Watergate and the American constitution

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I. *The Broad Issues*

The Watergate affair has spawned serious (1) allegations of misconduct and criminality by officers of the Executive Branch (2) of the Government of the United States. The factual charges against the officers fall into two categories :

1. Obstructing Justice (3) : Those who planned or unsuccessfully attempted to install a listening device in the Democratic Party Headquarters in Washington, D.C. were encouraged not to reveal the full facts of the case tot a Grand Jury or court of law. Promises were made that no party would speak out (4), that anyone who made revelations would meet with reprisal (5), and that the silent might be offered executive clemency (6) (reduction of sentence by Presidential order).

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The Redaction is very grateful to Doctor Lee Adlerstein for this remarkable contribution to Jura Falconis. With great knowledge, Mr. Adlerstein introduces us in the important constitutional problems arisen out of The Watergate affair. We are sure that his text, precise and clear, will be accessible even to readers not accustomed to the English language.

(1) The pages of American newspapers and government publications are replete with information on the Watergate affair, the subsequent Senate investigation and Grand Jury proceedings. For a summary of the testimony of one confessed participant in the Watergate crimes, former Presidential campaign aide Jeb Stuart MAGRUDER, see 31 Congressional Quarterly 1489-91.

(2) Members of several offices of the Executive branch have been implicated : the President's personal or 'White House' staff, the Department of Justice, the Federal Bureau of Investigation, and the Central Intelligence Agency. Other persons involved in public affairs, specifically men employed in the Committee to Re-Elect the President, have been found to have had a part in Watergate. This paper will not, however, concern itself with them since they do not have legal status as executive officers of the United States.

(3) 18 U.S.C. § 1503 reads : "Whoever corruptly... endeavors to influence, intimidate, or impede any witness, in any court of the United States... shall be fined not more than $5,000 or imprisoned not more than five years, or both.»

(4) See, for instance, the Senate testimony of Watergate conspirator James W. McCORD, Jr., summarized at 31 Congressional Quarterly at 1192, 1256-57.

(5) See the testimony of John CAULFIELD, Treasury Department Official and former White House aide, summarized at 31 Congressional Quaterly 1257-58.

(6) See testimony by McCORD, *supra* note 4, at 1257. Also see testimony of John DEAN, former White House counsel, to questions of Senator WEICKER, summarized at 31 Congressional Quarterly 1257-58.

2. Obtaining 'Information' : Small groups of men were organized and ordered to gather information against persons whom the Administration deemed security risks. Specifically, a psychiatrist's office was burglarized because one of his patients, formerly employed by the Defense Department, had confessed to leaking certain documents to the press ; the Administration believed he had also leaked information to a foreign embassy. Though no further operations were carried out by the groups, other domestic activities of this nature had been planned without prior court approval.

There is no question that obstruction of justice is a crime ; the activities described in the first category above, in and of themselves, present no legal issue. However, constitutional problems arise out of the obstruction of justice charges, and concern the power of prosecutors (7) and courts to obtain information from executive officers which those officers wish to withhold. In the second category of offenses, the legal issue is whether executive officers have the power to perform acts, such as burglary, which are normally illegal, when in their view, preeminent considerations of national interest necessitate the obtaining of such information. Thus, the constitutional issues which arise out of the Watergate case are

1. *The issue of 'executive privilege'.* Must executive officers produce to prosecutors and courts evidence (documents and live testimony) which the executive officers regard as having been produced within the course of executive duties ?

2. *The issue of executive investigative power.* May the executive, if it feels information is needed for national security, take steps which in ordinary criminal investigations would constitute an invasion of the rights of the person under investigation ?

II. *The Constitutional Background*

Unlike constitutional monarchies and republics, in which supreme governmental power is vested in the national legislature, the written Constitution of the United States (8) divides governmental power among three branches. Under this 'separation of powers' doctrine, 'all legislative

(7) In the United States, prosecutions are brought and conducted by District Attorneys in the state governments and by United States Attorneys assigned to every Federal Judicial district in the Federal Government. These prosecutorial agencies are independent of the police and have complete discretion on whether to bring a case before a Grand Jury. Sometimes, on the Federal level, the Department of Justice in Washington may wish to handle a criminal prosecution rather have it handled by a local United States Attorney, especially when the situs of the crime was the District of Columbia. For prosecutor in the Watergate case, a special prosecutor, Archibold COX, was appointed.

