

To Bar Tapes In Civil Suit

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Richard M. Nixon's lawyers asked a federal judge here yesterday to block a civil lawsuit subpoena for 1972 and 1973 White House tapes, contending that they are protected from such subpoenas by Mr. Nixon's claim of presidential privilege even though he is no longer in office.

Mr. Nixon's attorneys also argued that the U.S. Supreme Court ruling last July that forced Mr. Nixon to turn over other White House tapes to criminal prosecutors specifically does not apply to civil cases.

In deciding this separate subpoena question, the lawyers said the judge should uphold the presidential privilege claim because otherwise "the number of sincere or grand-standing efforts to gain access to privileged material (for civil suits) and the consequent concern for disclosure and reduction in candor will be considerable."

More importantly, the court's ruling could determine just how vulnerable Mr. Nixon will be to future civil suits over acts he performed as President. If his presidential privilege claim against civil subpoenas is upheld, suits against him could prove futile because of the difficulty plaintiffs would have in obtaining evidence. If Mr. Nixon's privilege claim is denied, however, his files could be opened on a wholesale basis through civil subpoenas.

The subpoenas in question were filed in the two remaining unsettled civil cases that grew directly out of the 1972 Watergate break-in. R. Spencer Oliver, a Democratic Party official whose phone was "bugged" by the burglars, subpoenaed White House tapes for May 26 through June 21, 1972, and Watergate break-in coconspirator James W. McCord has subpoenaed the tapes for the period of the original Watergate trial, from Jan. 1 to Jan. 31, 1973.

The subpoenas were directed to the White House, but President Ford's White House counsel, Philip Buchen, said last week through the Justice Department that the tapes belonged to Mr. Nixon under

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terms of a controversial agreement negotiated at the time of his pardon, and therefore could not be turned over by the White House. Buchen then notified Mr. Nixon's attorneys, Herbert J. Miller, Raymond G. Larroca and R. Stan Mortenson, who filed yesterday's motion.

Implementation of the agreement, which gives Mr. Nixon custody and control of the tapes and other presidential documents, was suspended after a complaint from Watergate Special Prosecutor Leon Jaworski and negotiations are under way on a new agreement.

The attorneys focused their motion to block the subpoena almost solely on the issue of executive privilege.

"No court has ever held that the documents, papers or other effects of a President containing communications between the President and his advisers may be discovered in a civil case by a party seeking to recover damages," the attorneys said.

They relied heavily on the Supreme Court decision last July that forced Mr. Nixon to turn over the tapes in the criminal case, pointing out that that ruling said "certain powers and privileges flow to a President . . . from the Constitution. One of these is the protection of confidential communications between the President and those who assist him."

The Supreme Court ruled only that the privilege could be surmounted in a criminal case upon a specific showing of need, and did not apply that ruling to civil cases, the attorneys said in their 11-page motion filed with U.S. District Judge Charles R. Richey.

"If litigants seeking civil damages can breach this privilege of confidentiality, the very reason for the privilege will be undercut . . . If the future availability of the privilege hinges upon the particular facts of each future civil case, the communications that flow day by day within executive offices will inevitably be tempered by the thought that disclosure might subsequently be ordered to satisfy the demands of a particular civil litigant," the attorneys said.

In support of their argument, the attorneys pointed to a strongly worded earlier ruling by Judge Richey in the same series of civil cases in

which he said that reporters have a privilege that protects them from having to turn over information relating to news stories.

"Without examining the materials in question or even inquiring whether they existed, this court determined that the materials sought were subject to at least a qualified privilege under the First Amendment which, when weighed against a civil litigant's right to recover damages—even in an action whose importance transcends anything yet encountered in the annals of American judicial history . . .—would compel striking the balance in favor of nondisclosure," they said in reference to Richey's ruling on newsmen.

In that ruling, the attorneys said, Richey "recognized that a privilege of confidentiality stemming from the framework of the Constitution is of sufficient importance to prevent intrusion . . ."

The attorneys continued:

"This time around the subpoenas have been directed at material which the Supreme Court has already held is subject to a constitutionally based privilege flowing from Article II and the doctrine of separation of powers.

"To hold that it can be breached when a qualified newsman's privilege cannot—a privilege the Supreme Court failed to recognize—would be anomalous and totally unjustified."

The attorney also argued that the subpoenas should be quashed because they are too broad and would constitute "an indiscriminate rummage through presidential materials."

"We can only conclude that the discovering parties are not so much interested in proving their case as they are intrigued by the possibility of gaining access to conversations held at the topmost decision-making level of government. This court should not lend its aid to this effort," the attorneys said.

Judge Richey has scheduled a hearing for next Monday on the two pending motions to block the subpoena—the one filed by the Justice Department last week and the one filed yesterday by Mr. Nixon's attorneys.

The hearing on the Justice Department motion based on the agreement with Mr. Nixon on ownership of presidential materials will be the first court test of that agreement.