SFChronicle

AUG 19 1973

# Executive Privilege: An Expert's Opinion

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*AP Wirephoto*

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**Washington**

THERE IS NO constitutional basis for President Nixon's refusal on the ground of executive privilege to make available the Watergate tapes subpoenaed by Sen. Sam Ervin's committee and special prosecutor Archibald Cox.

Simply put, Presidential tapes relating to criminal activities are not privileged. And, giving every presumption of innocence to the President and all other past and present officials of the White House, it is not controverted that Watergate and its aftermath involved criminal activities, including burglary, illegal wire tapping, perjury and obstruction of justice, and that the subpoenaed tapes relate to Watergate.

Even though the tapes are not privileged, it is by no means certain that the courts will sustain the subpoenas issued on behalf of either Senator Ervin's committee or Professor Cox.

There are formidable technical objections to both subpoenas.

**Jurisdiction Questions**

In the case of Senator Ervin's committee, there is great doubt whether (under present procedural legislation) the courts have jurisdiction to entertain a declaratory judgment lawsuit by the committee to enforce its subpoena. Additionally, there is the question whether production of the tapes would serve a legitimate legislative purpose.

With respect to Professor Cox's subpoena, there is the obstacle that the special prosecutor is an employee of the President. The courts are notably allergic to arbitrating differences within the executive branch of the government.

Be that as it may, the President would derive little comfort from the disposition of this matter on procedural grounds.

The American people rightly or wrongly would necessarily conclude, as the polls already indicate they are doing, that the subpoenas are not being honored because of Presidential concern over what the tapes may reveal as to his personal knowledge of Watergate and its cover-up.

The basic question involved in the assertion of executive privilege by the President is of such importance that its resolution transcends legal technicalities.

Putting aside technicalities and even the question of what the President ought to do as a matter of sound political judgment, there are authoritative decisions of the Supreme Court making it clear that there is no constitutional basis for the President's refusal to release the tapes.

I do not mean the oft-quoted 1807 opinion by Chief Justice John Marshall in the Aaron Burr case declaring that President Thomas Jefferson could be subpoenaed to appear as a witness and produce documents relevant

***The Chief Justice was sitting as a circuit judge***

to Burr's trial for treason. The Chief Justice in this instance was not speaking for the Supreme Court, but only for himself.

In accordance with the law of the time, the Chief Justice was sitting as a circuit trial judge. Marshall's declaration that a particular letter addressed to and in the hands of the President could be subpoenaed was hotly contested by Mr. Jefferson but was resolved by the President's action in turning over the letter to the court. The matter never reached the Supreme Court.

**Recent Decisions**

Although the Burr case does not decide the present issue, several recent authoritative decisions by the Supreme Court, in my opinion, sustain the proposition that the Presidential Watergate tapes are not privileged.

These decisions are: United States v. Brewster, Gravel v. United States, Branzburg v. Hayes and United

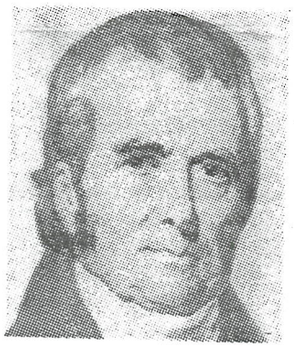
States v. Caldwell, all decided last year.

The Brewster case involved a conviction for accepting a bribe in exchange for a promise relating to Brewster's vote as a United States senator on postal rate legislation.

**'There is no provision whatsoever . . .'**

The Gravel case involved the question whether the privilege of members of Congress under the speech and debate clause of the Constitution immunizes an aide to a United States senator and, indeed, the senator himself from prosecution for making arrangements for private publication of classified documents (the Pentagon Papers) in alleged violation of federal law.

The Branzburg and Caldwell cases involved the issue of whether newspaper reporters could constitutionally refuse to respond to a grand jury subpoena and to answer questions relative to an investigation into the commission of crime.



MARSHALL

### No Privileges

In the cases involving Sens. Brewster and Gravel, the Supreme Court held that members of Congress and their staffs are not privileged with respect to alleged criminal conduct. In the two other cases, the Supreme Court decided that there is no newspaperman's privilege against being subpoenaed to testify before a grand jury concerning the criminal conduct of a news source or evidence thereof.

The Brewster and Gravel cases involved a claim to privilege far stronger than the President's claim of executive privilege.

The Constitution explicitly

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confers certain immunity to members of Congress in the speech and debate clause in these words: " . . . for any speech or debate in either house they shall not be questioned in any other place."

In the Brewster case, Chief Justice Warren Burger, writing for a majority of the court, said: "It can hardly be thought that the speech or debate clause . . . protects . . . criminal actions." The Gravel decision is of similar import.

### No Provisions

The caseforexecutive privilege is weaker than the rejected claim of legislative privilege in the Brewster and Gravel cases. There is no provision whatsoever in the Constitution explicitly affording any executive privilege.

President Nixon's assertion of executive privilege is based upon the concept of separation of powers — a concept itself not explicitly stated in the Constitution, although it is implicit in the grand design of our Constitution creating the three coordinate branches of government: the executive, the legislative and the judicial.

COX

The newspaper cases which I have mentioned contain an important expression by the Supreme Court relevant to President Nixon's claim of executive privilege. In the Branzburg case, Mr. Justice White, writing for a majority of the court, had this to say in a most pertinent footnote:

### Must Testify

"Jeremy Bentham vividly illustrated this maxim: 'Are men of the first rank and consideration — are men high in office — men whose time is not less valuable to the public than to themselves — are such men to be forced to quit their pleasure, at the beck of every idle or malicious adversary, to dance attendance upon every petty cause? Yes, as far as it is necessary, they and everybody . . .

"'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-sweeper and a barrow-woman were in dispute about a half-pennyworth of apples, and the chimney-sweeper or the barrow-woman were to think proper to call upon them for their evidence, could they refuse it? No, most certainly' . . .

"In United States v. Burr, 25 F cas. 30, 34 (No. 14,692D) (CC Va. 1807), Chief Justice Marshall, sitting on circuit, opined that in proper circumstances a subpoena could be issued to the President of the United States."

It is interesting to note that all of President Nixon's appointees to the court joined in judgments of the court in all four decisions I have cited.

### Must be Obeyed

There is, then, a firm body of recent Supreme Court law clearly indicating that the President may not invoke executive privilege to shield evidence of possible crime.

**'The time is long past for public toleration'**

And, since Marbury V. Madison, decided in 1803, it has been indisputable under our Constitutional system that, unless changed by the orderly processes provided by the Constitution, the decisions of the ultimate court must be respected and obeyed by all.

The time is long past for public toleration of what President Andrew Jackson said following a Supreme Court decision to his disliking: "John Marshall has made his decision, now let him enforce it."

The President, through an authorized spokesman, has said that he will comply with a "definitive" decision of the Supreme Court in this matter. The American people, under our Constitutional scheme, have the right to expect no less.

### Wiser Course

The problem with the President's statement and, indeed, with the entire question underlying resort to the courts in this matter, is this: there may well be no "definitive" decision of the court because of technical and procedural difficulties. More importantly, the fact is that a question of this magnitude involving separation of powers is better resolved by accommodation rather than by litigation.

*N.A.N.A.*