UNITED STATES V. NIXON

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Introductory Essay by
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JAMES ST. CLAIR: "The President is not above the law. Nor does he contend that he is. What he does contend is that as the President the law can be applied to him in only one way, and that is by impeachment."

LEON JAWORSKI: "Now, the President may be right in how he reads the Constitution. But he may also be wrong. If he is wrong, who is to tell him so? This nation's constitutional form of government is in serious jeopardy if the President, any President, is to say that the Constitution means what he says it does, and that there is no one, not even the Supreme Court, to tell him otherwise."

from the oral argument in the Supreme Court, July 8, 1974

PREFACE

The documents in this collection tell the story of one of the most important legal and constitutional events in our history: the Supreme Court decision in *United States* v. *Richard M. Nixon.* The title of the case itself illustrates the drama. It is usually the President who represents the people and embodies the power of the nation. But in this case the equation was reversed: it was the nation and the people against the President. And the great authority of the Presidency ultimately bowed to the courts and to the people represented by that uniquely pragmatic institution of our times, the Watergate Special Prosecution Force.

The case against the President—and its process—is important on many levels. Politically it was the immediate cause of the first resignation of a President of the United States. The Supreme Court decision, announced on July 24, 1974, played a significant role in the vote of the House Judiciary Committee to report to Congress three articles of impeachment within a week. It made a vote for impeachment respectable for members of the Committee and of Congress generally. More important, the first tapes to be produced under the Supreme Court's order revealed that the President had indeed known about and approved a cover-up plan to protect his aides from criminal liability, thereby obstructing justice in the Watergate prosecution. Three incriminating tapes were made public on August 5, 1974. By August 9, 1974 the nation had a new President, sworn in by the Chief Justice whose opinion had helped bring about the change.

But the Supreme Court decision had far-lasting importance beyond its immediate political consequences. It established certain basic propositions about our constitutional form of government and settled certain "issues of final power in the American system," as Anthony Lewis of *The New York Times* has called them. Among the issues confronted and decided were: Does the principle of separation of powers grant the President an absolute privilege to protect his confidential communications? How far does the doctrine of executive privilege extend? Can a special prosecutor subpoena the President under whom he serves? Is it more important that a criminal trial proceed with all the evidence available than that the President protect his personal documents and materials? And, above all, what acts of the President are not reviewable by the courts? Is he supreme in his interpretation of his own constitutional powers and prerogatives?

The materials in this collection contain Judge Sirica's first decision on the Presidential tapes as well as the Court of Appeals decision in *Nixon* v. *Sirica*, which served as the curtain-opener for the later Supreme Court decision in *United States* v. *Nixon*. Also included are all the briefs filed by the parties in the case, containing some of the most sophisticated and incisive constitutional arguments in Supreme Court history. I have also included the petitions for review in the Supreme Court and other preliminary documents relating to the scope of the Supreme Court's review in the case. One of the crucial portions of this book is the complete transcript of the oral argument before the Supreme Court, and behind its publication here lies another story.

Some years ago, Professor Yale Kamisar of the University of Michigan Law School urged Chelsea House Publishers to undertake a program of publishing Supreme Court oral arguments. We began with the oral arguments in *Brown* v. *Board of Education*, which were published under the title *Argument*. When we investigated further, we discovered that only a few of the oral arguments had been transcribed by a commercial court reporter, though the Supreme Court itself—irony of ironies—had preserved the audio tapes of all the oral arguments before it dating back to the early 1950's. Professor Kamisar asked Chief Justice Earl Warren to make them available to the public for research purposes, but the Court declined to do so (by an unofficial vote, we were told, of 7 to 2). A year later we again wrote to the Court suggesting that the tapes be transmitted to the National Archives. Shortly thereafter the Court announced that it would deposit at the Archives at the end of each term tapes of all the oral arguments held in the previous year, at last making these vital research tools generally available to interested lawyers, scholars and students.

