

NIXON CONTESTS SUBPOENAS, HEARING SET AUG. 7 ON

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COURT ACTION DUE

Aide Asserts President Will Abide by Ruling of Supreme Court

By R. W. APPLE JR.

Special to The New York Times

WASHINGTON, July 26—President Nixon refused today to comply with subpoenas requiring him to furnish to the Senate Watergate committee and the special prosecutor tape recordings of his conversations about the Watergate case.

Chief Judge John J. Sirica of the United States District Court immediately ordered Mr. Nixon

Texts of the letters and court order, Page 9.

to explain by Aug. 7 why he should not be compelled to release the tapes to the prosecutor, Archibald Cox. And the committee, in an unprecedented action, voted to go to court next week to secure the recordings.

KEEPS TAPES; HISTORIC CHALLENGE

The day's dramatic events intensified a historic constitutional struggle, compared by some participants to *Marbury v. Madison*, the landmark case in 1803 that established the principle of judicial review.

Gerald I. Warren, the deputy White House press secretary, said, "The President, just as in any other matter, would abide by a definitive decision of the highest court."

Hints Are Clarified

That statement, a clarification of earlier hints in the same vein by Mr. Warren, apparently means that if the Supreme Court rejects Mr. Nixon's argument that the separation of powers precludes him from turning over the tape recordings, he will then release them.

It also apparently eliminates the possibility that Mr. Nixon, faced with an adverse Supreme Court ruling but unwilling to comply, might leave Congress no alternative but impeachment if it wanted to gain access to the tapes.

The President made his position known in carefully reasoned letters, announcing to informal legal briefs that were delivered early this morning to Judge Sirica and to Senator Sam J. Ervin Jr. of North Carolina, the committee chairman.

With the former White House aide John D. Ehrlichman watching at the witness table and the nation watching by television, the committee voted quickly and unanimously to sue the President—something no Congressional committee has ever done in the Republic's 184-year history.

"I think this litigation is essential if we are to determine whether the President is

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above the law," said Senator Ervin gravely, "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."

The committee's staff was studying tonight the legal avenues open to it, but the chief counsel, Samuel Dash, said that a 'Contempt of Congress' citation would not be sought.

About an hour after the committee acted, Judge Sirica, who had presided over the original Watergate trial, mounted the bench in his courtroom about six blocks away. Like Mr. Ervin, he began by reading the contents of the President's letter.

Mr. Cox, lean and crew-cut, summarized the background of the case, the discovery last week of the existence of the tape recordings, the President's arguments and his own. He then asked Judge Sirica, with the grand jury present, to register its assent to issue an order requiring the President to demonstrate at a hearing a week from Tuesday why the tapes "should not be produced."

After questioning the grand jury briefly, Judge Sirica signed the order, and the courtroom emptied. The entire procedure required but 28 minutes.

In his letter to Senator Ervin, Mr. Nixon offered to make available and documents that the committee specifically requested, as long as they were not "Presidential papers that must be kept confidential" because of his constitutional responsibilities.

"I cannot and will not consent to giving any investigatory body private Presidential papers," the President wrote. He included in that category all the requested tape recordings.

Senator Ervin interpreted the letter as a sign of noncooperation from Mr. Nixon, despite the President's assertion that his staff had been instructed "to cooperate fully."

"We are not clairvoyant," the Senator said. "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 them or any parts of them, the President puts on the committee a manifest impossibility in receiving the documents."

"The way the chair construes the letter, the President flatly refuses to give us the tapes."

The Issue Was Joined

If Mr. Nixon were to comply with the committee's demands, Mr. Ervin added, his voice heavy with sarcasm, "the Constitution would not collapse, the heavens would not fall, but the committee might be aided by the President in determining the truth of his involvement."

Senator Howard H. Baker Jr., Republican of Tennessee, who had worked diligently to avoid the collision that occurred this morning, said, "the best way to summarize the situation is to say thus, the issue was joined." He held out a "flicker of the flame of optimism" that a way out of confrontation might be found but then made the motion to bring the court action.

The committee's legal situation is difficult. The normal procedure would be to seek from the full Senate a citation of the President for contempt. But, according to committee sources, that course has been rejected for these reasons:

It would take too long; the Senate as a whole is reluctant to debate a contempt citation, which might turn into a kind of mini-impeachment; the committee does not want to apply the word "contempt" to the Presidency, and it is questionable whether the Justice Department could enforce a contempt citation against the man responsible for it.

Therefore, the committee will attempt to win from a Federal court a declaratory judgment stating that Mr. Nixon must honor the subpoena. Alternatively, it might try to join in the procedure initiated by Mr. Cox and Judge Sirica today.

Ultimately, any Federal court decisions in either the Senate or Cox cases will be appealed to the United States Court of Appeals for the District of Columbia and then to the United States Supreme Court. The process could take up to 60 days or more.