(8) The Constitution of the United States is the "Supreme Law of the land", Article VI, and as such may not be superceded by any branch of the Government that it mandates.

powers' are vested in Congress (9), the 'executive power' is vested in the President (10), and the 'judicial power' is vested in the courts (11). The separation of powers concept blends the political thinking of Montesquieu and America's founding fathers, the writers of the Constitution. It was felt that personal and political liberties could best be preserved if no branch of the Government could, by itself, exercise complete power (12). Thus the Constitution provides means to each branch of Government to prevent another branch from assuming too much power on its own. Concomittantly, no branch may invade the privileges and prerogatives of the other branches so as to destroy or hamper the exercise of appropriate executive, legislative, and judicial responsibilities.

The checks and balances set up by the Constitution may be initially observed through the separate mechanisms through which a person assumes office in each branch of the Government. Senators and Representatives in Congress are elected individually from the states by direct popular vote ; every seat in the House of Representatives is filled every two years, and one-third of the Senate is filled every two years — each Senator being elected for a six-year term (13). The President is elected every four years — at the same time as all the Representatives and one-third of the Senators, though the vote for President is entirely separate from the balloting for Senator or Representative. Officially, the vote of a citizen for President is for the election of a college of Presidential electors rather than for the President himself (14). In fact, however, the President accumulates electoral votes by being elected through popular vote within each separate state. Under this system, the person elected President is, except in rare instances (15), the person who receives a plurality of popular votes. Justices of the Supreme Court and Judges of the Federal Courts are appointed by the President and must be approved through the 'advice and consent' of the Senate (16). Once they take office, judges serve during 'good behavior' (17) and cannot have their compensation reduced during their 'continuance in office'.

(9) U.S. Const. Art. I, sec. 1.
(10) U.S. Const. Art. II, sec. 1.
(11) U.S. Const. Art. III, sec. 1.
(12) In Federalist 47, James MARISON, perhaps the most influential member of the Convention of delegates that drew up the Constitution, quotes MONTESQUIEU to the effect that "there can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates." See also Federalist 48.
(13) See Art. 1, sec. 2 for the mechanics of election of Representatives and Amendment XX for the election of Senators.
(14) See Amendment XII.
(15) In three cases men who received less than a plurality of the votes were elected President : in 1824 John Quincy ADAMS over Andrew JACKSON and William CRAWFORD ; in 1876 Rutherford HAYES over Samuel J. TILDEN ; and in 1888 Benjamin HARRISON over Grover CLEVELAND.
(16) Art. II, sec. 2.
(17) Art. III, sec. 1.

This office filling procedure facilitates the maintenance of independence by each branch of the Government. Senators and Congressmen answer only to the voters in their states and districts. The President is not beholden tot any one section of the country or to any one state. Judges assume office only when their nominations are approved by both the President and the Senate, though once in office, in effect, they remain for life and need not worry about any political pressure.

The Constitution safeguards the integrity of each branch by assigning it separate powers and responsibilities. Article I, Section 8 lists the powers of the Congress, most of which center on the ability to raise (18) and appropriate money :

— To tax.
— To pay national debts.
— To borrow.
— To regulate commerce.
— To make laws on naturalization and bankruptcy.
— To coin money and fix standard weights and measures.
— To establish a post office.
— Power over patents and copyrights.
— To provide for a Federal Judiciary.
— To declare war.
— To punish offenses against the United States.
— To raise and make rules for an army and navy.
— To administer Federal land and property.
— To make other «necessary and proper» laws.

The President's powers are outlined in Article II, Sections 2 and 3 of the Constitution. He is made the 'Commander in Chief' of the armed forces of the United States. He can require the heads of the executive departments to answer for their actions — a provision which, over the years has evolved into Presidential power to issue orders to other executives. The President is further given power in the domestic area to appoint the principal executive officers and judges of the Federal Government. Additionally, Congress, over the course of time, has given the President discretionary powers in the economic area, particularly in the fields of labor relations and foreign trade (19). The President's executive powers are capped with the phrase «he shall take care that the laws be faithfully executed».

Article II also gives the President important powers in foreign affairs. He has the power to negotiate treaties with foreign countries and appoint and receive foreign ambassadors. In practice the office of the President

(18) In addition to Article I, sec. 8, see Amendment XVI, giving Congress the power to raise money by means of an income tax.

