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Excerpts From Brief Opposing

Following is a partial text of President Nixon's argument in opposition to Special Watergate Prosecutor Cox' subpoena of White House tapes, which was presented yesterday in U.S. District Court:

Statement of the Case

On July 23, 1973, at the direction of the Special Prosecutor, Watergate Special Prosecution Force, the Clerk of the United States District Court for the District of Columbia issued a subpoena duces tecum to Richard M. Nixon, or any subordinate officer whom he designates who has custody or control of certain documents or objects, directing him to produce certain specified documents or objects as evidence before an incumbent grand jury. Specifically the subpoena directs the President to turn over to the grand jury tape recordings of meetings and telephone conversations between the President and several of his closest advisers in the period from June 20, 1972, to April 15, 1973, as well as several memoranda consisting of communications between the President's advisers. As noted in the Petition for an Order to Show Cause, "virtually all of the participants in the conversations which are the object of the Grand Jury's subpoena have already testified in one forum or another about these conversations."

On July 26, 1973, the President outlined his reasons for refusal to comply with those portions of the subpoena relating to tape recordings in a letter to the Honorable John J. Sirica, Chief Judge of the United States District Court for the District of Columbia. That same letter expressed an intention to provide voluntarily the documentary evidence demanded by the subpoena. Also on July 26, 1973, the Special Prosecutor filed his verified Petition for an order directing Richard M. Nixon or any subordinate officer whom he designates to show cause why the specified documents or objects should not be produced in response to the subpoena. Pursuant to that Petition, this Court entered an order on July 26, 1973, directing Richard M. Nixon to show cause before the Court why the documents and objects demanded should not be provided pursuant to the subpoena and setting the matter for hearing on August 7, 1973.

Summary of Argument

The present proceeding, though a well-intentioned effort to obtain evidence for criminal prosecutions, represents a serious threat to the nature of the Presidency as it was created by the Constitution, as it has been sustained for 184 years, and as it exists today.

If the Special Prosecutor should be successful in the attempt to compel disclosure of recordings of Presidential conversations, the damage to the institution of the Presidency will be severe and irreparable. The character of that office will be fundamentally altered and the total structure of government—dependent as it is upon a separation of powers—will be impaired.

The consequence of an order to disclose recordings or notes would be that no longer could a President speak in confidence with his close advisers on any subject. The threat of potential disclosure of any and all conversations would make it virtually impossible for President Nixon or his successors in that great office to function. Beyond that, a holding that the President is personally subject to the orders of a court would effectively destroy the status of the Executive Branch as an equal and coordinate element of government.

There is no precedent that can be said to justify or permit such a result. On the contrary, it is clear that while courts and their grand juries have the power to seek evidence of all persons, including the President, the President has the power and thus the privilege to withhold information if he concludes that disclosure would be contrary to the public interest.

The breadth of this privilege is frequently debated. Whatever its boundaries it must obtain with respect to a President's private conversations with his advisers (as well as to private conversations by judges and legislators with their advisers). These conversations reflect advisory opinions, recommendations, and deliberations that are an essential part of the process by which presidential decisions and policies are formulated. Presidential privacy must be protected, not for its own sake, but because of the paramount need for frank expression and discussion among the President and those consulted by him in the making of presidential decisions.

The privilege with regard to recordings was not waived by the decision of the President, in the interest of having the truth about Watergate come out, to permit testimony about portions of those conversations by persons who participated in them. Testimony can be limited, as recordings cannot to the particular area in which privilege is not being claimed. Nor does the privilege vanish because there are claims that some of the statements made to the President by others in these conversations may have been pursuant to a criminal conspiracy by those other persons. That others may have acted in accordance with a criminal design does not alter the fact that the President's participation in these conversations was pursuant to his Constitutional duty to see that the laws are faithfully executed and that he is entitled to claim executive privilege to preserve the confidentiality of private conversations he held in carrying out that duty.

