Text of Jaworski Appeal on Watergate

Special to The New York Times

WASHINGTON, May 24—Following is thetext of the appeal by Leon Jaworski, the special Watergate prosecutor, to the Supreme Court asking for access to 64 tape recorded White House conversations:

The special prosecutor, on behalf of the United States, petitions for a writ of certiorari before judgment to the United States Court of Appeals for the District of Columbia Circuit. (footnote 1)

If the petition is granted, the special prosecutor suggests, in view of the imperative public importance that the issues herein be resolved during the present term of the Court, that the Court expedite the schedule for briefing and argument. In this regard, the special prosecutor would suggest that the brief for petitioner be filed on June 7, 1974, and any briefs for respondents on June 14, 1974—all briefs to be filed initially in typewritten form, but to be replaced as soon as possible with printed briefs. The special prosecutor further would suggest that the Court hear argument in this case as soon after the filing of briefs as is consistent with the Court's calendar.

Opinion Below

The District Court's opinion and order of May 20, 1974, denying the motion to quash the subpoena and enforcing compliance with it (Appendix A, infra, PP. 13-21) are not yet officially reported.

Jurisdiction

The order of the District Court sought to be reviewed was entered on May 20, 1974, in United States v. Mitchell, et al., (D.D.C. Crim. No. 74-110). On May 24, 1974, respondent Richard M. Nixon, President of the United States, filed a timely notice of appeal from that order in the District Court, (footnote 2) and that the same day the certified record from the District Court was docketed in the United States Court of Appeals for the District of Columbia Circuit. The jurisdiction of this court to review the instant case, which is now pending in the Court of Appeals (see Gay v. Ruff, 292 U.S. 25, 30), is invoked under 28 U.S.C. 1254 (1) and 2102 (E). See Youngstown Sheet & Tube Co. v. Sayer, 343 U.S. 579; United States v. United Mine Workers, 330 U.S. 258, 269. In both Youngstown Sheet & Tube Co., v. Sawyer and United States v. United Mine Workers, a writ of certiorari was granted before final judgment in the Court of Appeals at the instance of the party that had prevailed in the District Court.

Questions Presented

1. Whether the President, when he has assumed sole personal ad physical control over evidence demonstrably material to the trial of charges of obstruction of justice in a Federal Court, is subject to a judicial order directing compliance with a subpoena duces tecum issued on the application of the special prosecutor in the name of the United States.

2. Whether a Federal Court is bound by the assertion by the President of an absolute "executive privilege" to withhold demonstrably material evidence from the trial of charges of obstruction of justice by his own White House aides and party leaders, upon the ground that he deems production to be against the public interest.

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3. Whether a claim of executive privilege based on the generalized interest in the confidentiality of Government deliberations can block the prosecution's access to evidence material and important to the trial of charges of criminal misconduct by high Government officials who participated in those deliberations, particularly where there is a prima facie showing that the deliberations occurred in the course of the criminal conspiracy charged in the indictment.

4. Whether any executive privilege that otherwise might have been applicable to discussions in the offices of the President concerning the Watergate matter has been waived by previous testimony pursuant to the President's approval and by the President's public release of 1,216 pages of edited transcript of forty-three Presidential conversations relating to Watergate.

5. Whether the District Court properly determined that subpoena duces tecum issued to the President satisfies the standards of Rule 17 (C) of the Federal Rules of Criminal Procedure because an adequate showing has been made that the subpoenaed items are relevant to issues to be tried and will be admissible in evidence.

Evidence

Constitutional Provisions, Statues, Rule, and Regulations Involved

The constitutional provisions, statutes, rule, and regulations involved, which are set forth in Appendix B, infra pp. 22-34, are:

Constitution of the United States: Article 11, Section 1; Article 11, Section 2; Article 11, Section 3; Article 111, Section 2

Statutes of the United States: 3 U.S.C. 301; 28 U.S.C. 509, 510, 515-519

Rule: Rule 17(C), Federal Rules of Criminal Procedure.

Regulations: Department of Justice order No. 551-73 (Nov. 2, 1973), 38 Fed. Reg. 30,738, adding 28 C.F.R. Secs. 0.37, 0.38, and appendix to subpart G-1; Department of Justice order No. 554-73 Nov. 19, 1973), 38 Fed. Reg. 32,805, amending 28 C.F.R. appendix to subpart G-1.

Statement

This case presents for review the denial of a motion filed on behalf of respondent Richard M. Nixon, President of the United States, pursuant to rule 17(C) of the Federal Rules of Criminal Procedure, seeking to quash a subpoena duces tecum issued in a criminal case, directing the President to produce "tapes and other electronic and/or mechanical recordings and reproductions, and any memoranda, papers, transcripts, and other writings" relating to sixty-four specifically described conversations (Appendix C, infra pp. 36-41).