(19) See for instance the President's power to order a "cooling off" period in labor disputes, that power being given by the Labor Management Relations Act (Taft-Hartley Act), 29 U.S.C. §§ 141-97.

has come to be regarded as the major agency for the conduct of foreign affairs under the Constitution. This point has been underscored by the United States Supreme Court in two cases involving the power of the United States Government in foreign affairs, where the power of the President to act alone was recognized. In *United States v. Curtiss-Wright Export Corp.* (20), the Court upheld a Congressional resolution conferring authority in the President to place an embargo on the sale of arms by American companies to combattants in the Chaco region of South America. The Court discussed the President's responsibilities in the field of public affairs :

«... we are here dealing ... with ... the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations — a power which does not require as a basis for its exercise an act of Congress, but which, of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution. It is quite apparent that if, in the maintenance of our international relations, embarassment — perhaps serious embarrassment — is to be avoided and success for our aims achieved, congressional legislation which is to be made effective through negotiation and inquiry within the international field must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissable where domestic affairs alone involved. Moreover, he, not Congress, has the better opportunity of knowing the conditions which prevail in foreign countries, and especially is this true in time of war. He has his confidential sources of information. He has his agents in the front of diplomatic, consular, and other officials. Secrecy in respect of information gathered by them may be highly necessary, and the premature disclosure of it productive of harmful results ...» (21).

In a case decided the year after the *Curtiss-Wright* decision, the Supreme Court reaffirmed Presidential exercise of his foreign affairs power : *United States v. BELMONT* (22) involved the constitutionality of the Litvinov agreement between President Roosevelt and the Soviet Government in which the Soviet Union assigned to the Government of the United States all Soviet claims against Americans who held funds of Russian companies seized after the Soviet assumption of power. Congress had done nothing to either authorize or forbid such an agreement. On a challenge to the agreement's constitutionality, the Court held the agreements were entirely legal and that

«Governmental power over external affairs is not distributed, but is vested exclusively in the national government and in respect of what was done here, the Executive had authority to speak as the sole organ

(20) 299 U.S. 304 (1936).
(21) *Id.* at 319-20.
(22) *United States v. BELMONT,* 301 U.S. 324 (1937).

of that Government. The assignment and the agreements ... did not ... require the advice and consent of the Senate» (23). Thus has the court endorsed the expansion of Presidential powers beyond the face language of the Constitution.

The role of the Courts of the United States is defined explicitly in Article III of the Constitution. They exist to decide 'cases' and 'controversies' involving the Constitution, the Federal Government or persons from different states (24). In this sense the courts constitute a passive branch of Government under the Constitutional scheme. However, because of the American legal practice of 'judicial review' by which courts have power to negate legislation found to be contrary to the Constitution, the courts exert a great influence on the governing body of laws (25).

The writers of the Constitution, in creating a system of checks and balances similarly allowed for an overlap of power between the President and Congress. Thus the President may recommend measures for the consideration of Congress under certain circumstances (26). Most importantly, the President may veto legislation passed by Congress which can over-rule the veto only by a vote of two-thirds of its members (27). Congress may check the President's exercise of his executive powers by refusing to raise or spend required money. In addition, the President is required to give to the Congress, «from time to time ... information on the State of the Union» (28). The Senate is invested with special executive powers in that it must 'advise and consent' to the appointment of all public officers including judges and ambassadors ; the United States can not enter into a treaty unless two-thirds (29) of the Senators voting approve.

The final sanction which the Congress may impose on the executive is that of *impeachment* and *removal from office.* A case of impeachment is commenced by a bill of impeachment being drawn up by the House of Representatives (30). The Senate then tries the officier being impeached. The only power the Senate has is to remove the officer from

(23) *Id.* at 330. In a case decided by a United States Court of Appeals but not the Supreme Court, it was held that the President could not make an executive agreement which contravened a statute written by Congress. See *United States v. CAPPS,* 204 F.2d 655 (4th Cir. 1953).
(24) Art. III, sec. 2.
(25) See *MARBURY v. MADISON,* 1 Cranch 137 (1803).
(26) Art. II, sec. 3.
(27) Art. I, sec. 7.
(28) Art. II, sec. 3.
(29) Art. II, sec. 2.
(30) Article I, sec. 2 gives to the House of Representatives "the sole power of impeachment." In practice the House of Representatives has acted much as a combination of Grand Jury and prosecutor on the American model. First, by majority vote, the House of Representatives impeaches - or indicts. Then selected members of the House conduct the prosecution during the subsequent trial in the Senate.