In the exercise of his discretion to claim executive privilege the President is answerable to the nation but not to the courts. The courts, a co-equal but not a superior branch of government, are not free to probe the mental processes and the private confidences of the President and his advisers. To do so would be a clear violation of the Constitutional separation of powers. Under that doctrine the Judicial Branch lacks power to compel the President to produce information that he has determined it is not in the public interest to disclose.

The issue here is starkly simple: Will the presidency be allowed to continue to function?

Argument

I. Introductory Statement

The extent to which the Executive Branch has a power or privilege to withhold documents or testimony from the other two branches of government has been correctly described as "one of the most difficult, delicate and significant problems arising under our system." . . . There are few authoritative judicial decisions on the matter but this is because the other branches of government have respected claims of privilege by the Executive Branch and have recognized the inappropriateness of seeking resolution in the courts of controversies between branches of government.

Although there have been repeated clashes between Presidents and Congress over the issue from 1796 on, there is no judicial decision whatever on controversies of that kind. . . . There are decisions on the privilege as it exists against the courts, but these decisions tend to be cautious . . . and to be resolved on the narrowest possible grounds. . . . Though there is a fairly substantial literature on the question, it is more argumentative than authoritative.

The question is still further clouded by the tendency of all those who have spoken on this question to lump together questions that may require separate answers. Thus courts and writers have not always been careful to distinguish between the President himself, the heads of departments, and subordinates within the executive departments. Nor is it always recognized that the scope of the privilege may be one question, who is to judge of its existence a second question, and whether a decision adverse to the executive could be enforced a third question.

This case, however, does not require a sweeping analysis of the privilege and all of its ramifications. Rather the court is faced with the narrow question of its application to the President of the United States in his most confidential conversations with his intimate advisers. On this question judicial precedents are almost nonexistent. One fact does stand out. No court has ever attempted to enforce a subpoena directed at the President of the United States. No President—and, for that matter, no department head—has ever been held in contempt for refusal to produce information, either to the courts or to Congress, that the President has determined must be withheld in the public interest. Quite commonly Presidents have voluntarily made available information for which a claim of privilege could have been made. That happens very often—and has happened and is happening in this case. But practice throughout our history shows no exception to the rule that the President cannot be forced to disclose information that he thinks it would damage the public interest to disclose.

We do not question the power of the court to issue a subpoena to the President. In United States v. Burr . . . (1807), Chief Justice Marshall, sitting at circuit, ruled that a subpoena might issue, though he immediately recognized that "difference may exist with respect to the power to compel the same obedience to the process, as if it had been di-

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rected to a private citizen . . ." A subsequent Attorney General has ruled that a subpoena may be directed against the President to produce a paper, though the courts would be without power to enforce their process should the President refuse . . . The cautious reference to the Burr ruling in Branzburg v. Hayes . . . (1972), goes no further than to note that Chief Justice Marshall had "opined" that a subpoena might issue. For present purposes, we accept that proposition.

But the power to seek information from the Executive Branch does not impose on the Executive any concurrent obligation to disclose that information. Rather the responsibility of a President to disclose information to a grand jury and to the courts is limited by the Constitutional doctrine of separation of powers. The classic statement of that doctrine is contained in the opinion of the Supreme Court in Kilbourn v. Thompson . . . (1880), where the Court said:

"It is believed to be one of the chief points of the American system of written constitutional law, that all powers intrusted to government, whether State or national, are divided into the three grand departments, the executive, the legislative, and the judicial. That the functions appropriate to each of these branches of government shall be vested in a separate body of public servants, and that the perfection of the system requires that the lines which separate and divide these departments shall be broadly and clearly defined..."

The Court continued:

"In the main, however, that instrument, the model on which are constructed the fundamental laws of the States, has blocked out with singular precision, and in bold lines, in its three primary articles, the allotment of power to the executive, the legislative, and the judicial departments of the government. It also remains true, as a general rule, that the powers confided by the Constitution to one of the departments cannot be exercised by another.

