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Court Battle Set as Nixon Defies Subpoenas

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A grave constitutional battle began yesterday when Chief Judge John J. Sirica of the U.S. District Court here ordered President Nixon to explain in court why he should not produce certain tape recordings and documents in the Watergate case.

The order was sought by Watergate special prosecutor Archibald Cox and gives the President's attorneys until Aug. 7 to reply. Mr. Nixon did, however, turn over a separate memo and a series of other documents to the prosecutor.

At the same time he refused Cox, the President rejected a request from the Senate select committee investigating the Watergate scandal to furnish five tapes and some documents.

He said he would consider "specific requests" for other documents.

Committee Chairman Sam J. Ervin Jr. (D-N.C.) charged that Mr. Nixon had laid down an impossible condition since the committee has never seen the documents it wants.

And, just before the committee voted to send its lawyers to court to force compliance with its subpoenas for the material, Vice Chairman Howard H. Baker Jr. (R-Tenn.) commented on the magnitude of the situation:

"It would appear that the issues are in fact joined, and that the third branch of the government, the Judiciary, may, in fact, be called on to resolve a historic conflict between the remaining two branches."

At the White House, deputy press secretary Gerald L. Warren announced that Mr. Nixon would abide by a "definitive" Supreme Court decision.

"The President is very confident of his constitutional position as outlined in the letters," Warren said. The letters, citing the doctrine of separation of powers, went to Judge Sirica and the Watergate committee.

Stressing that Mr. Nixon "fully expects his position to be upheld in the courts," Warren added, "The President, just as in other matters, would abide by a definitive decision of the highest court."

Thus, what began as the bizarre burglary of the Democratic National Committee headquarters at the Watergate office complex 13 months ago, on June 17, 1972, has become a monumental struggle between coordinate branches of government.

The controversy over the tapes and documents sought by Cox on behalf of a special Watergate grand jury and by the Senate committee comes down basically to the question of whether the President himself was involved in the scandal.

He has denied prior knowledge of the burglary or participation in its cover-up, and has said he believed that reports about White House involvement were wrong until last March 21 when his former counsel, John W. Dean III, told him the facts. Dean, however, has testified that he feels the President knew about them as early as last September.

Yesterday's preliminary confrontation began at 9:23 a.m. when Douglas M. Parker, a lawyer from the White House counsel's office, entered the U.S. courthouse and a few minutes later delivered the President's letter to Judge Sirica.

Noting that Cox had subpoenaed tape recordings of nine conversations and certain documents, Mr. Nixon's letter said:

"I must decline to obey the command of that 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

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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."

That does not mean, Mr. Nixon added, "that all information in the custody of the President must forever remain unavailable to the courts." Therefore, he said, he would voluntarily transmit to Cox a two-paragraph memo and a set of other documents.

The memo was written March 30, 1972, by one White House aide, W. Richard Howard, to another, Bruce A. Kehrli. It concerned the transfer of E. Howard Hunt Jr. from his job as a White House consultant to a position with the Committee for the Re-election of the President. Hunt pleaded guilty in the Watergate burglary.

The other documents are called "political matters memoranda" with all "tabs" or attachments. They were written between Nov. 1, 1971, and Nov. 7, 1972, by former White House aide Gordon C. Strachan to his boss, H. R. Haldeman, who was then Mr. Nixon's chief of staff. The memos include a description of a March 30, 1972, meeting at Key Biscayne during which plans for Watergate surveillance were discussed.

In relying on the doctrine of executive privilege for his internal communications to remain secret, Mr. Nixon cited an obscure advisory opinion of James Speed, who was Attorney General of the United States from 1864 to 1866.

The Speed opinion, which some legal scholars say has not been cited in any court case, was delivered in 1865 to President Lincoln, who had asked whether the Secretary of the Navy or his subordinates could be compelled to testify in a state court about court-martial records.

Speed said they could be, but in the course of his opinion added that the President, heads of government departments and governors "are not bound to produce papers or disclose information communicated to them where, in their own judgment, the disclosure would, on public consideration, be inexpedient."

One constitutional lawyer, who does not have much respect for that opinion, said, "An Attorney General is the President's lawyer. He's going to give him the opinion he wants. It's not worth much more than the paper it's written on."

Judge Sirica read Mr. Nixon's letter in court, and Cox immediately asked him to sign an order directing the President to "show cause why there should not be full and prompt compliance" with his subpoena.

Cox said the special Watergate grand jury had asked him to seek the order because "we believe the materials are relevant and important evidence in the grand jury's investigation."

The President's position, he argued, "is not legally sound. Separation of powers from the beginning of history has not disabled a court from issuing orders to the executive branch. That was the case in Marbury versus Madison."

In that case, a landmark in judicial history, Chief Justice John Marshall in 1803 said President Thomas Jefferson violated the law when he did not permit the issuance of a judgeship commission for one William Marbury.