The transcript itself does not identify which Justice said what in the course of the argument; each question is simply headed "Question." To determine the identity of each questioner, I examined published accounts of the argument and spoke to a number of persons who were present on this historic occasion. I am especially indebted to Philip A. Lacovara, who argued part of the case for the Special Prosecutor, and patiently answered my many inquiries. It was not possible to determine the questioning Justice in every instance, but I hope that there is sufficient identification to give a more personal flavor to the questioning and to indicate the style of individual Justices as they test the historic constitutional problems—and the lawyers—before them.

Leon Friedman
August 1974

THE CASE FOR AMERICA

On Wednesday, July 24, 1974, shortly after 11 A.M., Chief Justice Warren Burger began reading the opinion of the United States Supreme Court in *United States* v. *Nixon.*[1] The courtroom was jammed with lawyers, Washington notables, and members of the public, some of whom had stood in line since early the previous afternoon in anticipation that this would be the day the Justices ruled in the Nixon tapes case. Outside, the Supreme Court's flag flew at half-mast, in honor of former Chief Justice Earl Warren, who had recently died. Across the street from the Court's building, two men wearing rubber masks of Richard Nixon and Henry Kissinger paraded back and forth carrying a banner with a quote on it from one of the already released presidential tapes:

> "I don't give a shit what happens. I want you all to stonewall it. Let them plead the Fifth Amendment, cover up or anything else that will save the plan. That's the whole point."
>
> Richard M. Nixon, March 22, 1973.

As the Chief Justice read his opinion in a calm, almost icy tone, the tension in the courtroom shifted into an excited awareness that this was an historic event. By an 8-0 ruling, the Supreme Court had decided that President Nixon must produce for District Judge John Sirica the tapes of 64 White House conversations sought by the Special Watergate Prosecutor for use in the pending obstruction of justice trial of seven former White House aides. The two-year saga of the Watergate break-in and cover-up was reaching its climax. Two weeks later, on August 8th, Richard M. Nixon would announce that he was resigning his presidential office. A reconstruction of that decision by a team of *New York Times* reporters would conclude that "the collapse of Mr. Nixon's fight to stay in office was a consequence of the ruling of the Nixon court."[2]

[1] This account of the Court's decision day is drawn from the *Washington Post* and *New York Times* of July 25, 1974, and from *Time* and *Newsweek* stories of August 5, 1974.

[2] "Nixon Slide From Power: Backers Gave Final Push," *New York Times*, August 12, 1974. See also the account of Saul Friedman, "Walkout Threat by Haig and St. Clair Put Nixon on Narrow Road to Resignation," *Boston Globe*, August 11, 1974, and William Safire, "Last Days in the Bunker," *New York Times Magazine*, August 18, 1974.

From start to finish, the case of *United States* v. *Nixon* was as distinctively American as apple pie a la mode. In no other country in the world would it have been both legally and politically possible for a court of law to force a chief executive to yield up the recordings of his confidential conversations with personal aides.

Indeed, in many nations, the Watergate affair would not have been a matter for the courts to consider at all. In some of these, the crisis would have led to the rumbling of tanks around the capitol following a presidential declaration of martial law. In parliamentary democracies, it would have meant a vote of no-confidence in the national legislature, the resignation of the president, and new national elections. But in the American governmental system, with our fixed term of office for the president and the cumbersome process of impeachment as our sole means of presidential removal, the Watergate crisis had to play out its slow constitutional course. And as it did, once President Nixon refused to deliver subpoenaed White House tapes to the Special Prosecutor, it became inevitable that the legality of his action would be brought to the Supreme Court for review.

As this essay is written, in mid-August 1974, the Supreme Court ruling in the Nixon case is only a month old. But it will be surprising if, a year or even a decade from now, analysts of our constitutional politics do not agree about five major aspects of the case:

1. Given conditions in the nation in July of 1974, the ruling was highly predictable.
2. It was one of the Supreme Court's "better" exercises of judicial statecraft.
3. The decision proved to be highly effective, in its immediate Watergate impact.
4. It was not at all typical of previous Court-versus-President conflicts in our history.
5. Its definition of executive privilege promises to be a source of fertile legal and political disputes in the future.