office, which must be by vote of 2/3 of the members present, «but the party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to law» (31).
The Constitution, in a section separate from those defining impeachment procedures, sets out the legal grounds which may be used for impeachment in rather broad language :
«The President, the Vice President and all Civil Officers of the United States shall be removed from Office on Impeachment for, and conviction of, Treason, Birbery, or other high Crimes and Misdemeanors» (32).
A more refined definition of the terms used by the Constitution has not been announced by major courts, partly because the impeachment process has been only seldomly used (33). Only one American President has been impeached by the House of Representatives, and he was acquitted by the Senate. Since then, over a century has elapsed and impeachment of a President has come to be regarded as a severe measure.

III. *Legal Doctrine of Executive Privilege.*

An important outgrowth of the Constitutional patterns of checks and balances has been the evolving legal doctrine of executive privilege. Under the doctrine, the President of the United States and his personal advisors have been held to be immune from summons to give testimony or answer questions before the courts or Congress (34). While it is true that the heads of the principal executive departments commonly testify before committees of Congress, partly for purposes of obtaining appropriations, there is controversy as to whether the doctrine holds that even these officers may avoid testifying if the President so orders. The policy behind the doctrine is reflected in the *Curtiss-Wright* reasoning : «a President who can be required to give answers at the orders of other officers is a President who is not free from encroachments by other branches into the areas of responsibility specifically delegated to the President.»
The doctrine of executive privilege has been invoked from time to time by Presidents seeking to protect their administrations from a suspicious or hostile Congress. In only rare instances has any form of the issue been presented to the courts for a decision. The first, and most famous case, arose from the criminal prosecution in 1807 of Aaron BURR, a former Vice President of the United States, and political foe of President

(31) Article I, sec. 3.
(32) Article II, Sec. 4.
(33) The House of Representatives has impeached only 12 Federal Officials in the 174 years since the effective date of the Constitution ; the Senate has removed 4 of these officials from office. See Congressional Directory, 92nd Congress, 2nd Session at 397.
(34) See *United States v. BURR,* 25 Fed. Cas. 30 No. 14,692 (CCD Va. 1807).

Thomas JEFFERSON. During the course of the trial it became known that JEFFERSON had in his possession a letter which contained information detrimental to the Government's case. The Judge sitting at the trial, Chief Justice of the United States Supreme Court John MARSHALL (35) (sitting temporarily as a Federal trial judge) issued a court order for President JEFFERSON to produce the letter for the court. JEFFERSON refused to comply. The court made no move to enforce its order, so it can not be said that the case was conclusive ; yet precedent was established for the privilege of future Presidents (36).

Though the question has not, since JEFFERSON's time, had a definitive airing in court there have been cases which are instructive on the issue. In *United States v. Reynolds* (37), civilian victims of an air accident involving a United States Air Force jet attempted to obtain an Air Force report on the accident for use in a suit against the Government. The Air Forced declined to supply the report on the basis that it contained information the Government considered secret. The Supreme Court ordered the Air Force to turn over the report to a Federal Judge, who would review it to determine whether there was secret information worthy of keeping the report from the hands of private parties. The important doctrine established by the case is that the Government itself cannot be the final determiner of the necessity for keeping information confidential. An independent reviewer alone can make the final decision ; any other arrangement would put the Government beyond law (38). It must be emphasized, however, that the REYNOLDS case involved only officials of the Air Force on a matter that was not critical for national security. The responsibilities of the President himself, or members of his staff, might be treated differently.

(35) Appointed by JEFFERSON's predecessor, John ADAMS.

(36) At least 20 of the 36 Presidents have invoked executive privilege on at least one occasion. See Harvard L. Rev., year 1971, at 1212, note 171.

(37) 345 U.S. 1 (1953).

