Why Nixon Fears to Resign

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—Washington

The biggest obstacle to Mr. Nixon's resignation may be his fear of going to jail. So long as he stays in the White House, he is safe. As President, he has the power to hamper investigation, drag out litigation, and block his own prosecution.

He has yet to be proven guilty, but he seems in no hurry to prove himself innocent either. If—as seems clear—he wants at any cost to avoid trial of the issue, his best barricade is the White House fence. Once he is put out of office, his position is not much better than that of Mitchell or Stans, Haldeman or Ehrlichman, or any other citizen.

While others talk of capacity to govern, Mr. Nixon's first concern may be to avoid conviction. From that point of view, much that has happened and much that will happen may still seem desperate but will no longer seem foolish or irrational. When Senator Jackson (echoing Goldwater) asked Mr. Nixon to go before the Ervin committee and "lay his cards on the table,"[1] he was asking the President to lay his head on the chopping block. If "the cards" could prove his innocence, he would have laid them on the table long ago. Not to see this is no longer naïveté. It is self-deception.

There is a parallel between the Nixon and Agnew cases. Agnew, too, clung to the Executive office, and tried to dig himself in with the claim that he could not be prosecuted until he was first convicted on impeachment. He was forced out by carrot and stick. The stick lay in the leaks from the grand jury proceedings (quite possibly another in the long list of White House "dirty tricks"), in the mounting evidence against him, and in the Nixon Administration's formal denial in court that the Vice President had any constitutional immunity.[2] The carrot was the Administration's willingness to let Agnew "cop a plea" and avoid going to jail.

Agnew must nurse a rankling bitterness that he only did on a small scale what Nixon did on a large, though there is no proof that Nixon diverted some campaign funds to personal use as Agnew did. Aside from the milk producers' $2 million contribution two days after Nixon reversed the decision of his Department of Agriculture and gave them a price boost, and aside from the $400,000 offer from ITT in its successful campaign to keep the rich cash reserves of Hartford Fire Insurance, there must be countless other cases where threats or promises, explicit or implicit, were made in raising that $60 million campaign kitty. It would shake investor faith in American capitalism if it turned out that so many of our biggest corporations indulgently gave away all that quid without some quo. Extortion and bribery are the plain names of the game.

But the parallel between Nixon and Agnew breaks dov · at a crucial point. There is no one President from whom he, like Agnew, can "cop a plea." Who could arrange immunity, or a plea of *nolo contendere*, to a scaled-down indictment? Who could promise that a judge would not impose a prison sentence?

Nixon's "Saturday night massacre" was no simple outbreak of homicidal mania but a miniature *coup d'état* to install a Praetorian Guard in the three offices on which Nixon must rely to thwart a prosecution. If he is forced out of office, his successor would be a close congressional crony and ideological carbon copy whom Nixon could trust to use the Executive office and its powers over prosecution and pardon in his favor.

His new designate as Attorney General is a former Attorney General of Ohio who seems to feel as Nixon does about those "campus bums" killed at Kent State. Already—Watergate style—he "can't recall" a speech he made to the US Chamber of Commerce in

[1] NBC, "Meet the Press," November 4.

[2] See my "Nixon's Game Plan After Agnew," *NYR*, November 1.

Hong Kong last August. A transcript shows he said that Nixon was right in withholding the tapes and that if incriminating they should be destroyed. Saxbe's jurisprudence is a counterpart of Nixon's: as he put it elegantly last August. "I think he [Nixon] is right in saying that a President cannot be horsed around in the courts."

The new special prosecutor is a strong law and order man (for the poor and black, that is, not for the Texas oil tycoons in whose faithful service this poor boy climbed the ladder). Jaworski has the added virtue of being close to Connally, and one of his first decisions must be whether to push a criminal investigation of the milk producers' $2 million contribution and the milk price rise that followed. This involves Connally as well since he was in on the milk discussions and got some of the money for his Democrats for Nixon.[3]

This new law enforcement cast may not bring a sharp rise in Nixon's credibility, but it will certainly give Nixon comfort. Yet even with such a team to backstop him, it would still be hazardous to try to arrange some promise of immunity from prosecution before agreeing to resign. From Nixon's point of view, "toughing it out" in the White House must look the better bet.

