, but they resolved only some of the complex and controversial legal issues involved.

The heavy overlay of political rhetoric that enveloped both Mr. Nixon's defiance of the courts last Friday and his capitulation four days later left both lawyers and laymen uncertain as to just where the law stood in the wake of the final Presidential decision.

Although the legal contest between the White House and the Watergate special prosecutor was stopped short of the dignity and finality of a Supreme Court ruling, it did establish a number of precedents in a hitherto uncharted area that now stand as the law of the land.

But the Federal court decisions finally acknowledged by the President yesterday leave unanswered a number of serious questions about the power of Mr. Nixon and his successors to keep their records confidential and of the courts to enforce rulings involving recalcitrant Presidents.

Picture May Clear

The legal picture may become somewhat clearer as the order of the United States Court of Appeals for the District of Columbia is carried out and the President submits the tapes, with national security material deleted, to Judge John J. Sirica and Judge Sirica submits them, with privileged material deleted, to the Watergate grand jury.

In the course of these screenings, it appears likely that subsidiary court cases may develop over what constitutes national security, what information is legitimately protected by executive privilege and what parts of the recorded White House conversations constitute potentially relevant evidence for the criminal investigators.

But, as of now, independent of extracurricular political interpretation, the courts have established the following principles that will control future relations between Presidents and grand juries, unless they are overruled by the Supreme Court in some future lawsuit.

¶The Federal courts have jurisdiction over controversy that arises when a President refuses to submit records of his private conversations to a grand jury seeking evidence of crime and claims his right to confidentiality is controlling.

¶A President is not absolutely immune to process, such as a subpoena requiring him to produce certain White House documents or a show-cause order asking his attorneys to demonstrate why he should not comply with a court order.

¶The President does enjoy some measure of executive privilege, the right to keep his records and conversations confidential, but the right is not absolute and the courts may properly decide when it is being legitimately invoked and when it is being abused.

¶To protect the confidentiality of Presidential records as much as possible, a judge may determine in private what portions he considers privileged and pass the rest on confidentially to a grand jury.

¶A judge conducting such a screening of Presidential records may show them to a special

prosecutor, again in a closed proceeding, to obtain advice on what information is relevant to the grand jury investigation. The prosecutor also has the right to contest the President's classification of part of a record as privileged.

As a practical matter, the resolution of the tapes controversy set a number of historical precedents that are likely to prove influential in the future although they do not carry the authority of any court ruling.

For one, President Nixon's agreement to accept the Court of Appeals decision, however reluctantly, was tacit acknowledgement that a President cannot adopt as his policy the dissenting opinion of a court by asserting his confidence that it would be adopted by the Supreme Court if he chose to appeal the case.

For another, a President cannot expect to ignore court deadlines, repudiate court decisions and then expect the courts to adopt unilaterally, after the fact, what the special prosecutor, Archibald Cox, dismissed as "some private arrangement," more favorable to him.

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Over Tapes

But left totally unresolved is the basic question of how broad executive privilege is and what kind of Presidential information it properly protects. Judge Sirica, in his first decision requiring Mr. Nixon to submit the tapes, said he could not decide this until he heard the recordings themselves.

The Court of Appeals, in upholding Judge Sirica, did not attempt to give him any guidelines for such a sensitive decision. Executive privilege is not recognized in the Constitution or any statute, and no court has ever previously attempted to define its limits.

An Unanswered Question

Also unanswered is a question that has troubled the courts since Aaron Burr subpoenaed President Thomas Jefferson in 1807 to obtain a Presidential letter: Even if a Federal court has the legal right to serve a President with legal process, how can it enforce this or any other order if he refuses?

Most legal authorities have concluded, as Chief Justice John Marshall indicated in the Burr case, that the judicial branch does not have the power to enforce an order against a President but must rely on his recognition of the moral obligation or political necessity to comply.

Perhaps most troublesome is the fact that the nation remains Nixon feels under any legal compulsion to obey any decision of the Supreme Court, either in the area involved in the tapes case or in some other challenge to what he believes to be his constitutional authority.

First, his deputy press secretary, Gerald L. Warren, and then Mr. Nixon himself announced while the case was pending that the President would obey only a "definitive" ruling by the Supreme Court. Now there will be no decision from the Supreme Court and, thus, no clarification of what "definitive" means in the current White House lexicon.

Sometime next year the Supreme Court is expected to decide one or more cases involving the President's power to impound funds appropriated by Congress. Then it may become critically important to know whether Mr. Nixon will recognize something less than a unanimous ruling that limits his executive powers.

Are Only Partly Resolved