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# Move to Subpoena Nixon Termed a Legal Delusion

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WASHINGTON, June 4—A law professor at an Eastern university, after an extended explanation of the legal and constitutional uncertainties in any move to subpoena the President, ended with a dissatisfied sigh.

"I think that it's a mare's-nest," he said. The conclusion is apparently one of the few that commands general agreement in the theoretical discussions now under way.

The issue arose last week when the White House announced that it would be "constitutionally inappropriate" for President Nixon to be subpoenaed before a Federal grand jury investigating the Watergate scandals.

The issue came up again today when the White House disclosed that Mr. Nixon had logs of his conversations with a principal figure in the Watergate investigation but would refuse to make them available to either the grand jury of the Senate investigation.

While there is nothing in the Constitution to prevent issuing a subpoena for the President, a number of legal experts said in telephone interviews, there is also nothing that would compel him to testify.

### Marshall Opinion Cited

The precedent most often cited, and believed to be the only one dealing directly with the issue, is an opinion written in 1807 by Chief Justice John Marshall while he sat as a circuit judge in Richmond.

The Chief Justice wrote, in United States v. Burr, that Aaron Burr had the right to subpoena Thomas Jefferson for his trial on treason charges and that he had the right to subpoena documents from the President.

The ruling is mentioned frequently by Senator Sam J. Ervin Jr., the North Carolina Democrat who presides over the Senate Select Committee on Presidential Campaign Activities.

But the decision is also brought up by those much less certain of the right to subpoena the President, because Jefferson did not appear in response to Burr's subpoena and the Court did nothing, letting the issue drop.

"The important point is that the case ended ambiguously," one law professor said. He and others contend that there is no modern precedent and that the Presidency has changed materially since the early 19th century.

"Does the Secret Service accompany the President into the grand jury room [no one is permitted to join a witness in normal circumstances]?" one expert asked rhetorically. "What about the man with the black bag [containing nuclear codes]?"

A more substantive point is the fear of judges and lawyers that, if the President could be subpoenaed, he would be harassed endlessly by social and political litigants with some ax to grind.

Those less convinced that a subpoena would be "constitutionally inappropriate" acknowledge this difficulty, but they contend that there are exceptional circumstances in which the President is a vital witness.

Many liberals have pointed to a decision last year, involving immunity from subpoenas for reporters, in which Nixon appointees to the Supreme Court joined in holding that "the public has a right to every man's evidence."

### Philosophical Footnote

In a footnote to the opinion, the Court quoted Jeremy Bentham, the 18th and early 19-century English philosopher, as saying that "men high in office" should be required "as far as it is necessary" to "dance attendance upon every petty cause."

"Were the Prince of Wales, the Archbishop of Canterbury and the Lord High Chancellor to be passing by in the same coach while a chimney sweep and a barrow-woman were in dispute about a half-pennyworth of apples, and the chimneysweeper or the barrow-woman wer to think proper to call upon them for their evidence, could they refuse it?" The Court quoted Bentham as asking. "no, most certainly."

If a subpoena is issued, the President could either ignore it and argue that the judiciary has no power to compel the President to testify, or could move to quash it and make this and other arguments before the courts, a number of experts said.

Several authorities said that political and ethical factors would be most important in any effort to get evidence from the President. The logs of Mr. Nixon's conversations with John W. Dean 3d, his former counsel, could provide a test of this.

"If Dean makes his charges in public and only the President can answer them," one lawyer said, "that will be a lot stronger than any subpoena."