(38) On this point see also EPSTEIN v. RESOR, 421 F.2d 930 (9th Cir. 1970, *cert. denied* 398 U.S. 965 (1970) where a United States Court of Appeals ordered that an independent judicial review be conducted to determine whether United States Army refusal to disclose a file on the repatriation of anti-communist citizens to the Soviet Union was "arbitrary and capricious." See also *Committee for Nuclear Responsibility v. SEABORG,* 463 F.2d 788 (U.S. App. D.C. 1971) where plaintiffs sued to obtain documents of the American Atomic Energy Commission to ascertain whether the Commission was meeting its statutory responsibility to properly show enviornmental effects of underground nuclear explosions. In answer to the Commission's claim of complete immunity, the Court stated :

"... this claim of absolute immunity for documents in possession of an execution department or agency, upon the bald assertion of its head, is not sound law... any claim to executive absolution cannot override the duty of the Court to assure that an official has not exceeded his charter or flouted the legislative will... the court will take into account all proper considerations, including the importance of maintaining the integrity of the executive decision-making process". 463 F.2d at 792-94.

In the Watergate controversy, the case of *In Re Subpoena to Nixon* brings the issue of executive privilege to the President's doorstep. The case involves a petition by the special prosecutor (appointed to bring to justice those who participated in the Watergate scandals) to obtain for presentment to a Grand Jury, tape recordings (admitted to exist) between the President and principal Presidential aides. The tapes sought specifically are those of conversations on certain crucial dates during which, as one former White House aide has alleged, President NIXON participated in plans to cover-up the organizers of the Watergate operation, and thereby engaged in the crime of obstruction of justice.

The opinion in *In Re Subpoeno to Nixon,* by Chief (District) Judge SIRICA is not to be the final judicial declaration in this case. A decision by the United States Court of Appeals for the District of Columbia is awaited and later the United States Supreme Court is expected to speak. Still, Chief Judge SIRICA's opinion covers the issues in the case with some thoroughness and is thus highly significant.

Judge SIRICA's decision stands within the doctrine of the *Reynolds* case that executive officers may be ordered to disclose information and turn over documents only to the extent that the documents are directly relevant to a valid legal interest and only after an independent judicial officer has the opportunity to review the documents. The court reviewed the debate which occurred in the Convention which wrote the Constitution and noted the special concern shown by the Convention members that all of the Governmental departments have a right to privilege limited to «what is necessary and no more» (40). The Court was quite clear in stating that it «cannot agree with» the President «that it is the Executive that finally determines whether its privilege is properly invoked» (41). Further, the court places the «burden ... on the President to define exactly what it is about his office that court process commanding the production of evidence cannot reach there» (42). The court was not bothered by the fact that its decision constituted an order by one branch of the Government against a co-equal branch. Citing the language of Chief Justice MARSHALL in the *Burr* case, the court re-assured the President that it would not permit information to pass which was either damaging to the nation or inessential to the criminal charges :

«... If ... (the tapes) ... contain matter not assertive to the defense, and disclosure be unpleasant to the executive, it certainly ought not to be disclosed» (43).

To support his argument that the courts can step in to review the scope of executive privilege, Judge SIRICA affirmed the fact that the American

(39) F. Supp. 1 (1973).
(40) 360 F. Supp. at 5.
(41) *Id.*
(42) *Id.* at 6-7.
(43) *Id.* at 7, quoting *United States v. Burr,* note 34 *supra* at 190.

Constitution does not make any one department 'watertight' from the others — that the powers and responsibilities of the respective branches are over-lapping (44). Lastly, the court brushed aside arguments that it does not possess the physical power to require anything of the President : «it would tarnish the Court's reputation to fail to do what it could in pursuit of justice. In any case, the courts have always enjoved the good faith of the Executive Branch ...» (45).
There the law stands at this time, slightly more weighted in favor of the interests of the criminal justice system, embodied in a Grand Jury, than the interests of Presidential secrecy.
That area of the executive privilege issue pertaining to the authority of Congress or courts to subpoena live testimony of executive officers has been omitted deliberately from this discussion. The issue has been largely untested ; it has not arisen in the context of Watergate since the President has permitted his aides to testify before Congress and Grand Juries. Only the President himself has not come forward and he has not been subpoened to do so.