Let us examine each of these judgments, and then venture an over-all estimate of the place that *United States v. Nixon* will occupy in our constitutional scheme.

1. THE PREDICITABILITY OF THE DECISION

Ever since the famous case of *Marbury* v. *Madison*, 170 years ago, the Supreme Court has followed a set of basic, unwritten rules when reviewing politically charged and controversial presidential actions:

a. When the political situation is too dangerous for the Supreme Court (e.g., if a ruling against the President is likely to be disobeyed by him or to produce serious reprisals against the

Court's powers or prestige), the Court should find a way to duck the issue or to deflect it, leaving its immediate resolution to the larger political process.

b. But if the political situation is favorable (that is, if a ruling against the President will enjoy broad public and Congressional support and virtually compel presidential compliance), then the Court is free (if the case warrants it) to do the two things most beloved by American judges — uphold the "rule of law" against claims of prerogative or privilege by the executive, and expand still further the discretionary power of the judiciary in the American constitutional system.

Seen in this tradition, *United States* v. *Nixon* was one of the most predictable rulings in the history of American constitutional law. The political situation was not only hospitable to a ruling against the President but almost irresistably pressing for it. Public opinion was solidly against the President's course of conduct in the Watergate affair and the cover-up. A solid, bi-partisan majority in Congress opposed presidential claims to withhold critical information. And the way in which Nixon had conducted his defense (including the firing of Special Prosecutor Archibald Cox and the forcing of Attorney General Elliot Richardson's resignation) collided with deep-seated American norms about the rule of law, thus creating special pressures on the courts to reassert the primacy of this value in the use of presidential authority.

In this sense, the *Nixon* case closely resembled the Supreme Court's situation in 1952, in passing on President Truman's seizure of the steel mills, under a claim of inherent executive power, to avert a dangerous strike during the last stages of the Korean War.[3] When that case came to the Justices, public opinion was hostile to the Truman administration (only 23% of the public expressed support for Truman); there was broad Congressional opposition to the economic burdens of the Korean War at that point and to the seizure of the steel industry without Congressional sanction. Furthermore, the way in which the President's lawyers had argued his case in the early stages of the litigation collided with public beliefs in "limited government" principles.

(At one key point in 1952, Assistant Attorney General Holmes Baldridge told Judge Pine in the federal district court hearing that the Constitution "did not limit the powers of the Executive" under Article II, even though the powers of the Congress and the judiciary *were* limited by the Constitution. This set off a violent reaction in Congress and in public opinion that was never effectively repaired by

[3] A full account of the *Steel Seizure* case can be found in Alan F. Westin, *The Anatomy of a Constitutional Law Case* (New York: Macmillan, 1958).

the President and his lawyers, despite their public repudiation of the Baldridge assertion.)

Thus the Supreme Court, in a 6-3 decision, declared Truman's seizure of the steel mills to be unconstitutional.[4] "With all its defects, delays, and inconveniences," Justice Robert Jackson wrote in his eloquent concurring opinion, "men have discovered no technique for long preserving free government except that the Executive be under the law, and that the law be made by parliamentary deliberations."

In other words, the Supreme Court generally tends to be a prudent body; it has had to be for the unique power of judicial review to have survived so long in a majority-rule republic. But when one of the fundamental tenets of the American constitutional system is widely regarded by the public as under assault by one of the elected branches of national government, the Justices can and do unite in defense of such basic values. In the *Nixon* case, it was the supremacy of the law, as interpreted by the courts and not the President, that was seen as being at stake.

2. THE SKILLFUL EXERCISE OF JUDICIAL STATECRAFT

The *Nixon* case, because it involved a major interpretation of presidential power and would necessarily affect the progress of the pending impeachment investigation, called for the Court to be unanimous, clear, and "non-controversial." The fact that the Court, highly divided on most sensitive issues of current constitutional law, was able to achieve those goals made the *Nixon* decition one of the Supreme Court's "better" efforts at judicial statecraft.

