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'The President Is Not Above the Law'

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In baseball, the pitcher does not also get to call balls and strikes. In school, the student does not grade exams. And in law, no man can be a judge in his own case.

Even the President of the United States is not exempt from that basic rule. If he were, the President could murder his wife and then order the Justice Department not to prosecute. Or he could refuse to pay taxes, and then order the Internal Revenue Service not to collect.

But elementary as these principles may seem, President Nixon is now challenging them. That is the nub of his fight over the White House tapes with the House Judiciary Committee and the Watergate Special Prosecutor. It also lies at the heart of his dispute with Judge Gerhard Gesell in the Ellsberg break-in case.

The Judiciary Committee is the agent of the House of Representatives in a duly authorized impeachment hearing. The first responsibility of the committee is to determine whether there is probable cause for a bill of impeachment to be drawn up against Mr. Nixon.

To that end, the committee has been gathering evidence. As part of the quest for evidence, the committee subpoenaed tapes of scores of conversations between the President and his aides.

Instead of the tapes, the President has given over transcripts which the White House edited from the tapes. But it happens that the Judiciary Committee had a number of tapes which the White House had previously turned over to the Watergate Special Prosecutor's office.

For the past week, the committee has been comparing copies of the edited transcripts with the actual tapes. The result has been an overwhelming sense of discrepancy. The committee staff has found over 100 cases where the transcripts differ from the tapes. In several cases, major matters seem to have been dropped from the transcripts.

Some of the tapes being withheld refer to the most obviously germane questions. For example, one tape the White House will not yield covers a discussion on April 4, 1972, in which Gordon Strachan of the White House staff laid out the intelligence-gathering activities of the Committee for the Re-election of the President. That tape might establish that the President and his aides had advance knowledge of the crudest Watergate crime—the actual break-in at Democratic headquarters.

Not surprisingly, the committee counsel John Doar has called the transcripts "inadequate" and "unsatisfactory." Most of the committee members

seem to agree that the transcripts are not the best evidence. Still, the White House refuses to honor the subpoena. The President is, in effect, saying that he—not the committee—is the best judge of the evidence in his own case.

An almost exactly parallel situation has arisen with the Watergate Special Prosecutor, Leon Jaworski. Mr. Jaworski is also seeking tapes and other material in pursuit of several areas pertinent to his investigation.

After being refused, he went to court for a subpoena. The White House moved to quash the subpoena in a session which—out of respect for the rights of various defendants—was being held in camera.

The general impression is that Mr. St. Clair argued against the subpoena on the grounds that Mr. Jaworski, as an employee of the Executive Branch, did not have the authority to go against the President. Thus, Mr. Nixon, in effect, claimed to be the prosecutor in his own case.

As to the Ellsberg break-in case before Judge Gesell, the two major defendants—former White House aides John Ehrlichman and Charles Colson—argue that they acted on orders of the President in the interests of national security. They have asked, as part of their defense, for access to their own White House files.

Judge Gesell felt the request might

be justified and moved to subpoena the files so that he could inspect them as to their possible relevance. But the White House is resisting the subpoena.

The ostensible reason offered for the resistance is that the files involve national security matters. In fact, one suspects that the President would like to hold up the material so that two of his former aides could argue that the case against them should be thrown out because the best evidence is not available.

Once again, in other words, the President is asserting his right to be judge in a case where he has high personal stakes. He is claiming that he—not Judge Gesell—is the true arbiter of what constitutes relevant evidence.

The appropriate remedies for the disposing of these issues vary. The Judiciary Committee, which needs to assert its primacy and get on with the impeachment, should avoid the courts and merely include the President's action in the bill of particulars on impeachment. The other two cases ought to go to the Supreme Court—and the sooner the better.

For no one should let complexity and sophistry obscure the issue. The basic fact is that the President and his lawyers are nakedly asserting the argument of tyranny—the argument that the president is above the law.