

Post 10/17/73

# Are Powell, Rehnquist on Nixon Tapes?

When the controversy over the Nixon tapes reaches the U.S. Supreme Court, which seems a virtual certainty now, will Justices Powell and Rehnquist have to disqualify themselves?

The point of the question is this: The President's Oval Office was "bugged" — with every single conversation there subject to being recorded — from "approximately the summer of 1970," according to former White House aide Alexander P. Butterfield, or "since the spring of 1971," according to presidential counsel Fred Buzhardt.

Now: Were Powell and Rehnquist, who were appointed in the fall of 1971, interviewed in the Oval Office? Are they on those tapes? And if they are, will they be compelled to disqualify themselves from hearing any case involving the tapes?

The question of disqualification isn't meant to be frivolous. It strikes me that some lower court judges have disqualified themselves for reasons no more substantial than this. And in the case of the lower courts, there is always the possibility of correction of error upon appeal.

Not so in the case of the Supreme Court, which makes the question that much more important. And how, without hearing the tapes, or having someone else hear them, could any justice know, whether he is on the tapes or not? And how could any justice hear them absent a prior finding that the President's notions of confidentiality and separation of powers are in error?

And supposing that the justices whose conversations may have been recorded in the Oval Office do, in fact,

**"Were Powell and Rehnquist, who were appointed in 1971, interviewed in the Oval Office?"**

disqualify themselves: Could the remaining justices then issue any ruling that would meet President Nixon's still-secret definition of "definitive"?

Perhaps the whole question can be avoided on the basis that Special Prosecutor Archibald Cox and the Ervin Watergate Committee have asked for recordings from specific dates.

In any case, the question of disqualification ought not go unasked.

And now a different kind of question: Should Rep. Gerald Ford, the President's choice for vice president, be confirmed by the Congress?

After watching the televised congressional response to Richard Nixon's light-hearted nomination, it's impossible to imagine that he won't be.

But should he be?

I say No. Not because the President made a bad choice (although the Michigan Republican is by no means a distinguished choice), but because it is questionable whether Mr. Nixon should be making any choice at all.

If Spiro Agnew's troubles were the only thing involved, then the only fair criticism of the appointment would be that it was too quickly and too jocularly made. The circumstances that

created the vacancy were, after all, both historic and tragic.

But it wasn't just Spiro Agnew. The Vice President's scandal was only part of a larger, more pervasive scandal, of which Mr. Nixon is the centerpiece. Long before any of us knew of the Agnew graft allegations, we had heard persuasive evidence—much of it from the President himself — that Mr. Nixon had committed, blinked at or covered up offenses that well might lead to his own impeachment.

What analogy makes the point? A surgeon facing possible malpractice charges for botching an operation naming the doctor to patch the patient up? The suspected philanderer telling his wife who her next husband should be in the event she files for divorce? Nero appointing the fire marshal?

You can't stop the President from making the nomination, of course; the Constitution allows for that. But there's nothing in the operative 25th Amendment to stop the Congress from disapproving this or any other Nixon nomination to the vice presidency.

Let House Speaker Carl Albert remain as potential successor; if the emergency occurs, let him assume the presidency. And if he is big enough, let him and his colleagues then choose a new vice president and let Albert resign and go back to being Speaker.

Don't bother memorizing that scenario. Ford will be quickly and easily confirmed, partly because the Congress hasn't heart for a fight and partly because its members get along with Gerald Ford.

Which isn't the point at all.