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Subpoenaing the President: Judge's Action in Ehrlichman's Case Raises New Questions

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WASHINGTON, Jan. 29—The question last summer was whether the President could be ordered to comply with a subpoena. A number of judges replied that he could. The question then became whose subpoena—only the special Watergate prosecutor's or a subpoena from the Senate Watergate Committee as well?

News Analysis

Today, before the courts have decided that second question, a Los Angeles judge added a third: Can anyone subpoena the President, in any court, in any trial, in any state?

When Judge Gordon Ringer of State Superior Court in Los Angeles announced today that he would authorize a procedure that could lead to an order that President Nixon testify in the trial of John D. Ehrlichman, his former aide, it evoked a vision of the President of the United States spending his term rushing to the airport and flying off to one courthouse after another, one witness stand after another.

Legal experts were quick to scoff at that vision, saying that not everyone may call the President as a witness. But they suggested that the President was vulnerable to suppoenas, from more people than one might imagine. They declined to speculate whether Mr. Nixon would infact appear at the Ehrlichman trial.

Mr. Ehrlichman's request that Mr. Nixon appear at his trial may eventually fail, for a number of reasons. Even if ordered to appear, the President might simply refuse, subjecting himself to a posslble citation for contempt of court. But, according to some lawyers; at least, the law provides a way for the President to be required to take the stand in Judge Ringer's courtroom.

Judge Ringer's announcement raises a number of questions.

First, can Judge Ringer, a member of the California state judiciary rather than a Federal judge, require the presence of someone who lives outside the state?

Second, can he, as a state official, require the presence of a Federal official?

And if those two questions are resolved, can a state judge order the President of the United States to appear?

Answers Qualified

While there was some disagreement among lawyers on the answers to these questions, several said that the answer to each was a qualified yes.

The first question, of a state court's power to reach beyond the boundaries of the state, is crucial, for if the judge has no such power, the case is over —President Nixon can simply abstain from trips to San Clemente for a while.

The Constitution apparently does not provide for such power.

According to Richard Uviller, professor at the Columbia Law School, the defendant's right under the Sixth Amendment to call witnesses does not extend beyond the jurisdiction of the state in which he is tried.

But, to remedy this "flaw," as Mr. Uviller put it, nearly all the states have entered into a compact to turn over witnesses to one another. Among those that are part of the compact are California and the District of Columbia.

Under this compact, written into the statute books of the participating jurisdictions, a judge in State A can sign a "certificate" stating that a certain person in State B is needed as a witness in a trial in State A. This certificate is then sent to the court in State B (or the District of Columbia) where the person resides.

A judge in the receiving state or jurisdiction is then required to issue a summons to the person in question to appear at a hearing. Alternatively, he can order the person to be taken into custody, if he feels it necessary.

If this judge finds that the legal technicalities of the procedure have been met, and the person is indeed "material and necessary" as a witness, he then orders the person to appear at the trial in State A.

The next question is whether a state official can exert control over a Federal official, in view of the fact that the Federal system is constitutionally "supreme" over t he state system. There have been some cases in which Federal courts have ruled that state courts cannot exert control over Federal officials, such as draft officials.

To Gerald Gunther, law professor at Stanford University, and some other experts, the "supremacy" rule is not really relevant here. For one thing, Mr. Gunther pointed out, state courts have generally been considered authorized to call some Federal officials, such as agents of the Federal Bureau of Investigation.

For another, he said, the Ehrlichman trial falls within the area that the states control — prosecution of crimes within their jurisdiction.

But, as Mr. Gunther put it, "It's a seperate question whether the President should be treated differently than any other Federal official."

The question here, as it was last fall when the special Watergate prosecutor suppoenaed Mr. Nixon to obtain the Watergate tapes, is whether the President is subject to subpoena and, if so, in what circumstances.

Judge John J. Sirica, and then the majority of the United States Court of Appeals for the District of Columbia Circuit, ruled in favor of the Watergate prosecutor, rejecting the President's contention that he had total immunity. The Court of Appeals ruling, which was never appealed, provides some clues as to how the Ehrlichman case may be resolved.

Saying that the President "is not above the law's commands," the Court of Appeals ruled that the "application of executive privilege depends on a weighing o fthe public interest protected by the privilege against the public interests that would be served by disclosure in a particular case."

In view of that ruling and the precedents on which it was based — chiefly, a court opinion in the case of Thomas Jefferson involving Aaron Burr — many lawyers feel that the issue must thus be decided on a case-by-case basis, applying a balancing test.

The fact that a state court is demanding the President's presence adds a factor that the Court of Appeals did not have to deal with. As one law professor commented, there are a lot more state courts than there are Federal courts, and thus a lot more potential areas that might take up the President's time.

Mr. Uviller, for oe, feels that the test should be whether the President's participation in the judicial process would take up so much time as to "jeopardize" the performance of his regular duties.

As Mr. Gunther points out, even the old cases, such as the one involving Jefferson, raised the possibility of what Mr. Gunther called "undue inconvenience" to the President.

The Court of Appeals opinion in the tapes case, in fact, notes that, when President Monroe was subpoenaed in 1818 to appear as a defense witness in a court-martial, he was able to satisfy the court by stating that his official duties precluded his personal appearance but that he would answer written questions—a promise he subsequently kept.

Thus, if Mr. Nixon would be greatly inconvenienced by appearing at the Ehrlichman trial, and if his written answers to questions might satisfy the defendant's need for information, the balancing test would not require Mr. Nixon's personal appearance.

And the subpoena would thus not stand.