However, rather than try to enforce an order to the President, Marshall declared unconstitutional the act under which Marbury had brought suit, thus setting the precedent for the judiciary to declare acts of

Congress unconstitutional.

Cox also disputed Mr. Nixon's claim of executive privilege, saying the President has waived it because he has already allowed his aides and former aides to testify about Watergate matters.

Because of the magnitude of the case and because the "show cause" motion was technically requested by the grand jury, Judge Sirica polled the 20 members present, and they all approved Cox's statement.

Sirica's order was served on special White House counsel J. Fred Buzhardt yesterday afternoon by Deputy U.S. Marshal Ernest Hall Jr.

After the Sirica hearing was adjourned, Cox said the President's decision to turn over some documents was "very gratifying" but called his legal position on the other material "quite wrong."

Cox said the constitutional issue involved was comparable to those in the Aaron Burr treason trial of 1807 and the case involving President Truman's seizure of the steel mills in 1952.

The Burr trial is the only other instance of a President being subpoenaed. Chief Justice Marshall ordered Thomas Jefferson to testify and produce certain correspondence in the case. Jefferson did not testify because the trial was being held in Richmond, but he did produce a letter that Marshall wanted and said he would testify if the hearing were held in Washington.

In the steel case the Supreme Court ruled that Truman exceeded his powers in ordering the seizure, and when the President later asked Congress for such authority, he was refused.

At the same time that the Sirica courtroom drama was unfolding, another White House lawyer was handing another letter from Mr. Nixon to the Watergate committee's chief counsel, Samuel Dash.

The committee had issued two subpoenas. One asked the President to provide tapes of five conversations that Mr. Nixon had with former White House counsel John W. Dean III. The other sought documents, logs, date books and other written materials of 25 present and former White House aides and presidential campaign staffers.

Before hearing the third day of testimony from former White House aide John D. Ehrlichman, Chairman Ervin read the President's letter, which concluded, "I cannot and will not consent to giving any investigatory body private presidential papers."

Mr. Nixon, in refusing again to disclose the tapes, referred to the separation of powers and executive privilege arguments he used in his July 6 and 23 letters to the committee.

In his July 6 letter Mr. Nixon referred to President Truman's refusal in 1953, after he was out of office, to appear before a House committee on separation of powers grounds. Explaining the refusal, Truman cited 16 earlier Presidents, including George Washington and Franklin Roosevelt, as having declined congressional subpoenas.

Of the documents dealing with the 25 aides and former aides, Mr. Nixon said it was "quite possible" he could supply some of them if the committee makes "specific requests."

But Ervin complained that the condition was unfair. "We are not clairvoyant," he said, adding:

"Since we have never seen the documents, and since even those of the White House aides who are willing to identify the documents are not allowed to copy then or any parts of them, the President puts on the committee a manifest impossibility in receiving the documents."

Ervin also declared, "I think the President could comply with the request of the committee . . . and the Constitution would not collapse, and the heavens would not fall, but the committee might be aided by the President in determining the truth of his involvement."

Senator Baker said he still hoped "that there is some way to ameliorate the situation." He repeated his earlier suggestion that a small group of "distinguished nongovernmental officials" review the tapes and documents and cull the relevant ones for the committee. Such a panel, he said, could determine whether any were so intermixed with other conversations that they could not be released.

A few minutes later Baker moved that the committee authorize its lawyers to go into court, and the other members agreed.

The committee is expected to seek a declaratory judgment next week in U.S. District Court that would order the President to comply with the subpoenas.

Committee members deliberately avoided the option of asking the full Senate to cite the President for contempt. Baker explained later that seeking a declaratory judgment would be "quicker" and "cleaner" and "gets away from the emotional issue that would develop in citing a President for contempt."

Ervin commented sadly:

"The chair recognizes that there is no precedent for litigation of this nature, but there originally was no precedent for any litigation.

"And I think this litigation is essential if we are to determine whether the President is above the law and whether the President is immune from all of the duties and responsibilities in matters of this kind which devolve upon all the other mortals who dwell in this land."

Referring to the statement by Mr. Nixon's deputy press secretary that the President would abide by a "definitive decision" of the Supreme Court, Charles A. Wright, a White House consultant who is expected to argue the case in the courts, noted that the Supreme Court sometimes issues rulings that are less than definitive. He suggested that if a high court ruling fails to deal fully with the separation of powers issue, the President might feel justified in continuing to defy the subpoenas.

Wright, a University of Texas law professor, told reporters the President is prepared to turn over documents that deal strictly wih political matters and those that do not threaten the confidentiality of his relations with his advisers.

Wright said he would construe all tape recording to fall within the confidential category. But he added that if a tape is discovered to be wholly political, "I think we would have to focus very squarely on that question."

He added, "I would like to have [the case] end as soon as it possibly can end. The sooner we can get to the bottom of Watergate, the better off the country will be."