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Nixon Sees Peril In Tapes' Release

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Declaring that he is "answerable to the nation but not to the courts," President Nixon argued yesterday that a judicial attempt to force him to disclose tapes of Watergate conversations would severely damage the presidency.

"The consequence of an order to disclose recordings or notes would be that no longer could a President speak in confidence with his close advisers on any subject," Mr. Nixon stated in a brief filed by his lawyers with Chief Judge John J. Sirica of the U.S. District Court here.

Presented in response to a July 26 order by Sirica that he show cause why he sould not produce tape recordings and notes about nine presidential conversations dealing with the Watergate scandal, the brief contended:

"The threat of potential disclosure of any and all conversations would make it virtually impossible for President Nixon or his successors in that great office to function.

JUDGE JOHN J. SIRICA
. . . gets Nixon's brief

"Beyond that, a holding that the President is personally subject to the orders of a court would effectively destroy the status of the executive branch as an equal and coordinate element of government."

The tapes were sought

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last month by Special Watergate Prosecutor Archibald Cox after their existence was revealed in testimony before the Senate Watergate committee. They contain conversations between the President and several of his closest advisers from June 20, 1972, to April 15 of this year.

"If the special prosecutor should be successful in the attempt to compel disclosure of recordings of presidential conversations, the damage to the institution of the presidency will be severe and irreparable," the brief said.

"The character of that office will be fundamentally altered, and the total structure of government—dependent as it is upon a separation of powers—will be impaired."

Judge Sirica gave Cox until next Monday to submit a written response to the President's brief. The special prosecutor had no comment about the Nixon arguments but said he hopes to file his response Friday.

The judge then gave the President's lawyers, led by special counsel J. Fred Buzhardt, until Aug. 17 to reply to Cox's response. Sirica set oral arguments on the issue for 10 a.m. Aug. 22.

The Senate Watergate committee postponed filing its own suit to compel production of five presidential tapes so that its lawyers can study the Nixon brief. The committee is expected to file later this week.

The President's prediction of dire consequences if he is ordered to produce the tapes was in contrast to the comments of Sen. Sam J. Ervin Jr. (D-N.C.), chairman of the Watergate committee, last week after former White House aide H. R. (Bob) Haldeman tstified about two tapes that he said. Mr. Nixon had let him hear.

Ervin commented then that "the presidency has not been destroyed and the Constitution hasn't collapsed and the heavens haven't fallen, have they?"

Yesterday, however, the 34-page Nixon brief asserted that "the issue here is starkly simple: will the presidency be allowed to continue to function?"

At the end of an impassioned argument, it concluded that a court order to produce the material would mean that "from that moment on, it would be simply impossible for any President of the United States to function.

"The creative interplay of open and spontaneous discussion is essential in making wise choices on grave and important issues.

"A president would be helpless if he and his advisers could not talk freely, if they were required always to guard their words against the possibility that next month or next year those words might be made public.

"The issue in this case is nothing less than the continued existence of the presidency as a functioning institution."

At least nine times in the brief, arguments are made that "no court has ever attempted to enforce a subpoena directed at the President of the United States" and that "the judicial branch lacks power to compel the President to produce information that he has determined it is not in the public interest to disclose."

The brief did not argue, as one of its authors—University of Texas law professor Charles Alan Wright—once did, that Cox is a Nixon administration appointee and therefore a member of the executive branch who cannot issue orders to his superior, the President.

Instead, the brief accepted Cox as an officer of the court, seeking the tapes on behalf of the special Watergate grand jury, and made its arguments squarely on the issue of the executive versus the judicial branch of government.

"The courts, a co-equal but not a superior branch of government, are not free to probe the mental processes and the private confidence of the President and his advisers," it said.

"We do not question the power of the court to issue a subpoena to the President," it added, noting that in the 1807 treason trial of Aaron Burr, Chief Justice John Marshall ordered Thomas Jefferson to produce some documents. Jefferson declined to leave Washington to testify in the trial, which was being held in Richmond, but he did offer to give a deposition and he supplied a letter that Marshall wanted.

The President's brief said that while Marshall had indeed "ruled that a subpoena might issue . . . he immediately recognized that (a) 'difference may exist with respect to the power to compel the same obedience to the process, as if it had been directed to a private citizen . . .'"

