THE CONSTITUTION

The Law on the Tapes and Papers

When the congressional request for certain of his papers was formally filed, the President quickly convened a Cabinet meeting so that the confrontation would be handled as correctly and carefully as possible. George Washington knew that this first effort of Congress to investigate an Executive Branch matter would be a vital precedent. He and his Cabinet members unanimously agreed "that the Executive ought to communicate such papers as the public good would permit and ought to refuse those the disclosure of which would injure the public."

That 1792 precedent has stood. As Senator Sam Ervin's committee grapples with the problem of getting Nixon's presidential papers, tape transcripts or the tapes themselves, the legal situation is much as Washington left it.

Presidents have continually suffered congressional inquisitiveness and have generally claimed that their response was a matter of presidential discretion. In that first case, for instance, which involved a military campaign against the Indians, Washington did agree to turn over the papers being sought. But four years later he turned down a request from the House for the written instructions to diplomats who had negotiated a treaty with Great Britain.

Theodore Roosevelt rebuffed a congressional attempt to get documents on a federal legal action that had or had not been undertaken against U.S. Steel —and if not, why not. (Lest it seem that nothing changes over the years, T.R.'s partial excuse was that he could not violate a promise of secrecy to an individual, an explanation that in this suspicious age would be hooted down.)

Within a month of taking office, John F. Kennedy was tangling with a congressional subcommittee that wanted documents on foreign aid programs for Latin America; after considerable acrimony, the documents were reluctantly, but voluntarily, turned over.

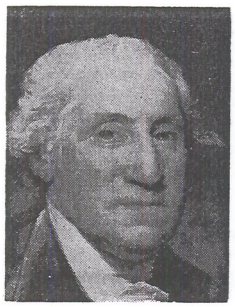
Open Door. A critical element in these and similar confrontations, observes New York Lawyer Martin F. Richman, a former Justice Department official, has been that "the committee involved usually backs down on its demand, but the Executive also backs down by providing the substance of the information sought in some other way." Which is one reason why there are virtually no court decisions dealing directly with the subject.

Because of that vacuum, constitutional scholars can scarcely be sure of anything. But there is general agreement that tapes and tape transcripts are legally the same as documents for the purposes of subpoena. And, for that matter, there is no major legal difference between a request for presidential papers and a request for his personal testimony. To date, there has never been a congressional subpoena issued to a President. Senator Ervin is confident that one could be, however. Such a subpoena, he argues, would not violate Executive privilege if it sought specified material that related only to campaign or allegedly illegal activity. Besides, he adds, the President has already waived his Executive privilege by allowing aides to testify; having opened the door with those aides, he cannot now close it for his papers.

Ervin is fond of citing a subpoena for certain papers and testimony issued to President Thomas Jefferson. But Jefferson's information was sought not by Congress but by a court for the criminal trial of Aaron Burr on treason charges. The situation is different when the Legislative Branch is locked in direct conflict with the Executive. Only last year Justice William O. Douglas argued that it is "no concern of the courts, as I see it ... whether a committee of Congress can obtain [an Executive Department document]. The federal courts do not sit as an ombudsman, refereeing the disputes between the other two branches." The statement was an aside in a dissent; but since that is the view of the court's most liberally activist member, it seems possible that the Supreme Court might decline to rule on *"Nixon* v. *the Ervin Committee,"* rather than turn matters into a three-way separation-of-powers brouhaha. That is, unless Ervin can make stick his contention that Congress has the same powers as a court in probing illegal White House activities, or unless he can force a criminal contempt-of-Congress charge to be brought.

The court is less likely to be able to duck any conflict resulting from a criminal case or a criminal investigation, such as that of Special Watergate Prosecutor Archibald Cox. There, a denied request for documents would not be a squabble between the two other governmental branches; criminal matters are an area of direct judicial concern. Though Cox originally announced that he had been assured full White House cooperation, there has in fact been foot-dragging on many requests. Cox has already filed a written request for the Nixon tapes, and, should Nixon eventually ignore a grand jury subpoena in that investigation, he might well run head-on into his own law-and-order majority on the Supreme Court.

In deciding last year that a grand jury could require a senatorial aide to testify about non-legislative affairs, Justice Byron White observed for the majority that "the so-called Executive privilege has never been applied to shield Executive officers from prosecution for crime." In another case requiring newsmen to answer grand jury questions, White, again for the majority, indicated that "in proper circumstances a subpoena could be issued to the President of the United States." And in the Pentagon papers case, Chief Justice Warren E. Burger criticized the New York *Times* for failing "to perform one of the basic and simple duties of every citizen" when it became aware of stolen property. "That duty ... was to report forthwith to responsible officers. This duty rests on taxi drivers, Justices and the New York *Times*." It is because of observations like these that many legal scholars guess that the President would lose a court test against a Cox grand jury, and sooner or later must yield.



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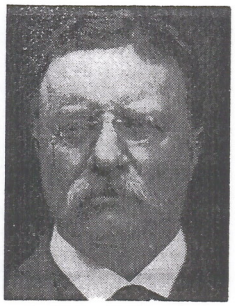

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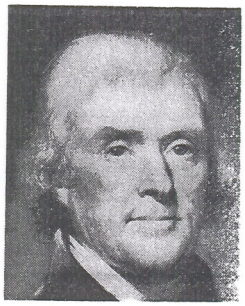

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Stanford Constitutional Expert Gerald Gunther notes an intriguing paradox, however, that might develop if Nixon did somehow prevail in court. "The more Nixon wins the Executive privilege issue against Ervin and Cox," says the law professor, "the more the pressure builds for an impeachment proceeding." For, unless the President took the politically suicidal road of invoking his Fifth Amendment privilege against self-incrimination, Congress could assuredly get any documents it wanted during an impeachment. Teddy Roosevelt recognized that reality when he withheld the U.S. Steel papers. The only way to get the papers, he told the Senate in his characteristically bully way, was to impeach him. Former Attorney General Richard G. Kleindienst also said as much four months ago, when he announced the Administration's broadest Executive privilege claim. President Nixon has already beaten several tactical retreats from that blanket no, most notably in permitting his former aides to testify before the Ervin committee. There may be more concessions to come.