1. On March 1, 1974, a grand jury of the United States District Court for the District of Columbia returned an indictment charging respondents John N. Mitchell, H. R. Haldeman, John D. Ehrlichman, Charles W. Colson, Robert C. Mardian, Kenneth W. Parkinson and Gordon Strachan with various offenses relating to the Watergate matter, including a conspiracy to defraud the United States and to obstruct justice. (Footnote 3). The subpoena duces tecum in question was issued by the District Court on April 18, 1974, upon the motion of the special prosecutor as attorney for the United States and was made returnable on May 2, 1974. (Appendix D, infra, pp. 42-43). The subpoena called for production of the evidence in advance of the Sept. 9, 1974 trial date in order to allow time for any litigation over the subpoena and for transcription and authentication of any tape recording produced. Several defendants joined in the subpoena.

On May 1, 1974, President Nixon, through his White House counsel, filed a "Special appearance" and motion to quash the subpoena. Subsequent proceedings, at the joint suggestion of counsel for the President and the special prosecutor and with the approval of counsel for the defendants, were held in camera because of some especially sensitive matters submitted to the District Court by the special prosecutor in opposition to the motion to quash. Although only defendants Colson, Mardian and Strachan formally joined in the special prosecutor's motion for issuance of the subpoena, all seven defendants (respondents herein) argued in opposition to the motion to quash at the hearing in the District Court. At that hearing, further motions to expunge and for protective orders, relating to the information submitted by the special prosecutor, were filed or raised orally by counsel for the President.

2. In its opinion and order of May 20, 1974, the District Court denied the motion to quash and the motions to expunge and for protective orders. It further ordered "the President or any subordinate officer, official or employe with custody or control of the documents or objects subpoenaed" to deliver to the court on or before May 31, 1974, the originals of all subpoenaed items as well as an index and anlysis of those items, together with tpe copies of those portions of the subpoenaed recordings for which transcripts had been released to the public by the President on April 30, 1974.

The District Court stayed its order pending appellate review on the condition that appellate review was sought before 4 P.M. on May 24, 1974, and further provided that matters filed under seal remain under seal when transmitted as part of the record.

In requiring compliance with the subpoena duces tecum, the District Court rejected the contention by counsel for the President that it had no jurisdiction because the proceeding allegedly involved solely an intra-executive dispute. The court ruled that this argument lacked substance in light of jurisdictional responsibilities and independence with which the special prosecutor has been vested by regulations that have the force and effect of law and that had receivedd the explicit concurrence of the President.. (Footnote 4)

The court emphasized the "unique guarantee of unfettered operation" given to the special prosecutor and noted that under these regulations, as amended and explained by the Acting Attorney General (Appendix B, infra, Pp. 33-35), the special prosecutor's jurisdiction, which includes express authority to contest claims of executive privilege, cannot be limited without the President's first consulting with the leaders of both houses of Congress and the respective committees on the judiciary and securing their consensus.

In these circumstances, the court found that there exists sufficient independence to provide the court with a concrete legal controversy between adverse parties and not simply an intra-agency dispute over policy. (Footnote 5)

On the merits, and relying on the en banc decision in Nixon v. Sirica, 487 F. 2D 700 (D.C. Cir. 1973), the District Court held that in the circumstances of this case, the courts, and not the President, are the final arbiter of the applicability of a claim of executive privilege for the subpoenaed items. Here, the court ruled, the presumptive privilege for documents and materials reflecting executive deliberations was overcome by the special prosecutor's prima facie showing that the items are relevant and important to the issues to be tried in the Watergate cover-up case and that they will be admissible in evidence. (Footnote 6).

Finally, the District Court held that the special prosecutor, in his memorandum and appendix below, satisfied the requirements of Rule 17(C) that the subpoenaed itmes be relevant and evidentiary. See Bowman Dairy Company v. United States, 341 U.S. 214.

The President has sought review of this decision in the Court of Appeals and the special prosecutor, on behalf of the United States, seeks certiorari before judgment.

Reasons for Granting the Writ

1. It is the position of the special prosecutor that the decision of the District Court, relying on Nixon v. Sirica, supra, is fully in accord with constitutional principles first enunciated in Marbury v. Madison, 1 Cranch 137, and United States v. Burr, 25 Fed. Cas. 30 (No. 14, 692D) (C.C.D. Va. 1807), and repeatedly reaffirmed by this court, as recently as the decision in Environmental Protection Agency v. Mink, 410 U.S. 73. See also United States v. Reynolds, 345 U.S. 1; Youngstown Sheet & Tube Co. v. Sawyer, supra. We believe these authorities support the principle that the President is amenable to judicial orders directing the performance of legal duties. Furthermore, we submit that they also demonstrate that, when a claim of executive privilege is interposed in a lawsuit, the courts have the ultimate power to decide whether that privilege has been properly invoked and whether, under all the circumstances, it should be accepted. The executive's determination is not conclusive. (Footnote 7).

Nevertheless, the constitutional issues involved in this case are exceedingly important, both in their own right and in the context of the litigation in which they arise. The case involves basic constitutional issues arising out of the doctrine of the separation of powers and the powers of the judiciary and the prerogatives of the chief executive. Perhaps more fundamentally, this case also presents a question of overriding concern to the full and impartial administration of justice—is our constitutional system of government sufficiently resilient to permit the executive branch to establish an independent prosecutor fully capable of investigating and prosecuting allegations of criminal misconduct by officials in the executive office of the President, and validly authorized to resort to the judicial process to secure physical evidence from the President himself.