Should Nixon choose to stick it out, he has many ways to delay court action against him. The possibilities of long-drawn-out delays fall into two categories. The first is offered by the special bills Congress is considering for an independent prosecutor. All of them involve serious constitutional questions, and therefore give the White House an avenue for prolonged appeals. Any bill that takes the appointment of a special prosecutor out of the hands of the Executive creates such opportunities. So does any bill which would allow Congress to override the discharge of a special prosecutor named by the President with the advice and consent of the Senate.

There are distinguished legal authorities and weighty precedents on both sides of the fence in this separation of powers controversy. As with almost all fundamental constitutional questions, the contenders have often changed sides, depending on the circumstances. In the landmark case of *US* v. *Cox* in 1965, people who share liberal-left views applauded when the Fifth Circuit blocked the efforts of Eastland's friend, Judge Cox in Mississippi, to have a grand jury indict two blacks for perjury after they had the temerity publicly to accuse a white supremacist voting registrar. Attorney General Katzenbach refused to permit their indictment. Judge Cox, like the sponsors of the Bayh-Hart bill, then claimed that a judge could appoint a special prosecutor with power to sign an indictment.

In 1951, when Nixon and Joe McCarthy were hounding Truman for firing MacArthur, and the State Department for being soft on Communist China, Nixon introduced a bill to authorize court-appointed special counsel to work with "runaway" grand juries. Those were the days when Nixon was an unremitting foe of Executive privilege while liberals defended it.

There are, of course, many ways of

[3] See Jerry Landauer's story "'Milk Scandal' Is Threatening to Blow Up Any Day: It May Kill Connally's Ambitions," *Wall Street Journal*, November 5.

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But among the many unmistakable features of the mature composer in this early work are marches (where would Mahler be without them?); fanfares; organ points and *ostinati*; the surprise noise (at 29); the numerous changes and modifications of tempo; the almost motionless string music near the end (anticipating the *Adagietto* and even the late adagios); the constant shifting between major and minor; the prevalence of the interval of the fourth; the successions of thirds in the horns—these, together with the parallel sixths in the same instrument, being so common in Mahler's music that they almost turn the Nietzsche movement of the Third, and the first movement of the Ninth, into "Alpine" symphonies. Yet listeners hearing *Das klagende Lied* for the first time have identified not Mahler but Bartók as the composer of its most dramatic moment (at 26).

The superior *role* of the orchestra, however, a characteristic of Mahler's lieder in general, is at least as significant in this early work as his "assured instrumental sense," being central to his musical personality. He once admitted that "it was both difficult and strange for him to conduct any opera in which the voice predominates throughout while the orchestra merely accompanies," and his comment on Melba was that he "would have preferred to listen to a clarinet." On the other hand, he maintained that "each orchestral part should sound as though written for a human voice" and that "even the bass tuba and the kettledrum should sing." He was concerned, too, as no composer before him had been, with color and other relationships between voices and instruments, and "the degree to which the word sustains the sound . . . when you pass from wordless music to text." Mahler was a song composer in everything that he wrote. Add to this that two of his ideals were "power" and "grandeur" and it should surprise no one that the orchestra plays so large a part in his vocal music, or that the orchestra so often lifts the song from the singer's throat, as it does in the dirge of *Der Abschied*, to continue the music in a more profound and powerful voice.

Mahler was obsessed with the pursuit of clarity. "Everything must be heard, everything must sound," he said, and he boasted that "the aspect of instrumentation in which I consider myself ahead of past and present composers can be summed up in a single word: clarity." As we learn from the testimony of musicians, as well as from the composer's letters, he was constantly revising his scores to correct instrumental balances and otherwise achieve the greatest possible precision. But Mahler meant more by the word than adjustments toward orchestral perfection. His deepest quest was for purification of the idea and its expression, a goal he attains to an unprecedented degree in the Eighth and Ninth symphonies, as well as in *Der Abschied*. In this last, in fact, his "ends" may even have diverted him from his normal "means" since he actually seems to have accepted the principle of economy. (Or was this composer of extremes simply on the rebound from the colossal expenditures in the Eighth Symphony?) For whatever reasons, not clarity alone but a unique simplicity enters his music in *Der Abschied* and the Ninth Symphony.

