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Nixon Stand on Tapes Recalls British Legal Tradition

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WASHINGTON, Aug. 12 — President Nixon's contention that the courts have no control over him or his records as long as he remains President recalls the British legal tradition of the immunity of the king more than any clear-cut intentions in the Constitution or its later interpretation by the Supreme Court.

In a brief filed in Federal District Court last week, the President's lawyers said Mr. Nixon could be prosecuted only for any crime "after he has been impeached, convicted and removed from office" and cited the Constitution, one of the Federalist Papers and a single Supreme Court case as authorities.

Archibald Cox, the special Watergate prosecutor, will file his response to the White House brief before Federal District Judge John J. Sirica tomorrow. Both sides are to argue the case on Aug. 22.

Mr. Cox filed suit against the President two weeks ago after Mr. Nixon had refused to honor a subpoena from the prosecutor compelling him to provide a grand jury with tape recordings of White House conversations and other related documents.

The White House brief filed in response to Mr. Cox's suit denied that the President had any responsibility to release the tapes. Going beyond that issue, it also declared that no criminal action could be brought against Mr. Nixon until after he had been removed from office by impeachment, should this occur.

The Constitution provides that "the President . . . shall be removed from office on impeachment for and conviction of treason, bribery or other high crimes and misdemeanors." It also specifies that "the party convicted shall nevertheless be liable and subject to indictment, trial, judgment and punishment, according to law."

The Nixon attorneys interpret this provision as prohibiting any criminal prosecution of the President until after he has been deprived of his office through the Congressional impeachment procedure.

But other legal authorities, including Prof. Raoul Berger of the Harvard law school, maintain that this language was put in the Constitution to make it clear that impeachment was not a criminal action but merely involved loss of office, perhaps even facts that did not fully constitute a crime.

Under this rationale, the drafters of the Constitution inserted the provision that an impeached official could still be prosecuted for a crime to get

around the long-standing common-law prohibition against trying anyone twice for the same offense. This was later incorporated in the Fifth Amendment.

In the Federalist Paper cited by the President's lawyers, Alexander Hamilton wrote, in explaining the proposed Constitution, that the President could be impeached, convicted and removed from office "and would afterwards be liable to prosecution and punishment in the ordinary course of law."

Case Is Cited

But neither the Constitution nor the Hamilton explanation states that a President cannot be prosecuted before impeachment; both say only that an impeached President can be prosecuted afterward.

The single case cited by the White House lawyers in support of the President's immunity from criminal prosecution was decided by the Supreme Court in 1838. It did not deal with that issue but with the power of the court to order the Postmaster General to pay money due two mail contractors.

"The executive power is vested in a President," the Court observed then, "and as far as his powers are derived from the Constitution, he is beyond the reach of any other department, except in the mode prescribed by the Constitution, through the impeachment power."

This statement by Associate Justice Smith Thompson, who wrote the majority opinion, constitutes what lawyers call "dictum," an observation that is not directly related to any issue in the case and thus does not set any legal precedent.

Power of Courts

In fact, the case cited by the White House, *Kendall v. United States ex rel. Stokes*, insofar as it relates to the relative powers of the President and the Court, tends to support the special prosecutor rather than Mr. Nixon.

For the Supreme Court upheld in that case the power of the courts to issue an order compelling the Postmaster General, Amos Kendall, to make the overdue payments, ordered by Congress, despite his lawyers' argument that he was subject only to the direction of the President, who in turn had full discretion as to his actions under the constitutional mandate

that he "faithfully execute" the laws.

"This is a doctrine," the Court declared, "that cannot receive the sanction of this Court. It would be vesting in the President a dispensing power which has no countenance for its support in any part of the Constitution and is asserting a principle which, if carried out in its results to all cases falling within it, would be clothing the President with a power entirely to control the legislation of Congress and paralyze the administration of justice."

Under British common law, the sovereign could not be prosecuted in a criminal action or sued in a civil court, served with process to force an appearance or required to give testimony in any case, although he could do so voluntarily.

"It is clear that the sovereign cannot be a witness," a British judge said of Queen Victoria in 1861, "because there is no means of compelling her attendance."

In an 1807 ruling that it was permissible to subpoena President Thomas Jefferson to produce a document at the treason trial of Aaron Burr, Chief Justice John Marshall emphasized that "many points of difference" between the monarchy and the new American republic had been expressly written into the Constitution.

"It is a principle of the English constitution that the King can do no wrong. That no blame can be imputed to him, that he cannot be named in debate," Chief Justice Marshall wrote. "By the Constitution of the United States, the President, as well as any other officer of the Government, may be impeached and may be removed from office on high crimes and misdemeanors."

"By the constitution of Great Britain, the crown is hereditary, and the monarch can never be a subject. By that of the United States, the President is elected from the mass of the people and, on the expiration of the time for which he is elected, returns to the mass of the people again," Chief Justice Marshall said.

Separation of Powers

On the issue of separation of powers, the Nixon lawyers quoted extensively from an 1880 Supreme Court decision declaring that "the powers confided by the Constitution to one of the departments cannot be exercised by another" and "the lines which separate and divide these departments shall be broadly and clearly defined."

But, again, the case, *Kilbourn v. Thompson*, did not involve the independence of the Presidency at all but the authority of the House of Representatives

Tradition

to cite a committee witness for contempt and imprison him, without becoming liable in an action for false imprisonment.

The President's lawyers placed considerable stress on an 1866 Supreme Court decision refusing to grant the state of Mississippi an injunction against President Andrew Johnson barring him from enforcing the Reconstruction Acts Congress had approved for the South after the Civil War.

Taken for Granted

There the Court took for granted that the President was immune from process and that it would thus be futile to grant the relief that Mississippi sought.

If the injunction were allowed, Chief Justice Salmon P. Chase wrote, and the President still refused to comply with it, "it is needless to observe that the Court is without power to enforce its process."

In addition, Chief Justice Chase declared that "this Court has no jurisdiction of a bill to enjoin the President in the performance of his official duties."

But this was a century ago, before the Court began granting injunctions against the enforcement of statutes that it found to be unconstitutional. By 1952, for example, when the Court enjoined President Truman from continued seizure of the steel industry, the power

of the Justices to issue such an injunction was not even debated.

The fact that the Constitution and its subsequent interpretation by the Supreme Court offer relatively modest support for the President's legal position does not mean that he will lose his case and be forced to surrender the tapes.

The White House attorneys have laid heavy stress on the historical tradition of Presidential independence and the practical difficulties implicit in operating the executive branch without some curtain of confidentiality, and these arguments could prove more persuasive than legal precedents in the long run.