IV. *Executive Investigative Power in Security Cases.*

The fact that the President of the United States may exercise special powers and employ secret measures to protect the national interest is well founded. At least since the time of Jefferson, when without prior authorization from Congress, forces were dispatched to counter the Barbary Pirates, the President has been given complete power to deploy American military forces. The *Curtiss-Wright* opinion underlines the respect accorded to the ability of the President to obtain information not available to the public at large and to act on the basis of that information.
The emergency power of the President has been affirmed in a number of cases arising out of war-time crises in which the United States has been involved. In the *Prize Cases* (46), the Supreme Court upheld actions by President LINCOLN to seize certain ships under the blockade he had imposed against the Southern Confederacy during the American Civil War. In *Ex Parte Quirin* (47), the Court affirmed the power of the President to try enemy military agents captured in the United States in front of a military tribunal. The well-known case of *Korematsu v. United States* (48) that the President, through a local military commander, has the authority to restrict the movement of a group of citizens (49) where

(44) 360 F. Supp. at 8-9.
(45) *Id.* at 9. The Judge, in addition, put great weight on the fact that the prosecution was specific as to the exact materials it wanted and for the exact reasons. See *Id.* at 11.
(46) 67 U.S. 635 (1863).
(47) 317 U.S. 1 (1942).
(48) 323 U.S. 214 (1944).

it is felt that military invasion is a real danger and the President believes the restrictions to be militarily desirable.

Nonetheless, the law in this area is far from being one-sided on behalf of Presidential powers. There is substantial case law holding that the President may not exercise emergency powers at the expense of the legitimate rights of American civilians. *Ex Parte Milligan* (50) is the first in this line of cases. At issue was an order by President LINCOLN during the American Civil War suspending the operation of the Writ of Habeas Corpus in the State of Indiana and causing certain criminal cases to be tried before a military tribunal set up in that state. Except for a cavalry raid of short duration, Indiana was not a battleground of the War and civilian courts remained open at the time MILLIGAN, an anti-war agitator, was convicted. The Supreme Court reversed the conviction on the basis that the Constitution made the military tribunal's exercise of power over a civilian unlawful. The Court declared :

«Martial rule can never exist where the courts are open, and in the proper and unobstructed exercise of their jurisdiction. It is also confined to the licality of actual war» (51).

Reid v. Covert (52) involved cases in which civilian dependents of American military personnel stationed in occupied Germany were tried and convicted before militray tribunals for crimes they were believed to have committed. The convicted persons petitioned the United States courts for their release under a writ of Habeas Corpus on the grounds that the Government could not try civilians before military tribunals when there were practical means to bring the accused persons before civilian courts (53). The Court held that notwithstanding the power of Congress to provide for naval and land forces, the Fifth Amendment to the Constitution makes «military trial of civilians ... inconsistent with both the 'letter and spirit of the Constitution'» (54). The Court predicated its opinion partly on the grounds that an upholding of the court-martials might open the door to Presidential interference into the disposition of criminal cases :

«... Congress has given the President broad discretion to provide the rules governing military trials ... If the President can provide rules of substantive law as well as procedure, then he and his military subordinates exercise legislative, executive and judicial powers with respect

(49) In *Korematsu* the citizens were Japanese-Americans living on the West Coast of the United States.

(50) 71 U.S. 2 (1866).

(51) *Id. at* 127.

(52) 354 U.S. 1 (1957).

(53) This time the courts were set up under Congressional as well as Presidential directive. This presents a stronger presumption in favor of legitimate exercise of governmental power than where the President acts alone. See *Youngstown Sheet and Tube Co. v. SAWYER,* concurring opinion by Mr. Justice JACKSON, 343 U.S. at 635-37.

(54) 354 U.S. at 22.

to those subject to military trials. Such blending of functions in one branch of the Government is the objectionable thing which the draftsmen of the Constitution endeavored to prevent by providing for the separation of governmental powers» (55).

Perhaps the most famous case to involve the peremptory powers of the President to effect the lives of American civilians was *Youngstown Sheet and Tube Co. v. Sawyer* (56). In that case President TRUMAN, during the period of American involvement in the Korean War, seized various steel mills as a means of assuring continued production of steel which had been threatened because the workers at the plants were planning a strike. The Government permitted the private managers of the plants to continue operating them, but the owners of certain plants sued the Secretary of Commerce, who had acted on behalf of the President, on the basis that the seizure was illegal under the 5th Amendment of the Constitution (57). No act of Congress authorized the President to seize the mills. The President based the legality of the seizure on his general executive powers, on his powers and responsibility as Commander-in-Chief to see to it that the armed forces received a continuing supply of steel.

