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# President Based Decision On Two Legal Doctrines

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WASHINGTON, July 23 — President Nixon based his refusal today to furnish the White House tapes to the Senate Watergate committee on the intertwined legal doctrines of separation of powers and executive privilege.

Neither of these principles has been tested in the courts in anything resembling the current Watergate context, but the President's action seemed certain to precipitate such a test, one that could reach the Supreme Court in a matter of months.

The separation of powers involves the theory that the executive, legislative and judicial branches of the Government, established separately by the Constitution, do not have the power to encroach on each other's jurisdictional territory, to maintain a balance of authority among them.

Executive privilege is the rationale invoked by Presidents when they refuse to divulge to Congress or the courts private internal communications between the President and his aides or among those aides, on the theory that some preliminary confidentiality is essential to any government.

In his letter to Senator Sam J. Ervin Jr., of North Carolina, the committee chairman, President Nixon did not cite executive privilege as such, but he argued that the tapes contained "a great many very frank and

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very private comments . . . whholly extraneous to the committee's inquiry."—in other words, private White House business.

Mr. Nixon also maintained that any attempt to understand the recordings of certain isolated meetings would require making public "an enormous number of other documents and tapes" and touch off "an endless process of disclosure and explanation of private Presidential records . . . highly confidential in nature."

### Refusal on Same Level

In a parallel letter to the special Watergate prosecutor, Archibald Cox, Prof. Charles Alan Wright, the new White House legal consultant, expanded the separation of powers argument to cover the President's refusal to provide the same information to a fellow official of the executive branch.

Professor Wright, in private life a constitutional law professor at the University of Texas, told Mr. Cox that "separation-of-powers considerations are fully as applicable to a request from you as one from the Senate committee."

"It is clear . . . the reason you are seeking these tapes is to use some or all of them before grand juries or in criminal trials," Mr. Wright continued. "Production of them to you would lead to their use in the courts, and questions of separation-of-powers are in the forefront when the most confidential documents of the Presidency are sought for use in the judicial branch."

The White House legal adviser cited a 1953 decision of the Supreme Court as proclaiming the existence of "an inherent executive power which is protected in the constitutional system of separation of power."

### Not Finding by Vinson

In fact, the quotation was taken from a footnote to the High Court's opinion that presented a contention of the Government but not a finding by Chief Justice Fred M. Vinson.

In addition, the case cited by Professor Wright, United States v. Reynolds, dealt with the Government's right to refuse to divulge a military secret for use in a civil damage suit, rather than any situation comparable to Mr. Cox's seeking White House records of a different character.

In the course of his opinion, in fact, Chief Justice Vinson made an observation that would seem to run counter to Professor Wright's case: "Judicial control over the evidence in a case cannot be abdicated to the caprice of executive officers."

The Ervin committee indicated how rapidly its members intend to press the now-inevitable court test of the President's legal position by issuing and serving subpoenas this afternoon, within hourts of receipt of the Pesident's message.

The timetable for the full course of the judicial challenge remained uncertain, however. If Mr. Nixon fails to honor the subpoenas, the committee, probably joined by Mr. Cox, will go into Federal District Court in Washington in an effort to compel his compliance.

### May Prefer Mandamus Suit

The committee could bring a contempt action against the President but might prefer a less arrogant sounding mandamus suit, the normal remedy for citizens who wish to compel Government officials to perform their regular duties. Mr. Cox could join in such an action.

Such a case would require the filing of legal papers by both parties, oral arguments, deliberation by the judge and a decision. Then the same process would undoubtedly be repeated, at the instigation of the losing party, in the United States Court of Appeals for the District of Columbia.

A routine case can often take a year to clear each of these Federal courts and another two in the Supreme Court. On the other hand, when time is of the essence, the process can be telescoped into a matter of days.

A year ago when the dispute over seating Illinois and California delegates at the Democratic National Convention wound up in Federal Court here, the entire process through the three judicial levels was accomplished in less than a week.

Expediting the Nixon-Ervin case would be largely up to the judges involved. Although there would be no impending deadline comparable to the opening of the Democratic convention, there would certainly be heavy political and moral pressure to resolve the controversy clouding the President's authority as rapidly as possible.

More as a matter of public relations than law, it would appear unlikely that Professor Wright and the rest of the President's legal advisers would seek to delay the proceedings beyond assuring themselves of adequate time to prepare their case.