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Nixon Tape Stand Rests On 4 Issues

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Only one United States President—Thomas Jefferson—has ever been told by a court that it has a right to subpoena him. Richard Nixon is trying to keep from becoming number two.

His lawyers will go into U.S. District Court here Tuesday to file arguments with Chief Judge John J.

News Analysis

Sirica telling why the President feels he should not produce tapes and documents relating to nine White House conversations involved in the Watergate case.

The material is sought by Watergate Special Prosecutor Archibald Cox on behalf of a federal grand jury investigating criminal aspects of the scandal. This week the Senate Select Watergate committee also is expected to sue for five tapes which it subpoenaed but which Mr. Nixon declined to supply.

While the issues of the committee's case will be spelled out when its petition is filed, those in Cox's case, as seen from the public record, involve at least four major questions:

- May any legal process, such as a subpoena, ever be served on the President of the United States?
- Does the President have an absolute privilege to withhold documents from the courts?

See LEGAL, A4, Col. 1

LEGAL, From A1

- Are these particular tapes and documents privileged?
- Has the President by any of his recent actions waived any right of executive privilege?

If the courts rule for Mr. Nixon on issues one and two, they will not need to decide points three and four. After receiving Mr. Nixon's written arguments Tuesday, Sirica is expected to set a date for Cox to submit a written reply. Then he will probably set a date for a hearing.

It's anyone's guess how long it will take to get a Supreme Court ruling on this first-magnitude constitutional test. But Charles Alan Wright, the University of Texas law professor who will argue on behalf of Mr. Nixon, has estimated it will take at least three months.

Court Powerless

On the issue of whether the President may legally be served a subpoena, the White House may refer to the 1867 case of Mississippi vs. Johnson in which the state sought to enjoin President Andrew Johnson from enforcing the Reconstruction acts, which it claimed were unconstitutional.

In that case Chief Justice Samuel Chase refused the state's request, citing "general principles which forbid judicial interference with the exercise of executive discretion."

Chase said that if the court did allow the injunction and "if the President refuse obedience, it is needless to observe that the court is without power to enforce its process."

The case, however, specifically concerned the President's discretion in carrying out an act of Congress and was decided long before the courts made it a practice to enjoin the enforcement of unconstitutional statutes.

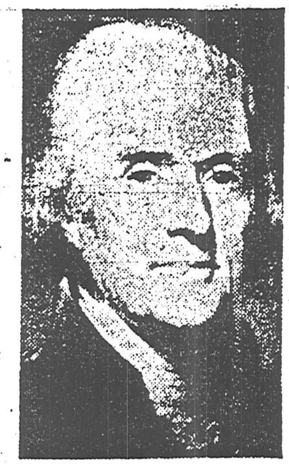
It could also be argued that the 1952 Supreme Court ruling that President Truman exceeded his authority by seizing the steel mills to avert a strike shows that a President is subject to judicial restrictions.

The court didn't have to enforce its ruling; Mr. Truman obeyed it, and the strike went on for 53 days.

Burr Case

In the only other case involving a court-ordered subpoena to a President, Chief Justice John Marshall ordered Thomas Jefferson to produce some documents in the 1807 treason trial of Aaron Burr.

Marshall asserted both the court's right to issue the subpoena and "the President's amenability to process." Jefferson declined to testify because the trial, in which Marshall was presiding as a circuit judge, was being held in Richmond and the President said his absence from Washington



THOMAS JEFFERSON
... treason trial documents

"would leave the nation without an executive branch." But he did offer to give a deposition in Washington and he did supply a letter that Marshall wanted.

The White House may argue that the Burr case is not Court ruling but only that of Marshall sitting on circuit.

But Cox could also argue that the Burr case is still good law, because it was cited as recently as last year by the Supreme Court in the Earl Caldwell case. In ruling 5 to 4 that newsmen have no First Amendment right to protect their sources when called before a grand jury, the court leaned heavily on the fact that the government was seeking information about alleged criminal conduct — which is what Cox and the grand jury are doing.

Case Law Sparse

The court also cited with approval the British philosopher Jeremy Bentham, who said:

"Were the Prince of Wales, the Archbishop of Canterbury, and the Lord High Chancellor, to be passing by in the same coach, while a chimney-sweeper and a barrow-woman were in dispute about a halfpenny worth of apples, and the chimney-sweeper or the barrow-woman were to think it proper to call upon them for their evidence, could they refuse it? No, most certainly."