Whether the President is amenable to the judicial process, whether the President or the courts have the ultimate authority to determine the applicability of "executive privilege" to material evidence for judicial proceedings, whether executive privilege can be invoked in the face of a prima facie showing that the conversations at issue involved a criminal enterprise, whether any confidentiality privilege for Watergate related conversations has been irretrievably waived by the President, and whether the President has been properly ordered to comply with the instant subpoena—are all issues worthy of review by this court.

2. Moreover, it is of imperative public importance that this case be resolved as quickl yas possible to permit the trial in the "Watergate cover-up case," United States v. Mitchell, et al., to proceed as scheduled on September 9, 1971. If the decision below were to proceed through normal appellate processes, it is likely that there would be no final decision in the court of appeals prior to the end of the current term of this court. Assuming that this court thereafter were not to convene a special term to hear this case, the case then could not be heard and disposed of by this court until the late fall of this year. Accordingly, the trial could not proceed until the spring of 1975, particularly if the District Court's decision is upheld and the District Court must conduct in camera proceedings to determine which items, if any, are to be produced to the Government or defense. In addition, the trial would have to await the transcription of any recordings produced for use at trial. All in all, at a minimum there would be a delay of six months in the start of the trial.

Immediate consideration of the case by this court during the present term would not sacrifice any benefits of intermediate appleate review. The Court of Appeals for the District of Columbia Circuit previously has considered and ruled at length on the principal constitutional issues presented for review by this petition. See Nixon v. Sirica.

Indeed, in his momorandum in support of the President's motion to quash subpoena duces tecum filed in the District Court, counsel for the President stated (Pp. 1-2): "We recognize that at the present stage of this case these [constitutional] contentions are foreclosed by the decision in Nixon v. Sirica——U.S. App. D.C.——, for 487 F. 2d 700 (1973). Thus we do not now press these points, but mention them here in order that they mey be preserved if necessary for this case to reach a court in which Nixon v. Sirica is not controlling precedent."

Thus, this case satisfies the standards of Rule 20 of this court's rules for granting certicrari before judgement as those standards have been articulated in the cases therein cited.

Conclusion

For the foregoing reasons, the petition for a writ of certiorari should be granted and the case set for briefing and argument this term.

Respectfully submitted.

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JAMES F. NEAL,
Special Assistant to the Special Prosecutor.

Footnotes

(1) Under 28 U. S. C. 510, 517, and 18, and Department of Justice Order No. 551-73, 28 C.F.R. Sec. 0.37 et sep, (Appendix B, pp. 24-32, infra), the special prosecutor has authority, in lieu of the Solicitor General, to conduct litigation before this Court on behalf of the United States in cases within his jurrrisdiction.

(2) In Nixon V. Sirica, 487 F.2d 700, 707 B.21 (D.C. cir. 193), the Court of Appeals stated that an order of this type directed to the President is appealable under 28 U.S.O. 1291, In any event, the Court of Appeals has jurisdiction pursuant to the all writs act, 28 U.S.C. 1651. See 487 F.2dd at 706-707.

On May 24, 1974, the President also filed a petition for a writ of mandamus in the court below seeking review of the District Court's order in this additional way. This case is docketed as D. C. Cir. No. 4-1532.

(3) At some or all of the times in question, respondent Mitchell, a former Attorney General of the United States, was chairman of the Committee for the Re-election of the President. Respondent Haldeman was Assistant to the President and chief of staff. Respondent Ehrlichman was Assistant to the President for domestic affairs. Respondent Colson was counsel to the President. Respondent Mardian, a former Assistant Attorney General, was an official of the President's re-election campaign. Respondent Parkinson was an attorney for the re-election committee. And respondent Strachan was taff assistant to the President.

(4) The validity of these regulations establishing the authority of the special prosecutor has been upheld in three other cases, in addition to the decision below. Se Nader v. Ehrlichman, —— F. Supp. —— (D.D.C. Crim. No. 74-16) (May 21, 1974); United States v. Andreas, —— F. Supp. —— (D. Minn. No. 4-73-CR. 201) (March 12, 1974). The regulations are reprinted in Appendix B, Infra, Pp. 26-35.

(5) The court later held that as the recipient of a subpoena in this criminal case, the President "as a practical matters, is a third party" (Appendix A, infra, P. 17).

As this Court noted in Berger v. United States, 295 U.S. 73, 88, the prosecuting attorney in a Federal criminal case represents the United States as a sovereign government.

(6) As to the claims by defendants that they are entitled to the subpoenaed items under Rule 17 (C), the court withheld ruling, stating that defendants' requests for access will be more appropriately considered in conjunction with their pretrial discovery motions.

(7) It is possible that the President is now foreclosed from contesting in this case the issues finally decided in Nixon v. Sirica, supra, a related proceeding between essentially the same parties. Sec, E.G., Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 402-404.