During the 1973-74 term, a *New York Times* analysis of 144 decisions handed down between October and the *Nixon* ruling showed the court to be split 5-4 or 6-3 in a large number of major constitutional cases.[5] In the majority were the four Nixon appointees — Chief Justice Burger and Justices Blackmun, Powell, and Rehnquist — "solidified into a bloc that is increasing in both unity and capacity to produce a working majority for their views of the law and the constitution." They were joined most frequently by Justice Byron White, a Democrat and a Kennedy appointee to the Court (85% of the time), and almost as often (82%) by Justice Potter Stewart, a Republican appointed by President Eisenhower. This left the Court's three liberals — Democrats William O. Douglas, appointed by Franklin Roosevelt; William J. Brennan Jr., appointed by Dwight

[4] *Youngstown Sheet and Tube Co. et al.* v. *Sawyer*, 343 U.S. 579 (1952).

[5] Warren Weaver Jr., "Four Nixon Justices on High Court Vote in Bloc That Could Become Majority," *New York Times*, July 26, 1974.

Eisenhower; and Thurgood Marshall, appointed by Lyndon Johnson — as the consistent dissenters, voting together as a block in 74% of the 144 decisions analyzed. As if to underscore how deeply the Court was divided in 1974, the Court delivered its last opinion of the term the day after the *Nixon* ruling; in a straight ideological as well as party-line division, the Court held, 5-4, that Detroit's plan for busing school children to effect better racial integration was invalid, since the majority said that such a scheme can be imposed on suburban communities in a metropolitan area only when the suburbs can be shown to have participated in unlawful educational segregation.[6]

Given these divisions, the challenge to Chief Justice Burger and his colleagues was to find a way to unite behind one unanimous opinion in the *Nixon* case, thus putting the greatest weight of judicial authority behind the Court's ruling, earning the greatest support from the public, and applying the greatest pressure on the President to comply with such a "definitive ruling." There were eight Justices to be persuaded to such a course, Justice William Rehnquist having withdrawn from participation because of his earlier Justice Department relationship with several of the defendants in the case.

What goes on in the conference room of the Supreme Court is kept entirely confidential, with no record published and no law clerks or other Court personnel even allowed to be present. But a combination of journalistic accounts based on "Court sources" and an unusual official explanation of how Chief Justice Burger worked on the Court's opinion gives us what seems to be a reliable account of what went on among the Justices.[7] According to these reconstructions, when the Court gathered for its conference on July 9th, the day after oral argument had been presented, the Chief Justice urged his colleagues to try to reach a unanimous judgment and to join in a single opinion, a goal to which they assented. After a review of where each Justice stood, it became clear that the President had no support among the eight Justices for his position as to executive privilege. However, Chief Justice Burger and Justice Blackmun — the so-called Minnesota twins — were troubled about the issue of justiciability, that is, whether the Special Prosecutor had the standing to bring this suit to enforce a subpoena against his formal superior, the President of the United States. Justice Stewart stressed the clear autonomy that the Special Prosecutor had been given when this office was created by the President and confirmed by the Senate, and the

[6] Reported in *New York Times*, July 26, 1974.

[7] See "Burger's 41-day Ordeal Told," *New York Times*, August 6, 1974; "A Very Definitive Decision," *Newsweek*, August 5, 1974; "A Unanimous No to Nixon," *Time*, August 5, 1974.

discussions brought Burger and Blackmun around to that view. Four of the Court's liberals — Douglas, Brennan, Marshall, and Stewart — favored drafting a broad opinion limiting the concept of executive privilege, while White and Powell favored the writing of a narrow opinion that would leave the Court flexibility on this issue. After about six hours of discussion, the Justices agreed on the main lines of a decision, and Chief Justice Burger assigned to himself the drafting of this opinion. The other Justices contributed memoranda for his use, and one account states that it was Justice Stewart who contributed the draft of the opinion's treatment of the justiciability issue.