Declines to Obey

The most complete statement of Mr. Nixon's legal position came in his letter to Judge Sirica. After promising to deliver two documents mentioned in the Cox subpoena, Mr. Nixon said that he would not deliver the tapes or other documents.

"With the utmost respect for the court of which you are chief judge, and for the branch of Government of which it is a part, I must decline to obey the command of the subpoena. In so doing, I follow the example of a long line of predecessors as President of the United States who have consistently

adhered to the position that the President is not subject to compulsory procedure from the courts.

"The independence of the three 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."

In his argument, Mr. Cox said first that the grand jury had "an enforceable right to access to the documents and objects sought," and second, that even if Mr. Nixon did have a legitimate claim of executive privilege, he had in effect waived it by permitting aides and former aides to testify.

Charles Alan Wright, the lanky and articulate University of Texas law professor who will represent the President at next month's hearing, said at a White House briefing after the court proceeding that Mr. Nixon would withhold only clearly "Presidential" papers.

Will Have to Focus

Documents that have lost their confidentiality or documents dealing exclusively with political rather than governmental matters do not fall into that category, he said.

At first, the 45-year-old constitutional authority said that all the tape recordings were considered to be Presidential papers. But later, press to define the status of a recording of an exclusively political conversation, Mr. Wright said, "We would have to focus very squarely on that question."

Mr. Wright was also asked to explain how Mr. Nixon could with one breath deny the court's jurisdiction in the Cox subpoena and with the next promise to abide by a Supreme Court ruling.

He replied that the two statements spoke to "different questions." One, he said, "says what the President's position is, and the other "states what the President's reaction would be in the event the Supreme Court should disagree with him."

Mr. Wright, who spoke good-naturedly at one point about "process-servers at every door" of the White House, said that he hoped the court could end

as soon as possible, because "the sooner we can get to the bottom of Watergate, the better off the country will be."

"But we are not going to ace helter-skelter merely to set a new speed record," he added. Similarly, Mr. Dash spoke of the need to "d it right" through careful procedure.

A Middle Course

Mr. Wright said that Mr. Nixon chose to write a letter to Judge Sirica rather than to move formally to set aside the subpoena, because of precedent. Lawyers said that another reason was that the President's argument against judicial competence in the matter would have been undercut by a motion.

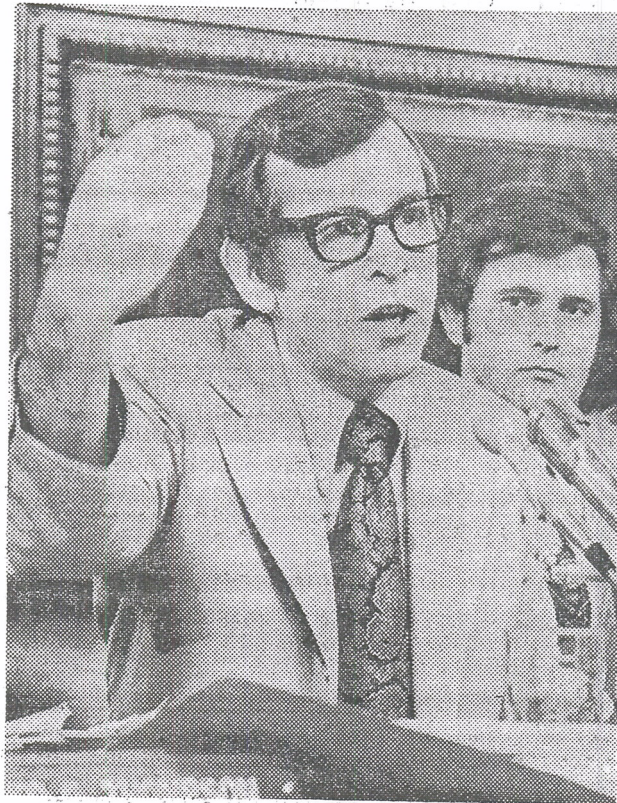
So he chose, contrary to what some of his aides predicted last night, a middle course between a formal motion and ignoring the subpoena. The letter constituted, in a murky legal situation, an informal appeal that the subpoena in some way be rendered void.

Mr. Cox and J. Fred Buzhardt Jr., a special White House counsel, agreed this morning that the show-cause hearing should be held on Aug. 7 at 10 A.M. The delay of 12 days was described by lawyers here as about the normal time span.

Among the anomalies of the court test will be the fact that all the participants—Mr. Nixon's counsel, the Senate committee counsel, the grand jury, the prosecutor and the judge—are Federal employees.

The tapes at the center of the controversy were made by automatic recording devices secreted in the White House, the Executive Office Building next door and the Presidential retreat at Camp David, Md. Nearly all of Mr. Nixon's private conversations and telephone calls from the spring of 1971 until last week were recorded.

Alexander P. Butterfield, a former White House aide, disclosed the recording practice in testimony to the Senate committee.



The New York Times/Mike Lien

Senator Howard H. Baker Jr. interrogating John D. Ehrlichman yesterday.