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Nixon and Supreme Court

THE MORE I WATCH the action, the more I am convinced that every morning the President wakes up and simply reacts to whatever has been served into his court.

On divulging tapes, for example, first it was "never," then "maybe some," then "no more." A strategic response would have been either to turn them all over right off the bat with a qualifying statement that this constituted no precedent; or burn them all the night before Alexander Butterfield testified to the Ervin committee and revealed their existence.

Mr. Nixon, the renowned poker player, has, however, consistently been playing middle hands in a high-low game. So now the matter is off to the Supreme Court for final adjudication, and once again the President is waffling all over the map.

Last year, when the matter was initially adjudicated as far as the court of appeals, the President backed off from appeal to the high court and disgorged a number of tapes. At that time, while avoiding the Supreme Court, he said he would accept a "definitive" holding by the justices on the matter of executive privilege.

I have been teaching constitutional law for a quarter of a century and never before learned of the distinction between a definitive and a non-definitive holding. It's a simple matter of counting heads with the majority of a quorum (6) providing the answer.

True, there can be divisions among the justices on why they ruled as they did; the death penalty decision was a classic of this kind. But when it comes down to the straight answer — yes or no — it makes no difference what routes the judges took.

In other words, the court majority could disagree among themselves on why Mr. Nixon has, or does not have, executive privilege. But, unless the court takes a dive on the ground that this is a "political question," a head count will answer the President's query.

However, recently — after first trying to talk the Court out of using a jurisdictional shortcut to speed things up — the President and his spokesmen are hedging on whether he would accept an (undefined) "definitive" judgment. This all begins to have an Alice In Wonderland quality about it.

What is more interesting is that, even with Mr. Justice Rehnquist disqualifying himself from hearing any Watergate-related cases, four Justices were willing to grant *certiorari* and sidestep the Court of Appeals. By traditional criteria this would indicate the court is willing to tackle the merits (although it should be noted that in the De Funis case involving reverse segregation, four justices agreed to hear the argument and then a majority denied jurisdiction on the ground that the issue was moot).

So the stall didn't work. But instead of asking what the President's strategy next entails, I am just wondering what bright idea he will wake up with on the day the justices hand down their decision.

A man who sent his lawyer, who had not heard the tapes, into a courtroom to argue they were irrelevant could come up with almost anything.