Yet it is the great density of

Mahler's music that counts as one of the most apparent elements of its modernism—as well as a chief reason behind his search for lucidity. The melange of noise and music at a country fair provoked him to say that *that* was true polyphony and "anything else . . . mere part-writing and disguised homophony. . . . Themes must come from a lot of different sources and differ from each other in rhythm and melody." Mahler did not go as far as Charles Ives in this direction, yet the statement helps to explain those great climaxes of the principal melodies and motives together in the late symphonies. And also to explain the deliberate harmonic clashes ("We are what we are, we moderns") which led to Mahler's "emancipation of the dissonance"—to borrow Schoenberg's words but not his sense, for, unlike Schoenberg, Mahler never attempted to "free" himself from tonality, but, rather, increased its importance as one of his principal construction tools.

The sense of contrasting key relationships in Mahler's music is unerring, though not necessarily unusual: viz. the conventional use of the key of B flat in relation to the home key in the first movement of the Symphony in D major. (Mahler: "One is always building a new edifice with the same stones.") A further and favorite device, the contrasting of a tonality in its purest and most polluted forms, is another expression of that taste for freakish juxtapositions evident from the first piece he ever wrote, "Polka with Introductory Funeral March." Thus a passage in the first movement of the Ninth Symphony lilts along between tonic and dominant, then suddenly explodes into harmonic combinations resembling that country fair.

Mahler exulted in the creation of his Eighth Symphony. And at least one of the reasons was that the man who had spent his life conducting other people's operas had found an opportunity to compose "operatically" himself, at least to the very limited extent that he wished to go; the *Faust* movement of the Eighth displays an absolute mastery of operatic scene-setting. But the clarity of the music is even more astonishing: of form, above all, no doubt because of the text which imposes it; of thematic and tonal structure, these being simple and clear in inverse proportion to the complexity of vocal and instrumental timbres; and of the orchestration, for nothing is lost in this immense apparatus, and even the thunderous organ does not blur. The vocal and instrumental music are very different in kind, incidentally, the latter, especially in the purely orchestral passages, being the newer. The first instrumental interlude in Part One contains the most modern rhythms that Mahler ever wrote, the last interlude in Part Two some of the most modern sonorities and spacings of sound.

The transparency and radiance of sound in *Der Abschied*, Mahler's supreme song as well as his "*Abschied*" *to* Song, are unique. Here even the kettledrum—and every other instrument—*does* sing as Mahler said it should. He had predicted that "the future of music resides . . . in untried combinations of color . . . leading to unknown combinations of sound." One such combination, in this song, is composed of a melody played by flutes in a low range (doubled by

"distinguishing" the principles of *US* v. *Cox* from those involved in the Bayh-Hart bill, notably the lack of any statutory authority for Judge Cox's action. The separation of powers issue, reduced to essentials, represents in the case of US v. Nixon a choice between allowing some legislative invasion of an Executive function or permitting a man to be the judge of his own case. To allow Nixon alone to decide whether he has violated the law is a far more basic infraction of any separation of powers doctrine. But this choice will ultimately have to be made by the Supreme Court. The inescapable point being made here is that whatever route Congress chooses to prevent the President from being judge and prosecutor in his own case will open the door to prolonged constitutional litigation by the White House. That means months of delay for a final decision on the constitutional issue even before the issue of guilt or innocence can be tried.

The other category of delaying actions is opened up by the recent Court of Appeals decision upholding Judge Sirica's subpoena for the White House tapes. Nixon's decision not to appeal has made this ruling final. It has both positive and negative features, neither of which has been adequately reported in the press.

A good place to begin is with the characteristically disingenuous way in which Nixon discussed the issue in his press conference of October 26. After asserting that "every President since George Washington has tried to protect the confidentiality of presidential conversations," Nixon went on to pack half a dozen misstatements into his discussion of the Burr case, the first in which confidential presidential papers were subpoenaed by a trial judge. Nixon said—

> And you remember the famous case involving Thomas Jefferson, where Chief Justice Marshall, then sitting as a trial judge, subpoenaed a letter which Jefferson had written, which Marshall thought, or felt, was necessary evidence in the trial of Aaron Burr. Jefferson refused to do so, but it did not result in a suit. What happened was, of course, a compromise in which a summary of the contents of the letter, which was relevant to the trial, was produced by Jefferson, and the Chief Justice of the United States, acting in his capacity as Chief Justice, accepted that. That is exactly, of course, what we tried to do in this instant case.

