

CHIEF JUSTICE Warren Burger has written a particularly sound and skillful opinion for a unanimous Supreme Court in the tapes case that was settled yesterday. In upholding Federal District Judge John J. Sirica's decision ordering the President to surrender 64 White House tapes for possible use in next fall's Watergate coverup trial, Chief Justice Burger and his colleagues have defined executive privilege in a way which leaves the broad principle safely intact, while delineating sensible exceptions to its application. The Court's opinion recognizes the importance of confidentiality to the conduct of the presidency, with particular respect to military, diplomatic and other national security secrets. It also acknowledges that presidential advisers must feel free to offer their private counsel without fear that it will subsequently be made public. But the opinion goes on to assert that "we cannot conclude that advisers will be moved to temper the candor of their remarks by the infrequent occasions of disclosure because of the possibility that such conversations will be called for in the context of a criminal prosecution." By way of nicely reconciling the conflicting interests of confidentiality for the President and the right of due process for criminal defendants, the Court declared that:

*A President's acknowledged need for confidentiality of his office is general in nature, whereas the constitutional need for production of relevant evidence in a criminal proceeding is specific and central to the fair adjudication of a particular criminal case in the administration of justice. Without access to specific facts a criminal prosecution may*

*be totally frustrated. The President's broad interest in confidentiality of communications will not be vitiated by disclosure of a limited number of conversations preliminarily shown to have some bearing on the pending criminal cases.*

*We conclude that when the ground for asserting privilege as to subpoenaed materials sought for use in a criminal trial is based only on the generalized interest in confidentiality, it cannot prevail over the fundamental demands of due process of law in the fair administration of criminal justice. The generalized assertion of privilege must yield to the demonstrated, specific need for evidence in a pending criminal trial.*

This thought and language is notable for its lack of ambiguity. It offers no room, as court rulings sometimes do, for creative interpretation with respect to compliance. And yet it preserves the principle of privilege in the name of which Mr. Nixon has been resisting production of evidence in his possession to both the House Judiciary Committee and the courts. So the President's announcement last night that he would comply with the Supreme Court's ruling should have surprised nobody. The only reason it did was that an element of suspense had been built up by Mr. Nixon's associates with an apparent view to making a virtue of a decision to obey the law. It is a measure of how far we have come when the President of the United States can hope to earn favor by not defying a decision by the Supreme Court.