

U.S. to Appeal Court Order On Milk Data

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The Nixon administration contended yesterday that inspection of White House papers by the judiciary—even in secret—would “do irreparable injury to the principle of the separation of powers.”

Moving to protect the White House's flanks on the contested doctrine of executive privilege, Justice Department lawyers made the

argument in a last-minute effort to block production of 67 official memos concerning the dairy industry and the government's controversial 1971 increase in milk price supports.

U.S. District Court Judge William B. Jones had ordered the government to submit the documents today for his private inspection. The papers are being sought by consumer groups who charged in a lawsuit filed last year that the higher price supports were a payoff for early contributions to Mr. Nixon's 1972 re-election campaign.

The government asked for a stay of Judge Jones' order so that the decision could be contested before the U.S. Circuit Court of Appeals here.

Citing what they described as the White House viewpoint, the Justice Department asserted that “the mere production of these documents in camera (in chambers) creates a substantial breach in the constitutional doctrine of separation of powers.”

Compliance with Judge Jones' ruling, the government lawyers suggested, could also compromise the President's claims of executive privilege in the face of subpoenas by Special Watergate Prosecutor Archibald Cox and the Senate Watergate investigating committee.

“In view of the related questions of executive privilege now being adjudicated . . . in several other cases of great public importance, the subject is obviously one which should be preserved for appellate consideration without the ne-

cessity for interim compliance,” the Justice Department contended in asking for the stay.

Overriding White House protests in the milk fund case after a July 27 hearing, Judge Jones ruled that the documents involving the dairy industry should be submitted to him so that he could determine which ones, if any, should be handed over to the consumer groups pressing the lawsuit.

A similar solution has been proposed by Special Watergate Prosecutor Cox, who is seeking a court order directing Mr. Nixon to turn over tapes of his conversations with White House aides about the Watergate scandal to a federal grand jury here.

The President has asserted that he “is not subject to compulsory process from the courts.” Cox maintains that “no man is above the law.” Chief U.S. District Court Judge John J. Sirica has scheduled a hearing on that dispute for Aug. 22.

William A. Dobrovir, the attorney for Ralph Nader's Public Citizen, Inc., and the other consumer groups contesting the 1971 milk price supports, said he would have no objection to a stay of Judge Jones' order so long as the government would agree to seek a quick resolution of the issue in the appellate courts.

“This is going to the Supreme Court, along with Cox and along with Sen. Ervin's committee, I think,” he said yesterday. “It raises the issue of executive privilege in a dif-

ferent but equally important context. We've been trying to get these documents for months. It's high time we get them or don't get them.”

The Justice Department lawyers seeking to keep the dairy industry documents secret—Acting Assistant Attorney General Irving Jaffe and Civil Division attorneys Irwin Goldbloom and David J. Anderson—maintained they had a good chance of winning the case on appeal.

They cited what they called “a settled line of judicial authority” capped by a Supreme Court decision last January growing out of the controversial 1971 nuclear blast on Amchitka Island in Alaska. That ruling, government lawyers maintained, “recognized that a privilege, based on the constitutional doctrine of separation

of powers, attaches to internal governmental communications containing opinions, recommendations, considerations and deliberations which are involved in the processes by which governmental decisions and policies are formulated and carried out.”

Special Prosecutor Cox, however, has said that the high court's 5-to-3 ruling in that case, brought by Rep. Patsy Mink (D-Hawaii) and 32 other congressmen under the 1967 Freedom of Information Act, explicitly recognized that the government carried the burden of establishing “to the satisfaction of the District Court” that the documents were exempt from disclosure.

“Neither in Mink nor in any other decision has any doubt been expressed about the constitutional power of the courts

to enter mandatory orders for the production of evidence,” Cox said in a brief filed Monday with Judge Sirica.

A ruling favorable to Mr. Nixon, who personally ordered the lid kept on the 67 dairy industry memos, would also seem to run counter to the course followed by the government in the first court test of a subpoena for presidential papers.

In that case, growing out of Aaron Burr's conspiracy trial in 1807, Chief Justice John Marshall issued a subpoena for a letter in the possession of President Thomas Jefferson.

The President turned over the letter, leaving it to the government lawyer in that case, George Hay, “to withhold communication of any parts of the letter which are

not directly material for the purposes of justice.” Hay, in turn, excised certain portions, but at the same time offered to let the court have the entire letter and decide for itself what should be withheld.

The controversy over the 1971 increase in milk price supports revolves around \$422,500 in Nixon campaign contributions by the political arms of three big dairy farm co-operatives which won the higher government subsidies after a March 23, 1971, meeting with Mr. Nixon at the White House.

The consumer groups are demanding a rollback of the increase, which dairy co-op leaders have said added roughly \$500 million to \$700 million to dairy farmers' income.

The Justice Department contended in yesterday's pleadings that the case “is now essentially moot” since current milk price supports are at the minimum fixed by law.

Secretary of Agriculture Earl Butz raised the supports this week by 32 cents a hundredweight, from \$5.29 to \$5.61, in line with the new legislation, which Mr. Nixon signed last Friday, fixing the subsidies at 80 per cent of parity. The increase from \$5.29, which represented 75 per cent of parity, will raise the price of milk by nearly 3 cents a gallon.

The contested 1971 increase sent milk price supports from \$4.66 to \$4.93 a hundredweight under old legislation permitting the Agriculture Department to fix the payments at 75 to 90 per cent of parity.