In the first place the letter in question was written not by Jefferson but to him by General Wilkinson. Secondly, the subpoena was issued on motion of the Burr defense, not because of something Marshall "thought or felt." Third, Jefferson did not refuse to submit the letter; he furnished a full copy to the prosecutor for submission to the court. Fourth, there was no compromise which resulted in "a summary." A summary was never suggested either by Jefferson or the court or accepted by Marshall. Fifth, what Jefferson offered—and Marshall was ready to accept—was exactly what Sirica asked: that the court be allowed to examine the letter *in camera* and decide which portions were relevant to the Burr trial.

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Judge Wilkey's dissent in the recent Court of Appeals decision is the most exhaustive scholarly investigation of this issue anyone has ever made. It shows that Jefferson was even ready to let Burr's lawyers see the full text *in camera* and thus verify the fact that nothing was being withheld which concerned the Burr trial. The negotia-

tions broke down because Burr insisted on seeing the whole letter for himself, including those portions Jefferson said had no connection with his case. Burr was finally acquitted of treason and later of misdemeanor without pressing the issue of the Wilkinson letter to a final conclusion.

Nixon completely distorted what happened, particularly in passing over the fact that Marshall's opinion on issuing the subpoena declared that the President unlike a king was not immune to judicial process. Nixon's lawyers in the case of the tapes claimed absolute immunity for the President, unreviewable discretion to invoke Executive privilege.

The Court of Appeals refused to accept this doctrine. It said that counsel for the President had not been able to cite a single case "in which a court has accepted the Executive's mere assertion of privilege as sufficient to overcome the need of the party subpoenaing the documents." "Indeed," it added in a footnote, "no common law country follows the rule, urged by the President in this case, that mere executive assertions of privilege are conclusive on the courts." Like Marshall and Sirica, the majority of the Court of Appeals held that the President's claim of privilege was subject to scrutiny by the courts, that the President was not above the law.

On the contrary, the pleadings in the case revealed that during the first half century of the Republic two other incumbent Presidents and two ex-Presidents submitted to subpoenas. President Monroe, on advice of Attorney General Wirt, accepted service of a subpoena from a naval court martial in 1818 and answered interrogatories from the court under oath. Attorney General Wirt's advice to Monroe to submit to this subpoena *ad testificandum* is given additional weight because Wirt had served as special prosecutor for Jefferson in the Burr trial a decade earlier and apparently regarded Marshall's opinion as a binding precedent.[4]

The first test of a congressional investigating committee's power to subpoena a President came in 1846 when two Senate committees were set up to investigate charges that Daniel Webster had made improper disbursements from a CIA-type secret White House fund for foreign policy shenanigans. President Polk was subpoenaed and provided a list of amounts expended but refused to disclose the purposes. But he did so not on the grounds of Executive privilege but on the ground that the congressional statute creating the fund made its disbursements immune from disclosure. Polk also pleaded that the allegations involved events which occurred before he took office. The Senate investigators thereupon subpoenaed former Presidents John Tyler and John Quincy Adams. Both testified about the use of the funds and their conversations with aides who handled it. Webster was cleared.[5]

These Presidents all followed examples set by Washington. It is true, as Nixon said in his disingenuous way, that "every President since George Washington has tried to protect the confidentiality of presidential conversations." This is only true, however, in the most precise and literal sense. Washington—unlike Nixon—did not plead confidentiality to cloak alleged Executive malfeasance from congressional investigation. Raoul Berger, in two superb law review articles[6] soon to appear in expanded book form, has shown that when the first inquiry of this kind occurred in 1792 Washington did not hide from a House investigating committee "even the ugliest line on the flight of the beaten troops" in the ill-fated St. Clair expedition. About the same time Washington welcomed a congressional investigation of his Secretary of the Treasury, Alexander Hamilton, for alleged derelictions. Hamilton was investigated and cleared.