The Court rejected the President's assertion of authority under his general executive power by stating that the Constitution rejects the idea of President as law maker (58). Also rejected was the President's argument under his power as Commander-in-Chief :

«Even though 'theatre of war' be an expanding concept, we cannot with faithfulness to our constitutional system hold that the Commander-in-Chief of the Armed Forces has the ultimate power as such to take possession of private property in order to keep labor disputes from stopping production» (59).

The Court held the seizure to be illegal as a Presidential incursion into an area reserved for action by Congress. The President complied with the decision and the Government dropped all control of the steel mills. It can be seen from the cases that though American law leaves a great deal to the discertion of the President, the Courts are not timid about putting brakes on the use of Presidential power when such use threatens to encroach on well established liberties.

These different strands come together, in the context of a case involving the President's authority to surreptitiously gather information about suspected citizens : *United States v. United States District Court* (60).

(55) *Id.* at 38-39.
(56) 343 U.S. 579 (1952).
(57) The relevant portion of the 5th Amendment is "nor shall private property be taken for public use, without just compensation."
(58) 343 U.S. at 587.
(59) *Id.*
(60) 407 U.S. 297 (1972).

The case involved a decision by the Attorney General, with general approval by the President, to wiretap certain American citizens within the United States whom he thought might be consummating dangerous activities, potentially threatening to national security. A United States District Judge ordered the Government to turn over records of the wiretaps to the defendants who had been tapped. The Judge did this bacause the Government had disregarded the procedure instituted by the 4th Amendment to the Constitution (61) wherein a warrant, or approval by a neutral judicial officer need be obtained before documents or tangible evidence is seized from a criminal suspect. The Judge ordered the turning over of the records because the United States Supreme Court in the cases of *BERGER v. New York* (62) and *KATZ v. United States* (63) held that wiretaps without warrants were unconstitutional and the case of *ALDERMAN v. United States* (64) required that the handing over of records be used as a sanction against the Government and as a method of protecting the rights of accused persons.

District Court gains its prominencie from the fact the executive branch sought to distinguish it from earlier wiretap cases on the basis that it involved national security while the earlier cases merely involved domestic crime. The Government contended that the President could exercise his executive powers by obtaining evidence without a warrant in a case in which the President himself determined might affect the national over-all strength in the world :

«disclosure to a magistrate of all or even a significant portion of the information involved in domestic security surveillance would create serious potential dangers to the national security and to the lives of informants and agents. Secrecy is the essential ingredient in intelligence gathering ; requiring prior judicial authorization would create a greater 'danger of leaks'».

The Court, however, citing an old English case (66), found that the Fourth Amendment's preference for search warrants could not be overcome even if the case had national security implications. The executive would still be required to come before a neutral judicial officer in order to carry out a lawful wiretap :

«... Fourth Amendment freedoms cannot properly be guaranteed if domestic security surveillance may be conducted solely within the

(61) The 4th Amendment reads : "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."
(62) 388 U.S. 41 (1967).
(63) 389 U.S. 347 (1967).
(64) 394 U.S. 165 (1969).
(65) 407 U.S. at 319.
(66) *Leach v. Three of the Kings Messangers,* How. St. Tr. 1001, 1027 (1765).

discretion of the executive branch ... unreviewed executive discretion may yield too readily to pressures to obtain incriminating evidence and overlook potential invasions of privacy and protected speech ... (67). Any inconvenience is justified in a free society to protect constitutional values» (68).

In view of the judicial checks placed upon exercise of Presidential discretion in the *Youngstown* and *District Court* cases, the case against White House covert information gathering operations, as reportedly surrounded the Watergate affair, would appear to be a strong one. Certainly there is no law that holds that operations by vestige of Presidential decision alone. The White House organizers may contend that the operations were conducted largely before the *District Court* case was decided, so that the guidelines were less clear. They may also point out that *District Court* left open the question of whether wiretaps without warrants may be conducted on foreign citizens in the United States thought to be carrying on subversive opersations (69). Still the message that should have been clear and should remain clear is that the United States is a land in which the Constitution, not the Government, is 'Supreme' (70).

(67) 407 U.S. at 316-17.
(68) *Id.* at 321.
(69) *Id.* at 321-22.
(70) Article VI of the Constitution states : This Constitution... shall be the Supreme Law of the Land." In addition Article II, section 1 of the Constitution prescribes that the President "before he enters on the Execution of his Office... shall take the following oath : 'I do solemnly swear that I... will to the best of my ability, preserve, protect and defend the Constitution of the United States'."