

THE TALMUD AND NIXON'S TAPES

Now that the highest courts in the land are studying the problem of President Nixon's refusal to surrender the famous tapes, it is timely to inquire what other systems of law have to say about this historic confrontation between the executive and the judiciary. Can any wisdom be gleaned from the Hebrew tradition, one of the main streams that feed into Western culture and civilization?

The Mishnah, the Jewish legal code redacted by Rabbi Judah in Palestine during the early part of the third century, teaches that a king may not judge and not be brought to trial; others may not testify against him and he may not be made to testify concerning others. The Talmud (the Babylonian commentary and extension of the Mishnah) limits this law to "Israelite Kings", i.e. those who were not of Davidic descent. Kings of the House of David, however, are subject to judgment and may be compelled to testify.

The Talmud then concludes that fundamentally the law requires that the king should submit to judgment and testimony, but that an exception was made in the case of later Jewish Kings ("Israelite Kings") because of a historic incident. In the first century of the common era Jannai was King, and the head of the Sanhedrin (supreme court) was the fearlessly independent Simeon ben Shetah. Now it happened that a servant of the King had been accused of committing murder. According to the law, the master had to be present during the trial of the slave. Jannai obeyed, and presented himself in court. But then Simeon informed Jannai that the law required the master to stand while the trial was in session. Aware of the sensitivities involved, Simeon hastened to assure the King that "you are not standing before us, but before Him who by His word created the world." Here Jannai drew the line and hurled a challenge at Simeon: "not when you say so, but only when your colleagues will tell me so." The shrewd monarch had made the right move. Simeon turned to his right, and his colleagues "buried their heads in the ground." He looked to his left, and his fellow judges did likewise. Defeated,

Simeon was furious and called down the wrath of heaven upon his colleagues who, because of a combination of political calculations and cowardice, had subverted their eminent calling. The text closes with a legend-like flourish: the angel Gabriel came down, smote them on the ground, and they died.

What the Talmudic sages are teaching us is that in a healthy society the executive is not above the law. The Chief magistrate of the land must honor a summons to trial and must offer testimony upon the order of the courts. It is only when the judiciary itself is bankrupt and shows a failure of nerve in its confrontation with the executive head of the government that the "separation of powers" becomes complete and all interaction between the various branches ceases. With an overpowerful king and an apprehensive and politically motivated judiciary, better abdicate all jurisdiction over the king and attend to other pressing matters, lest the courts be completely destroyed or corrupted.

Scholars agree that the story of this confrontation is factual. Some historians, however, maintain that the actual story took place some thirty years later, with a different cast of characters. Making this change brings the Talmudic tale somewhat into conformity with the report by the historian Josephus. It is important to note the identity of the people involved in the Josephus story, because it adds another element of contemporary relevance. Instead of Simeon, Josephus talks of Sameas (Shemayah) as the head of the Sanhedrin. In place of Jannai, he writes of Hyrkan. And instead of an anonymous "slave" of the King, the accused is none less than Herod -- later to become the detested King -- brought up on charges of political assassination. Herod is likewise called eved, which in this case means not one who is technically a slave, but an advisor of the King. The opinion of the ancient Jewish Court was, thus, that the King is responsible for the malfeasance of his advisors in the pursuit of their official duties!

Historical analogies should, of course, never be driven too far, and ancient law can at most provide illumination, rarely detailed

prescriptions, for complex modern political problems. Yet the sense of the Hebrew legal tradition is clear enough: no one, not even a King, is above the law, and if his advisors commit a crime he is responsible for them. And, as Judge Sirica reminded us in quoting Chief Justice Marshall in his landmark decision against President Jefferson, there is, after all, a difference between an American President and an English King. The argument applies a fortiori to our case: if a Davidic King, who was not democratically elected, must submit to the courts, how much more so an American president! (Interesting coincidence: Simeon ben Shetah and John Marshall were both related, respectively, to Jannai and Thomas Jefferson.)

The Talmud is a continuation of the Biblical tradition. Deuteronomy commands the appointment of judges before the crowning of a king. "Judges" ruled in ancient Israel before the rise of the monarchy. This limitation on the political head of the government is not only for the good of the people, but for the good of the king himself: "Thus he will not act arrogantly toward his fellow countrymen or deviate from the commandments to the right or to the left, to the end that he and his descendants may reign long in the midst of Israel" (Deut.17:20).

Will America learn in time what the Bible and the Talmud knew ages ago? If the President is wise, he will obey the Courts, if necessary yield the tapes, and "reign long." If he is not, the Congress will have to remind him ~~not~~ (to) act arrogantly toward his fellow countrymen."