Other Presidents who cooperated with congressional investigating committees were Lincoln (voluntary appearance before a House judiciary committee), Grant (deposition in the Whiskey Fraud cases against his confidential secretary), and Teddy Roosevelt (who testified in person twice as ex-President in investigations of his administration).[7]

The Court of Appeals decision in the "tapes" case recognized that the President does possess a considerable measure of Executive privilege comparable to the evidentiary privilege which exists between husband and wife, doctor and patient, attorney and client, priest and parishioner. But it held that like these other privileges it is lost (1) where used to prevent investigation of fraud or criminality and (2) where it is breached by selective disclosure.

These common law privileges, as Justice Cardozo said in a leading case, *Clark* v. *US* (289 US 1), may not be invoked in "a relation dishonestly assumed as a cover and cloak for the concealment of the truth" in a criminal investigation. Similarly, in passing upon Sirica's decision, the Court of Appeals held that where the President has allowed aides to testify on the subject matter and to examine the tapes, and has himself discussed their contents, the Executive privilege has been lost.

As Chief Justice Vinson said in another key case, *Rogers* v. *US* (340 US 367), to uphold a claim of privilege where it has already been breached by the person who claims it "would open the way to distortion of facts by permitting a witness to select any stopping place in the testimony." Nixon all his life has shown himself a master of such selective disclosure. The half truth has proven in his hands more misleading than the total lie.

In deciding not to contest the Court of Appeals decision, Nixon and his lawyers may well have felt that they could not hope for a Supreme Court reversal of such well-established legal propositions. They may also have felt that their application was so blurred by the guidelines set up by the Court of Appeals that they could indefinitely delay final decision. The Court of Appeals allows Nixon to withhold from Sirica altogether matter which "relates to national defense or foreign relations" and to ask Sirica to reconsider his request for such material. In practice "national defense and foreign relations" may prove broad and vague enough for considerable evasion. In the

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[4] This fact, which appears neither in the circuit court's opinion nor in the pleadings in the Nixon "tapes" case, may be found in Randall's *Jefferson*.

[5] Pages 6-7 of the Historical Appendix to the Motion for Summary Judgment filed by the Ervin committee in the US District Court for the District of Columbia (Civil Action 1593-73).

[6] "Executive Privilege v. Congressional Inquiry," 12 *UCLA Law Review* (1965), and also pages 3 and 4 of the same Historical Appendix.

[7] Historical Appendix cited above.

absence of judicial scrutiny, material on the Ellsberg break-in might be cloaked by the White House as bearing on both or either national defense and foreign relations.

In addition, under the Court of Appeals guidelines, the White House may cloak portions of other tapes and documents "with particular claims of privilege." Here the court told Sirica that he may (1) allow the claim in full, (2) order segments disclosed to the grand jury, or (3) if segmentation is impossible, provide the grand jury with summaries. Sirica "may" give the special prosecutor access to the documents *in camera* to determine the relevance of the material, but if he does so the White House may appeal and stay the special prosecutor's access to the documents. The White House may also appeal and stay the judge's rulings on partial claims of privilege and the way he has chosen to meet them. These complex and cumbersome procedures—rich in ambiguity—open the way to months of litigation, perhaps sufficient to put off a final determination of the case until Nixon's term is almost over.

Thus Nixon can stay barricaded in the White House for a long time to come, "toughing it out" and hoping that at some point the public may grow weary of the whole affair or be distracted by some other affair—perhaps by the triumphant imposition of a settlement on the Middle East or, if Kissinger's efforts fail, by a new confrontation.

What few may realize is the sharp escalation of what is involved. Watergate began with a simple burglary. It evolved into a conspiracy to obstruct justice. It now threatens a revolution.

What I mean by that is this. The claims made by the President in his pleadings far overshadow the mere crimes of burglary and obstruction of justice. The President's lawyers have advanced three claims. One is that the President is absolutely immune to judicial process. The second is that he has an absolute right, unreviewable by the courts, to invoke Executive privilege against any investigation of the Executive branch. The third is that his constitutional duty to see to the faithful execution of the laws makes him the nation's No. 1 Prosecutor with the right to withhold any information he chooses from any grand jury and to block any indictment he chooses. To allow such claims to be established by successfully eluding final decision in the Supreme Court, and to set future Presidents an example of how they may break the law with impunity, would be to lay the basis for transforming the Republic before its bicentennial into a presidential dictatorship. This threat can only be met by a Congress resolute enough to impeach him. □

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