

JUL 29 1973

Nixon on Shaky Ground, Lawyers Say

By C. P. McCarthy

President Nixon is on shaky legal ground in his battle with the Senate committee investigating Watergate.

That was the majority opinion of several local constitutional law experts questioned by The Examiner as the Watergate committee moved into the unprecedented position of taking the President to court.

The issue — the President's rejection of committee subpoenas for White House records and tape recordings — pits the presidency against Congress in one of the most dramatic constitutional confrontations in history.

It is a showdown some constitutional law experts in the Bay Area see the President losing. But at least one expert thinks it is an unwarranted confrontation and believes the courts should reject the whole matter.

Fight It Out
"The courts should not be involved," said Professor Jesse Choper, who teaches constitutional law at the University of California at Berkeley. "I think the major function of the federal courts is to secure the rights of individuals and not to act as umpire between the Congress and the President."
"If the court chooses not



Jesse Choper

to decide," Choper said, "and just leaves it to the respective parties' own devices, the respective parties have plenty of devices."

He said Congress has certain options — such as refusing to approve presidential nominations — to use in bargaining with the President.

Sen. Gravel Case

And Congress, Choper noted, does hold the ace. "The ultimate option, and I am by no means suggesting it," he said, "is to impeach the President."

A different view was taken by Professor Peter Donnici of the University of San

Where Does

Executive Privilege End?



Peter Donnici

Francisco law school.

"This case is going to give the court the opportunity to make some law," he said. "In the future we'll know what the President will be able to get away with and what the President won't be able to get away with."

"It's an area of law that has received almost no attention by the courts," he said, but he noted similarities with the case of Sen. Mike Gravel of Alaska and the Pentagon Papers.

When Gravel refused to tell a Boston grand jury how he acquired the secret papers, the Supreme Court ruled that Gravel's Senate

immunity did not extend to matters other than immediate congressional business.

Same for President

"I think the same rule would apply toward executive immunity," Donnici said. "If it's arguable that some of these tapes and papers concern activities not normally within the President's duties — such as illegal goings-on to get elected — the immunity would not cover it."

"Nowhere in the President's duties is he authorized to commit criminal activities, so immunity

shouldn't apply to that."

What may happen, says Donnici, is that some court, possibly in closed session, will have to review the tapes and documents to see if they do fall under the protection of executive privilege.

"What will be interesting to see is if the President would turn them over to a court trying to decide."

See Nixon Defeat

Both Professor William Cohn of Stanford University and Jon Van Dyke, associate professor at Hastings College of the Law, see the courts ruling against President Nixon. Cohn cautioned, however, that he distrusts anyone who says with confidence that one side or the other will win this battle.

"I don't know how anyone can be confident where there has been no judicial decision. As far as court decisions go, it is totally unprecedented," Cohn said.

"If you recognize there is some executive privilege," said Cohn, "the question is where it ends."

Van Dyke sees the Nixon argument as "totally re-orienting what the founding fathers had in mind."

"He seems to be saying he was given a four-year mandate to act as irresponsibly as he chooses. That seems to be twisting the constitution on its head," said Van Dyke.