Nevertheless, the case law is sparse on either side, and Mr. Nixon is expected to rely on the argument he made in a letter to Sirica July 26:

"I must decline to obey the command of the subpoena. In doing so I follow the example of a long line of my predecessors as President of the United States who have consistently adhered to the position that ~~the President is not subject~~ to compulsory process from the courts.

"The independence of the three branches of our government is at the very heart of our constitutional system. It would be wholly inadmissible for the President to seek to compel some particular action by the courts. It is equally inadmissible for the courts to seek to compel some particular action from the President."

Footnote Quote

On the second issue — whether executive privilege is absolute — the President's lawyers will rely at least partly on a point made in a July 23 letter from Professor Wright to Cox:

"The power of the President to withhold confidential documents that would otherwise be material in the courts comes from 'an inherent executive power which is protected in the constitutional system of separation of power.' "

However, the Wright quote is not from a Supreme Court ruling. Rather, it is from a footnote cited by Chief Justice Fred M. Vinson in a 1953 case, United States vs. Reynolds. Vinson was acknowledging that the government had asserted such an inherent executive power.

Vinson ruled that the documents sought in that case contained military secrets which are privileged and do not have to be disclosed in a civil damage suit.

The Cox case involves criminal matters, and the prosecutor no doubt will stress that distinction.

A ruling in 1971 by the U.S. Court of Appeals here contains language supporting the Cox viewpoint. The case, brought by the Committee for Nuclear Responsibility, sought to stop the Atomic Energy Commission from detonating a five-megaton underground nuclear explosion on Amchitka Island off Alaska. The committee lost, but the court did allow it to see certain documents the government contended should be secret.

Secrecy Question

"Any claim to executive absolutism cannot override the duty of the court to assure that an official has not exceeded his charter or flouted the legislative will," the appellate court said.

"The court will take into account all proper considerations, including the importance of maintaining the integrity of the executive decision-making process. But no executive official can be given absolute authority to determine what documents in his possession may be considered in its task.

ANDREW JOHNSON
. . . reconstruction act

"Otherwise, the head of an executive department would have the power on his own say-so to cover up all evidence of fraud and corruption where a federal court or grand jury was investigating malfeasance in office, and this is not the law."

If the privilege is not absolute, then the argument will come down to whether the particular tapes and documents sought by Cox ought to remain secret.

In the atomic-test case, about 90 of 203 pages of documents were withheld from the Committee for Nuclear Responsibility because, as U.S. District Judge George L. Hart wrote:

"Those are documents which reflect intra-executive advisory opinion and recommendation whose confidentiality contributes substantially to the effectiveness of the government's decision-making process."

Inspect Memos

In another case growing out of the Amchitka test, 33 members of Congress sought to force the Environmental Protection Agency to release nine documents which allegedly advised President Nixon against approving the test.

The Supreme Court ruled this year that the material did not have to be disclosed, but it added that in some cases, mainly those where national defense secrets are not at issue, a judge may inspect documents alone in his chambers.

And late last month U.S. District Court Judge William B. Jones said he would do just that with 67 memos dealing with a 1971 government decision to raise price supports for milk.

Jones rejected a blanket claim of executive privilege that the White House had claimed for the papers, and the Justice Department told Jones it would produce them. After Jones reads them, he will decide which, if any, to turn over to William A. Dobrovir, lawyer for the consumer groups fighting the price support increase.

In arguing that the particular tapes Cox has sought are privileged, Mr. Nixon's lawyers may cite the so-called Jencks Act in which Congress provided that the government may refuse to disclose material that a court orders it to produce even if the nondisclosure results in a mistrial.

HARRY S. TRUMAN
... steel mills seizure

The reason, stated in Wright's letter to Cox, is that "legitimate national interests" requiring confidentiality outweigh "the interest in punishing a particular malefactor."

Nine Tapes

Cox might contend that Mr. Nixon's claim to confidentiality has been waived because he has allowed certain former aides—John W. Dean III, John D. Ehrlichman, and H.R. Haldeman—and a current aide, special counsel Richard A. Moore, to testify to the Senate Watergate committee about many of the conversations the nine tapes recorded.

Mr. Nixon might reply, citing his July 6 letter to the committee, that testimony is different from documentary evidence.