

Dear Jim, Re: CA decision vs. WG committee on tapes,

5/24/74

There is language in this decision of which I believe we should take note on the possibility of its being used in future FOI suits, both ways.

As Lerner interprets the decision, I think correctly, it does broaden the legal base for executive privilege. That is my concern.

Was it the consistent poor performance of the Ervin committee which did well at nothing except getting on TV. This had advantages, but it was not investigating. What was new that it brought to light is negligible and the best of that it never used.

Without claiming to have a basis for evaluating the decision itself, except for agreement with Gessell in the court below that publicizing the tapes could jeopardize defendants' rights. I will quote some of the language.

Gessell's argument seems sound to me. In fact, I believe and have written that it is precisely this that the conspiracy of the defense, between Nixon and his former aides whose silence is essential to him, has been exploiting and will exploit. I will not be a bit surprised if the WH does not deliver at 2 p.m. this p.m. and that Gessell will then say that he has no choice but to turn the defendants free. That really is the law. It works uniquely in this case to make the violators the beneficiaries.

Does this language relate in any way to later interpretations of American Mail:

"The court however, held that the tapes/~~records~~ were still privileged even though they had been turned over to the Watergate grand jury and the House Judiciary Committee and even though the White House has not made censored transcripts public."

Do you see future use for this reasoning?

"It is true, of course, Bazelon said, 'that the executive cannot any more than the other branches of government invoke a general confidentiality privilege shield its officials and employees from investigations by the proper governmental institutions into wrongdoing.'"