This account of what went on within the Court may or may not be entirely accurate; in the main, it has the ring of credibility. But what is entirely certain is that the 31-page unanimous opinion delivered in the *Nixon* case reads like a perfect committee product. It proceeds with measured tread along its course, avoiding lofty rhetoric or slashing prose. Most of all, it sounds like the cool lecture on constitutional fundamentals that a rather pedantic school master might deliver to a pupil who has handed in a very poor paper on the constitutional fundamentals of the American system, and deserved a lesson in basics. Again, there is a striking parallel to the *Steel Seizure* case, where a similar opinion in tone and treatment was written by Justice Hugo Black for the six-Justice majority in that case. But here, of course, the similarity ends. In the *Steel Seizure* case, each of the Justices in the majority (besides Black) also wrote a concurring opinion. This gave us the brilliant constitutional exegesis of Robert Jackson on our checks and balances system; Felix Frankfurter's painstaking analysis of congressional policies toward executive seizure of private property; and William O. Douglas' effort to soften the blow to President Truman by saying that the attempted expansion of executive power was being done by a "kindly president . . . " But these opinions also diluted and fragmented the holding of the *Steel Seizure* case, so much so that legal commentators despaired of saying just what view of inherent presidential powers the six majority Justices had really agreed upon, beyond the fact that President Truman had not acted legally here. It was, Professor Edward Corwin has said, "a judicial brick without straw."

The *Nixon* opinion avoided that pitfall carefully. There were no concurring opinions to raise points of differing emphasis or suggest divided views. There was only the majesty that a unanimous opinion of liberals and conservatives, Democrats and Republicans, can convey to the public, of the rule-of-law defended against attack. Time, and later tests cases in non-Watergate settings, may reveal that there is considerable uncertainty lurking in the Court's certitudes in the

Nixon case, as we will explore shortly. But for an embattled Richard M. Nixon, there was not the slightest shred of comfort in the Court's ruling: the taped conversations were to be delivered, now, to Judge John Sirica. They would be screened to suppress any conversations whose disclosure might jeopardize "military, diplomatic, or sensitive national security secrets." But as to discussions of what the President knew about Watergate and did to cover up its investigation and prosecution, the cat was officially ordered to be let out of the bag.

3. THE POLITICAL EFFECTIVENESS OF THE DECISION

Before the tapes case was argued in the Supreme Court, and even after the President's counsel had appeared before the Justices, no spokesman for the President, or the President himself, would say that he would obey the Court's decision if it proved to be adverse. Even when pressed during the oral argument, the President's attorney James St. Clair stated that "the President . . . has his obligations under the Constitution," implying that he might conclude that his "responsibilities" as head of a coordinate branch of national government required him to refuse to deliver the tapes.

We know from a variety of "inside" accounts, many of these from sources within the Nixon White House and among his supporters in Congress, that the President argued with his counsel for several hours on July 24th that he had a constitutional duty to reject the Supreme Court's ruling and that he could refuse to comply.[8] His lawyer told the President that if he did so, he would certainly be impeached (the House Judiciary Committee had not yet voted on bringing Articles of Impeachment) and just as certainly convicted in the Senate. In addition, St. Clair informed Mr. Nixon that legal ethics would not permit him to stay on as the President's lawyer if he defied the Court's order. Only after this pressure did the President agree to have a statement issued that he would obey the ruling. This came eight hours after the Court had handed down its unanimous decision.

At first, commentators assumed that Nixon would attempt to win further delays in furnishing the tapes to Judge Sirica, perhaps by saying time was needed to prepare copies or transcripts, etc. But Special Prosecutor Jaworski asked Judge Sirica to order a speedy, batch-by-batch timetable, and the judge not only agreed but directed St. Clair personally to listen to the tapes and be responsible for compliance with the schedule.