Mr. Nixon's lawyers insisted that "the power to seek information from the executive branch does not impose on the executive any concurrent obligation to disclose that information."

Thus, the brief raised the question of whether the President would obey a Supreme Court order to produce the tapes, although the White House has said he "would abide by a definitive decision of the highest court."

While specifically not suggesting that the President is above the law, the brief said he is "accountable under the law, but only in the manner prescribed in the Constitution."

It then cited an argument by Attorney General Henry

Stanbery in the 1867 Mississippi vs. Johnson case, in which the state tried unsuccessfully to enjoin President Andrew Johnson from enforcing the Reconstruction Acts.

Stanbery contended that the President "is above the process of any court or the jurisdiction of any court to bring him to account as President," the brief noted. "There is only one court or quasi-court that he can be called upon to answer to for any dereliction of duty, for doing anything that is contrary to law or failing to do anything which is according to law, and that is not this tribunal" but Congress, Stanbery said.

Only after a President has been impeached by the House, convicted by the Senate, and "stripped of the robes of office," can he be "subjected to the jurisdiction of the courts," the post-Civil War Attorney General said.

The President's vrief observed that there is "uncertainty" about the limits of executive privilege, the doctrine that certain internal advisory communications within the executive branch must remain secret.

But it insisted that the privilege "must obtain with respect to a President's private conversations with his advisers (as well as to private conversations by judges an legislators with their advisers)."

Then it claimed a sweeping scope for the doctrine: "It reaches any information that the President determines cannot be disclosed consistent with the public interest and the proper performance of his constitutional duties."

Citing administration opinions dating back to the time of George Washingon, the Nixon brief included one of Supreme Court Justice William H. Rehnquist, which he offered to a House subcommittee in 1971 when he was an assistant attorney general.

Rehnquist asserted then that the privilege of the President to withhold information, "the disclosure of which he feels would impair the proper exercise of his constitutional obligations," is "firmly rooted in history and precedent," the brief recalled.

Its quotation raises the possibility that Rehnquist may be asked to disqualify himself if the case reaches the Supreme Court. However, in a case involving military surveillance last year Rehnquist took part in the 5-to-4 decision although he had publicly expresed an opinion on the issue while he was at the Justice Department.

Mr. Nixon's brief indicated that if the courts do not accept the claim that his view of the "public interest" should determine what is privileged, they should at least apply the doctrine to the tapes.

"Recordings are the raw material of life," the brief argued. "By their very nature the contain spontaneous, informal, tentative, and frequently pungent comments on a variety of subjects inextricably interttwined into one conversation.

"Disclosure of information allegedly relevant to this inquiry would mean disclosure as well of other information of a highly confidential nature relating to a wide range of matters5not relevant to this inquiry."

The brief added, "nce the totality of the confidential nature of the recordings is destroyed, no person could ever be assured that his own frank and candid comments to the President would not eventually be made public."

It charged that "the present subpoena would be only the first installment of requests for many more of the President's most confidential conversations."

Prosecutor Cox has said that irrelevant or national security material on the tapes could be excised either by a judge or by opposing lawyers in the case.

But the Nixon brief insisted that the President and not the courts or the prosecutor should decide what should be privileged and what should not be.

It also denied that the President has waived executive privilege because he permitted his former and present aides to testify about the tapes before the Watergate committee or because he let Haldeman and other aides listen to some of them or because the grand jury is looking into alleged criminal conduct.

Even if the President were involved in any crimes under investigation—"and the President's statements have categorically denied any such involvement"—he would not be subject to the jurisdiction of the court, Cox, or the grand jury, the brief said. He would be liable to criminal process only after being removed from office, it stressed.

The brief pointed out that "it is the President, not those who may be subject to indictment by this grand jury, who is claiming executive privilege." It added that the privilege "would be meaningless if it were to give way whenever there is reason to suspect that disclosure might reveal criminal acts."

Denying the contention that refusal to turn over the tapes will defeat Cox's prosecution efforts, the brief said that the President feels Cox can make his cases with other evidence available to him.

"But the President has concluded that even if he should be mistaken about this is some particular case, the public interest in a conviction, important though it is, must yield to the public interest in preserving the confidentiality of the President's office."