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Professors See Courts Likely to Force Tapes' Release

By JOHN M. CREWDSON
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WASHINGTON, July 26—In the view of some constitutional experts, the White House's most recent interpretation of executive privilege has increased the linelihood that the courts will force President Nixon to release the Watergate tapes.

"They have now conceded that if a given subject matter has to do with the President's role as head of the Republican party, it's not privileged," said Sanford B. Kadish, a professor of law at the University of California at Berkeley. He added:

"That's the kind of issue the courts are equipped to deci de. They've conceded away what they might otherwise have argued, a broad, sweeping scope of Presidential privilege."

'Constitutional Duties'

Mr. Kadish was one of a number of law professors contacted following a White House briefing today by Charles A. Wright, himself a constitutional expert from the University of Texas Law School, who is advising Mr. Nixon on the Watergate case.

Mr. Wright told reporters that the President would not withhold from Congress or from Archibald Cox, the special Watergate prosecutor, any documents or other materials that dealt with Mr. Nixon's "duties as the head of the Republican party," or any Presidential papers that had lost their "confidentiality" through public disclosure.

But he said that he regarded the tape recordings of the President's conversations and telephone calls concerning the Watergate case as nonpolitical and "going to the President's constitutional duties" as chief executive. Mr. Cox and the Senate Watergage committee have filed subpoenas seeking the tapes.

Principal Importance

The issue of the tapes, Mr. Kadish said, was now "a readily justiciable one," since the court would not have to decide the trickier question of w ether the judiciary and legislative branch had an absolute right to procure information from the executive, but only whether the material in the tapes and other subpoenaed documents was political in nature.

According to Melville B. Nimmer, a professor of constitutional law at the University of California at Los Angeles, Mr. Wright's relelation that information that was no longer confidential would not be considered privileged amounted to a waiving of executive privilege with respect to the tapes.

Mr. Nimmer noted that the President, in his statement of May 22, had declared that his aides and former aides would not be prevented from testifying before the Senate or the grand jury about "possible criminal conduct or discussions of possible criminal conduct" in the Watergat case.

John W. Dean 3d, the dismissed White House counsel, has told the Senate committee in detail of his discussions with Mr. Nixon over the Watergate affair. Mr. Dean has contended that they show that the President was deeply involved in the effor to cover up the scandal. The recordings of the Nixon-Dean conversations are of principal importance among those that have been subpoenaed.

Yale Kamisar of the University of Michigan said he felt that Mr. Nixon himself had aided in removing the confidentiality surrounding the recordings, and thus had undercut his contention that they were privileged.

"He has already publicly stated that he has heard the tapes and that they support him," Mr. Kamisar said. He referred to the President's assertion on Mondayp in a letter to Senator Sam J. Ervin Jr., that the information in the recordings was "entirely consistent with what I know to be the truth" in the Watergate case.

Direct Contradiction

Mr. Nixon's position, as stated on May 22, was that none of the illegal or unethical activities surrounding Watergate took place with his "specific approval or knowledge," a direct contradiction of Mr. Dean's testimony.

Mr. Kamisar said he believed that "the essentail flaw in Nixon's position all along" had been his contention that "i you turn over information, you set a precedent for future precedents."

"The whole thing," he went on, "could have been avoided if the President had done what President Jefferson did" in the Aaron Burr case. President Jefferson asserted an absolute right to withhold documents from the other branches of government, and then agreed to furnish the documents to further the cause of justice.

Mr. Kamisar said that Mr. Nixon's "claim that he's doing this for the sake of future precedents rings hollow. It's hard to believe that that's his real reason."

Legitimate Test

Gerald Israel, a colleague o Mr. Kamisar at Michigan, turned aside the contentions of some lawyers that the courts would throw out the specia prosecutor's subpoena because Mr. Cox is a member of the executive branch—as one put it, a case of "the executive fighting itself."

The Cox subpoena, Mr. Israel noted, was "issued on behalf of the grand jury" that is investigating the Watergate case, and not by Mr. Cox alone.

Like any prosecutor, he said, Mr. Cox had no authority to subpoena material for his own use, but only for the purpose of presenting it to a grand jury, which the Supreme Court has "consistently" recognized as an arm of the judicial branch.

"It is not the prosecutor's subpoena, it is the court's subpoena," he said, and therefore represented a legitimate test of executive privilege and a proper subject for a decision by the courts.

While most of the lawyers interviewed by telephone today believed that the Supreme Court would make the ultimate resolution of the conflict, they differed on how that might come about and what the decision would say.

Mr. Kadish noted that "Supreme Court justices in the -ast have been upredictable and disappointing to the Presidents wh appointed them."

It was not clear, he said, that the four members of the court appointed by Mr. Nixon would side with him in this case, because "the President in this case puts a block in the path of discovery of the truth.

"I don't know how they'll come out," he said. "This is a brand new situation."

Mr. Nimmer, said he believed that the court might split four and four, and that Associate Justice Byron R. White, a Kennedy apointee, would be "the swing-man."

He recalled Mr. White's decision last year in the Branzburg case, in which a reporter was seeking to avoid answering a grand jury subpoen. Mr. White had argued persuasively in the majority opinion of enlarging the scope of the subpoena power. he said.

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Visitors to the Watergate hearing yesterday. Capitol policemen said the morning group was the largest of any so far to wait for a session to begin.