

# Court of Appeals Refuses To Halt Amchitka A-Blast

Sullivan

By E. W. KENWORTHY OCT 29 1971

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WASHINGTON, Oct. 28—The United States Court of Appeals for the District of Columbia refused today to halt the underground nuclear test on Amchitka Island pending the outcome of litigation by seven environmental organizations.

In denying a stay of the test in the Aleutians sought by the Committee of Nuclear Responsibility and six other groups, the court said that such an order "would interject the court into national security matters that lie outside its province."

At the same time, the Court of Appeals affirmed an order by the Federal District Court here directing the Atomic Energy Commission to deliver to the district court certain documents that the environmental groups allege contain factual material on the potential environmental dangers of the test.

Yesterday the President authorized the commission to proceed with the test, in which the prototype of the warhead for the Spartan antimissile mis-

sile is to be exploded at the bottom of a mile-deep shaft. Congress had barred the test until the middle of next year unless it was authorized by the President.

Mr. Nixon ordered that preparations for the test, code-named Cannikin, be completed within a week.

The Court of Appeals, announcing its affirming order at 1 P.M., said it would stay the order for 24 hours if the Justice Department indicated by 4 P.M. that it would appeal to the Supreme Court over producing the documents.

About 4:30 o'clock, the Justice Department, representing the Atomic Energy Commission, announced that the Court of Appeals had granted its request for an extension until 10 A.M. tomorrow to make up its mind whether to appeal. But the Court of Appeals insisted on a deadline of 4 P.M. tomorrow for getting any stay from

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the Supreme Court.

If the Nixon Administration refuses to produce the requested documents and goes to the Supreme Court, the lines will be drawn in what could be a classic case on the limits of the executive branch's right to withhold from Congress and the public information that it insists is privileged.

There have been many cases involving this issue. What distinguishes this one is that the environmental organizations and the district court have made plain that they do not ask the Government to produce any information involving military secrets or foreign relations.

They have asked only for factual information in the documents that may relate to the environmental effects of detonating the nuclear device with the force of five million tons of TNT. Opponents of the test fear the explosion could vent radioactive gas and debris into the atmosphere and water and could set off a seismic sea wave.

## Claim of Immunity

Edmund B. Clark, a Justice Department attorney, before the Court of Appeals yesterday, claimed what the court today described as "absolute immunity" for documents in the possession of the executive, and appealed to "the separation of powers" doctrine.

Mr. Clark argued that the inherent constitutional powers of the executive branch gave it the legal basis for deciding what documents it would produce to a court for the court's

determination whether a plaintiff had a right to inspect them in support of his case.

The unsigned opinion of the Court of Appeals said, "In our view this claim of absolute immunity for documents, in possession of an executive department or agency, upon the bald assertion of its head, is not sound law."

As for the recourse to separation of powers, the court said: "There is no direct Supreme Court precedent. An essential ingredient of our rule of law is the authority of the courts to determine whether an executive official or agency has complied with the Constitution and with the mandates of Congress which define and limit the authority of the executive."

Mr. Clark told the court yesterday that the whole issue had become moot because the President, as directed by Congress, had made the decision to go ahead with the test, and consequently "you are totally blocked from granting any kind of relief."

## Exemption Disputed

David Sive, lawyer for the Committee on Nuclear Responsibility, said that the President's action did not repeal the National Environmental Policy Act or exempt the Atomic Energy Commission from obeying that law.

The law requires that every federal agency submit a statement to the Council on Environmental Quality setting forth the environmental impact of any proposed action. Mr. Sive contended that the commission statement, submitted last spring, did not contain any testimony by reputed scientists who had urged cancellation of

the test because of environmental hazards and therefore did not meet the requirements of the law.

The case was heard by Chief Judge David L. Bazelon and Judges Harold Leventhal and Spottswood W. Robinson 3d.