

Time Viewed as Nixon's Biggest Gain in Subpoena Fight

BY LESLEY OELSNER
Special to The New York Times
WASHINGTON, May 8

President Nixon officially notified the United States District Court today that he would indeed fight the special prosecutors' latest subpoena, earlier hints to the contrary notwithstanding.

In so doing, he avoided, for the moment, the embarrassment and political fallout that might come from releasing the material that the House conversationalists allegedly related to the Watergate cover-up.

The decision to fight also provides an option that the White House now seems to consider priceless: delay. The litigation will probably take months to complete, and that fact, some observers suggested today, may well have been the major factor behind President Nixon's decision.

Yet the decision to fight also means that Mr. Nixon has embarked on a legal battle that many legal experts believe is impossible to win. It will be a legal battle of historic magnitude, for the

President's lawyers have indicated that they are willing to take the case to the Supreme Court.

If the recent statements by White House personnel are any guide, it may have an even more drastic outcome than did the President's last confrontation in the courts with the special prosecution—the confrontation over tapes of nine White House conversations.

That culminated in a Federal Court of Appeals ruling against Mr. Nixon, in the dismissal of the first special prosecutor and in the resignation of the Attorney General.

Last fall, President Nixon eventually agreed to abide by the Court of Appeals ruling. His press office, moreover, had consistently said that the President would abide by a "definitive" court ruling on the case. This time, however, the President's chief lawyer, James D. St. Clair, has refused time after time to answer the question of whether or not the President would abide by a Supreme Court ruling.

The unavoidable conclusion is that the President has not ruled out the possibility of defying the Supreme Court—a possibility that is the subject of a constitutional confrontation of obviously immense proportions.

To many lawyers, the President, having decided to contest the subpoena, actually has no other choice but to take the matter to the Supreme Court.

For the Court of Appeals ruling last fall, although issued in the context of a grand jury subpoena rather than in the present context of a prosecution related to a trial, set a general precedent that is probably binding in the present case.

The Court of Appeals ruled, essentially, that executive privilege is not absolute, and that it is up to the courts rather than to the President to decide whether or not a claim of executive privilege is proper. In deciding on such claims, the court said, judges are to apply a kind of balancing test, weighing the need for the subpoenaed information against the need for protecting the confidentiality of Presidential communications.

There is a somewhat technical threshold question in the present case that must be decided before the issue of executive privilege is raised: whether the issuance of the subpoena at this time, returnable several months before trial

rather than at the start, was to the Supreme Court, Mr. Kurland, a professor of law at the University of Chicago Law School, noted today that courts can always "distinguish" cases and thus avoid setting precedents. But he said it would be "very hard to justify a distinction" in this case.

Other than that, however, several lawyers said today, the issues in this case seem similar to the case last fall, Philip Kurland, a professor of law at the University of Chicago Law School, noted today that courts can always "distinguish" cases and thus avoid setting precedents. But he said it would be "very hard to justify a distinction" in this case.

Adverse Decision Seen
Thus it follows from this view that both the District Court and the Court of Appeals might rule against President Nixon.

As for the Supreme Court, of course, it is impossible to predict an outcome. As some observers pointed out, however, it might be politically easier for the court simply to affirm previous court rulings than to go off on an opposite tact. So, what are the advantages to Mr. Nixon's decision to fight? Both Normal Dorsen, a professor at New York University School of Law, and Mr. Kurland noted that the battle could take months.

The Supreme Court sometimes grants expedited appeal, but it might be better than releasing more

directly from the District Court tapes.