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Gratifying Mr. Nixon

By Tom Wicker

The Supreme Court may well have sealed Richard Nixon's personal fate with the psychological impact of its decision against him on surrender of tapes and other records of 64 White House conversations to the special prosecutor. Even so, the Court's opinion seems to give Mr. Nixon substantial basis for responding as he did.

"I was gratified," he said, through his attorney, James St. Clair, "to note that the Court reaffirmed both the validity and the importance of the principle of executive privilege — the principle I had sought to maintain."

In fact, the Court established for the first time what it called at one point the "constitutional underpinning" of the doctrine of executive privilege. It may have gone even further by establishing categories in which the privilege could be regarded as absolute, overriding any competing interest. If so, and whatever happens in the Nixon impeachment case, executive privilege as a principle and as a tool of governance may have been enhanced.

Chief Justice Burger's opinion for a unanimous Court stated at one point: "Nowhere in the Constitution . . . is there any explicit reference to a privilege of confidentiality, yet to the extent this interest relates to the effective discharge of a President's powers, it is constitutionally based." At another point, the Chief Justice was even more precise:

"The privilege can be said to derive from the supremacy of each branch within its own assigned areas of constitutional duties. Certain powers and privileges flow from the nature of enumerated powers; the protection of the confidentiality of Presidential communications has similar constitutional underpinnings."

Never before had the Supreme Court given executive privilege such "validity and importance." In the Nixon tapes matter, of course, it found that executive privilege was neither valid nor important enough to override the competing claims of a "demonstrated, specific need for evidence in a criminal trial."

Neither the separation of powers nor a President's need for confidentiality, "without more," could sustain an absolute Presidential privilege of immunity from judicial process, the Court said. But more what? Chief Justice Burger did not leave the question hanging.

"When the privilege depends solely on the broad, undifferentiated claim of public interest in the confidentiality of such conversations, a confrontation with other values arises. *Absent claim of need to protect military, diplomatic or sensitive national security secrets* we find it difficult to accept that even the very important interest in the confidentiality of Presidential communications" could be impaired by providing the tapes in question for a Federal judge's in-camera inspection. (The italics are mine, not the Court's.)

IN THE NATION

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Then the Chief Justice said it again: "A generalized claim of the public interest in confidentiality of non-military and non-diplomatic discussions would upset the constitutional balance of 'a workable government' and gravely impair the role of the courts. . . ." But not, presumably, a more specific claim of confidentiality for military or diplomatic discussions.

Unquestionably, there has to be some area of secrecy enclosing the highest and most vital military and diplomatic secrets. The problem is that, in the doctrine of executive privilege now certified by the Supreme Court to have "constitutional underpinnings," a President apparently could determine the scope of that area of secrecy for himself, and the privilege he asserted for it would be absolute—except in the unlikely event that it came into conflict with a higher, competing interest. It is possible even to read the Burger decision as saying that had Mr. Nixon been able to claim that the tapes concerned "military, diplomatic or sensitive national security secrets," the privilege he could claim for them would have outweighed "the fundamental demands of due process of law in the fair administration of criminal justice."

Suppose the House took its case for the Watergate tapes to the Supreme Court; the ruling suggests that the Justices might find that the legitimate needs of the impeachment process outweighed Mr. Nixon's generalized claim of privilege. But if the House subpoenaed tapes referring to the secret bombing of Cambodia, even for use in the impeachment process, would the Court hold them to be privileged as touching upon military secrets?

Maybe this is only seeing ghosts and goblins between the lines of an otherwise admirable decision. But the phraseology—"military, diplomatic or sensitive national security secrets"—seems so broad and inclusive as to provide an umbrella for a huge proportion of Presidential activities. And Americans have by now had an education in the ability of Presidents of both parties to transform almost any mistaken judgment, disastrous circumstance or piece of chicanery into a "sensitive national security secret." The next one who does it may well be able for the first time to point to the Supreme Court as certifying his constitutional right to do so.