Subpoena for Nixon Involves Historical Precedents

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WASHINGTON, Aug. 5—"It cannot be denied," John Marshall wrote with some prescience in 1807, "that to issue a subpoena to a person filling the exalted position of the Chief Magistrate is a duty which would be dispensed with more cheerfully than it would be performed."

"But, if it be a duty," the Chief Justice declared, "the Court can have no choice in the case."

Both Archibald Cox, the Justice Department's special Watergate prosecutor, and President Nixon, on whom he served a subpoena two weeks ago, would have preferred to dispense with that process, but that ends any agreement between them on the historic legal controversy that will unfold here this week.

On Tuesday, the President's attorney, Prof. Charles Alan Wright of the University of Texas, is scheduled to appear in Federal District Court with a statement justifying Mr. Nixon's refusal to furnish the prosecutor with tape-recordings of White House conversations dealing with the Watergate affair.

Oral Arguments Expected

Mr. Cox will be in the courtroom in case any need for a statement or motion on his side of the case arises, but Chief Judge John J. Sirica is expected to accept the White House legal papers and then schedule oral arguments by both attorneys for a later date.

Professor Wright has been close-mouthed about the case he plans to present for the President, but the general outlines of Mr. Cox's legal position are discernible in the petition he filed with the court that forced the White House response set for Tuesday.

Among legal authorities who have studied the relatively few judicial precedents and the applicable history, the following emerge as the major issues of the controversy:

¶Is the President, as the Chief Executive of the nation, exempt from all legal process and thus from the subpoena that would require him to produce the White House tapes?

¶Does the President have an absolute privilege, by virtue of his office, to refuse to provide internal White House records to a grand jury if he feels such a refusal is in the public interest, with no power in the courts to review his decision?

¶Assuming the President has a qualified privilege to keep some of his records confidential, with the courts determining which ones qualify, does the special prosecutor's need for grand jury information outweigh the President's need for confidentiality in the case of these specific records?

¶Did the President waive whatever privilege he might have claimed for these tapes either by permitting past and present White House aides to testify before the Senate Watergate committee about the conversations involved or by granting personal access to some of the tapes to a committee witness who then abandoned a claim of privilege and discussed their contents freely?

Both May Cite Him

On the issue of Presidential immunity from subpoena or any other legal process, Chief Justice Marshall's 1807 opinion is likely to be cited by both the White House and the special prosecutor.

Involved in that decision, which Marshall handed down while presiding as a circuit judge over the treason trial of Aaron Burr, was the question of whether President Jefferson could be subpoenaed to produce a letter that Burr felt was important to his defense.

While Marshall ruled that the Court had the power to subpoena the President, he appeared to leave open the question of whether the President could then be compelled by any court to obey such a subpoena.

"Whatever difference may exist with respect to the power to compel the same obedience to the process, as if it had been directed to a private citizen," the Chief Justice wrote, "there exists no difference with respect to the right to obtain it."

Professor Wright is likely to claim a significant precedent in an 1866 case in which the Supreme Court denied an attempt by the State of Mississippi to enjoin President Andrew Johnson from enforcing the Reconstruction laws approved by Congress.

Chief Justice Salmon P. Chase declared that if an injunction were issued by the Court and the President refused to obey it, "it is needless to observe that the Court is without power to enforce its process."

Modern critics of this decision point out that the Supreme Court, at that time, had not yet reached the point of permitting anyone to obtain an injunction against the enforcement of any unconstitutional Congressional statute.

The special prosecutor has already indicated that he will cite the Supreme Court's 1952 decision that President Truman had exceeded his constitutional powers in seizing the steel industry to avoid a strike, as evidence that the court can effectively order a President to do something or stop doing it.

One of the more persuasive arguments that high government officials are not exempt from testifying before a court or grand jury, voiced by Jeremy Bentham, the 19th century British philosopher and legal critic, was quoted approvingly by the Supreme Court just a year ago.

"Were the Prince of Wales, the Archbishop of Canterbury, and the Lord High Chancellor to be passing by in the same coach," Bentham observed, "while a chimney-sweeper and barrow-woman were in dispute about a half-pennyworth of apples, and the chimney-sweeper or the barrow-woman were to think proper to call upon them for their evidence, could they refuse it? No, most certainly not."

Wigmore's classic legal text on evidence calls the President's exemption from compulsory process "a large question" but argues that he would have a duty to testify even if the courts could not properly require him to.

"The public has a right to every man's evidence," the 1961 edition of Wigmore states. "Is there any reason why this right should suffer an exception when the desired knowledge is in the possession of a person occupying at the moment the office of chief executive of a state? There is no reason at all."

On the issue of whether the President has an absolute right to keep certain documents confidential, a position Mr. Nixon asserted earlier with respect to some of the Watergate material but has since moderated, Mr. Cox cited in his complaint a 1953 Supreme Court decision denying court access to military secrets.

In that case, which involved a damage suit against the Government by widows of surveillance pilots killed in a crash, the Justices ruled, however, that such a claim of privilege could be examined by the courts before it was allowed, not merely asserted by the executive branch.

Against Losing Control

"Judicial control over the evidence in a case cannot be abdicated to the caprice of executive officers," the Supreme Court declared then.

In 1972, denying any constitutional privilege by news porters to refuse to reveal confidential information sources the Supreme Court held that "citizens generally are not constitutionally immune from grand jury subpoenas, and neither the First Amendment nor other constitutional provision protects the average citizen from disclosing to a grand jury information that he has received in confidence."

On behalf of the President, Professor Wright is certain to respond that his client is far from the "average citizen" of whom the Court spoke, having special responsibilities as the Chief Executive of the Government that entitle him to special privileges.

There are almost no legal precedents on the questions of whether the President enjoys a qualified privilege, how the courts can determine what information is privileged, how privileged and unprivilged material should be disentangled and how such a privilege is waived.

Right To Access

Mr. Cox contended in his petition for a show-cause order against the President that the tapes he is seeking contain "relevant and important evidence" for the grand jury, that the jury has an enforceable right to access to them, that the President has waived any claim of executive privilege as to criminal matters and that, if any legitimate claim of privilege is involved, the courts, not the President, must determine if it is valid.

Another unresolved legal question is whether papers relating to the internal management of government can be kept confidential in the interest of making a wide variety of preliminary advice freely available to the President and his Cabinet officers.

In a speech promoting ratification of the Constitution, Patrick Henry declared: "To cover with the veil of secrecy the common routine of business is an abomination in the eyes of every intelligent man and every friend to this country."

Wigmore follows this quotation with a declaration of his own that "such a secrecy can seldom be legitimately desired."

"It is generally desired," the evidence authority wrote in 1940, "for the purpose of partisan politics or personal self-interest or bureaucratic routine. The responsibility of officials to explain and to justify their acts is the chief safeguard against oppression and corruption."