

# REVIEW & OUTLOOK

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## A Note on Evidence

The White House is again in confrontation with the House Judiciary Committee and the special prosecutors' office over subpoenas and executive privilege. We have mixed feelings, though clearly the White House position makes it the intransigent party.

A number of readers have taken us to task for our editorial saying that the President was generous in his offer to release transcripts and have Representatives Rodino and Hutchinson verify them. Our position was that such a mass of evidence was bound to be highly illuminating regardless of what the White House did with it. We feel that position is vindicated every time the transcripts are cited against the President, which it seems to us has been reasonably often.

It must also be remembered that when it comes to the key tapes—September 15, March 21 and so on—the committee already has copies of the full recordings. Thus on these tapes, it can check the deletions, listen to voice inflections or whatever. It can also run technical tests, and if the copies are not sufficient for this purpose the originals are held by Judge Sirica.

Also, it needs to be understood that while the White House has said it will provide no more "Watergate" tapes, it does not foreclose the possibility of providing further evidence on such matters as the milk fund and the ITT case. At least, that is the way we read the remarks of James St. Clair, the President's attorney.

Thus the Rodino committee will have before it quite a body of evidence on which to base its findings. At the same time, we do not see how the committee could responsibly refrain from seeking to fill gaps in its evidence. In the past it has issued wide-ranging requests, and generally refused to acknowledge any limits to its powers. So when it took this attitude and the White House was willing to compromise, we have generally approved the President's approach.

Now, however, matters have reversed. Chairman Rodino says that the committee will tie future subpoenas to specific gaps in the evi-

dence, which seems to us precisely the way to proceed. The White House has said it will refuse such subpoenas no matter what, which seems to us an indefensible attitude.

That is not to say the President should totally abandon executive privilege; his doing so would be no more responsible than the committee's abandoning its side of the case. The transcripts show that the doctrine has often been used as a cloak, but unfortunately that does not mean that no such thing as executive privilege exists.

When the President is on trial, no matter how you look at it, the principle that the President needs confidentiality is in head-on conflict with the principle that no man should be a judge of evidence in his own case. The problem is how to reconcile these principles.

One way is through compromise between the Executive and Legislative Branches. We think that at the moment the President ought to be trying harder to compromise, especially if the House hearings turn into a full-scale trial, which is an evolution the President could profitably promote.

Another way to reconcile the principles is to agree to disagree. At some point the President draws the line and refuses to supply further evidence. Then the House, asserting its own prerogative, cites this refusal as a reason for impeachment. This seems to be the present course.

The third, and to our minds best way to resolve the matter, is to let the courts referee. The courts have recognized and can balance both principles. In fact the White House has moved to quash the subpoena from the special prosecutor, which seems to us a forthright course. Our chief complaint, in fact, is that Mr. St. Clair did not make an outright pledge to abide by the Supreme Court verdict; but at that point a refusal to do so would be highly plausible grounds for impeachment.

It seems to us that the dispute between the President and the House ought also to go to the courts, though neither party seems to desire that. We keep coming back to the question: If not the courts, who else can balance both principles?