"It may be said that these are truisms which need no repetition here to give them force. But while the experience of almost a century has in general shown a wise and commendable forebearance in each of these branches from encroachments upon the others, it is not to be denied that such attempts have been made . . ."

This concept of separation of powers, which was recognized by the Supreme Court as early as 1803 in Marbury vs. Madison . . . caused Chief Justice Marshall, in the Burr case, to qualify his remarks about subpoenaing the President. He said:

"In no case of this kind would a court be required to proceed against the President as against an ordinary individual. The objections to such a course are so strong and so obvious that all must acknowledge them..."

To insist on the doctrine of separation of powers is by no means to suggest that the President is accountable under the law, but only in the manner prescribed in the Constitution. The distinction was drawn vividly by Attorney General Stanbery in his argument in Mississippi vs. Johnson... (1867):

"It is not upon any peculiar immunity that the individual has who happens to be President; upon any idea that he cannot do wrong; upon any idea that there is any particular sanctity belonging to him as an individual, as is the case with one who has royal blood in his veins; but it is on account of the office that he holds that I say the President of the United States is above the process of any court or the jurisdiction of any court to bring him to account as President. There is only one court or quasi court that he can be called upon to answer to for any dereliction of duty, for doing anything that is contrary to law or failing to do anything which is according to law, and that is not this tribunal but one that sits in another chamber of this Capitol. There he can be called and tried and punished, but not here while he is President; and after he has been dealt with in that chamber and stripped of the robes of office, and he no longer stands as the representative of the government, then for any wrong he has done to any individual, for any murder or any crime of any sort which he has committed as President, then and not till then can hebe subjected to the jurisdiction of the courts. Then itis the individual they deal with, not the representative of the people."

See the similar statement of position by Alexander Hamilton in Federalist No. 69.

Nor is the privilege derived from the doctrine of separation of powers one that is available only to protect the President, or the Executive Banch generally, from the other two branches of government. Each branch of government has claimed, and rightly so, a privilege to do its own business in its own way, without coercion from other branches of government. No other branch of government can compel disclosure of what judges of a court say to each other when the court is in conference. No other branch can require disclosure of discussions about legislative business between a Congressman and his aide . . . As Judge Wilkey recently wrote, "the privilege aginst disclosure of the decision-making process is a tripartite privilege, because precisely the same privilege in conducting certain aspects of public business exists for the legislative and judicial branches as well as for the executive." . . . The Congress has always claimed a privilege for its own private papers. No court subpoena is complied with by the Congress or its committees without a vote of the house concered to turn over the documents. 448 F.2d at 1081-1082 (Footnote deleted). The Judiciary claims a similar privilege aginst giving testimony about the official conduct of judges, . . . (and) Justice Tom C. Clark, (in a letter) dated November 14, 1953, (refused) to respond to a subpoena to appear before the House Un-American Activities Committee, on the ground that the "complete independence of the judiciary is necessary to the proper administration of justice."

All branches of government benefit from the independence secured to them by the Constitutional separation of powers. All America has benefited from the sturdy insistence of all three of the branches, over the years, on preserving that independence. . . .

Conclusion

The result for which we have argued is supported by such precedent as exists. It is supported by premises that are, and have always been, at the heart of our Constitutional system. It is supported by the unvarying practice of 184 years. It is supported finally, and most importantly, by the consequences that would follow if any other results were to be reached.

Were it to be held, on whatever ground, that there is any circumstance under which the President can be compelled to produce recordings or notes of his private conversations, from that moment on it would be simply impossible for any President of the United States to function. The creative interplay of open and spontaneous discussion is essential in making wise choices on grave and important issues. A President would be helpless if he and his advisers could not talk freely, if they were required always to guard their words against the possibility that next month or next year those words might be made public. The issue in this case is nothing less than the continued existence of the Presidency as a functioning institution.

For all of the foregoing reasons, the motion of the Special Prosecutor should be denied.