Among the tapes to be turned over to Judge Sirica on August 2nd were three conversations held on June 23, 1972, just six days after the Watergate burglary. What Mr. Nixon knew was that these three conversations were political and legal dynamite — they would supply

[8] See the accounts noted in note 2, *supra*.

precisely the "smoking gun" that Mr. Nixon's supporters on the House Judiciary Committee had argued had been missing from the case made against the President: clear and convincing proof that the President knew of the Watergate affair and had used his authority in an attempt to cover up the episode. Now, Mr. Nixon realized, his two-year fight to keep the secret in the bottle was about to be lost. On the June 23rd tapes was the clear and convincing evidence that the President had ordered the CIA to be brought into the case in an effort to derail the FBI's investigation. What was even more heinous was that these conversations showed that the President had lied to the American public in several of his statements as to what he knew; had failed to tell his own counsel what the extent of his knowledge and involvement had been; and had failed to provide this material to the House Judiciary Committee.

After the President listened to these tapes while at Camp David during the August 3-4 weekend, and when these were, at last, heard by St. Clair, General Alexander Haig, and a few other key staff members, the last act of the drama began to unfold. Under intense pressure from his aides and several of his most fervent defenders in Congress who were informed of what was on the tapes, the President was persuaded to release transcripts of the June 23rd conversations on the afternoon of August 5th. Three days later, after these disclosures had drained away virtually all of his support in Congress and the nation, the President announced that he was resigning.

It would be claiming too much for the Supreme Court's ruling to say that, had it not occurred, the President would still be in office today, or would have served out his term until 1976. The House Judiciary Committee had compiled a powerful record and had voted out strong Articles of Impeachment. Observers agreed that, even before the August 5th revelations, the House was certain to vote impeachment and the Senate was more than likely to convict. But it was the tape disclosures ordered by the Supreme Court's decision that pushed the President's situation into the critical stage, dissipated his last-ditch support, and forced his resignation. It is hard to think how an outcome could have vindicated any more fully the underlying (and carefully unenunciated) assumption of the Justices that the President's claim of executive privilege in this instance was essentially spurious.

4. THE ATYPICAL CHARACTER OF THIS DECISION IN TERMS OF COURT-PRESIDENTIAL CONFRONTATIONS

United States v. *Nixon* does not fit at all the general character of major executive-judicial encounters in our constitutional history. Professor Glendon Schubert reports that about 800 cases in the federal and state courts dealt with questions of presidential power

between 1790 and 1956.[9] Of these, 38 rulings held presidential orders to be invalid, with only 14 of these rulings coming from the United States Supreme Court. Almost half of the total 38 dealt with the exercise of presidential powers during national emergencies, such as Madison's embargo proclamation in 1809, Lincoln's suspension of habeas corpus during the Civil War, and Franklin Roosevelt's actions during World War II. And only two Supreme Court decisions between 1790 and 1956 invalidated a major program or policy of the Executive — the *Steel Seizure* in 1952 and a 1956 decision (*Cole* v. *Young*) limiting executive loyalty-security programs because of due process failings.

Between 1957 and 1974, and especially during the last two years of the Nixon presidency, the federal courts did decide some important cases that curtailed presidential claims of authority. Examples of these are the Supreme Court's decision in 1958, limiting the President's power to remove members of independent commissions[10] and the 1972 decision denying that the President's national security powers provided the basis for the Attorney General to employ electronic surveillance against domestic organizations without the judicial warrant required by the 1968 Omnibus Crime Control and Safe Streets Act.[11] There has also been a series of lower federal court rulings in 1973-74 striking down the President's impoundment of funds appropriated by Congress,[12] and several other exercises of power by President Nixon.[13]

Viewed as a whole, however, the major relationships between the Supreme Court and the Chief Executive has been for the Court either to uphold presidential authority, though at times with some limiting construct, or to decline to pass on uses of presidential power because of special circumstances, such as Congressional ratification of the President's action or the problem becoming moot owing to the passage of time.

Yet there is a sense in which the Nixon decision is quite untypical of famous collisions between "Court" and "President" in our history. In most of these, such as the conflicts between Thomas

[9] Glendon A. Schubert, Jr., *The Presidency in the Courts* (Minneapolis: University of Minnesota Press, 1957), Part IV and Appendices A, B, and C.

