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A Matter Of Two Principles

By Tom Wicker

"To indulge in judicial rationalization in order to sanction the exercise of a power where no power in fact exists is to strike the deadliest of blows to our Constitution."

So held the United States Court of Claims, in a ruling that Richard Nixon exceeded his powers in a tariff matter, on the very day that Mr. Nixon's defense attorney, James D. St. Clair, tried to sell the United States Supreme Court this monumental bill of goods:

(A) That tape recordings of a President's confidential conversations are absolutely protected against subpoena, even when there is a substantial showing that they may provide evidence in a criminal prosecution, and even where there is no showing that they pertain to matters of high state policy; (B) if even the Supreme Court should rule to the contrary, then a President has the obligation to decide whether to obey the Court or to pursue his own idea of his "constitutional duties"; (C) the public interest in these positions is that they protect the office of the Presidency and its ability to function.

Since Mr. Nixon has already allowed tapes of numerous confidential conversations to be used in court and impeachment proceedings, and has made public the transcripts of many of them, Proposition A amounts to a claim that Mr. Nixon as sole arbiter can pick and choose among the tapes as to which he will allow to be so used —even if withholding certain tapes might prevent disclosure of a criminal conspiracy, or conceal his own complicity in it or some other crime, or cause the dismissal of cases against other defendants, or perhaps their improper conviction.

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As for Proposition B, the fact that Mr. St. Clair was arguing before the Supreme Court might suggest that it is only a thesis put forward for the Justices to rule upon. Mr. Justice Stewart, for example, reminded Leon Jaworski, the special prosecutor who seeks the tapes as evidence in the Watergate trials, that Mr. Nixon was "asking this Court to say that his position is correct as a matter of law, is he not?" If so, no one could complain, since the implication would be that, if the Court ruled otherwise, the issue would be settled.

But later in the proceeding, Mr. St. Clair himself said that the tapes issue was "being submitted to this Court *for its guidance and judgment with respect to the law,*" (italics added) which is not necessarily to say that Mr. Nixon would be bound by that "guidance and judgment." In fact, said Mr. St. Clair, "the President also has an obligation to carry out his constitutional duties."

The lawyer made the same point more specifically in speaking to reporters the next day. Asked by one of them how long it might take to "process" the subpoenaed tapes and turn them over to Mr. Jaworski, Mr. St. Clair replied:

"It would take some time, if the President is required to [by the Court] and determines it is in the public interest to do so." Two criteria would have to be met, therefore, before the tapes could go to the special prosecutor—the Supreme Court would have to require it of Mr. Nixon, and Mr. Nixon then would have to "determine" whether it was in the public interest for him to obey the Court. Richard Nixon, that is to say, will once again be the sole arbiter of the law and the Constitution as it is to be applied to him.

If Propositions A and B are audacious, Proposition C is ludicrous. The principle of confidentiality that Mr. Nixon holds himself out as defending may be valid enough—but *he* first endangered it in the act of making his secret tapes and *he* has already breached it with the public release of thousands of pages of transcripts for his own purposes; nor did the White House collapse when he did so.

But that principle, even before being so riddled by Mr. Nixon himself, was never half as important as the principle of legal accountability that Mr. Nixon is trying to evade. In asserting the immunity of a President to judicial processes, and raising the possibility that a President has the constitutional right to determine the meaning of the Constitution for himself, Mr. Nixon would put all Presidents beyond the reach of law. The precedent he is trying to set would do more damage to the Presidency, to the Constitution and to democratic government than a thousand loopholes in the principle of confidentiality.

Under that precedent, had it existed then, Harry Truman need not have obeyed the Supreme Court's ruling that he had no power inherent in his office to seize the steel companies, even in an emergency. Under that precedent, Mr. Nixon could simply tell the courts that have regularly been holding against him on the impoundment issue that his judgment of his constitutional powers was better than theirs, and that he would continue to impound.

"Neither need nor national emergency," the Court of Claims said in the tariff case, "will justify the exercise of a power by the Executive not inherent in his offiec nor delegated by the Congress." One President's self-interest won't either.