[10] *Wiener* v. *United States*, 357 U.S. 349 (1958).

[11] *United States* v. *United States District Court*, 407 U.S. 297 (1972).

[12] See *National Council of Community Mental Health Centers* v. *Weinberger*, 361 F. Supp. 897 (1973) and *People ex. rel Bakalis* v. *Weinberger*, 368 F. Supp. 721 (1973).

[13] In July of 1974, the United States Customs Court ruled that President Nixon had acted illegally in 1971 when he imposed a 10% surcharge on all dutiable imports, *New York Times*, July 9, 1974. And on August 14, 1974, the United States Court of Appeals for the District of Columbia held that President Nixon had acted illegally when he claimed to have vetoed a bill by withholding his signature when Congress went into a five-day Christmas recess, *New York Times*, August 15, 1974.

Jefferson and the Court, Andrew Jackson and the Court, or Franklin D. Roosevelt and the Court, it was federal or state legislation supported by the President and a majority in Congress that came under the judicial guillotine.

In these kinds of battles, with basic social programs being struck down by the judiciary, Presidents have rallied their supporters to overcome judicial vetoes. Constitutional amendments have been passed, new Justicies have been appointed to vacancies, and legislation has sometimes been revised to take the objections of the Court into account. Franklin D. Roosevelt even threatened to pack the Supreme Court by enlarging its size, in an effort to influence the swing Justices to modify their positions on New Deal legislation in 1937.

United States v. *Nixon* was not that kind of case at all. Here, Congress was actively hostile to the President's claims of authority to withhold information, leaving him without the Congressional support necessary to the classic court-versus-elected branches conflict.

Whatever the type of court-Presidential conflict involved, though, every President of the United States, now including Richard M. Nixon, has obeyed a "definitive" decision of the Supreme Court directing him to do or not to do something. The oft-quoted episode in which President Andrew Jackson is supposed to have said, "John Marshall has made his decision; now let him enforce it," was not a situation in which the President was directed to do anything. The Court's ruling was directed to a Georgia state court, and President Jackson did nothing to interfere with that situation.

5. THE COURT'S RULING ON EXECUTIVE PRIVILEGE WILL ENGENDER LIVELY DISPUTES IN THE FUTURE

Great Supreme Court cases, especially those dealing with separation-of-powers review over presidential and legislative authority are sometimes like delayed-fuse aerial bombs. They have an initial impact when they first hurtle to earth, but their greater effect comes later, when their full explosive force is released.

That is quite likely to be the legacy of *United States* v. *Nixon*. The decision's immediate effect was to order 64 taped conversations to be delivered. And the immediate rule of law in the public focus is that the President cannot withhold information from a criminal proceeding in which such information is directly relevant, on the grounds of a *general* claim that this would impair the confidentiality of executive communications and not be in the public interest.

But the decision declared a larger premise that will be far more significant in the long run. It rejects the argument of some populist-minded commentators that there is no constitutional basis at all for executive privilege. The Justices were unanimous in

declaring that in many key areas — the court stipulated "military, diplomatic or sensitive national security secrets" — the President has a constitutional basis for asserting privileges and can have this enforced by the courts.

In my view, this judgment about the Executive's need for and right to confidential communications is entirely right in principle. What it will mean in practice, however, is that from now on, the federal courts have been given the role of arbitrating both the general definitions and the document-by-document review of those presidential communications that may become central to criminal proceedings.

In the long run, therefore, the ruling is a loss for executive power in our constitutional system and a major gain for judicial authority, one that will surely stimulate platoons of litigation in the future. And it was the sheer demonstration of illegitimacy by President Nixon — the invocation of a long-maintained tradition of executive secrecy to protect illegal and immoral conduct in the White House — that compelled the Supreme Court to act.

Future generations of Americans, for better or for worse, will have Richard Nixon to thank for what will probably become one of the most important expansions of judicial authority in the history of the Republic.

Alan F. Westin

Cape Cod
August 18, 1974